Case: 19-51131 Document: 00515348460 Page: 1 Date Filed: 03/17/2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 17, 2020
Lyle W. Cayce
Clerk

No. 19-51131
Summary Calendar

D.C. Docket No. 5:19-CV-440

GEORGE ANDREW BENAVIDES,

Plaintiff - Appellant

v.

WILLIAM PELHAM BARR, United States Attorney General; DONALD TRUMP, United States President; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES FEDERAL BUREAU OF INVESTIGATIONS; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE NAVY; UNITED STATES OF AMERICA; OFFICE OF THE NAVAL INSPECTOR GENERAL,

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed. *See* 5th Cir. R. 47.6.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Case: 19-51131 Document: 00515308742 Page: 1 Date Filed: 02/12/2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-51131

GEORGE ANDREW BENAVIDES,

Plaintiff - Appellant

v.

WILLIAM PELHAM BARR, United States Attorney General; DONALD TRUMP, United States President; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES FEDERAL BUREAU OF INVESTIGATIONS; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE NAVY; UNITED STATES OF AMERICA; OFFICE OF THE NAVAL INSPECTOR GENERAL,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas

ORDER:

IT IS ORDERED that the appellant's motion to amend the caption is DENIED.

JAMES C. HO
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GEORGE ANDREW BENAVIDES,	§	No. 5:19-CV-440-DAE
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
UNITED STATES OF AMERICA, UNITED STATES PRESIDENT DONALD TRUMP, UNITED STATES DEPARTMENT OF THE NAVY, UNITED STATES FEDERAL BUREAU OF INVESTIGATIONS, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, and UNITED STATES DEPARTMENT OF DEFENSE,	§	
	§	
Defendants.	§	
	§	

ORDER ADOPTING REPORT AND RECOMMENDATION AND DISMISSING CASE WITH PREJUDICE

Before the Court is a Report and Recommendation filed by Magistrate Judge Henry J. Bemporad on November 21, 2019. (Dkt. # 56.) Pro se Plaintiff George Andrew Benavides ("Plaintiff") filed both objections (Dkt. # 70) and an affidavit of bias or prejudice against Magistrate Judge Bemporad (Dkt. # 69) on December 3, 2019. After careful consideration and review, the Court ADOPTS

the Report and **DISMISSES** Plaintiff's case as frivolous and **DENIES** Plaintiff's eight motions for entry of default judgment for the following reasons.

BACKGROUND

Plaintiff filed his original complaint on April 29, 2019. (Dkt. # 1.) In response to Magistrate Judge Bemporad's Order to Show Cause (Dkt. # 18), Plaintiff filed an amended complaint on October 11, 2019. (Dkt. # 24.)

Plaintiff seeks a minimum of $1.5 million in damages based on allegations that, in 1993, doctors in the United States Navy implanted devices inside Plaintiff's teeth that intercept his thoughts and broadcasts those thoughts to the Government. (Dkt. # 24.) The amended complaint contains various exhibits including Plaintiff's alleged dental x-rays, as well as letters from Plaintiff to various members of the Government. (Id.) Plaintiff argues there was an "illegal un-authorized implant of a device: wiretap or bug." (Id.)

Magistrate Judge Bemporad concluded that Plaintiff failed to state non-frivolous claims upon which relief may be granted and failed to provide substantial evidence supporting his motions for default judgment. (See Dkt. # 56.) Magistrate Judge Bemporad found that Plaintiff's response to the Court's original Order to Show Cause (Dkt. # 18) was "entirely repetitive of his original complaint" such that it included "no additional details that would make his claim appear plausible on its face" and that Plaintiff's claims appeared to have occurred outside

the two-year statute of limitations period for civil rights claims against the Government. (Dkt. # 56 at 3–4.)

