

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION**

FILED

SEP 17 2018

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

KIRK WAYNE McBRIDE, TDCJ # 733097, §

Plaintiff §

v. §

**TEXAS BOARD of PARDONS
& PAROLES, ET AL., §**

Defendant §

**Civil Action
No. SA-18-CA-873-XR**

DISMISSAL ORDER

Before the Court is Plaintiff Kirk Wayne McBride's 42 U.S.C. § 1983 Civil Rights Complaint and Application to Proceed In Forma Pauperis (IFP).

McBride's IFP application shall be granted. Pursuant to 28 U.S.C. § 1915, a prisoner who brings a civil action IFP must pay an initial partial filing fee, and must thereafter pay the balance of the \$350 filing fee through monthly deductions from the prisoner's institutional trust fund account.

This Court assesses and directs Plaintiff to pay an initial partial filing fee of \$2.66 and the Texas Department of Criminal Justice - Correctional Institutions Division (TDCJ-CID) shall deduct this sum from Plaintiff's TDCJ-CID institutional trust fund account and forward this sum to this Court. (If no such funds are available, TDCJ-CID shall place a hold on the account in this amount and forward the funds when available.) The balance of the \$350 filing fee shall be paid in monthly installments as provided in 28 U.S.C. § 1915(b)(1). TDCJ-CID shall each month deduct twenty percent (20%) of the preceding month's income credited to Plaintiff's inmate trust account, provided the account exceeds \$10.00, and forward payments to the Court until the \$350 fee is paid.

McBride's § 1983 Complaint alleges the Texas Board of Pardons & Paroles wrongfully revoked his parole, resulting in his false imprisonment. McBride sues the Parole Board and its Directors seeking declaratory and injunctive relief and damages.

Appendix B.

Title 28 U.S.C. §§ 1915(e)(2)(B)(i)-(iii) and 1915A(b)(1)-(2) require this Court to screen an IFP or prisoner's complaint, and dismiss the complaint if the court determines it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from an immune defendant. An action is frivolous where there is no arguable legal or factual basis for the claim. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A complaint is legally frivolous when it is based on an indisputably meritless legal theory. *Id.* To state a claim pursuant to Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The "[f]actual allegations must be enough to raise a right to relief above the speculative level," and "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). A conclusory complaint, one that fails to state material facts, may be dismissed as frivolous, *see Wilson v. Budney*, 976 F.2d 957, 958 (5th Cir. 1992); *Moody v. Baker*, 857 F.2d 256, 257 (5th Cir. 1988), or for failure to state a claim, *see Rios v. City of Del Rio*, 444 F.3d 417, 426 (5th Cir. 2006).

Before dismissal, this Court would generally enter a show cause order advising the plaintiff of the deficiency of his allegations and give the plaintiff an opportunity to amend. Here, however, McBride's Complaint is sufficiently definite, but it fails to state a non-frivolous claim for reasons no plausible amendments could cure. Plaintiff has thus pleaded his best case and such a show cause order would be futile. *See Brewster v. Dretke*, 587 F.3d 764, 767-68 (5th Cir. 2009) (holding notice and an opportunity to amend are not required before dismissal where the plaintiff has pleaded his "best case").

Therefore, McBride's Complaint shall be dismissed for the following reasons. McBride's suit challenges the legality of his parole revocation and his current sentence, but McBride has no federal civil rights action until his parole revocation and sentence are declared unlawful in criminal

proceedings or in a habeas corpus proceeding. In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Supreme Court held a civil rights claim for damages arising from wrongful imprisonment does not accrue until the sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Because Plaintiff's allegations imply the invalidity of his parole revocation, and the revocation of his parole has not been declared unlawful in the criminal proceeding or a habeas corpus proceeding, his civil rights action is barred by *Heck v. Humphrey*. See *McGrew v. Texas Brd. Pardons & Paroles*, 47 F.3d 158, 160-61 (5th Cir. 1995).

Moreover, the states and their agencies enjoy sovereign immunity from suit pursuant to the Eleventh Amendment, see *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 69-71 & n.10 (1989), and therefore McBride's suit against the Texas Board of Pardons & Paroles is barred. The parole officials in their individual capacities are absolutely immune from civil actions arising from proceedings to revoke parole or the imposition of additional conditions of parole. See *Cousins v. Small*, 325 F.3d 627, 635 (5th Cir. 2003); *Hulsey v. Owens*, 63 F.3d 354, 356-57 (5th Cir. 1995).

Further, injunctive and declaratory relief are not available in this civil rights action. In *Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973), the Supreme Court held that the sole remedy of an inmate seeking release from confinement is through a writ of habeas corpus.

This Court will not construe Plaintiff's Complaint as a 28 U.S.C. § 2254 Habeas Corpus Petition and let it proceed as such because doing so would be futile. McBride's § 2254 Petition challenging the revocation of his parole was denied by this Court in *McBride v. Davis*, No. SA-17-CA-1262-FB (W.D. Tex., dismissed July 26, 2018), and thus a further § 2254 petition would be dismissed as successive pursuant to 28 U.S.C. § 2244(b)(4). Furthermore, McBride's Complaint seeks damages, which is not a basis for § 2254 relief. See *Meadows v. Evans*, 550 F.2d 345, 349

(5th Cir.) ("In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy.").

