FILED
United States Court of Appeals
Tenth Circuit

April 17, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID WAYNE ROBINSON ,

Plaintiff - Appellant,

v.

JARED POLIS,* Governor, individual and official capacity; MICHAEL HANCOCK, Mayor, individual and official capacity; PHIL WEISER, Attorney General, individual and official capacity; FRAN GOMEZ, Sheriff, individual and official capacity,

Defendants - Appellees.

No. 19-1379
(D.C. No. 1:18-CV-01453-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT**

Before **MATHESON**, **BALDOCK**, and **KELLY**, Circuit Judges.

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* Jared Polis, Colorado's current Governor, is substituted for Colorado's former Governor, John Hickenlooper.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

April 17th 2020

Pro se state prisoner David Wayne Robinson appeals from the district court's dismissal of his 42 U.S.C. § 1983 amended complaint as frivolous. We dismiss his appeal as frivolous and deny him leave to proceed *in forma pauperis* ("*ifp*") on appeal. Further, because Mr. Robinson is subject to the three-strikes provision of the Prison Litigation Reform Act ("PLRA"), we impose a strike under 28 U.S.C. § 1915(g).[1]

Denied IFP.

STRIKE Administered And Denied IFP

I. BACKGROUND

Mr. Robinson, a Colorado state prisoner, sued under § 1983 for alleged violations of his civil rights when he was a pre-trial detainee at the Denver Detention Facility ("DDF"). According to Mr. Robinson, because various state and local officials collected a $30 fee when he was booked into the DDF, they infringed (1) his due process rights, (2) the of separation of powers, and (3) his right to be free from cruel and unusual punishment.

The magistrate judge found Mr. Robinson's initial complaint was deficient and directed him to file an amended complaint within 30 days. When he failed to do so, the magistrate judge reviewed the original complaint under 28 U.S.C. § 1915(e)(2)(B)(i). He recommended dismissal with prejudice as legally frivolous because Mr. Robinson failed to plead factual allegations to support his claims.

[1] Because Mr. Robinson is proceeding pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

Shortly thereafter, Mr. Robinson filed a belated amended complaint, explaining he had not received a copy of the magistrate judge's order to file an amended complaint until after the 30-day deadline expired. He asked the district court to accept the untimely complaint for filing. Mr. Robinson did not raise any substantive objections to the magistrate judge's recommendation. He argued only that the district court should accept his late-filed amended complaint, which the court read to contain only a due process claim.

The district court was "unconvinced" by Mr. Robinson's explanation as to why he failed to file a timely amended complaint. R. at 84. But the court determined that even if it "were to accept and consider the amended prisoner complaint . . . the action would still be dismissed" because the complaint "fails to assert factual allegations to support an arguable due process claim." *Id.* at 85. It dismissed Mr. Robinson's amended complaint with prejudice as legally frivolous and denied leave to proceed *ifp* on appeal.[2]

II. DISCUSSION

A. *Mr. Robinson's Claims*

We review a district court's order dismissing claims as frivolous under § 1915(e)(2)(B)(i) for an abuse of discretion. *See Fogel v. Pierson*, 435 F.3d 1252,

[2] On appeal, Mr. Robinson maintains he was not at fault for failing to file a timely amended complaint. Because the district court overlooked the untimely filing and reviewed the amended complaint, timeliness "has no bearing on the ultimate outcome of this case," and we will not address it on appeal. *Orr v. City of Albuquerque*, 417 F.3d 1144, 1154 (10th Cir. 2005).

1259 (10th Cir. 2006). If the district court based its frivolousness determination a legal determination, we review that issue de novo. *Id.*

1. **Separation of Powers and Cruel and Unusual Punishment**

The magistrate judge determined the original complaint failed to assert factual allegations to support the claims of separation of powers[3] or cruel and unusual punishment and recommended they be dismissed as legally frivolous. Although Mr. Robinson alludes to these claims in his brief, he has waived appellate review because he did not object to these findings and recommendations. "We have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate." *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (brackets and internal quotation marks omitted). "The failure to timely object to a magistrate's recommendations waived appellate review of both factual and legal questions." *Id.* (internal quotation marks omitted). *See also United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996) (finding a general objection insufficient to preserve appellate review of specific issues).