In his objections, Plaintiff asserts that Magistrate Judge Bemporad ignored Plaintiff's allegations of illegal eavesdropping and wiretapping and that the Report fails to consider other material facts. (Dkt. # 70.) Plaintiff also asserts that Magistrate Judge Bemporad is biased. (Id.; see also Dkt. # 69.)

LEGAL STANDARDS

Any party who seeks to object to a Magistrate Judge's findings and recommendations must serve and file written objections within 14 days after being served with a copy of the findings and recommendation. Fed. R. Civ. P. 72(b)(2). The Court conducts a de novo review of any of the Magistrate Judge's conclusions to which a party has specifically objected. See 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

When a party files an affidavit that states "the facts and the reasons for the belief" that the judge overseeing the matter "has a personal bias or prejudice against him," another judge shall be assigned to hear the pending proceeding. 28 U.S.C. § 144. A judge or magistrate judge must be disqualified where "his impartiality might reasonably be questioned" or where he "has a personal bias or prejudice concerning a party." 28 U.S.C. §§ 455(a) & (b)(1). A judicial ruling

alone "almost never constitute[s] a valid basis for a bias or partiality motion." United States ex rel Gage v. Davis S.R. Aviation, L.L.C., 658 F. App'x 194, 198–99 (5th Cir. 2016) (internal quotation marks omitted). The determination of whether disqualification is appropriate is within the sound discretion of the judge. In re Hipp, Inc., 5 F.3d 109, 116 (5th Cir. 1993).

DISCUSSION

This Court finds that Magistrate Judge Bemporad's Report and Recommendation should be adopted. As noted above, Plaintiff had multiple chances to show cause and failed to demonstrate "an arguable basis either in law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). This Court agrees with Magistrate Judge Bemporad's finding of frivolousness as it appears that "the facts alleged rise to the level of the irrational or the wholly incredible[.]" Denton v. Hernandez, 504 U.S. 25, 33 (1992). There is nothing in the original or amended complaint to suggest otherwise. This Court also agrees that it is highly likely that the claims asserted here for alleged actions occurring in the 1990s are barred by the statute of limitations. See Moore v. McDonald, 30 F.3d 616, 620–21 (5th Cir. 1994); Spotts v. United States, 613 F.3d 559, 573 (5th Cir. 2010) (citing Jones v. Alcoa, Inc., 339 F.3d 359, 364 (5th Cir. 2003) ("Federal civil rights actions . . . which lack[] an express statute of limitations, are governed by the most closely analogous limitations period provided under state law.")) Based on the foregoing,

this Court also finds that Plaintiff is not entitled to default judgment. See Fed. R. Civ. P. 55(d) ("A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.")

In addition, the Court finds Plaintiff's assertion that Magistrate Judge Bemporad is "biase[d] and prejudice[d]" unfounded. (See Dkts. ## 69, 70.) Plaintiff argues that Magistrate Judge Bemporad is biased against him as Magistrate Judge Bemporad worked for District Court Judge Edward Prado in May 2000, during which Plaintiff's lawsuit "was thrown out of [Judge Prado's] court." (Id.) Plaintiff asserts that as a result of this connection between Magistrate Judge Bemporad and Judge Prado, Magistrate Judge Bemporad should be disqualified under 28 U.S.C. § 144. (Dkt. # 69.)

The Court first notes that it was Judge Prado who made a judicial ruling in 2000, not Magistrate Judge Bemporad. Furthermore, even if Magistrate Judge Bemporad had ruled against Plaintiff that alone "almost never constitute[s] a valid basis for a bias or partiality motion." See United States ex rel Gage v. Davis S.R. Aviation, L.L.C., 658 F. App'x 194, 198–99 (5th Cir. 2016) (internal quotation marks omitted). The Court finds that there is no evidence that Judge Prado's ruling in 2000 caused Magistrate Judge Bemporad to be biased against Plaintiff.

