

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

December 14, 2020

No. 20-50316

Lyle W. Cayce  
Clerk

JACOB EARL MURPHY,

*Plaintiff—Appellant,*

*versus*

GREG ABBOTT, *Governor of the State of Texas*; DALE WAINWRIGHT, *Chairman, Texas Board of Criminal Justice*; BRIAN COLLIER, *Executive Director, Texas Department of Criminal Justice*; PAMELA THIELKE, *Director, Texas Board of Pardons and Parole*,

*Defendants—Appellees.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:19-CV-667

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Before STEWART, GRAVES, and HIGGINSON, *Circuit Judges.*

PER CURIAM:\*

Jacob Earl Murphy, Texas prisoner # 01805040, moves for leave to proceed in forma pauperis (IFP) from the denial of his postjudgment motion

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 20-50316

challenging the dismissal of his 42 U.S.C. § 1983 complaint. He also moves this court to seal the district court record.

By moving for leave to proceed IFP, Murphy is challenging the district court's certification that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry on appeal is restricted 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).

Murphy does not challenge the district court's determination that his claims for monetary damages were barred because he failed to overcome the bar set forth in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). 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. *Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987); *see also* FED. R. APP. P. 28(a)(8). Murphy therefore has abandoned any challenge to the district court's denial of his postjudgment motion. *See Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008).

Accordingly, Murphy's appeal does not present a nonfrivolous issue and has not been brought in good faith. *See Howard*, 707 F.2d at 220. Thus, the motion to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *see also* 5TH CIR. R. 42.2. His motion to seal the record is DENIED.

The district court's dismissal of Murphy's § 1983 complaint and our dismissal of this appeal as frivolous both count as strikes for purposes of 28 U.S.C. § 1915(g). *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Murphy 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

No. 20-50316

any facility unless he is under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g).

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

FILED

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CLERK'S OFFICE  
WESTERN DISTRICT OF TEXAS  
BY *SM*  
REPUTY

**JACOB EARL MURPHY,  
PLAINTIFF,**

v.

**GREG ABBOTT, DALE  
WAINRIGHT, BRIAN COLLIER,  
PAMELA THIELKE, INC.  
DEFENDANTS.**

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**CAUSE NO. 1:19-CV-667-LY**

**ORDER ON REPORT AND RECOMMENDATION**

Before the court is Plaintiff Jacob Earl Murphy's complaint (Dkt. #1). Plaintiff, proceeding *pro se*, paid the full filing fee in this case. The case was referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U.S.C. § 636(b) and Rule 1(f) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended. The magistrate filed his Report and Recommendation on July 8, 2019 (Dkt. #5), recommending that Murphy's complaint be dismissed without prejudice as frivolous pursuant to 28 U.S.C. § 1915(e) to refile once the conditions of *Heck v. Humphrey*, 512 U.S. 477 (1994) are met.

Pursuant to 28 U.S.C. § 636(b) and Rule 72(b) of the Federal Rules of Civil Procedure, a party may serve and file specific, written objections to the proposed findings and recommendations of the magistrate judge within 14 days after being served with a copy of the Report and Recommendation, thereby securing a *de novo* review by the district court. A party's failure to timely file written objections to the proposed findings, conclusion, and recommendations in a Report and Recommendation bars that 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. *See Douglass v. United States Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (*en banc*).

Plaintiff Jacob Earl Murphy filed his Objection to Report and Recommendations on July 22, 2019 (Dkt. #11). Prior to filing his objection, Plaintiff filed a Motion to Withdraw Restraint on Liberty on July 15, 2019 (Dkt. #10). In addition, Plaintiff filed a Motion for Summary Judgment (Dkt. #13), a Motion to Proceed with Motion to Withdraw Restraint on Liberty (Dkt. #14), and a Motion for Summary Judgment and Discovery (Dkt. #15). In light of Plaintiff's objections, the court has undertaken a *de novo* review of the entire case file in this action and finds that the Report and Recommendation filed by the magistrate judge is correct and should be approved and accepted by this court for substantially the reasons stated therein.

**IT IS THEREFORE ORDERED** that Plaintiff's Objection to Report and Recommendations (Dkt. #11) is **OVERRULED**.

**IT IS FURTHER ORDERED** that the Report and Recommendation of the United States Magistrate Judge (Dkt. #5) is **ACCEPTED AND ADOPTED** by the court as stated herein.

**IT IS FURTHER ORDERED** that Plaintiff Jacob Early Murphy's complaint is **DISMISSED WITHOUT PREJUDICE** as frivolous pursuant to 28 U.S.C. § 1915(e).

