UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1166

TITO KNOX,

Plaintiff - Appellant,

v.

PLOWDEN, Public Defender,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:17-cv-02665-HMH)

Submitted: May 23, 2018 Decided: May 31, 2018

Before GREGORY, Chief Judge, and KING and THACKER, Circuit Judges.

Dismissed and remanded by unpublished per curiam opinion.

Tito Lemont Knox, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Tito Knox seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing without prejudice his 42 U.S.C. § 1983 (2012) action. We dismiss the appeal as interlocutory and remand for further proceedings.

This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2012), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2012); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949). Because the order from which Knox seeks to appeal does "not clearly preclude amendment," Knox may be able to remedy the deficiencies identified by the district court by filing an amended complaint. *Goode v. Cent. Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619, 630 (4th Cir. 2015). Accordingly, the district court's dismissal order is neither a final order nor an appealable interlocutory or collateral order. *See id.* at 623-24; *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1066-67 (4th Cir. 1993).

We therefore dismiss this appeal for lack of jurisdiction. *See Goode*, 807 F.3d at 630. In *Goode*, we remanded to the district court with instructions to allow amendment of the complaint. *Id.* Here, however, the district court has already afforded Knox the opportunity to amend. Accordingly, we direct on remand that the district court, in its discretion, either afford Knox another opportunity to file an amended complaint or dismiss the complaint with prejudice, thereby rendering the dismissal order a final, appealable order. We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED AND REMANDED

FILED: May 31, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1166
(6:17-cv-02665-HMH)

TITO KNOX

Plaintiff - Appellant

v.
PLOWDEN, Public Defender

Defendant - Appellee

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: July 24, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1166
(6:17-cv-02665-HMH)

TITO KNOX

Plaintiff - Appellant

v.

PLOWDEN, Public Defender

Defendant - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Tito Knox,
Plaintiff

v.

Plowden, Public Defender,
Defendant

Civil Action No. 6:17-cv-02665-HMH

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

❒ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

■ The plaintiff, Tito Knox, shall take nothing of the defendant, Plowden, Public Defender, and this action is dismissed without prejudice.

This action was *(check one)*:

❒ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

❒ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■ decided by the Honorable Henry M. Herlong, Jr., Senior United States District Judge, presiding, adopting the Report and Recommendation of the Honorable Paige J. Gossett, United States Magistrate Judge, which recommended dismissing the amended complaint without prejudice.

Date: February 6, 2018

ROBIN L. BLUME, CLERK OF COURT

s/B. Goodman

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Tito Knox,	)	
	)	C.A. No. 6:17-2665-HMH-PJG
Plaintiff,	)	
	)	
vs.	)	**OPINION & ORDER**
	)	
David Plowden, Public Defender,	)	
	)	
Defendant.	)	

This matter is before the court with the Report and Recommendation of United States Magistrate Judge Paige J. Gossett, made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 of the District of South Carolina.[1] Tito Knox ("Knox"), proceeding pro se, alleges a violation of 42 U.S.C. § 1983 or Bivens v. Six Unkown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In her Report and Recommendation, Magistrate Judge Gossett recommends dismissing this case without prejudice and without issuance and service of process because Knox's complaint fails to state a cognizable claim for relief. (Report & Recommendation 5, ECF No. 16.)

Knox filed objections to the Report and Recommendation. Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir.

[1] The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

1984). In the absence of specific objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

Upon review, the court finds that Knox's objections are non-specific, unrelated to the dispositive portions of the magistrate judge's Report and Recommendation, or merely restate his claims. Accordingly, after review, the court finds that Knox's objections are without merit. Therefore, after a thorough review of the magistrate judge's Report and the record in this case, the court adopts Magistrate Judge Gossett's Report and Recommendation and incorporates it herein by reference.