CONCLUSION

For the reasons stated, the Court **ADOPTS** the Report. (Dkt. # 56.) Plaintiff's case is **DISMISSED WITH PREJUDICE** as frivolous and Plaintiff's eight motions for entry of default judgment are **DENIED.**

IT IS SO ORDERED.

DATED: San Antonio, Texas, December 9, 2019.

David Alan Ezra
Senior United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GEORGE ANDREW BENAVIDES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-19-CA-440-DAE
	§	
UNITED STATES PRESIDENT DONALD TRUMP, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES FEDERAL BUREAU OF INVESTIGATIONS, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE NAVY, UNITED STATES OF AMERICA, and OFFICE OF THE NAVEL INSPECTOR GENERAL,	§	
	§	
Defendants.	§	

ORDER RETURNING CASE TO DISTRICT COURT

All matters for which this cause was referred to the Magistrate Judge having been considered and acted upon, it is **ORDERED** that the above-entitled and numbered cause is **RETURNED** to the District Court for all purposes.

SIGNED on November 22, 2019.

Henry J. Bemporad
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GEORGE ANDREW BENAVIDES,	§	
	§	
Plaintiff,	§	
v.	§	SA-19-CA-440-DAE (HJB)
	§	
UNITED STATES PRESIDENT DONALD TRUMP, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE NAVY, UNITED STATES OF AMERICA, and OFFICE OF THE NAVEL INSPECTOR GENERAL,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States Senior District Judge David A. Ezra:

This Report and Recommendation concerns the status of this case. Plaintiff was ordered by this Court to show cause why his case should not be dismissed for failing to state a non-frivolous claim for relief. (Docket Entry 18.) In response to that Order, Plaintiff filed an Amended Complaint on October 11, 2019. (Docket Entry 24.) Plaintiff has additionally filed eight motions for entry of default judgment against the named defendants. (Docket Entries 39–46.) After reviewing Plaintiff's Amended Complaint, along with the other pleadings in this case, I recommend that Plaintiff's case be **DISMISSED** as frivolous, and Plaintiff's motions for entry of default judgment (Docket Entries 39–46) be **DENIED**.

I. Background.

Pro se Plaintiff has filed this action under the Civil Rights Act, 42 U.S.C. § 1983. His complaint alleges that, while he was serving in the U.S. Marine Corps in 1993, he underwent a root canal surgery during which the Navy dental staff implanted a device in his teeth to intercept and broadcast his thoughts. (Docket Entry 24, at 8, 26.)[1] He also contends that he is "being targeted and tortured by satellite weapons and electronic harassment." (*Id.* at 89.) Plaintiff has previously complained of this issue: he indicates that he filed a suit in this District in 2000 which was "dismissed and [sic] being denied due process" by U.S. District Judge Edward C. Prado, and that his complaints to numerous federal agencies, officers and politicians have gone unheeded. (*Id.* at 26.)[2] Plaintiff sues Defendants President Donald Trump, Attorney General William Barr, the U.S. Department of the Navy, the U.S. Department of Defense, the U.S. Department of Veteran Affairs, the Federal Bureau of Investigation, and the U.S. Department of Justice, seeking $25 million in damages, or $1 million a year for the past 25 years. (Docket Entry 24. at 90.) With the exception of a recent complaint he made to the Office of Inspector General for the Department of Justice, all the events of which he complains occurred in 2015 or earlier. (*Id.* at 88.)

On October 10, 2019, this Court ordered Plaintiff to show cause why his case should not be dismissed for failing to state a non-frivolous claim for relief. (Docket Entry 18.) In response to that Order, Plaintiff filed his Amended Complaint on October 11, 2019. (Docket Entry 24.)

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[1] The documents comprising Plaintiff's Amended Complaint were not filed in sequential order. Several exhibits and former complaints interrupt the sequence of what is otherwise an Amended Complaint of only ten pages.

[2] Plaintiff does indicate that U.S. Congressman Will Hurd submitted a congressional inquiry regarding the issue, but he claims that the Navy responded by lying to the congressman. (Docket Entry 24, at 72.)