2. **Due Process**

The magistrate judge determined that "[i]n order to pursue a due process claim, [Mr. Robinson] must file an amended prisoner complaint that adequately alleges that the booking fee either deprived him of liberty or that he was entitled to a

[3] We are unaware of any authority, and Robinson has cited none, that the doctrine of separation of powers is a source of individual rights actionable under § 1983.

refund of the booking fee but the post-deprivation remedies are inadequate." R. at 54 (internal quotation marks omitted). In its review of the amended complaint, the district court found that Mr. Robinson "has not adequately asserted factual allegations to support a procedural due process claim for the same reasons as stated in [the magistrate judge's recommendation]. As a result, the only claim asserted in the amended prisoner complaint suffers from the same deficiencies as the initial complaint." *Id.* at 86.

On appeal, Mr. Robinson fails to address these deficiencies. Instead, he argues that "[t]here should have been no such deprivation . . . to begin with." Aplt. Opening Br. at 7. This perfunctory argument is insufficient to invoke this court's review. *See Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) ("[P]erfunctory" allegations of error that "fail to frame and develop an issue [are] [in]sufficient to invoke appellate review.").

B. ***Strike for Frivolousness***

The three-strikes provision, § 1915(g), states that after a prisoner files three civil "action[s] or appeal[s]" that are dismissed as "frivolous, malicious, or [for failure] to state a claim," he is no longer entitled to proceed *ifp* unless he is in "imminent danger of serious physical injury." A claim is frivolous "where it lacks an arguable basis either in law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

Mr. Robinson has filed three civil rights cases, including this one, related to his pre-trial detention at the DDF. All of them have produced § 1915(g) strikes, first in *Robinson v. Coffman,* No. 18-cv-01455-GPG, 2019 WL 8223565 (D. Colo. Mar. 7,

2019), and then in *Robinson v. Firman*, No. 18-cv-01494 (D. Colo. Feb. 21, 2019), which were both dismissed as frivolous. Strike three was assessed in this case when the district court dismissed the amended complaint as frivolous. *Robinson v. Hickenlooper*, No. 18-cv-01453 (D. Colo. Apr. 23, 2019).[4]

Mr. Robinson's brief simply reiterates his amended complaint's conclusory averments—namely, that the booking fee violates due process and is part of a corrupt scheme to collect money from pre-trial detainees. He does not address the district court's conclusion that his amended complaint was frivolous or attempt to demonstrate that his claims do not meet the § 1915(e)(2)(B)(i) standard for frivolity. We therefore assess the fourth strike here for a frivolous appeal.

III. CONCLUSION

We dismiss Mr. Robinson's appeal as frivolous, deny his motion for *ifp* status, and impose a strike under the PLRA. We remind Mr. Robinson of his obligation to pay the filing fee in full.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[4] Although the district court's strike here was Robinson's third, we permitted him to proceed *ifp* in this appeal.

5-23-19 (ROWLEY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL

Civil Action No. 18-cv-01453-LTB-GPG

DAVID WAYNE ROBINSON,

Plaintiff,

10

v.

JOHN HICKENLOOPER, Governor, individual and official capacity,
MICHAEL HANCOCK, Mayor, individual and official capacity,
CYNTHIA COFFMAN, Attorney General, individual and official capacity,
PATRICK FIRMAN, Sheriff, individual and official capacity,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge Gordon P. Gallagher filed on April 5, 2019. (ECF No. 17). Plaintiff has filed timely written objections to the Recommendation. (ECF No. 19). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct.

In the Recommendation, Magistrate Judge Gordon P. Gallagher noted that on February 13, 2019, the Court had ordered Plaintiff to file an amended prisoner complaint within thirty days. (ECF No. 17 (citing ECF No. 14)). As Plaintiff failed to file an amended prisoner complaint within the time allowed as directed, Magistrate Judge Gallagher proceeded to review the original prisoner complaint filed on June 11, 2018. (ECF No. 1). Magistrate Judge Gallagher recommended that the prisoner complaint be

Frivolous Citation of the law

NO LEGAL MONEY

4-23-19

dismissed because Plaintiff failed to adequately allege the personal participation of each named defendant, and he failed to assert factual allegations to support an arguable due process claim, separation of powers claim, and cruel and unusual punishment claim. (ECF No. 17). The report and recommendation from Magistrate Judge Gallagher was entered on April 5, 2019. (*Id.*).