**IT IS FURTHER ORDERED** that Plaintiff Jacob Earl Murphy's pending motions are **DISMISSED**.

Plaintiff Jacob Earl Murphy is **HEREBY WARNED** that filing or pursuing any further frivolous lawsuits may result in (1) the imposition of court costs pursuant to Section 1915(f) of Title 28 of the United States Code; (2) the imposition of significant monetary sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure; (3) the imposition of an order barring Plaintiff from filing any lawsuits in this court without first obtaining permission from a District

Judge of this Court or a Circuit Judge of the United States Court of Appeals for the Fifth Circuit; or (4) the imposition of an order imposing some combination of these sanctions.

Plaintiff is **FURTHER WARNED** that for causes of action which accrue after June 8, 1995, the Texas Department of Criminal Justice, upon receipt of a final order of a state or federal court that dismisses as frivolous or malicious a lawsuit brought by an inmate while the inmate was in the custody of the Department or confined in county jail awaiting transfer to the Department following conviction of a felony or revocation of community supervision, parole, or mandatory supervision, is authorized to forfeit (1) 60 days of an inmate's accrued good conduct time, if the Department has previously received one final order; (2) 120 days of an inmate's accrued good conduct time, if the Department has previously received two final orders; or (3) 180 days of an inmate's accrued good conduct time, if the Department has previously received three or more final orders. *See Tex. Gov't Code Ann. § 498.0045.*

Plaintiff is **FURTHER WARNED** that if he files more than three actions or appeals while he is a prisoner which are dismissed as frivolous or malicious or for failure to state a claim on which relief may be granted, he will be prohibited from bringing any other actions *in forma pauperis* unless he is in imminent danger of serious physical injury. *See 28 U.S.C. § 1915(g).*

The court hereby directs the Clerk to e-mail a copy of this order and judgment to the TDCJ-Office of the General Counsel and the keeper of the three-strikes list.

A Final Judgment shall be filed subsequently.

SIGNED this 10th day of September, 2019.

  
LEE YEAKEL  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**JACOB EARL MURPHY #01805040**

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V.

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**A-19-CA-667-LY**

**GREG ABBOTT, et al.**

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**REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE LEE YEAKEL  
UNITED STATES DISTRICT JUDGE**

The undersigned submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. §636(b) and Rule 1(f) of Appendix C of the Local Rules. Before the Court is Plaintiff's original complaint. Plaintiff is proceeding pro se, and in forma pauperis.

**STATEMENT OF THE CASE**

At the time he filed his complaint pursuant to 42 U.S.C. § 1983, Plaintiff was confined in the Telford Unit of the Texas Department of Criminal Justice - Correctional Institutions Division. Plaintiff sues Governor Greg Abbott, Chairman of the Texas Board of Criminal Justice Dale Wainwright, Executive Director of the Texas Department of Criminal Justice Brian Collier, and Director of the Texas Department of Criminal Justice - Pardons and Paroles Division Pamela Thielke. Plaintiff alleges the defendants "allowed [him] to persist injuriously under liberty restraint after claim of right demand when notified." Plaintiff indicates he has mailed to the defendants notices for liberty to be granted, contract obligation notices, letters of favor for presentation, and warrant affidavit notices. Plaintiff seeks \$31,300,000,000 in damages and the "unrestrained free body and liberty rights of [himself], and John Alfred Grimes."<sup>1</sup>

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<sup>1</sup>Plaintiff has no standing to request the release of Grimes, who is not a party to this action.

DISCUSSION AND ANALYSIS

A. Standard Under 28 U.S.C. § 1915(e)

An in forma pauperis proceeding may be dismissed sua sponte under 28 U.S.C. § 1915(e) if the court determines the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from suit. A dismissal for frivolousness or maliciousness may occur at any time, before or after service of process and before or after the defendant's answer. Green v. McKaskle, 788 F.2d 1116, 1119 (5th Cir. 1986).

When reviewing a plaintiff's complaint, the court must construe plaintiff's allegations as liberally as possible. Haines v. Kerner, 404 U.S. 519 (1972). However, the petitioner's pro se status does not offer him "an impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation and abuse already overloaded court dockets." Ferguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986).

B. Eleventh Amendment Immunity

Being sued in their official capacities for monetary damages, Defendants are immune from suit under the Eleventh Amendment because such an action is the same as a suit against the sovereign. Pennhurst State School Hosp. v. Halderman, 465 U.S. 89 (1984). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, 304 (1990). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity because such an indirect pleading remains in essence a claim upon the state treasury. Green v. State Bar of Texas, 27 F.3d 1083, 1087 (5th Cir. 1994).