Since filing his Amended Complaint, Plaintiff has filed eight motions for Entry of Clerk's Default Judgment against the named defendants. (Docket Entries 39–46.)

II. Discussion.

A. *Failure to Show Cause.*

Even when, as in this case, a plaintiff has paid the filing fee, district courts "have the inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint *sua sponte*." *Pope v. Mountcastle Mortg. Corp.*, No. 3-11-CV-1689-B, 2011 WL 4986927, at *1 (N.D. Tex. Oct. 18, 2011) (citing *Fitzgerald v. First E. Seventh St. Tenants*, 221 F.3d 362, 363–64 (2d Cir. 2000)).

A complaint may be dismissed as frivolous if it lacks any arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). Claims are factually frivolous if the facts are clearly baseless, a category encompassing allegations that are fanciful, fantastic, and delusional. *See Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992); *Neitzke*, 490 U.S. at 327. A court must not dismiss a complaint simply because the set of facts presented by the plaintiff appears to be "unlikely." *Denton*, 504 U.S. at 33. However, a complaint must be dismissed if it fails "to state a claim . . . that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Plaintiff's complaint that he was subject to surveillance through a surreptitious dental implant appears to be delusional: such claims "rise to the level of the irrational or the wholly incredible." *Denton*, 504 U.S. at 33. His Amended Complaint is almost entirely repetitive of his original complaint and includes no additional details that would make his claim appear plausible on its face. Moreover, even if Plaintiff were able to state a non-frivolous claim for relief, virtually all of the acts of which he complained occurred well outside the two-year limitations

period that applies to civil rights claims against the federal government. *See Spotts v. United States*, 613 F.3d 559, 573 (5th Cir. 2010).[1]

Plaintiff's response to the Show Cause Order fails to state a non-frivolous claim for relief. Therefore, Plaintiff's claims are subject to dismissal. *Neitzke*, 490 U.S. at 325. For these reasons, the undersigned recommends Plaintiff's Amended Complaint be dismissed.

B. ***No Right to Default Judgment.***

Federal Rule of Civil Procedure 55 states that default is to be entered "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." FED. R. CIV. P. 55(a). Default judgment may be entered by the Clerk of Court upon a sum certain "against a defendant who has been defaulted for not appearing," FED. R. CIV. P. 55(b)(1); however, "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." FED. R. CIV. P. 55(d). Even when federal officials are not involved, default judgments are "generally disfavored in the law" in favor of a trial upon the merits. *Lacy v. Sitel Corp* , 227 F.3d 290, 292 (5th Cir. 2000).

Applying these rules to the instant case, default judgment is not warranted. Default judgment may not be entered against the United States, its officers, or its agencies unless "the claimant establishes a claim or right to relief by evidence that satisfies the court." FED. R. CIV. P. 55(d). That requirement must be met only by a showing of substantial evidence supporting the movant's claim. *Carroll v. Sec'y, Dept. Health, Educ. & Welfare*, 470 F.2d 252, 256 (5th Cir.

[1] District courts are authorized to dismiss a complaint as frivolous when "it is clear from the face of a complaint . . . that the claims asserted are barred by the applicable statute of limitations." *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994); *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993). A district court may raise the limitations period *sua sponte*. *See Harris v. Hegmann*, 198 F.3d 153 (5th Cir. 1999).

inappropriate.

B. *No Right to Relief.*

As noted above, Federal Rule of Civil Procedure 55(d) provides that default judgment may not be entered against the United States, its officers, or its agencies unless "the claimant establishes a claim or right to relief by evidence that satisfies the court." FED. R. CIV. P. 55(d). To meet this requirement, a party must show substantial evidence to support his claims. *Carroll v. Sec'y, Dept. Health, Educ. & Welfare*, 470 F.2d 252, 256 (5th Cir. 1972). In this case, Plaintiff has made no such substantial showing. To the contrary, he admits that his claims have previously been rejected by this Court, and they appear to be frivolous.[2] In such circumstances, default judgment is unavailable against the Government.

