

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11409

ELMO FORTENBERRY;

Plaintiff - Appellant

v.

BOARD OF PARDON AND PAROLE; PAROLE OFFICER JENNIFER S. BROWN; DAVID GUTIERREZ; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; TEXAS DEPARTMENT OF PUBLIC SAFETY; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; LIEUTENANT GOVERNOR DAN PATRICK; LYNNE SHARP,

Defendants - Appellees

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

ON PETITION FOR REHEARING

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

APPendix B

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

February 5, 2020

Lyle W. Cayce
Clerk

No. 18-11409

ELMO FORTENBERRY,

Plaintiff-Appellant

v.

BOARD OF PARDON AND PAROLE; PAROLE OFFICER JENNIFER S. BROWN; DAVID GUTIERREZ; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; TEXAS DEPARTMENT OF PUBLIC SAFETY; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; LIEUTENANT GOVERNOR DAN PATRICK; LYNNE SHARP,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:15-CV-167

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

ENTIRE PANEL
PER CURIAM: *This is not entire panel all 12 Cir. Judges*

Elmo Fortenberry, Texas prisoner # 1949652, moves for leave to proceed in forma pauperis (IFP) on appeal from the dismissal of his 42 U.S.C. § 1983 suit. The district court denied Fortenberry leave to proceed IFP on appeal,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

APPENDIX A.1

certifying that this appeal was not taken in good faith. See 28 U.S.C. § 1915(a)(3). By moving to proceed IFP here, Fortenberry is challenging the district court's certification decision. See *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Fortenberry also moves for default judgment and the appointment of counsel.

Our inquiry into an appellant's good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted). ^{conviction as knowledge} ^{see page 3} ^{THIS CASE APPLIES TO THESE KNOWLEDGE OF FORCE} Fortenberry's contention that immunity is not a defense against violations of law or constitutional rights does not establish a nonfrivolous issue for appeal with respect to the district court's decisions on Eleventh Amendment immunity, absolute immunity, and qualified immunity. See *Toney v. Owens*, 779 F.3d 330, 336 (5th Cir. 2015) (qualified immunity); *Moore v. La. Bd. of Elementary and Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014) (Eleventh Amendment immunity); *Hulsey v. Owens*, 63 F.3d 354, 356-57 (5th Cir. 1995) ^{implied} (absolute immunity). His reliance on *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), is unavailing, as *Monell* concerns local government units and does not set forth an exception to a state agency's Eleventh Amendment immunity. See *Monell*, 436 U.S. at 690 & n.54; *Johnson v. Kegans*, 870 F.2d 992, 998 n.5 (5th Cir. 1989).

Fortenberry also has not demonstrated a nonfrivolous issue regarding the district court's determinations that respondeat superior liability is not a basis for relief under § 1983, see *Brown v. Taylor*, 911 F.3d 235, 245 (5th Cir. 2018), and that his claim that he was unlawfully required to register as a sex offender was time barred because the claim accrued in 2010 when Fortenberry knew or had reason to know of the alleged unlawful registration, see *Moon v.*

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Moore v. City of El Paso, 906 F.3d 352, 358 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2616 (2019).

Lastly, even when the litigant is pro se, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to state a claim for relief" under § 1983. *Coleman v. Lincoln Par. Det. Ctr.*, 858 F.3d 307, 309 (5th Cir. 2017) (internal quotation marks and citation omitted). Fortenberry does not raise a nonfrivolous issue regarding the district court's determination under § 1915(e)(2)(B)(ii) that his conclusory allegations were insufficient to state a claim on which relief may be granted. *See id.*; *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). *This case has nothing to do with my case.*

The instant appeal is without arguable merit and is dismissed as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2. The district court's dismissal of Fortenberry's § 1983 suit and our dismissal of this appeal as frivolous both count as strikes for purposes of § 1915(g). *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Fortenberry is warned that if he accumulates three strikes, he will not be able to proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

MOTIONS FOR LEAVE TO PROCEED IFP, DEFAULT JUDGMENT, AND APPOINTMENT OF COUNSEL DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.

Appendix A.1.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

ELMO FORTENBERRY,
TDCJ No. 1949652,

Plaintiff,

v.

BOARD OF PARDONS AND PAROLE,
et al.,

Defendants.

Civil Action No. 7:15-cv-167-O

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and decisions duly rendered,

It is **ORDERED, ADJUDGED, and DECREED** that Plaintiff's claims against the Texas Board of Pardons and Paroles, the Texas Department of Criminal Justice, and the Texas Department of Public Safety are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii). See Order, ECF No. 82.

money from immunity MONETARY AND POSITIVE DAMAGES BECAUSE THEY ARE NOT HARMING
Plaintiff's claims against Defendants William Stephens, Greg Abbott, Dan Patrick, David Gutierrez, Lynne Sharp, and Jennifer Brown are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief may be granted. See Orders, ECF Nos. 45, 83. *Relief*

Plaintiff's claim of unlawful sex offender registration is **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.

SIGNED this 9th day of October, 2018.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX A.2.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

**ELMO FORTENBERRY,
TDCJ No. 1949652,**

Plaintiff,

v.

**BOARD OF PARDONS AND PAROLE,
et al.,**

Defendants.

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Civil Action No. 7:15-cv-167-O

ORDER

All Defendants named in this action have been dismissed as parties to this lawsuit. *See* Orders, ECF Nos. 45, 82, 83. Upon further review of the record in this case, the Court finds and orders as follows:

In 1991, Plaintiff was charged with the offense of burglary of a habitation with attempted sexual assault in Potter County, Texas. *See* Plaintiff's Answer to the Court's Question No. 1, ECF No. 41 at 1. Plaintiff entered into a plea agreement in which he pleaded guilty to burglary of a habitation and the additional charge of attempted sexual assault was dismissed. *Id.* Plaintiff states that, in 2000, the "prosecutor changed [his] conviction to burglary of a habitation and sexual assault." *Id.* at Answer to Question No. 2, ECF No. 41 at 2. Then, Plaintiff states, in 2004, the original trial court judge, Patrick Pirtle, listened to Plaintiff's story, reviewed the court records, and "made [the] prosecutor correct his mistake." *Id.* at Answer to Question No. 3, ECF No. 41 at 3. Plaintiff claims that, despite the correction to his criminal records, he is required to register as a sex offender. *See* Plaintiff's Answer to the Court's Supplemental Question No. 3, ECF No. 44 at 3. Plaintiff argues that the requirement that he register as a sex offender is unlawful because he has

Appendix A.2.

never been convicted of a sex offense. *Id.* at Answer to Supplemental Question No. 4, ECF No. 44 at 4.

In 2008, Troy Fox, Board Administrator for the Texas Board of Pardons and Paroles, sent a letter to Plaintiff telling him that his conviction record originally showed that he was convicted of Burglary of a Habitation with Intent to Commit Sexual Assault. Fox informed Plaintiff that the records later reflected that Plaintiff was convicted only of Burglary of a Habitation, and that when Plaintiff was “next released to supervision,” he should not have to register as a sex offender. *See* ECF No. 5 at 5. But Plaintiff states that he was required to register as a sex offender six to eight months after he was released from prison in 2010. *See* Plaintiff’s Answer to the Court’s Question No. 11, ECF No. 41 at 11. The Texas Sex Offender Registry lists Plaintiff’s registration date as “8/10/2010.” <https://records.txdps.state.tx.us/SexOffenderRegistry/Search/Rapsheet?Sid=03055130> (last visited October 5, 2018).

“[W]here it is clear from the face of a complaint filed *in forma pauperis* that the claims asserted are barred by the applicable statute of limitations, those claims are properly dismissed [as frivolous].” *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993); *accord Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999); *Gonzalez v. Wyatt*, 157 F.3d 1016, 1019-20 (5th Cir. 1998); *Slack v. Carpenter*, 7 F.3d 418, 419 (5th Cir. 1993). “Under federal law, a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.” *Slack*, 7 F.3d at 419 (quoting *Gartrell*, 981 F.2d at 257). A district court may dismiss a § 1983 complaint *sua sponte* under 28 U.S.C. § 1915(e)(2)(B) when the complaint demonstrates that the claims asserted are time-barred. *Gonzalez*, 157 F.3d at 1019-20.

In 2008, Plaintiff was notified by Troy Fox, Parole Board Administrator, that he should not be required to register as a sex offender upon his release from prison. Plaintiff states that he was required to register six to eight months after he was released from prison in 2010. Plaintiff's sex offender registration corroborates his statement as it shows his registration date to be August 10, 2010. Therefore, Plaintiff was aware of the alleged unlawful registration requirement, at the latest, in August of 2010. Plaintiff filed the instant lawsuit on November 25, 2015, over five years after his cause of action accrued. In light of the two-year statute of limitations, Plaintiff's claim that he is unlawfully required to register as a sex offender is time-barred. *See Ivie v. Abbott*, 578 F. App'x 402, 403 (5th Cir. 2014) (affirming dismissal as time-barred, plaintiff's claim that he was denied due process when the trial court failed to admonish him, prior to his guilty plea, that he would be required to register as a sex offender); *Comeaux v. Texas Bd. of Pardons & Paroles*, No. CV H-14-2293, 2014 WL 11600892, at *1 (S.D. Tex. Dec. 4, 2014) (finding time-barred, plaintiff's claim that his sex offender registration requirement was an unlawful *ex post facto* violation); *Owens v. Abbott*, No. 3-12-cv-1576-L, 2012 WL 12893393, at *2 (N.D. Tex. June 13, 2012), *rec. adopted*, No. 3:12-cv-1576-L, 2012 WL 12893043 (N.D. Tex. June 29, 2012) (finding that plaintiff's claim of unlawful sex offender registration accrued on the date he was ordered to register, which was nine years prior to filing suit, and was therefore time-barred); *Tippett v. Foster*, No. 3:10-cv-0744-B, 2010 WL 2891119, at *2 (N.D. Tex. June 16, 2010), *rec. adopted*, No. 3:10-cv-0744-B, 2010 WL 2912248 (N.D. Tex. July 19, 2010) (dismissing plaintiff's claim that he was forced to register as a sex offender without proper notice or other procedural safeguards as time-barred; cause of action accrued on the date he was ordered to register).

For the foregoing reasons, Plaintiff's claim that he is unlawfully required to register as a sex offender is **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.¹

SO ORDERED this **9th** day of **October, 2018**.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

¹ Plaintiff claims that false charges, perjury, and fraud resulted in a conviction for assault on a public servant in Midland County, Texas. *See* Amended Complaint, ECF No. 12 at 5; Plaintiff's Answer to the Court's Question No. 1, ECF No. 41 at 1. However, he states that the Midland County case has nothing to do with the instant case. *See* Plaintiff's Answer to the Court's Question No. 1, ECF No. 41 at 1. Therefore, the Court will not construe his statement regarding the conviction as a successive habeas petition. *See Fortenberry v. Davis*, No. 7:16-cv-344 (W.D. Tex. June 8, 2017) (federal habeas challenge to 2014 Midland County conviction for assault on a public servant dismissed as time-barred).