

~~17-41258~~ 6:17 CV 577

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 12, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 17-41258 Lorenzo Escudero v. Lorie Davis, Director
USDC No. 6:17-CV-577

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Appendix A, e.g.,

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Nancy F. Dolly".

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Lorenzo Escudero

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-41258

United States Court of Appeals
Fifth Circuit

FILED

March 12, 2020

Lyle W. Cayce
Clerk

LORENZO ESCUDERO,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:17-CV-577

Before BARKSDALE, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:*

Appellant Lorenzo Escudero challenges the dismissal without prejudice of his claims alleging constitutional deficiencies related to both his conviction and the conditions of his confinement. The district court dismissed his petition because Escudero failed to comply with the Magistrate Judge's order directing him to specify whether his lawsuit was a petition for a writ of habeas corpus

* 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, e.g.;

No. 17-41258

or a civil rights lawsuit. Despite the Magistrate Judge's warning the case would be dismissed if he failed to submit either a habeas form or a 42 U.S.C. § 1983 form within 30 days, Escudero responded only by denouncing the deficiency order for making unconscionable and unconstitutional demands of him.

Federal Rule of Appellate Procedure 28 provides, "[t]he appellant's brief must contain . . . a statement of the issues presented for review." Fed. R. App. P. 28(a)(5). "Despite [a] policy of liberally construing briefs of pro se litigants and applying less stringent standards to parties proceeding pro se than to parties represented by counsel, pro se parties must still brief the issues and reasonably comply with the standards of Federal Rule of Appellate Procedure 28." *Hodge v. E. Baton Rouge Par. Sheriff's Office*, 394 F. App'x 124, 126 (5th Cir. 2010). When a party fails to brief a claim, the court need not consider this claim. *Id.*; *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) ("Fed. R. App. P. 28(a)[(8)(a)] requires that the appellant's argument contain the reasons he deserves the requested relief 'with citation[s] to the authorities, [] and parts of the record relied on.'" (quoting *Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir. 1990))). Indeed, failing to identify an error in the district court's legal analysis is the same as not appealing the judgment. *Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Escudero makes no effort to contest the district court's basis for dismissal. His briefing does not mention the Magistrate Judge's decision or the order requiring him to fill out either a § 1983 or a habeas form. Even construing his argument liberally, nothing in either the initial or the supplemental brief can fairly be read as relating to the basis for the district court's dismissal. Because Escudero has not complied with Rule 28, his appeal fails. *See generally McGee v. Sturdivant*, 628 F. App'x 317, 317–18 (5th Cir. 2016); *Cooper v. Wilkinson*, 547 F. App'x 558, 559 (5th Cir. 2013).

No. 17-41258

Accordingly, the judgment of the district court is **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

LORENZO ESCUDERO, #878388 §

VS. §

CIVIL ACTION NO. 6:17cv577

DISTRICT ATTORNEY JACK SKEEN, JR., §
ET AL.

FINAL JUDGMENT

The court having considered Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that Petitioner take nothing by his case and that the lawsuit is **DISMISSED** without prejudice.

So Ordered and Signed

Dec 7, 2017

Tom Clark

Ron Clark, United States District Judge

Appendix B. e.g.;

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LORENZO ESCUDERO, #878388 §
VS. § CIVIL ACTION NO. 6:17cv577
DISTRICT ATTORNEY JACK SKEEN, JR., §
ET AL.

ORDER OF DISMISSAL

Petitioner Lorenzo Escudero, an inmate confined at the Neal Unit of the Texas prison system, proceeding *pro se* and *in forma pauperis*, brings this lawsuit about a wide array of matters. The cause of action was referred to United States Magistrate Judge K. Nicole Mitchell, who issued a Report and Recommendation (Dkt. #13) concluding that the lawsuit should be dismissed without prejudice for want of prosecution and failure to obey an order. Mr. Escudero has filed objections (Dkt. #15).

The original lawsuit includes claims that are both habeas and civil rights in nature. Judge Mitchell issued an order explaining the difference between the two types of cases. Mr. Escudero was ordered to submit an amended pleading on the requisite form, and it was left up to him whether to file a § 2254 form or a § 1983 form. Instead of complying with the order, Mr. Escudero filed a response defiantly refusing to comply with the order. Judge Mitchell thus issued the Report and Recommendation to dismiss the case. In his objections, Ms. Escudero once again refuses to obey the court's order. He presents a long discussion complaining about the legal system and the court.

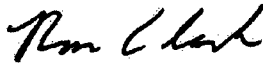
The lawsuit should be dismissed for want of prosecution and failure to obey an order. FED. R. Civ. P. 41(b).

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Mr. Escudero to the Report, the court is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and Mr. Escudero's objections are without merit. Therefore, the findings and conclusions of the Magistrate Judge are adopted as the findings and conclusions of the court. It is accordingly

ORDERED that the lawsuit is **DISMISSED** without prejudice for want of prosecution and failure to obey an order. FED. R. CIV. P. 41(b). All motions not previously ruled on are **DENIED**.

So Ordered and Signed

Dec 7, 2017



Ron Clark, United States District Judge

ordered to submit an amended pleading on the requisite form, and it was left up to him whether to file a § 2254 form or a § 1983 form. He was given thirty days from the receipt of the order to file an amended pleading on the requisite form. He was warned that the lawsuit may be dismissed if he did not timely comply with the order.

The Court has received an acknowledgment from Escudero indicating that he received the order on October 16, 2017. His amended pleading was due on November 15, 2017. He has not submitted the requisite amended pleading. Instead, on October 26, 2017, he filed a response defiantly rejecting the order.

A district court may dismiss an action for failure to prosecute or to comply with any order of the court. *McCullough v. Lynaugh*, 835 F.2d 1126 (5th Cir. 1988); Fed. R. Civ. P. 41(b). Escudero has not complied with the Court's order and refuses to do so; thus, the cause of action should be dismissed.

Recommendation

It is recommended that the cause of action be dismissed without prejudice for want of prosecution and failure to obey an order. Fed. R. Civ. P. 41(b).

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Services Auto. Ass'n.*,

79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 17th day of November, 2017.



K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**