On April 12, 2019, Plaintiff filed an untimely amended prisoner complaint. (ECF No. 18). In the amended prisoner complaint, Plaintiff fails to provide any explanation as to why the document was untimely filed. However, in his Objections filed on April 17, 2019, he now argues that he did not receive the Court's February 13, 2019 Order to Amend until April 2, 2019, after the deadline to file an amended prisoner complaint had already passed. (ECF No. 19 at 1). He further states "[a]ll my dates of incoming and outgoing mail have / is [sic] documented with the legal mail system" and "I can prove the date that I received the [February 13, 2019] order." (*Id.*). Plaintiff alleges that he "amended his complaint in a timely manner and sent the amended complaint in to the District courts [sic] on April 4th. [sic] 2019 through the Crowley county legal mail system." (*Id.*).

The Court is unconvinced by Plaintiff's arguments. Although Plaintiff alleges he can provide documentation from the legal mail system to substantiate his argument that he did not receive the Court's February 13 order until April 2, he fails to provide any evidence besides his conclusory allegation. Further, if Plaintiff did receive the Court's Feb 13 order forty-eight days after it was filed, he should have promptly notified the court of the circumstances. Instead, he filed an untimely amended prisoner complaint without mentioning any reason for the delay or explaining that he experienced an

extreme delay in receiving the Court's order. Plaintiff failed to notify the Court of the alleged delay in receiving his mail until after he received an unfavorable court order. Further, he provides no support for his argument that he sent his amended prisoner complaint to the Court on April 4, 2019. *See Price v. Philpot*, 420 F.3d 1158, 1163-66 (10th Cir. 2005) (describing prisoner mailbox rule). In fact, the envelope containing the amended prisoner complaint indicates it was received by prison staff for mailing on April 10, 2019. (ECF No. 18 at 23).

Additionally, even if, in an abundance of caution, the Court were to accept and consider the amended prisoner complaint submitted by Plaintiff on April 12, 2019, the action would still be dismissed. Plaintiff's amended prisoner complaint fails to comply with the directives of the Court's February 13 order. Initially, the Court notes that the amended prisoner complaint is not on the court-approved prisoner complaint form. Plaintiff has been warned numerous times that a *pro se* prisoner plaintiff must use the court-approved prisoner complaint form. (ECF Nos. 4, 8, 10 & 14). Therefore, the amended prisoner complaint filed on April 12 was deficient and could be dismissed for failure to follow a court order because Plaintiff failed to submit it on the court-approved prisoner complaint form.

Furthermore, the amended prisoner complaint fails to comply with other directives in the Court's February 13 order. In the amended prisoner complaint, Plaintiff asserts one claim of "violation of due process 5th[,] 4th & 14th Amend." (ECF No. 18 at 6). However, the amended prisoner complaint fails to assert factual allegations to support an arguable due process claim.

As explained in Magistrate Judge Gallagher's Recommendation:

> In this case, Plaintiff has not asserted any facts to support the conclusion that the State of Colorado and City of Denver lack a process by which a person can seek the return of the fee under certain circumstances. Plaintiff makes no allegations that the charges against him were dismissed. He also fails to allege that the booking fee payment hindered his ability to be released before trial in anyway. Importantly, Plaintiff has not alleged that he was entitled to a return of the fee, but that it was not returned. Plaintiff, therefore, has not adequately alleged a procedural due process claim.

(ECF No. 17 at 7 (citing (ECF No. 14 at 3-6)). Similarly, in reviewing the amended prisoner complaint filed by Plaintiff on April 12, 2019, he has not adequately asserted factual allegations to support a procedural due process claim for the same reasons as stated in Magistrate Judge Gallagher's Recommendation. As a result, the only claim asserted in the amended prisoner complaint suffers from the same deficiencies as the initial complaint. Therefore, the Court concludes that Plaintiff's Objections to the Recommendation by Magistrate Judge Gallagher are without merit and will be overruled.

Accordingly, for the foregoing reasons, it is

ORDERED that Plaintiff's Objections to the Recommendation by Magistrate Judge Gordon P. Gallagher (ECF No. 19) are overruled. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge Gordon P. Gallagher (ECF No. 17) is accepted and adopted. It is

FURTHER ORDERED that that the Prisoner Complaint (ECF No. 1), the Amended Prisoner Complaint (ECF No. 18), and this action be DISMISSED WITH PREJUDICE as legally frivolous. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal be DENIED WITHOUT PREJUDICE to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED: April 23, 2019

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01453-GPG

DAVID WAYNE ROBINSON,

Plaintiff,

v.

GOVENOR [sic] JOHN HICKENLOOPER,
MAYOR MICHAEL HANCOCK,
ATTORNEY GENERAL CYNTHIA COFFMAN, and
SHERIFF PATRICK FIRMAN,

Defendants.

