

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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June 15, 2018

Sharon Harris
U.S. District Court
Hugo L. Black United States Courthouse
1729 5TH AVENUE
BIRMINGHAM, AL 35203

Appeal Number: 17-13554-B
Case Style: Don Wilborn v. Robert Tuten, et al
District Court Docket No: 4:16-cv-00106-VEH

The enclosed copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Melanie Gaddis, B
Phone #: (404) 335-6187

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13554-B

DON MITCHELL WILBORN,
an individual,

Plaintiff-Appellant,

versus

ROBERT B. TUTEN,
an individual,
TUTEN LAW OFFICES,
an Alabama Legal Professional Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before: WILSON, ROSENBAUM and JILL PRYOR, Circuit Judges.

BY THE COURT:

Mr. Don Wilborn, a South Carolina prisoner, proceeding *pro se*, moves for leave to proceed after the district court dismissed without prejudice his civil rights complaint against Robert B. Tuten and Tuten Law Offices, filed pursuant to the Alabama Legal Services Liability Act ("ALSLA"), for lack of subject matter jurisdiction. In Count I of his complaint, Mr. Wilborn alleged that Tuten and Tuten Law Offices committed legal malpractice in a federal criminal case, in violation of the Alabama Legal Services Liability Act. In Count II, he requested a declaratory judgment under 28 U.S.C. § 2201. The district court dismissed the complaint, finding that neither diversity jurisdiction nor federal-question jurisdiction existed.

Mr. Wilborn, in the district court, filed a notice of appeal and a motion to proceed on appeal *in forma pauperis*. The district court assessed the \$505.00 appellate filing fee, pursuant to the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915. The district court then certified that this appeal is frivolous and not taken in good faith. Because the district court already has instituted a partial payment plan under 28 U.S.C. § 1915(a) and (b), the only remaining issue is whether the appeal is frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i).

Here, the district court did not err by dismissing Mr. Wilborn's complaint against Tuten and Tuten Law Offices for lack of subject matter jurisdiction, as neither diversity nor federal question jurisdiction existed. First, Mr. Wilborn failed to establish diversity jurisdiction. For purposes of jurisdiction, he was a citizen of Alabama, as that was his last domicile, and he did not change it by demonstrating intent to remain in South Carolina indefinitely, as he provided only a tax form that proved he had paid South Carolina income taxes while working at his prison. *See McCormick v. Aderholt*, 293 F.3d 1254, 1257-58 (11th Cir. 2002) (stating that natural persons are citizens of the state where they are domiciled, and a change of domicile requires a concurrent showing of physical presence at the new location with an intention to remain there indefinitely). Tuten and Tuten Law Offices were also citizens of Alabama, and, thus, diversity did not exist. *See Univ. of South Ala. v. American Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999) (stating that, for federal diversity jurisdiction to attach, all parties must be completely diverse, requiring all plaintiffs to be diverse from all defendants).

Moreover, Mr. Wilborn did not establish federal question jurisdiction. Count I of his complaint alleged a cause of action under Alabama law, which contained no federal question. Although Count II requested relief pursuant to 28 U.S.C. § 2201, that statute did not confer federal question jurisdiction because it was procedural only. *See Household Bank v. JFS Grp.*,

320 F.3d 1249, 1253 (11th Cir. 2003) (stating that the Declaratory Judgment Act, 28 U.S.C. § 2201, is procedural only and does not provide a basis for federal court jurisdiction). Furthermore, although Mr. Wilborn argued that federal question jurisdiction was conferred by *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the Federal Tort Claims Act (“FTCA”), he set forth no allegations to support a *Bivens* or an FTCA claim, as Tuten was not a federal actor. *See* 28 U.S.C. § 1346(b)(1) (stating that federal district courts have exclusive jurisdiction to hear claims against the United States for money damages “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment”); *Carlson v. Green*, 446 U.S. at 18 (stating that *Bivens* established that a victim of a constitutional violation by a federal agent has a right to recover damages against the official in federal court despite the absence of any statute conferring such a right”); *Motta ex rel. A.M.*, 717 F.3d at 843 (holding that the FTCA provides a limited waiver of sovereign immunity for tort claims against the United States government).

Accordingly, Mr. Wilborn has not presented any non-frivolous claim on appeal. Therefore, his motion for leave to proceed is DENIED and the appeal is DISMISSED.

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David J. Smith
Clerk of Court

August 28, 2018

Don Mitchell Wilborn
FCI Estill - Inmate Legal Mail
PO BOX 699
ESTILL, SC 29918

Appeal Number: 17-13554-B
Case Style: Don Wilborn v. Robert Tuten, et al
District Court Docket No: 4:16-cv-00106-VEH

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Melanie Gaddis, B
Phone #: (404) 335-6187

Enclosure(s)

MOT-2 Notice of Court Action

EXHIBIT B

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FOR THE ELEVENTH CIRCUIT

No. 17-13554-B

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ROBERT B. TUTEN,
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TUTEN LAW OFFICES
an Alabama Legal Professional Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before: WILSON, ROSENBAUM and JILL PRYOR, Circuit Judges.

BY THE COURT:

Don Mitchell Wilborn has filed a motion for reconsideration of this Court's order dated June 15, 2018, denying his motion for leave to proceed and dismissing his appeal as frivolous. Because Wilborn has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, this motion for reconsideration is DENIED.