IV. Conclusion and Recommendation.

For the reasons set out above, I recommend that Plaintiff's Motions for Default Judgment (Docket Entries, 10, 11, 12, 13, 14, 15, and 16) be **DENIED**.

V. Instruction for Service and Notice for Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this Report and Recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the

[2] The undersigned has today issued a show cause order requiring Plaintiff to show why his claims should not be dismissed as frivolous. (*See* Docket Entry 18.)

attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on November 21, 2019.

Henry J. Bemporad
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GEORGE ANDREW BENAVIDES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-19-CA-440-DAE (HJB)
	§	
UNITED STATES PRESIDENT DONALD TRUMP, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES FEDERAL BUREAU OF INVESTIGATIONS, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE NAVY, UNITED STATES OF AMERICA, and OFFICE OF THE NAVEL INSPECTOR GENERAL,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable David A. Ezra, Senior United States District Judge:

This Report and Recommendation concerns *pro se* Plaintiff's Motions for Default Judgment against Defendants President Donald Trump, Attorney General William Barr, the U.S. Department of the Navy, the U.S. Department of Defense, the U.S. Department of Veteran Affairs, the Federal Bureau of Investigation, and the U.S. Department of Justice. (Docket Entries, 10, 11, 12, 13, 14, 15, and 16.) Pretrial matters in this case have been referred to the undersigned for consideration. (*See* Docket Entry 17.) For the reasons set out below, I recommend that the motions be **DENIED**.

I. Jurisdiction.

Plaintiff has filed this action under the Civil Rights Act, 42 U.S.C. § 1983, asserting the jurisdiction of this Court pursuant to 28 U.S.C. § 1343. (Docket Entry 1, at 2.) I have authority to

issue this Report and Recommendation pursuant to 28 U.S.C. § 636(b).

II. Background.

Plaintiff's complaint alleges that, while he was serving in the U.S. Marine Corps in 1993, he underwent a root canal surgery during which the Navy dental staff implanted a device in his teeth to intercept and broadcast his thoughts. (Docket Entry 1, at 2.)

This is not the first time Plaintiff has complained of this issue: he indicates that he filed a suit in this District in 2000 which was "thrown out of court" by U.S. District Judge Edward C. Prado, and that his complaints to numerous federal agencies, officers and politicians have gone unheeded. (*Id.* at 2–3.)[1]

Plaintiff filed suit on April 29, 2019. Over the following weeks, Plaintiff obtained summonses for Defendants President Trump, the Offices of the Inspector General for the Departments of the Navy, Defense Justice, and Veterans Affairs, the Federal Bureau of Investigation, and Attorney General William Barr. (Docket Entries 2, 4, and 8.) Plaintiff filed returns of these summons; the proof of service in the returned summons were either blank, or indicated that the summons had been served Plaintiff himself *via* certified mail. (Docket Entries 3, 5, 6, 7, and 9.) None of the summons were served on the United States Attorney for the Western District of Texas. None have been answered.

Plaintiff has now moved for default judgment against the parties for whom the summonses have been returned, pursuant to Federal Rule of Civil Procedure 55(b)(1). In each case he seeks a judgment of $25 million. (Docket Entries 10, 11, 12, 13, 14, 15, and 16.)

[1] Plaintiff does indicate that U.S. Congressman Will Hurd submitted a congressional inquiry regarding the issue, but he claims that the Navy responded by lying to the congressman. (*Id.* at 3.)