ORDER DENYING APPOINTMENT OF COUNSEL AND
REPEATING SECOND ORDER DIRECTING PLAINTIFF TO CURE DEFICIENCIES

Plaintiff, David Wayne Robinson, is currently held at the Denver County Detention Facility located in Denver, Colorado. On June 11, 2018, Plaintiff submitted a "Prisoner Complaint" which indicates that it is the "form revised December 2017." (ECF No. 1). However, it is not the Court's approved form. The document reflects jurisdiction pursuant to 42 U.S.C. § 1983. (*Id.* at 3). Plaintiff did not pay the required filing fee or submit a properly supported request to proceed without prepaying fees or costs under 28 U.S.C. § 1915.

Following review of the materials submitted on June 11, 2018 as required pursuant to D.C.COLO.LCivR 8.1(b), on June 13, 2018, the Court issued an Order Directing Plaintiff to Cure Deficiencies requiring the Plaintiff to either pay the $400.00 filing fee required under 28 U.S.C. § 1914 or submit a properly supported request to proceed without prepaying fees or costs under 28 U.S.C. § 1915 through use of the Court's approved forms. (ECF No. 4). The Order further required the Plaintiff to submit his

8-14-2018

claims on the Court's approved Prisoner Complaint form as required by the Local Rules of this Court at D.C.COLO.LCivR 5.1(c). (*Id.*). The Plaintiff was provided with the necessary forms to use in curing the filing deficiencies in this matter. (*Id.*). In response to the Court's Order, the Plaintiff filed a document titled "Cease and Disist [sic] Order of Bias and Prejudice Proceedings" on June 27, 2018 which, among other things, challenged the requirement that Plaintiff has to submit a signed Authorization form allowing the agency holding him in custody to calculate and disburse funds from his inmate account and also sought an Order from this Court directing the jail to allow him "all the time, material, and information access that he needs so that he can prepare for his trials." (ECF No. 5). The cease and desist request was denied by the Court on July 17, 2018 for reasons stated in the Order Denying Cease and Desist Request. (ECF No. 6). Additionally, in the same document, the Court issued a Second Order Directing Plaintiff to Cure Deficiencies. (*Id.*).

In the Second Order Directing Plaintiff to Cure Deficiencies issued on July 17, 2018, Plaintiff was again required to cure the filing deficiencies in this matter by paying the $400.00 filing fee or submitting a properly supported request to proceed without prepaying fees or costs under 28 U.S.C. § 1915 through use of the Court's approved forms and also required to submit his claims on the Court's approved Prisoner Complaint form. (*Id.*). Plaintiff was provided with 30 days from the date of the Order in which to cure the filing deficiencies and he was again provided with the necessary forms to use in curing the filing deficiencies. (*Id.*). Plaintiff was warned that this action would be dismissed if he failed to cure the deficiencies within the time allowed. (*Id.*).

On August 10, 2018, Plaintiff filed a Request for Attorney. (ECF No. 7). Plaintiff contends that there is an affirmative obligation on the Court to provide him with counsel in this matter. (*Id.*). However, the Court recognizes that there is neither a constitutional

nor a statutory right to counsel for civil litigants. *See Johnson v. Johnson*, 466 F.3d 1213, 1217 (10th Cir. 2006); *Parham v. Johnson*, 126 F.3d 454, 456–57 (3d Cir. 1997); *Carper v. DeLand,* 54 F.3d 613, 616 (10th Cir. 1995); *Tabron v. Grace*, 6 F.3d 147, 153 (3d Cir. 1993); *Durre v. Dempsey,* 869 F.2d 543, 547 (10th Cir. 1989); *Merritt v. Faulkner*, 697 F.2d 761, 763 (7th Cir. 1983). "The burden is on the [*pro se* litigant] to convince the court that there is sufficient merit to his [or her] claim to warrant the appointment of counsel." *Steffey v. Orman,* 461 F.3d 1218, 1223 (10th Cir. 2006) (quoting *Hill v. SmithKline Beecham Corp.,* 393 F.3d 1111, 1115 910th Cir. 2004)). It is not enough "that having counsel appointed would have assisted [the *pro se* litigant] in presenting his [or her] strongest possible case, [as] the same could be said in any case." *Steffey,* 461 F.3d at 1223 (quoting *Rucks v. Boergermann,* 57 F.3d 978, 979 (10th Cir. 1995)). In other words, the Court does not appoint an attorney to assist a plaintiff in finding claims that have sufficient merit.

