IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 1, 2019
Lyle W. Cayce
Clerk

No. 19-10078
Summary Calendar

BILLY JOHN ROBERSON,

Plaintiff - Appellant

v.

ROWLETT POLICE DEPARTMENT; WILLIAM M. BRODAX, Chief of Police,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-2535

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:*

Billy John Roberson, proceeding pro se and in forma pauperis, filed a 42 U.S.C. § 1983 complaint against the City of Rowlett, Texas, the Rowlett Police Department, and Police Chief William M. Brodax for violating his constitutional rights. Roberson asserts that he was wrongfully charged, arrested, and convicted of aggravated assault with a deadly weapon. The

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

district court dismissed Roberson's complaint for failure to state a claim and as frivolous under 28 U.S.C. § 1915(e)(2)(B). Because Roberson's appeal is frivolous, we DISMISS this appeal.

In 2005, Roberson was convicted by a jury in Texas state court of aggravated assault with a deadly weapon. He was sentenced to six years in prison and fined $5,000. His conviction and sentence were affirmed on direct appeal. *Roberson v. State*, No. 05-05-00629-CR, 2006 WL 147397 (Tex. App. – Dallas, Jan. 20, 2006, pet. dismissed).[1] In his § 1983 complaint, Roberson asserts that he was wrongfully charged, arrested, and convicted, in violation of his rights under the First, Fourth, Fifth, and Fourteenth Amendments. Specifically, he contends that there was no evidence of a weapon and no medical evidence of harm to the alleged victim. Roberson seeks reversal of his conviction and monetary damages for the alleged constitutional violations.

The district court determined that Roberson's claim requesting reversal of his conviction was not cognizable under § 1983 because the claim sought habeas relief, which Roberson had previously been denied under 28 U.S.C. § 2254. It therefore dismissed the claim pursuant to § 1915(e)(2)(B)(ii) for failure to state a claim on which relief may be granted. The district court further determined that because Roberson's claim for monetary damages pursuant to § 1983 clearly challenged the validity of his state court conviction, the claim was barred under the principles set forth in *Heck v. Humphrey*.[2] Relying on our precedent, it dismissed the claim as frivolous under § 1915(e)(2)(B)(i).

In *Heck*, the Supreme Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harmed caused by actions

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[1] Roberson has completed his term of imprisonment.
[2] 512 U.S. 477 (1994).

> whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or 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.

As noted by the district court, we have held that "[a] § 1983 claim which falls under the rule in *Heck* is legally frivolous unless the conviction or sentence at issue has been reversed, expunged, invalidated, or otherwise called into question."[3]

On appeal, Roberson asserts that the district court "miss[ed] the point." He contends that his case is not frivolous because the evidence was insufficient to support the jury's guilty verdict. He further argues that the State never responded to his complaint and that it should be held in contempt for its failure to do so. However, Roberson does not challenge the bases for the district court's dismissal of his complaint. In particular, he does not argue that the rule set forth in *Heck* is inapplicable to his complaint.

Pro se briefs are afforded liberal construction.[4] Nevertheless, when an appellant fails to identify any error in the district court's analysis, it is the same as if the appellant had not appealed that issue.[5] Because Roberson has failed to challenge any legal aspect of the district court's disposition of the claims raised in his § 1983 complaint, he has abandoned the critical issues of this appeal. Roberson's appeal is without arguable merit and is dismissed as frivolous.[6]

APPEAL DISMISSED.

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[3] *See Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996).

[4] *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

[5] *See Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

[6] *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10078

BILLY JOHN ROBERSON,

Plaintiff - Appellant

v.

ROWLETT POLICE DEPARTMENT; WILLIAM M. BRODAX, Chief of Police,

Defendants - Appellees

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

O R D E R :

(X) The Appellant's motion for stay of the mandate pending petition for writ of certiorari is DENIED.

( ) The Appellant's motion for stay of the mandate pending petition for writ of certiorari is GRANTED through _____ .

W. Eugene Davis

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILLY JOHN ROBERSON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. **3:18-CV-2535-L**
	§	
ROWLETT POLICE DEPARTMENT and WILLIAM M. BRODAX, Chief of Police,	§	
	§	
Defendants.	§	

ORDER

On October 23, 2018, the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Reports") (Docs. 12, 14) were entered in this case that was brought pursuant to 42 U.S.C. § 1983, recommending that the court: (1) pursuant to 28 U.S.C. § 1915(e)(2)(B), dismiss with prejudice Plaintiff's request for habeas relief under 42 U.S.C. § 1983 for failure to state a claim because "[h]abeas relief is an inappropriate remedy in a § 1983 action" and may only be sought in a habeas corpus action* (Report 2-3) and dismiss with prejudice his remaining claims as frivolous until he satisfies the conditions in *Heck v. Humphrey*, 512 U.S. 477 (1994); and (2) deny Plaintiff's Petition for Pre-Trial Hearing, Request/Motion for Default Judgment (Doc. 13). Plaintiff filed objections to the magistrate judge's recommendation that all claims asserted by him be dismissed (Doc. 15). He also filed a response (Doc. 16), which the court construes as an objection to an order

* In construing this claim as one for relief under section 1983, the magistrate judge noted: "Plaintiff's claims are not construed as a habeas petition because he has previously challenged his conviction with a habeas petition under 18 U.S.C. § 2254, which was denied," and any new habeas petition by him would be considered successive and filed without prior authorization. Report 3.

(Doc. 11) by the magistrate judge denying his request to supplement the record with documents supporting his claims.

Having reviewed the pleadings, file, record in this case, and Report, the court determines that the findings and conclusions of the magistrate judge are correct, and **accepts** them as those of the court. Accordingly, the court **overrules** Plaintiff's objections; **denies** Plaintiff's Petition for Pre-Trial Hearing, Request/Motion for Default Judgment (Doc. 13); **dismisses with prejudice** Plaintiff's request for habeas relief under 42 U.S.C. § 1983 for failure to state a claim; and **dismisses with prejudice** his remaining claims as frivolous until he satisfies the conditions in *Heck v. Humphrey*, 512 U.S. 477 (1994). Dismissal of the claims asserted by Plaintiff is pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii), which applies to frivolous claims and claims that fail to state a claim on which relief may be granted that are subject to screening under 28 U.S.C. § 1915(e)(2).

The court prospectively **certifies** that any appeal of this action would not be taken in good faith. *See* 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). In support of this certification, the court **incorporates** by reference the Report. *See Baugh v. Taylor*, 117 F.3d 197, 202 and n.21 (5th Cir. 1997). The court **conclude**s that any appeal of this action would present no legal point of arguable merit and would, therefore, be frivolous. *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). In the event of an appeal, Plaintiff may challenge this certification by filing a separate motion to proceed *in forma pauperis* on appeal with the clerk of the United States Court of Appeals for the Fifth Circuit. *See Baugh*, 117 F.3d at 202; Fed. R. App. P. 24(a)(5).

It is so ordered this 14th day of January, 2019.

Sam A. Lindsay
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 1, 2019
Lyle W. Cayce
Clerk

No. 19-10078
Summary Calendar

D.C. Docket No. 3:18-CV-2535

BILLY JOHN ROBERSON,

Plaintiff - Appellant

v.

ROWLETT POLICE DEPARTMENT; WILLIAM M. BRODAX, Chief of Police,

Defendants - Appellees

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

Before DAVIS, HAYNES, and GRAVES, 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 appeal is dismissed as frivolous.

Certified as a true copy and issued as the mandate on Jun 14, 2019

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILLY JOHN ROBERSON,	)	
	)	
Plaintiff,	)	
vs.	)	**No. 3:18-CV-2535-L-BH**
	)	
ROWLETT POLICE DEPARTMENT, et al.,	)	
	)	
Defendants.	)	**Referred to U.S. Magistrate Judge**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Special Order No. 3-251*, this case has been automatically referred for findings, conclusions and recommendation. Based on the relevant filings and applicable law, the plaintiff's complaint should be **DISMISSED**.

I. BACKGROUND

On September 24, 2018, Billy John Roberson (Plaintiff) filed this lawsuit against the City of Rowlett, the Rowlett Police Department, and the Chief of Police in his official capacity based on a 2005 conviction and sentence in Cause No. F03-45525 in Dallas County, Texas, for aggravated assault with a deadly weapon. (*See* doc. 3 at 4;[1] doc. 8 at 1-9, 14.) He alleges that he was falsely arrested on December 11, 2003, and there was insufficient evidence to support his arrest and the conviction. (*See* doc. 8 at 1-9.) He seeks to have the judgment in his criminal case vacated as well as monetary damages. (*See* doc. 8 at 16.) No process has been issued in this case.

II. PRELIMINARY SCREENING

Because Plaintiff is proceeding *in forma pauperis*, his complaint is subject to screening under 28 U.S.C. § 1915(e)(2). It provides for *sua sponte* dismissal of the complaint, or any portion thereof,

[1] Citations to the record refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

if the Court finds it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief against a defendant who is immune from such relief.