III. Analysis.

Federal Rule of Civil Procedure 55 states that default is to be entered "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." FED. R. CIV. P. 55(a). Default judgment may be entered by the Clerk of Court upon a sum certain "against a defendant who has been defaulted for not appearing," FED. R. CIV. P. 55(b)(1); however, "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." FED. R. CIV. P. 55(d). Even when federal officials are not involved, default judgments are "generally disfavored in the law" in favor of a trial upon the merits. *Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir. 2000). And any default is premised on proper service; the Fifth Circuit has held that "[w]hen a district court lacks jurisdiction over a defendant because of improper service of process," any "default judgment is void and must be set aside . . . ." *Rogers v. Hartford Life and Acc. Ins. Co.*, 167 F.3d 933, 940 (5th Cir. 1999).

Applying these rules to the instant case, default judgment is not warranted, both because of improper service and because no right to relief has been shown against the United States, its officers or its agencies.

A. Improper Service.

Federal Rule of Civil Procedure 4(c)(2) specifies who may serve a defendant. In particular, Rule 4(c)(2) states that service cannot be made by a person who is a party to the action. FED. R. CIV. P. 4(c)(2). Even when service is made by mail, service must be made by someone other than Plaintiff. *See Avdeef v. Royal Bank of Scotland, P.L.C.*, 616 F. App'x 665, 672 (5th Cir. 2015) (affirming district court's denial of default judgment because service was improper); *Shabazz v. City*

of Hous., 515 F. App'x 263, 264 (5th Cir. 2013) (affirming district court's dismissal of *pro se* litigant's complaint for lack of proper service); *Allen v. Travis*, No. Civ. A. No.3:06-CV-1361-M, 2007 WL 1989592 (N.D. Tex. July 10, 2007) (ordering the plaintiffs to make additional efforts to complete proper service when a plaintiff personally mailed defendants). "There is no exception for pro se litigants." *Avdeef*, 616 F. App'x at 672. Thus proper service has not been made in this case.

Service was improper in this case for another reason as well. Federal Rule of Civil Procedure 4(i) sets forth the procedures for serving United States agencies and officers and employees sued in their official capacities. To serve a United States agency, officer or employee, a party must serve both the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, officer or employee. *See* Fed. R. Civ. P. 4(i)(2). To serve the United States, a plaintiff must, among other things, either:

> (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court—or
>
> (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office.

FED. R. CIV. P. 4(i)(1)(A). In this case, Plaintiff has not served a copy of the complaint on the United States as required by Rule 4.

"[P]roper service of process is a jurisdictional prerequisite to the entry of a default judgment." *Avdeef*, 616 F. App'x at 672 (citing Rogers *v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 940 (5th Cir. 1999)). Because Defendants were not properly served, default is

inappropriate.

B. *No Right to Relief.*

As noted above, Federal Rule of Civil Procedure 55(d) provides that default judgment may not be entered against the United States, its officers, or its agencies unless "the claimant establishes a claim or right to relief by evidence that satisfies the court." FED. R. CIV. P. 55(d). To meet this requirement, a party must show substantial evidence to support his claims. *Carroll v. Sec'y, Dept. Health, Educ. & Welfare*, 470 F.2d 252, 256 (5th Cir. 1972). In this case, Plaintiff has made no such substantial showing. To the contrary, he admits that his claims have previously been rejected by this Court, and they appear to be frivolous.[2] In such circumstances, default judgment is unavailable against the Government.

IV. Conclusion and Recommendation.

For the reasons set out above, I recommend that Plaintiff's Motions for Default Judgment (Docket Entries, 10, 11, 12, 13, 14, 15, and 16) be **DENIED**.

V. Instruction for Service and Notice for Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this Report and Recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the

[2] The undersigned has today issued a show cause order requiring Plaintiff to show why his claims should not be dismissed as frivolous. (*See* Docket Entry 18.)

objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on October 2, 2019.