Notwithstanding this lack of a constitutional or statutory right to appointed counsel, in a civil case, 28 U.S.C. § 1915(e)(1) provides that "[t]he court may request an attorney to represent any person unable to employ counsel." The decision to request that an attorney assist an individual unable to employ counsel and then appoint that attorney as counsel in a case is left to the sound discretion of the trial court. A district court's appointment of counsel pursuant to this statute is discretionary and must be made on a case-by-case basis. *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995); *Tabron*, 6 F.3d at 157–58. Plaintiff has the burden to convince the Court that there is sufficient merit to his claims to warrant the appointment of counsel. *United States v. Masters*, 484 F.2d 1251, 1253 (10th Cir. 1973). Whether there is sufficient merit to the claims requires

an examination of the record at the time the request is made. *See Jackson v. Turner*, 442 F.2d 1303 (10th Cir. 1971).

The exercise of this discretion, however, is guided by certain basic principles. *Gordon v. Gonzalez*, 232 F. App'x 153, 156 (3d Cir. 2007). As a preliminary matter, the plaintiff's claim must have some merit in fact and law. *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985). If the district court determines that the plaintiff's claims have some merit, then the district court should consider the following factors in considering a motion to appoint counsel: 1) the plaintiff's ability to present his or her own case; 2) the complexity of the legal issues; 3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue such an investigation; 4) the amount a case is likely to turn on credibility determinations; 5) whether the case will require the testimony of expert witnesses; and 6) whether the plaintiff can attain and afford counsel on his or her own behalf. *See, e.g., Hill v. SmithKline Beecham Corp.*, 393 F.3d 111, 1115 (10th Cir. 2004) (holding that district courts should evaluate the merits of the claims, the nature and complexity of the factual and legal issues, and the litigant's ability to investigate the facts and present his or her claims); *Montgomery v. Pinchak*, 294 F.3d 492, 498–99 (3d Cir. 2002); *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981); *Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971).

Analysis of the above factors suggests that counsel should not be appointed in this case at this time. As discussed above, Plaintiff has yet to cure the filing deficiencies in this matter as ordered by the Court on June 13, 2018 (ECF No. 4) and again on July 17, 2018 (ECF No. 6). Consideration of whether the Plaintiff's claims have some merit in fact and law is preempted because Plaintiff has failed to address the issue of the filing fee through either the payment of the required $400.00 filing fee as required to initiate an

action in this Court under 28 U.S.C. § 1914, or by submitting a properly supported request to proceed without prepaying fees or costs under 28 U.S.C. § 1915 through use of the Court's approved forms. Plaintiff has been twice provided with the Court approved forms to be used in addressing this issue. After receiving notice of the requirements for *in forma pauperis* filing and being provided with adequate time to address the issue, the failure of the Plaintiff to either pay the required filing fee or file a properly supported request to proceed without prepayment of the fee would, by itself, provide sufficient grounds for a court to dismiss this matter under Rule 41(b). *See Campanella v. Utah County Jail,* 78 Fed.Appx. 72, 73 (10th Cir. 2003) (holding district court did not abuse its discretion in dismissing action without prejudice because plaintiff failed to pay the filing fee where plaintiff received adequate notice of IFP requirements and had sufficient time to cure any deficiencies).

Further, although Plaintiff has twice been provided with the Court-approved Prisoner Complaint form, he has yet to comply with the rules of this Court which requires that his claims be submitted on the form. *Pro se* status does not excuse the obligation of any litigant to comply with the same rules of procedure that govern other litigants. *See Green v. Dorrell,* 969 F.2d 915, 917 (10th Cir. 1992); *see also Nielsen v. Price,* 17 F.3d 1276, 1277 (10th Cir. 1994). Dismissal of an action pursuant to Fed. R. Civ. P. 41(b) is appropriate where a plaintiff fails to comply with court orders and the rules governing procedure. *See Reed v. Bennett,* 312 F.3d 1190, 1195 (10th Cir. 2002) ("A district court undoubtedly has discretion to sanction a party for failing to prosecute or defend a case, or for failing to comply with local or federal procedural rules."); *see also United States ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853, 855 (10th Cir. 2005) (citing *Nat'l Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) ("dismissal is an appropriate disposition against a party who disregards court orders and fails to proceed

as required by court rules.").