Accordingly, Plaintiff McBride's IFP Motion is **GRANTED**, and his § 1983 Complaint is **DISMISSED WITH PREJUDICE** pursuant to §§ 1915(e)(2)(B)(i)-(iii) and 1915A(b)(1)-(2) for failure to state a non-frivolous claim and because he seeks relief against immune Defendants.

The Clerk shall send a copy of this Order to the TDCJ Office of General Counsel, P.O. Box 13084, Austin, Texas, 78711, and TDCJ Inmate Trust Fund, P.O. Box 629, Huntsville, Texas 77342. The Clerk of Court shall also send a copy of this Dismissal Order and the Judgment in this case to: Keeper of the "Three Strikes List," Operations Division, U.S. District Court for the Western District of Texas, San Antonio Division, so this case may be recorded in the "Three-Strikes List."

DATED: September 17, 2018



XAVIER RODRIGUEZ
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

FILED


OCT 22 2018

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

KIRK WAYNE McBRIDE, TDCJ # 733097, §**Plaintiff****v.****TEXAS BOARD of PARDONS
& PAROLES, ET AL.,****Defendant****Civil Action
No. SA-18-CA-873-XR****ORDER**

Plaintiff Kirk Wayne McBride's Motion for Reconsideration (Entry # 5) of this Court's order dismissing his 42 U.S.C. § 1983 civil rights complaint for failure to state a non-frivolous claim is **DENIED** for the reasons stated in this Court's Dismissal Order (Entry # 3). Plaintiff failed to identify an error of law or fact or other grounds warranting a new trial pursuant to Fed. R. Civ. P. 59 or relief from judgment pursuant to Fed. R. Civ. P. 60(b).

DATED: October 22, 2018



XAVIER RODRIGUEZ
United States District Judge

Appendix F

FILED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEC 27 2018

No. 18-50978

CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
DEPUTY

KIRK WAYNE MCBRIDE, SR.,

Plaintiff - Appellant

A True Copy

Certified order issued Dec 27, 2018

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

v.

TEXAS BOARD OF PARDONS AND PAROLES; TEXAS DEPARTMENT OF
CRIMINAL JUSTICE - PAROLE DIVISION; PAMELA THIELKE, Director,
Texas Department of Criminal Justice - Parole Division; R. ALDERETE,
Director of Housing Operations; DAVID GUTIERREZ, Director, Board of
Pardons and Paroles,

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas5:18-CV-873-XR

CLERK'S OFFICE:

Under 5TH CIR. R. 42.2, the appeal is dismissed as of December 27, 2018,
for want of prosecution. The appellant failed to timely pay the docketing fee.

LYLE W. CAYCE

Clerk of the United States Court
of Appeals for the Fifth Circuit*Melissa Mattingly*By: _____
Melissa V. Mattingly, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

Appendix C

PRISONER'S CIVIL RIGHTS COMPLAINT (Rev. 05/2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE Western DISTRICT OF TEXAS
San Antonio DIVISION

FILED

AUG 20 2018

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY CLERK

Kirk Wayne Mc Bricke, Sr.
Plaintiff's Name and ID Number # 733097

Wynne Plantation
Place of Confinement

SA18CA0873

XR

CASE NO. _____
(Clerk will assign the number)

v.

Texas Board of Pardons and Paroles,
Defendant's Name and Address

TDCJ- Parole Division
Defendant's Name and Address

Defendant's Name and Address
(DO NOT USE "ET AL.")

INSTRUCTIONS - READ CAREFULLY

NOTICE:

Your complaint is subject to dismissal unless it conforms to these instructions and this form.

1. To start an action you must file an original and one copy of your complaint with the court. You should keep a copy of the complaint for your own records.
2. Your complaint must be legibly handwritten, in ink, or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space, **DO NOT USE THE REVERSE SIDE OR BACKSIDE OF ANY PAGE.** ATTACH AN ADDITIONAL BLANK PAGE AND WRITE ON IT.
3. You must file a separate complaint for each claim you have unless the various claims are all related to the same incident or issue or are all against the same defendant, Rule 18, Federal Rules of Civil Procedure. Make a short and plain statement of your claim, Rule 8, Federal Rules of Civil Procedure.
4. When these forms are completed, mail the original and one copy to the clerk of the United States district court for the appropriate district of Texas in the division where one or more named defendants are located, or where the incident giving rise to your claim for relief occurred. If you are confined in the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID), the list labeled as "VENUE LIST" is posted in your unit law library. It is a list of the Texas prison units indicating the appropriate district court, the division and an address list of the divisional clerks.

DEC - 4 2018

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

[illegible]

Appendix G:

Plaintiff's "Motion for Conversion of Funds" (Entry # 10), apparently objecting to this Court's previous order granting Plaintiff's motion to proceed IFP in District Court and requiring payment of the initial partial filing fee, is **DENIED** as otherwise incomprehensible.

DATED: December 3, 2018



XAVIER RODRIGUEZ
United States District Judge