It is therefore

ORDERED that the case is dismissed without prejudice and without issuance and service of process.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
February 5, 2018

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Tito Knox, Plaintiff, v. David Plowden, *Public Defender*, Defendant.	)	C/A No. 6:17-2665-HMH-PJG **REPORT AND RECOMMENDATION**

The plaintiff, Tito Knox, proceeding *pro se*, brings this civil rights action pursuant to 28 U.S.C. § 1915. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.). By order dated December 7, 2017, the court provided Plaintiff the opportunity to file an amended complaint to correct deficiencies identified by the court that would warrant summary dismissal of the Complaint pursuant to 28 U.S.C. § 1915. (ECF No. 9.) Plaintiff filed an Amended Complaint on December 21, 2017. (ECF No. 11.) Having reviewed the Amended Complaint in accordance with applicable law, the court concludes this action should be summarily dismissed without prejudice and issuance of service of process.

I. Factual and Procedural Background

Plaintiff indicates he completed a ten-year term of imprisonment for a firearms offense. He seeks to raise a claim that his civil rights were violated because Defendant, his public defender, did not request a hearing to determine whether he should be found not guilty by reason of insanity pursuant to 18 U.S.C. § 4243. He claims this violated his right to due process because he would have served only forty days in prison rather than ten years. He seeks damages for his injuries.

PJG

II. Discussion

A. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Amended Complaint. The Amended Complaint has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. This statute allows a district court to dismiss the case upon a finding that the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

In order to state a claim upon which relief can be granted, the plaintiff must do more than make mere conclusory statements. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Rather, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. The reviewing court need only accept as true the complaint's factual allegations, not its legal conclusions. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555.

This court is required to liberally construe *pro se* complaints, which are held to a less stringent standard than those drafted by attorneys. Erickson v. Pardus, 551 U.S. 89, 94 (2007); King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016). Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990); see also Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for "all civil actions").

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B. Analysis

In his Amended Complaint, Plaintiff does not specify the cause of action or legal theory upon which he bases his claim for relief, other than to briefly reference his right to due process. But in accordance with the court's duty to liberally construe *pro se* complaints, the court construes it as attempting to assert a cause of action pursuant to 42 U.S.C. § 1983 or Bivens v. Six Unkown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). A legal action under 42 U.S.C. § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). Similarly, in Bivens, the United States Supreme Court established a remedy in certain circumstances for plaintiffs alleging constitutional violations by federal officials to obtain monetary damages in suits against federal officials in their individual capacities.

However, the court finds that despite having availed himself of the opportunity to cure the deficiencies previously identified by the court, Plaintiff's Amended Complaint should nonetheless be summarily dismissed because he fails to state a claim upon which relief can be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii). Plaintiff fails to provide sufficient facts to plausibly show the court has jurisdiction over Plaintiff's claims or that Plaintiff is entitled to relief. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (stating the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Plaintiff's assertion that his due process rights were violated is conclusory and unsupported by facts.

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Moreover, state and federal public defenders generally cannot be sued pursuant to 42 U.S.C. § 1983 or Bivens. See Hall v. Quillen, 631 F.2d 1154, 1155 (4th Cir. 1980) (finding no state action under § 1983 even where the plaintiff's attorney was a court-appointed public defender); Campbell v. North Carolina, No.1:12-CV-719, 2013 WL 2153110, at *2 n.1 (M.D.N.C. May 16, 2013) (collecting cases finding that federal public defenders are not amenable to suit pursuant to Bivens). Plaintiff's allegation against Defendant appears to concern Defendant's judgment as Plaintiff's advocate in a criminal proceeding, and therefore, does not implicate any state action. Nor has Plaintiff pled any facts that would indicate Defendant was acting in a role that has been found to implicate state action in other cases. See, e.g., Dodson, 454 U.S. 312, 324-25 (1981) (administrative and investigative functions); Tower v. Glover, 467 U.S. 914, 920 (1984) (conspiracy with state actors).

Additionally, Plaintiff's claim would appeared to be barred by Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the United States Supreme Court held that a state prisoner's claim for damages is not cognizable under § 1983 where success of the action would implicitly question the validity of the conviction or duration of the sentence, unless the prisoner can demonstrate that the conviction or sentence has been previously invalidated. Id. at 487. However, Plaintiff has provided no factual

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allegations to show that he successfully challenged his conviction. Thus, Plaintiff's claim for damages associated with his conviction would be barred by the holding in Heck.[1]

III. Conclusion

Accordingly, the court recommends that the Amended Complaint be summarily dismissed without prejudice and without issuance and service of process.

Paige J. Gossett

January 23, 2018
Columbia, South Carolina

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

Plaintiff's attention is directed to the important notice on the next page.

[1] The court notes that Plaintiff is no longer incarcerated. See Wilson v. Johnson, 535 F.3d 262, 268 (4th Cir. 2008) (holding that former prisoners are exempt from Heck's favorable termination requirement if, as a practical matter, they could not seek habeas relief). However, Plaintiff provides no facts to demonstrate that habeas relief was unavailable during the ten years he claims he was incarcerated. See Bishop v. Cty. of Macon, 484 F. App'x 753, 754-55 (4th Cir. 2012) (clarifying that the Wilson exception only applies where a plaintiff can show that circumstances beyond his control left him unable to pursue habeas relief); cf. Greene v. Sterling, Civil Action No. 5:16-cv-00587-JMC, 2016 WL 2864894, at *2 (D.S.C. May 17, 2016) (declining to adopt the magistrate judge's report and recommendation dismissing a former inmate's § 1983 claim that he was wrongfully convicted in a disciplinary proceeding during his four-month incarceration based on the plaintiff's failure to show Heck's favorable termination requirement because plaintiff's limited custodial sentence effectively left him without an adequate remedy at law to address the alleged constitutional infirmities).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Tito Knox,	)	
	)	C.A. No. 6:17-2665-HMH-PJG
Plaintiff,	)	
	)	
vs.	)	**OPINION & ORDER**
	)	
David Plowden, Public Defender,	)	
	)	
Defendant.	)	

This matter is before the court on remand from the United States Court of Appeals for the Fourth Circuit. This court, after affording Tito Knox ("Knox") an opportunity to amend his complaint pursuant to Goode v. Cent. Va. Legal Aid Soc'y, Inc., 807 F.3d 619, 630 (4th Cir. 2015), adopted the recommendation of the magistrate judge and dismissed this case without prejudice for failure to state a claim on February 5, 2018. Knox appealed and the Fourth Circuit dismissed the appeal as interlocutory and remanded the case. Knox v. Plowden, No. 18-1166, 2018 WL 2446689, at *1 (4th Cir. May 31, 2018) (unpublished). On remand, the Fourth Circuit directed that "the district court, in its discretion, either afford Knox another opportunity to file an amended complaint or dismiss the complaint with prejudice, thereby rendering the dismissal order a final, appealable order." Id.

After review, the court denies Knox another opportunity to amend the complaint. In his amended complaint, Knox fails to state any claim for relief and offers only conclusory facts. Further, the only named defendant in this case was a federal public defender during all times relevant to this action, and federal public defenders generally cannot be sued pursuant to 42

U.S.C. § 1983 or Bivens v. Six Unkown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Hall v. Quillen, 631 F.2d 1154, 1155 (4th Cir. 1980) (finding no state action under § 1983 even where the plaintiff's attorney was a public defender); Campbell v. North Carolina, No. 1:12-CV-719, 2013 WL 2153110, at *2 n.1 (M.D.N.C. May 16, 2013) (collecting cases finding that federal public defenders are not amenable to suit pursuant to Bivens). Moreover, this case appears to be barred by Heck v. Humphrey, 512 U.S. 477 (1994), as claims for damages associated with a valid conviction are barred by Heck. For all these reasons, the court denies Knox the opportunity to amend his complaint for the second time.

It is therefore

ORDERED that the case is dismissed with prejudice.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
June 4, 2018

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

Additional material from this filing is available in the Clerk's Office.