The Court further notes that Plaintiff has been able to present his various contentions and arguments in a fairly comprehensible manner to date, and that he has regularly communicated with the Court on other matters in this case. The Court therefore cannot conclude at this time that Plaintiff lacks the ability to present his own case. The Court also finds that the legal issues presented by this case are not overly complex and that it appears that no factual investigation is necessary at this point in the proceedings. Plaintiff has been provided with the necessary forms needed to proceed in this regard, and he need only complete them and submit them along with any necessary supporting documentation. In submitting a Prisoner Complaint on the Court's approved form, Plaintiff may plead facts of which he is already aware. Finally, Plaintiff does not state whether he attempted to secure counsel to represent him on a volunteer basis before making his request for the Court to provide volunteer counsel. As such, the Court cannot conclude that Plaintiff is unable to attain counsel on his own behalf. If this case passes initial review and is drawn to a presiding judge, Plaintiff may renew his motion for appointment of counsel at that time. Accordingly, it is

ORDERED that Plaintiff's request for appointment of counsel (ECF No. 7) is **DENIED** without prejudice as premature. It is

FURTHER ORDERED that Plaintiff has **until and including August 17, 2018 in which to cure the filing deficiencies noted in the Court's Orders of June 13, 2018 (ECF No. 4) and July 17, 2018 (ECF No. 6)**. Any papers that Plaintiff files in response must be labeled with the civil action number identified on this Order. It is

FURTHER ORDERED that Plaintiff must pay the $400.00 filing fee or submit a properly supported request to proceed without prepaying fees or costs under 28 U.S.C. § 1915 through use of the Court's approved forms and he must also submit his claims on

the Court's approved Prisoner Complaint form **on or before August 17, 2018**. Plaintiff has twice previously been provided with the necessary forms in this regard. It is

FURTHER ORDERED that if Plaintiff fails to cure the designated filing deficiencies set forth in the Court's Orders of June 13, 2018 (ECF No. 4) and July 17, 2018 (ECF No. 6), and again restated in this Order, on or before August 17, 2018, the action will be dismissed without further notice. The dismissal shall be without prejudice.

DATED August 14, 2018, at Denver, Colorado.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

4-11-19 S M T W T F 9 10 11 12

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 18-cv-01453-GPG

DAVID WAYNE ROBINSON,

Plaintiff,

v.

JOHN HICKENLOOPER, Governor, individual and official capacity,
MICHAEL HANCOCK, Mayor, individual and official capacity,
CYNTHIA COFFMAN, Attorney General, individual and official capacity,
PATRICK FIRMAN, Sheriff, individual and official capacity,

Defendants.

RECOMMENDATION REGARDING DISMISSAL

This matter comes before the Court on the Prisoner Complaint (ECF No. 1)[1] filed *pro se* by the Plaintiff on June 11, 2018. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 16)[2]. The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is

[1] "(ECF No. ___)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive, or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

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sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the Prisoner Complaint be dismissed with prejudice as legally frivolous.

I. Factual and Procedural Background

Plaintiff, David Wayne Robinson, is currently incarcerated at the Bent County Correctional Facility (BCF). At the time Plaintiff initiated this action, he was a pre-trial detainee at the Denver Detention Facility.

On February 13, 2019, the Court ordered Plaintiff to file an amended prisoner complaint. (ECF No. 14). Mr. Robinson was warned that if he failed to file an amended prisoner complaint as directed within thirty days, the action could be dismissed without further notice. Plaintiff has failed to file an amended prisoner complaint within the time allowed and he has failed to communicate with the court in any way since the February 13 Order was issued. Therefore, the Court will review the original Prisoner Complaint (ECF No. 1), filed on June 11, 2018.

II. Legal Standards

The Court must construe the Prisoner Complaint liberally because Mr. Robinson is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for *pro se* litigants. *See Hall*, 935 F.2d at 1110.

Mr. Robinson has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (ECF No. 13). Therefore, the Court must dismiss the action if the claims in the Prisoner Complaint are frivolous or seek damages from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B)(i) & (iii). A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does

not exist or asserts facts that do not support an arguable claim. *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989). For the reasons discussed below, I recommend that this action be dismissed as legally frivolous.