A claim is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." *Id.* at 327. A claim that falls under the rule announced in *Heck v. Humphrey*, 512 U.S. 477 (1994), "is legally frivolous unless the conviction or sentence at issue has been reversed, expunged, invalidated, or otherwise called into question." *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996). A claim fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. SECTION 1983

Plaintiff sues under 42 U.S.C. § 1983. It "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms." *Id.* To state a claim under § 1983, a plaintiff must allege facts that show (1) he has been deprived of a right secured by the Constitution and the laws of the United States; and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

A. Habeas Relief

Plaintiff seeks to have his conviction set aside based on insufficient evidence. Habeas relief

is an inappropriate remedy in a § 1983 action, however. *See Wolff v. McDonnell*, 418 U.S. 539, 554 (1974). A plaintiff cannot challenge the fact or duration of confinement in a § 1983 action. *Clarke v. Stalder*, 154 F.3d 186, 189 (5th Cir. 1998) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973)). He may only do so within the exclusive scope of habeas corpus. *See Preiser*, 411 U.S. at 487. Plaintiff may only obtain declaratory or monetary relief in this § 1983 action. Plaintiff's claims are not construed as a habeas petition because he has previously challenged his conviction with a habeas petition under 28 U.S.C. § 2254, which was denied. *See Roberson v. Quarterman*, No. 3:07-CV-339-B (N.D. Tex. Dec. 13, 2007). A new habeas petition would be successive, and a district court cannot exercise jurisdiction over a second or successive § 2254 petition without authorization from the court of appeals. *See* 28 U.S.C. § 2244(b); *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003). Plaintiff has not shown that he has been authorized to file a successive § 2254 petition.

B. *Heck* Bar

Plaintiff also seeks monetary relief for alleged violation of his rights in connection with his prosecution and conviction.

In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Supreme Court held that when a successful civil rights action would necessarily imply the invalidity of a plaintiff's conviction or sentence, the complaint must be dismissed unless the plaintiff demonstrates that the conviction or sentence 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 under 28 U.S.C. § 2254. A plaintiff does so by achieving "favorable termination of his available state, or federal habeas, opportunities to challenge the

underlying conviction or sentence." *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (per curiam). *Heck* applies to claims seeking declaratory and injunctive relief as well as those seeking damages. *Shabazz v. Franklin*, 380 F. Supp. 2d 793, 805 (N.D. Tex. 2005) (accepting recommendation of Mag. J.) (citing *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) and *Clarke v. Stalder*, 154 F.3d 186, 190-91 (5th Cir. 1998)).

Here, because Plaintiff's claims concerning his 2003 arrest and subsequent conviction clearly challenge the validity of his state court conviction, they are barred under *Heck*. He has not demonstrated that his allegedly improper conviction has been reversed, invalidated, or expunged prior to bringing this action under § 1983, so his claims are not cognizable at this time. The claims are "legally frivolous" within the meaning of 28 U.S.C. § 1915 and should be dismissed "with prejudice to [] being asserted again until the *Heck* conditions are met." *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996); *see also Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996).

IV. RECOMMENDATION

Plaintiff's habeas claims should be **DISMISSED** with prejudice for failure to state a cause of action and his remaining claims should be **DISMISSED** with prejudice as frivolous under § 1915(e)(2)(B) until he satisfies the conditions in *Heck v. Humphrey*, 512 U.S. 477 (1994).

SIGNED this 22nd day of October, 2018.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILLY JOHN ROBERSON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. **3:18-CV-2535-L**
	§	
ROWLETT POLICE DEPARTMENT and WILLIAM M. BRODAX, Chief of Police,	§	
	§	
	§	
	§	
Defendants.	§	

ORDER

On October 23, 2018, the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Reports") (Docs. 12, 14) were entered in this case that was brought pursuant to 42 U.S.C. § 1983, recommending that the court: (1) pursuant to 28 U.S.C. § 1915(e)(2)(B), dismiss with prejudice Plaintiff's request for habeas relief under 42 U.S.C. § 1983 for failure to state a claim because "[h]abeas relief is an inappropriate remedy in a § 1983 action" and may only be sought in a habeas corpus action* (Report 2-3) and dismiss with prejudice his remaining claims as frivolous until he satisfies the conditions in *Heck v. Humphrey*, 512 U.S. 477 (1994); and (2) deny Plaintiff's Petition for Pre-Trial Hearing, Request/Motion for Default Judgment (Doc. 13). Plaintiff filed objections to the magistrate judge's recommendation that all claims asserted by him be dismissed (Doc. 15). He also filed a response (Doc. 16), which the court construes as an objection to an order

* In construing this claim as one for relief under section 1983, the magistrate judge noted: "Plaintiff's claims are not construed as a habeas petition because he has previously challenged his conviction with a habeas petition under 18 U.S.C. § 2254, which was denied," and any new habeas petition by him would be considered successive and filed without prior authorization. Report 3.

(Doc. 11) by the magistrate judge denying his request to supplement the record with documents supporting his claims.

Having reviewed the pleadings, file, record in this case, and Report, the court determines that the findings and conclusions of the magistrate judge are correct, and **accepts** them as those of the court. Accordingly, the court **overrules** Plaintiff's objections; **denies** Plaintiff's Petition for Pre-Trial Hearing, Request/Motion for Default Judgment (Doc. 13); **dismisses with prejudice** Plaintiff's request for habeas relief under 42 U.S.C. § 1983 for failure to state a claim; and **dismisses with prejudice** his remaining claims as frivolous until he satisfies the conditions in *Heck v. Humphrey*, 512 U.S. 477 (1994). Dismissal of the claims asserted by Plaintiff is pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii), which applies to frivolous claims and claims that fail to state a claim on which relief may be granted that are subject to screening under 28 U.S.C. § 1915(e)(2).

The court prospectively **certifies** that any appeal of this action would not be taken in good faith. *See* 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). In support of this certification, the court **incorporates** by reference the Report. *See Baugh v. Taylor*, 117 F.3d 197, 202 and n.21 (5th Cir. 1997). The court **concludes** that any appeal of this action would present no legal point of arguable merit and would, therefore, be frivolous. *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). In the event of an appeal, Plaintiff may challenge this certification by filing a separate motion to proceed *in forma pauperis* on appeal with the clerk of the United States Court of Appeals for the Fifth Circuit. *See Baugh*, 117 F.3d at 202; Fed. R. App. P. 24(a)(5).

It is so ordered this 14th day of January, 2019.

Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILLY JOHN ROBERSON,	)	
	)	
Plaintiff,	)	
vs.	)	**No. 3:18-CV-2535-L-BH**
	)	
ROWLETT POLICE DEPARTMENT, et al.,	)	
	)	
Defendants.	)	**Referred to U.S. Magistrate Judge**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Special Order No. 3-251*, this case has been automatically referred for findings, conclusions and recommendation. Before the Court are the plaintiff's *Petition for Pre-Trial Hearing [and] Request/Motion for Default Judgement*, filed on October 26, 2018 (doc. 13). Based on the relevant filings and applicable law, the motions should be **DENIED**.

I. BACKGROUND

On September 24, 2018, Billy John Roberson (Plaintiff) filed this lawsuit against the City of Rowlett, the Rowlett Police Department, and the Chief of Police in his official capacity based on a 2005 conviction and sentence in Cause No. F03-45525 in Dallas County, Texas, for aggravated assault with a deadly weapon. (*See* doc. 3 at 4;[1] doc. 8 at 1-9, 14.) He alleges that he was falsely arrested on December 11, 2003, and there was insufficient evidence to support his arrest and the conviction. (*See* doc. 8 at 1-9.) He seeks to have the judgment in his criminal case vacated as well as monetary damages. (*See* doc. 8 at 16.) On October 22, 2018, it was recommended that his complaint be dismissed with prejudice for failure to state a claim and as frivolous under *Heck v. Humphrey*, 512 U.S. 477 (1994). He now seeks a hearing and default judgment based on the

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defendants' failure to respond to his complaint, which was never ordered served. (doc. 13.)

II. DEFAULT JUDGMENT

Rule 55 of the Federal Rules of Civil Procedure sets forth the conditions under which default may be entered against a party, as well as the procedure for seeking the entry of default judgment. There is a three-step process for securing a default judgment. *See N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). First a default occurs when a party "has failed to plead or otherwise defend" against an action. Fed. R. Civ. P. 55(a). Next, an entry of default must be entered by the clerk when the default is established "by affidavit or otherwise". *See id.*; *N.Y. Life Ins.*, 84 F.3d at 141. Third, a party may apply to the clerk or the court for a default judgment after an entry of default. Fed. R. Civ. P. 55(b); *N.Y. Life Ins.*, 84 F.3d at 141.

Here, the defendants have not been ordered served yet because of the preliminary screening required by 28 U.S.C. § 1915(e)(2)(B) of complaints filed by persons proceeding *in forma pauperis*, so no default has occurred or been entered. Without a prior entry of default, the plaintiff has no basis for seeking a default judgment. Moreover, "a party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default." *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001) (quoting *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996)). "In fact, '[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations.'" *Lewis*, 236 F.3d at 767 (quoting *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989)). Dismissal of the plaintiff's complaint for failure to state a claim and as frivolous has been recommended. Default judgment is not warranted.

III. RECOMMENDATION

Plaintiff's motion for a hearing and default judgment should be **DENIED**.

SIGNED this 29th day of October, 2018.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10078

BILLY JOHN ROBERSON,

Plaintiff - Appellant

v.

ROWLETT POLICE DEPARTMENT; WILLIAM M. BRODAX, Chief of Police,

Defendants - Appellees

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

ON PETITION FOR REHEARING

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
UNITED STATES CIRCUIT JUDGE