Henry J. Rempora
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GEORGE ANDREW BENAVIDES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-19-CA-440-DAE (HJB)
	§	
UNITED STATES PRESIDENT DONALD TRUMP, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES FEDERAL BUREAU OF INVESTIGATIONS, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF THE NAVY, UNITED STATES OF AMERICA, and OFFICE OF THE NAVEL INSPECTOR GENERAL,	§	
	§	
Defendants.	§	

SHOW CAUSE ORDER

Before the Court is the status of the above case. Pretrial matters in this case have been referred to the undersigned for consideration. (*See* Docket Entry 17.) Because Plaintiff's claims appear to be frivolous, he must amend his complaint to make a further showing before his case may go forward.

Plaintiff has filed this action under the Civil Rights Act, 42 U.S.C. § 1983. His complaint alleges that, while he was serving in the U.S. Marine Corps in 1993, he underwent a root canal surgery during which the Navy dental staff implanted a device in his teeth to intercept and broadcast his thoughts. (Docket Entry 1, at 2.) This is not the first time Plaintiff has complained of this issue: he indicates that he filed a suit in this District in 2000 which was "thrown out of court" by U.S. District Judge Edward C. Prado, and that his complaints to numerous federal agencies, officers and

politicians have gone unheeded. (*Id.* at 2–3.)[1] With the exception of a recent complaint he made to the Office of Inspector General for the Department of Justice, all the events of which he complains occurred in 2015 or earlier. (*Id.*)

Plaintiff sues Defendants President Donald Trump, Attorney General William Barr, the U.S. Department of the Navy, the U.S. Department of Defense, the U.S. Department of Veteran Affairs, the Federal Bureau of Investigation, and the U.S. Department of Justice, seeking $25 million in damages, or $1 million a year for the past 25 years. (*Id.* at 6.)

Even when, as in this case, a plaintiff has paid the filing fee, district courts "have the inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint *sua sponte*." *Pope v. Mountcastle Mortg. Corp.*, No. 3-11-CV-1689-B, 2011 WL 4986927, at *1 (N.D. Tex. Oct. 18, 2011) (citing *Fitzgerald v. First East Seventh St. Tenants*, 221 F.3d 362, 363–64 (2d Cir. 2000)).

A complaint may be dismissed as frivolous if it lacks any arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). Claims are factually frivolous if the facts are clearly baseless, a category encompassing allegations that are fanciful, fantastic, and delusional. *See Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992); *Neitzke*, 490 U.S. at 327. A court must not dismiss a complaint simply because the set of facts presented by the plaintiff appears to be "unlikely." *Denton*, 504 U.S. at 33. However, a complaint must be dismissed if it fails "to state a claim . . . that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[1] Plaintiff does indicate that U.S. Congressman Will Hurd submitted a congressional inquiry regarding the issue, but he claims that the Navy responded by lying to the congressman. (*Id.* at 3.)

Plaintiff's complaint that he was subject to surveillance through a surreptitious dental implant appears to be delusional: such claims "rise to the level of the irrational or the wholly incredible." *Denton*, 504 U.S. at 33. Moreover, even if Plaintiff were able to state a non-frivolous claim for relief, virtually all of the acts of which he complained occurred well outside the two-year limitations period that applies to civil rights claims against the federal government. *See Spotts v. United States*, 613 F.3d 559, 573 (5th Cir. 2010).[2]

Accordingly, it appears that Plaintiff's claims are subject to dismissal. However, as Plaintiff proceeds *pro se*, he should be given the opportunity to attempt to cure the defects in his complaint before the case is dismissed. *See Neitzke*, 490 U.S. at 329.

For the reasons set out above, it is hereby **ORDERED** that **within twenty-one (21) days of the date of this Order**, Plaintiff must **SHOW CAUSE** why his case should not be dismissed for failing to state a non-frivolous claim for relief. Plaintiff may make this showing by filing an amended complaint, of **no more than 10 pages**, alleging specific facts presenting a plausible claim against any Defendant. Failure on Plaintiff's part to comply with the requirements of this paragraph may result in the dismissal not only for failure to state a non-frivolous claim, but alternatively for failure to prosecute or failure to comply with this Order, pursuant to Federal Rule of Civil Procedure 41(b).