III. The Prisoner Complaint

In the Prisoner Complaint, Mr. Robinson asserts three claims: (1) violation of due process; (2) separation of powers; and (3) cruel and unusual punishment. (ECF No. 1 at 4). According to Mr. Robinson, the Denver Detention Facility collects a $30.00 booking fee when a detainee is booked into jail, which is illegal in several other states. As for the specific factual allegations regarding the defendants' participation, Mr. Robinson alleges that Defendant Governor Hickenlooper enacts and retracts laws for the state, Defendant Mayor Michael Hancock oversees the city policies and the corruption, Defendant Attorney General Cynthia Coffman is supposed to press charges for criminal violations, and Defendant Sheriff Patrick Firman enforces the $30.00 booking fee. (*Id.*). For his second claim of "separation of powers," Plaintiff alleges that "Sheriff Deputies take the money when they can't impose a sentence." (*Id.*). For his third claim of cruel and unusual punishment, Plaintiff alleges that "[i]t's very traumatizing to individuals[.]" (*Id.*). For relief, he states he is "really not sure at this point. Although Compensation is definetly [sic] a sure thing." (*Id.* at 6).

IV. Deficiencies in Prisoner Complaint

As set forth in the February 13 Order directing Plaintiff to file an Amended Prisoner Complaint (ECF No. 14), the prisoner complaint is deficient because Plaintiff failed to adequately allege the personal participation of each named defendant, and he

failed to assert factual allegations to support an arguable due process claim, separation of powers claim, and cruel and unusual punishment claim.

A. § 1983 and Personal Participation

The Complaint is deficient because Mr. Robinson fails to adequately allege the personal participation of any of the defendants in the violation of his federal rights. In the Court's February 13 Order, the Court directed Mr. Robinson as to the personal participation requirement as follows:

> "To state a claim under [42 U.S.C. §] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States . . . ." *West v. Atkins*, 487 U.S. 42, 48 (1988). In addressing a claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed. *Graham v. Connor*, 490 U.S. 386, 393–394 (1989) (internal quotations and citations omitted). The validity of the claim then must be judged by reference to the specific constitutional standard which governs that right. *Id.*
>
> Plaintiff must allege each defendant's personal participation in the alleged deprivation. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). There must be an affirmative link between the alleged constitutional violation and each defendant's participation, control or direction, or failure to supervise. *See Gallagher v. Shelton,* 587 F.3d 1063, 1069 (10th Cir. 2009) (citations and quotations omitted); *Dodds v. Richardson*, 614 F.3d 1185, 1200-1201 (10th Cir. 2010). "The requisite showing of an 'affirmative link' between a supervisor and the alleged constitutional injury has '[come] to have three related prongs: (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.'" *Cox v. Glanz*, 800 F.3d 1231, 1248 (citing and quoting *Dodds*, 614 F.3d at 1195). A supervisor can only be held liable for his own deliberate intentional acts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *Serna v. Colo. Dep't of Corrections*, 455 F.3d 1146, 1151 (10th Cir. 2006) ("Supervisors are only liable under § 1983 for their own culpable involvement in the violation of a person's constitutional rights.").

(ECF No. 14 at 2-3).

Despite these explicit instructions from Judge Gallagher, Plaintiff failed to file an amended prisoner complaint that adequately alleged the personal participation of any of the defendants in the violation of his federal rights. His allegations that Defendant Governor Hickenlooper enacts and retracts laws for the state, Defendant Mayor Michael Hancock oversees the city policies and the corruption, and Defendant Attorney General Cynthia Coffman is supposed to press charges for criminal violations fail to adequately allege any personal involvement, sufficient causal connection, or culpable state of mind by these Defendants. Further, his allegation that Defendant Sheriff Patrick Firman "enforces" the $30.00 booking fee is vague and conclusory and does not establish an affirmative link between the Defendant and Plaintiff's alleged constitutional injury. Thus, I recommend that all of Plaintiff's claims be dismissed as legally frivolous for failure to adequately allege how each of the named defendants personally participated in violating Plaintiff's federal rights.

B. Constitutional Claims

Next, even if Plaintiff had adequately alleged the personal participation of Defendants, I would recommend that his claims be dismissed as legally frivolous.

1. Due Process

Plaintiff's allegations regarding the collection of a $30.00 jail booking fee fail to adequately assert facts to support a due process claim. In the February 13 Order, the Court specifically instructed Plaintiff as to the deficiencies in his due process claim as follows:

> Plaintiff's due process claim appears to be based on deprivation of his property (*i.e.*, $30.00) without due process.

The United States Constitution guarantees due process when a person is to be deprived of life, liberty, or property. *See Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994). The analysis of a due process claim proceeds in two stages. First, the Court considers "whether there exists a liberty or property interest of which a person has been deprived," and if so, it then considers "whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). "[T]he processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985).

In this case, Plaintiff alleges he was deprived of $30.00, but there are no allegations that the booking fee deprived him of his liberty in anyway. It is clear that Mr. Robinson had a property interest in the $30.00 used to pay the booking fee. The booking-fee policy thus implicates procedural due process, and "the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The requirements of due process are not rigid; rather, they "call[ ] for such procedural protections as the particular situation demands." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1, 12, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). To determine whether the process afforded is sufficient, courts must balance the following three interests: (1) "the private interest that will be affected by the official action;" (2) "the Government's interest;" and (3) "the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Id.* at 348. The Supreme Court "has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

> Many Courts have determined that the collection of a jail booking fee does not violate due process as long as there is an adequate post-deprivation procedure available to recover the fee for individuals who were wrongfully arrested, not charged, or not convicted. *Sickles v. Campbell County,* 501 F.3d 726 (6th Cir.2007) (a pre-deprivation hearing was not constitutionally required because the county had a legitimate interest in collecting the fee and because the challenging parties did not demonstrate why the jail's grievance procedure and other post-deprivation remedies failed to protect their interests in preventing a flawed withholding); *Mickelson v. Cty. of Ramsey*, 823 F.3d 918, 923–30 (8th Cir. 2016) (same). Further, other courts have reached the same conclusion about the limited nature of the private interest at stake when considering automatic deductions for other jail-related fees. *See, e.g., Slade v. Hampton Roads Reg'l Jail,* 407 F.3d 243, 253 (4th Cir.2005) (stating that inmates had only a "limited" property interest in a dollar-per-day jail-housing fee because the fee could only be imposed, absent a hearing, for a period not to exceed five months).
>
> In this case, Plaintiff has not asserted any facts to support the conclusion that the State of Colorado and City of Denver lack a process by which a person can seek the return of the fee under certain circumstances. Plaintiff makes no allegations that the charges against him were dismissed. He also fails to allege that the booking fee payment hindered his ability to be released before trial in anyway. Importantly, Plaintiff has not alleged that he was entitled to a return of the fee, but that it was not returned. Plaintiff, therefore, has not adequately alleged a procedural due process claim.
>
> In order to pursue a due process claim, Plaintiff must file an amended prisoner complaint that adequately alleges that the booking fee either deprived him of liberty or that he was entitled to a refund of the booking fee but the post-deprivation remedies are inadequate.

(ECF No. 14 at 3-6). Therefore, as the facts asserted by Mr. Robinson in the Prisoner Complaint do not support an arguable due process claim, I recommend the claim be dismissed as legally frivolous.

> humane conditions of confinement, including adequate food, clothing, shelter, sanitation, medical care, and reasonable safety from serious bodily harm." *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008). The Eighth Amendment is violated when a prison official acts with deliberate indifference to a substantial risk of serious harm to an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). An Eighth Amendment claim must satisfy two requirements. "First, the deprivation alleged must be, objectively, 'sufficiently serious.'" *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, "a prison official must have a 'sufficiently culpable state of mind.'" *Id.* This second requirement is subjective, rather than objective: "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Based on Plaintiff's factual allegations, he has failed to adequately assert the objective and subjective components of a cruel and unusual punishment claim against the defendants.

(ECF No. 14 at 7). Therefore, because Mr. Robinson has failed to adequately assert the objective and subjective components of a cruel and unusual punishment claim in his Prisoner Complaint, I recommend that this claim be dismissed as legally frivolous.

C. In Forma Pauperis on Appeal

The Court further recommends certification pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith and, therefore, *in forma pauperis* status should be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he should also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the U.S. Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

V. Recommendation

For the reasons set forth herein, this Magistrate Judge respectfully

RECOMMENDS that the Prisoner Complaint (ECF No. 1) and this action be DISMISSED WITH PREJUDICE as legally frivolous. It is

FURTHER RECOMMENDED that leave to proceed *in forma pauperis* on appeal be DENIED WITHOUT PREJUDICE to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Grand Junction, Colorado, this 5th day of April, 2019.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

Certificate of Service

I David Wayne Robinson Swear And Attest That A Copy of The Original Petition Has been Mailed To The United STATES Supreme Court And The ATTORNEY GENERAL for The STATE of Colorado whom is The ATTORNEY FOR The PARTIES ON June 15th 2020 from The Buena Vista Correctional Center To The United STATES Postal Service To be delivered To The Addresses below Under The Penalty of Perjury. 28 USCA 1746

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