C. Heck v. Humphrey

Insofar as Plaintiff is seeking monetary damages against Defendants in their individual capacities for his alleged illegal confinement, Plaintiff's claims must be dismissed pursuant to Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) and the Fifth Circuit's application of Heck to state prisoner § 1983 lawsuits in Boyd v. Biggers, 31 F.3d 279 (5th Cir. 1994). In Heck, the Supreme Court held:

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

In this case Plaintiff does not allege that his conviction has been reversed, expunged, invalidated, or called into question by a federal court's issuance of writ of habeas corpus. Accordingly, Plaintiff's claims for monetary damages regarding his alleged illegal confinement are currently barred by Heck. Plaintiff should be allowed to refile only upon a showing that his conviction "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." Heck, 512 U.S. at 486-87.

D. Habeas Claims

To the extent Plaintiff seeks his immediate release, he must seek such relief in an application for habeas corpus relief after he has exhausted his state court remedies. The exclusive remedy for a prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release is habeas corpus relief. Preiser v. Rodriguez, 411 U.S. 475, 488-490 (1973). The Court should decline to construe this action as a request for habeas corpus relief. If Plaintiff did not intend

for this action to be an application for habeas corpus relief pursuant to 28 U.S.C. § 2254, any subsequently filed applications could be subject to the restrictions on “second or successive” motions. See e.g. Castro v. United States, 540 U.S. 375 (2003). Additionally, Plaintiff makes no allegations suggesting he has exhausted his state court remedies.

RECOMMENDATION

It is therefore recommended that Plaintiff’s complaint be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e). Specifically, Plaintiff’s claims seeking monetary relief brought against the defendants in their official capacities should be dismissed without prejudice for want of jurisdiction, Plaintiff’s claims seeking monetary relief brought against the defendants in their individual capacities should be dismissed without prejudice to refile once the conditions of Heck are met, and Plaintiff’s claims seeking his immediate release should be dismissed without prejudice to filing an application for habeas corpus relief after he has exhausted his state court remedies.

It is further recommended that the Court include within its judgment a provision expressly and specifically warning Plaintiff that filing or pursuing any further frivolous lawsuits may result in (a) the imposition of court costs pursuant to Section 1915(f); (b) the imposition of significant monetary sanctions pursuant to Fed. R. Civ. P. 11; (c) the imposition of an order barring Plaintiff from filing any lawsuits in this Court without first obtaining the permission from a District Judge of this Court or a Circuit Judge of the Fifth Circuit; or (d) the imposition of an order imposing some combination of these sanctions.

It is further recommended that Plaintiff should be warned that for causes of action which accrue after June 8, 1995, the Texas Department of Criminal Justice, upon receipt of a final order of a state or federal court that dismisses as frivolous or malicious a lawsuit brought by an inmate

while the inmate was in the custody of the Department or confined in county jail awaiting transfer to the Department following conviction of a felony or revocation of community supervision, parole, or mandatory supervision, is authorized to forfeit (1) 60 days of an inmate's accrued good conduct time, if the Department has previously received one final order; (2) 120 days of an inmate's accrued good conduct time, if the Department has previously received two final orders; or (3) 180 days of an inmate's accrued good conduct time, if the Department has previously received three or more final orders. See, TEX. GOV'T CODE ANN. § 498.0045 (Vernon 1998).

It is further recommended that Plaintiff be warned that if Plaintiff files more than three actions or appeals while he is a prisoner which are dismissed as frivolous or malicious or for failure to state a claim on which relief may be granted, then he will be prohibited from bringing any other actions in forma pauperis unless he is in imminent danger of serious physical injury. See 28 U.S.C. § 1915(g).

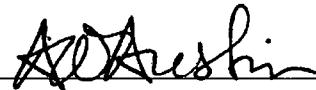
In the event this Report and Recommendation is accepted, adopted or approved, it is recommended that the Court direct the Clerk to e-mail a copy of its order and judgment to the TDCJ - Office of the General Counsel and the keeper of the three-strikes list.

#### OBJECTIONS

Within 14 days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C). Failure to file written objections to the proposed findings and recommendations contained within this report within 14 days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest

injustice. Douglass v. United Servs. Auto. Assoc., 79 F.3d 1415 (5th Cir. 1996)(*en banc*); Thomas v. Arn, 474 U.S. 140, 148 (1985); Rodriguez v. Bowen, 857 F.2d 275, 276-277 (5th Cir. 1988).

SIGNED this 8<sup>th</sup> day of July, 2019.



ANDREW W. AUSTIN  
UNITED STATES MAGISTRATE JUDGE