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[2] District courts are authorized to dismiss a complaint as frivolous when "it is clear from the face of a complaint . . . that the claims asserted are barred by the applicable statute of limitations." *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994); *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993). A district court may raise the limitations period *sua sponte*. *See Harris v. Hegmann*, 198 F.3d 153 (5th Cir. 1999).

SIGNED on October 2, 2019.

Henry J. Hemporad
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GEORGE ANDREW BENAVIDES,	§	No. 5:19-CV-440-DAE (HJB)
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
WILLIAM BARR, et al.	§	
	§	
Defendants.	§	

REFERRAL TO MAGISTRATE JUDGE

The matter before the Court is the status of the above-referenced case. In accordance with the authority vested in a United States Magistrate Judge pursuant to Local Rule CV-72, and Appendix C, Local Rules for the Assignment of Duties to United States Magistrate Judges, and pursuant to 28 U.S.C. § 636(b), it is **ORDERED** that the instant action is **REFERRED** to **United States Magistrate Judge Henry Bemporad** for disposition of all pretrial matters.

I. MATTERS REFERRED

This reference confers the following duties upon the magistrate judge to whom this case is assigned, the parties and their counsel:

(1) The magistrate judge may enter a scheduling order and exercise his discretion in extending or otherwise modifying deadlines in the scheduling order upon a showing of good cause.

(2) Pursuant to the magistrate judge's authority under 28 U.S.C. § 636(b), the magistrate judge shall rule, or make a recommendation where appropriate, on all pretrial motions, including Motions for Temporary Restraining Orders and Preliminary Injunctions brought under Federal Rule of Civil Procedure 65. Where the magistrate judge's authority to make rulings is limited by statute, a recommendation to this Court shall be made in lieu of an order, pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), unless all parties consent that the magistrate judge may rule on such otherwise exempt matters, pursuant to 28 U.S.C. § 636(c)(l).

(3) Unless the parties have consented to proceed to trial before the magistrate judge in accordance with the scheduling order, the magistrate judge shall return the case to this Court upon the ruling and/or filing of recommendations on all pretrial motions pending at the time all documents under Local Rule CV-16(e) are submitted.

II. MATTERS NOT REFERRED

This reference includes any pretrial matter not specifically mentioned above; however, this reference does not include the following:

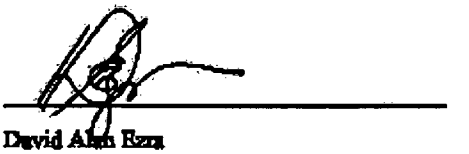
(1) Settlement Agreements. Should the parties reach a settlement of this case, they should contact the chambers of the undersigned judge in writing or by telephone. Upon being informed of a settlement, this Court will enter such orders as it finds proper to resolve the case.

III. OBJECTIONS AND APPEALS

Appeals from the magistrate judge's orders and objections to the magistrate judge's recommendations shall be made in compliance with 28 U.S.C. § 636(b)(1), Rule 72 of the Federal Rules of Civil Procedure, and Rule 4 of Appendix C to the Local Rules. Such objections and appeals shall be limited to issues first raised before the magistrate judge; failure to bring any defect in any order or recommendation to the attention of the magistrate judge prior to raising the issue before this Court shall be deemed a waiver of such issue.

IT IS SO ORDERED.

DATED: San Antonio, Texas, September 16, 2019.



David Alan Ezra
Senior United States District Judge

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-51131

GEORGE ANDREW BENAVIDES,

Plaintiff - Appellant

v.

WILLIAM PELHAM BARR, United States Attorney General; DONALD TRUMP, United States President; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES FEDERAL BUREAU OF INVESTIGATIONS; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE NAVY; UNITED STATES OF AMERICA; OFFICE OF THE NAVAL INSPECTOR GENERAL,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE