# APPENDIX "A"

(*United States Fifth Circuit Court of Appeals)

(*United States District Court Eastern District of Louisiana)

# United States Court of Appeals
# for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
**FILED**
June 7, 2021
Lyle W. Cayce
Clerk

No. 19-30922

JARVIS BROWN,

*Plaintiff—Appellant*,

*versus*

ORLEANS PARISH SHERIFF OFFICE; MARLIN N. GUSMAN, *Sheriff*; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE; LEON A. CANNIZZARO, JR., *District Attorney*; NEW ORLEANS POLICE DEPARTMENT; RONALD SERPAS, *New Orleans Police Department Chief*; H. CANTRELL, *Orleans Parish Criminal Court Magistrate Judge*; ET AL.,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-CV-12432

Before JONES, COSTA, and WILSON, *Circuit Judges*.

PER CURIAM:*

Jarvis Brown, Louisiana prisoner # 710737, has filed a motion for leave to proceed in forma pauperis (IFP) on appeal from the district court's

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

dismissal of his pro se 42 U.S.C. § 1983 complaint as frivolous. By moving to proceed IFP in this court, Brown challenges 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 "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 citations omitted).

With the benefit of liberal construction, Brown's arguments that he is financially eligible, that he is illegally imprisoned, and that he is being denied access to the courts in this appeal fail to demonstrate a nonfrivolous issue for appeal with respect to the district court's dismissal of his complaint and denial of injunctive relief pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). *See Clarke v. Stalder*, 154 F.3d 186, 189-91 (5th Cir. 1998) (en banc); *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996). He has abandoned any claims raised in objections to the report and recommendations. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

Accordingly, Brown has failed to show that his appeal involves any arguably meritorious issues. *See Howard*, 707 F.2d at 220-21. His IFP motion is therefore DENIED and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

This dismissal and the dismissal of Brown's complaint in the district court count as strikes under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). Brown 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).

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| JARVIS BROWN | CIVIL ACTION |
| VERSUS | NO. 19-12432 |
| ORLEANS PARISH SHERIFF'S OFFICE, ET AL. | SECTION "R" (1) |

**ORDER AND REASONS**

Before the Court is Jarvis Brown's section 1983 complaint[1] and motion for a preliminary injunction and restraining order.[2] The Court has reviewed *de novo* the complaint,[3] the record, the applicable law, the Magistrate Judge's Report and Recommendation,[4] and the petitioner's objections.[5] Because the Magistrate Judge correctly determined that Brown's complaint is frivolous, the complaint is dismissed. And because the plaintiff offers no legal basis for a temporary restraining order or preliminary injunction, his motion is likewise dismissed.

---

1 R. Doc. 4.
2 R. Doc. 8.
3 R. Doc. 4.
4 R. Doc. 6.
5 R. Doc. 7.

In 2016, Jarvis was found guilty of three counts of armed robbery, one count of possession of marijuana, and one count of access device fraud. *See State v. Brown*, 219 So. 3d 518, 523 (La. App. 4 Cir. 2017), *writ denied*, 243 So. 3d 1061 (La. 2018). He was sentenced to sixty years' imprisonment. *Id.* In September 2019, Jarvis filed this section 1983 action against the Orleans Parish Sheriff's Office and numerous other state officials, requesting damages for wrongful imprisonment.[6] Jarvis states in his complaint that he believes he is wrongfully imprisoned, and seeks release and damages in the amount of $400 billion.[7]

Because the plaintiff is incarcerated, his complaint is subject to the screening provisions of 28 U.S.C. § 1915A, which require that the Court review "as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). The Court should dismiss the complaint if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted." *Id.* at 28 U.S.C. § 1915A(b)(1). A complaint is frivolous if it "lacks an arguable basis in law or fact." *Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir. 1994). The Magistrate Judge correctly

6 R. Doc. 4.
7 *Id.* at 7.

determined that in addition to a "myriad [of] other obstacles",[8] the plaintiff's action lacks an arguable basis in law because Brown's suit it is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Supreme Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, 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 a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

512 U.S. at 486-87. In his objections, the plaintiff does not respond to the Magistrate Judge's analysis of *Heck*. Instead, he only restates his claims and makes new allegations regarding correctional officer misconduct that were not included in his complaint. Because *Heck* bars the plaintiff's suit, it must be dismissed.

The plaintiff also filed a motion that he stylized as an "order to show cause for a preliminary injunction and temporary restraining order."[9] This filing largely restates the plaintiff's arguments that he is wrongfully imprisoned. A temporary restraining order is an "extraordinary remedy." *See Miss. Power & Light Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Because of

---

8 R. Doc. 6 at 2.

9 R. Doc. 8.

this, a temporary restraining order or preliminary injunction will be granted only where "(1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve public interest." *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987).

Here, the plaintiff has not attempted to address these requirements, and in any event fails to meet them. For example, the plaintiff has not shown that there is a substantial likelihood he would succeed on the merits, as a motion for a temporary restraining order or injunction is not a proper vehicle to challenge a state court conviction. Nor has the plaintiff made a showing or irreparable harm. And because the plaintiff must prove a required element, the court must deny his motion. *Clark* at 993 ("The party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated before a temporary restraining order or preliminary injunction can be granted.").

For the reasons in the Report and Recommendation, the plaintiff's complaint is frivolous. Accordingly, IT IS ORDERED that the plaintiff's complaint is DISMISSED WITH PREJUDICE. Additionally, the plaintiff's

motion for a preliminary injunction and temporary restraining order is DENIED WITH PREJUDICE.

New Orleans, Louisiana, this 31st day of October, 2019.

Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | |
|---|---|
| **JARVIS BROWN** | **CIVIL ACTION** |
| **VERSUS** | **NO. 19-12432** |
| **ORLEANS POLICE DEPT. CHIEF R. SERPAS, ET AL.** | **SECTION: "R"(1)** |

**REPORT AND RECOMMENDATION**

Plaintiff, Jarvis Brown, a state prisoner, filed this federal civil rights action against numerous law enforcement officials, parish prosecutors, public defenders and appointed counsel, state court judges and justices, and penal officials. In this lawsuit, he claims that he has been illegally prosecuted, convicted, and imprisoned.

Plaintiff filed this federal civil action *in forma pauperis*. Concerning such actions, federal law provides: "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that ... the action ... is frivolous ...." 28 U.S.C. § 1915(e)(2)(B)(i).

In addition, because plaintiff is incarcerated, he is also subject to the screening provisions of 28 U.S.C. § 1915A. That statute mandates that federal courts "review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). Regarding such lawsuits, federal law similarly requires: "On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint ... is frivolous ...." 28 U.S.C. § 1915A(b)(1).

A complaint is frivolous "if it lacks an arguable basis in law or fact." Reeves v. Collins, 27 F.3d 174, 176 (5th Cir. 1994). In determining whether a claim is frivolous, the Court has "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Neitzke v. Williams, 490 U.S. 319, 327 (1989); Macias v. Raul A. (Unknown), Badge No. 153, 23 F.3d 94, 97 (5th Cir. 1994).

Here, even if plaintiff could somehow overcome the myriad other obstacles which would appear to prevent him from obtaining relief in this lawsuit,[1] there is one he clearly cannot: Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the United States Supreme Court stated:

> We hold that, in 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, 28 U.S.C. § 2254. A claim for damages bearing that relationship to

[1] For example, it appears that many of the defendants would be entitled to immunity: the judges and justices would presumably be protected by their absolute judicial immunity, see, e.g., Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871) ("[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."); the prosecutors by their prosecutorial immunity, see, e.g., Boyd v. Biggers, 31 F.3d 279, 285 (5th Cir. 1994) ("Prosecutorial immunity applies to the prosecutor's actions in initiating the prosecution and in carrying the case through the judicial process."); and any state officials sued in their official capacities for monetary damages by the Eleventh Amendment, see, e.g., Damond v. LeBlanc, 552 F. App'x 353, 354 (5th Cir. 2014) ("Official capacity monetary damage claims against state actors are considered a suit against the state and barred by the Eleventh Amendment."). Further, to the extent that plaintiff is seeking relief under 42 U.S.C. § 1983, his claims against the public defenders and appointed counsel fail because they are not state actors. See, e.g., Polk County v. Dodson, 454 U.S. 312, 325 (1981) ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."); Mills v. Criminal District Court # 3, 837 F.2d 677, 679 (5th Cir. 1988) ("[S]ection 1983 claims require that the conduct complained of be done under color of law, and private attorneys, even court-appointed attorneys, are not official state actors, and generally are not subject to suit under section 1983."). Lastly, even as to those individuals who would otherwise be proper defendants, plaintiff's conclusory allegations do not suffice to state cognizable claims. Rather, when a plaintiff asserts individual-capacity claims, he "must allege specific conduct giving rise to a constitutional violation. This standard requires more than conclusional assertions: The plaintiff must allege specific facts giving rise to the constitutional claims." Oliver v. Scott, 276 F.3d 736, 741 (5th Cir. 2002) (citation omitted). When he asserts official-capacity claims, he must allege that a policy or custom resulted in the violation of his rights, and he must identify that policy or custom. See, e.g., Butler v. Weppelman, 487 F. App'x 940, 941 (5th Cir. 2012); Murray v. Town of Mansura, 76 F. App'x 547, 549 (5th Cir. 2003); Treece v. Louisiana, 74 F. App'x 315, 316 (5th Cir. 2003). Plaintiff's complaint does not comply with those requirements.

> a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Heck, 512 U.S. at 486-87 (footnote omitted). Heck has since been extended also to bar claims for declaratory and injunctive relief. See, e.g., Walton v. Parish of LaSalle, 258 F. App'x 633, 633-34 (5th Cir. 2007); Collins v. Ainsworth, 177 F. App'x 377, 379 (5th Cir. 2005); Shaw v. Harris, 116 F. App'x 499, 500 (5th Cir. 2004). Claims barred by Heck are legally frivolous. See Hamilton v. Lyons, 74 F.3d 99, 102 (5th Cir. 1996); see also Anderson v. Galveston County District Clerk, 91 F. App'x 925 (5th Cir. 2004); Kingery v. Hale, 73 F. App'x 755 (5th Cir. 2003).

In 2016, plaintiff was convicted in the Orleans Parish Criminal District Court of three counts of armed robbery, one count of possession of marijuana, and one count of access device fraud. See State v. Brown, 219 So. 3d 518 (La. App. 4th Cir. 2017), writ denied, 243 So. 3d 1061 (La. 2018). In this lawsuit, he claims that he was illegally prosecuted, convicted, and imprisoned with respect to those convictions. However, because those convictions have not been invalidated, and because a judgment in plaintiff's favor on his claims would necessarily imply the invalidity of those convictions, his claims should be dismissed with prejudice until such time as the Heck conditions are met.[2]

Lastly, it is noted that Heck does not prevent plaintiff from challenging those convictions in a federal habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254. However, if he wishes to seek habeas corpus relief, he should institute a separate civil action by filing a properly

[2] See DeLeon v. City of Corpus Christi, 488 F.3d 649, 657 (5th Cir. 2007) ("A preferred order of dismissal in Heck cases decrees, 'Plaintiff[']s claims are dismissed with prejudice to their being asserted again until the Heck conditions are met.'").

completed habeas corpus form. See Rules Governing Section 2254 Cases in the United States District Courts, Rule 2.[3]

## RECOMMENDATION

It is therefore **RECOMMENDED** that that plaintiff's federal civil rights claims be dismissed with prejudice until such time as the Heck conditions are met.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar 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, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

New Orleans, Louisiana, this 26th day of September, 2019.

Janis van Meerveld

**JANIS VAN MEERVELD**
**UNITED STATES MAGISTRATE JUDGE**

[3] Although a federal civil rights complaint can, in appropriate circumstances, be construed in part as a federal habeas corpus petition, the undersigned finds that it would not be appropriate to do so in this instance. Plaintiff's contention that he has been wrongly convicted is asserted in a wholly conclusory manner with no specific allegations as to the respect(s) in which his rights were violated in the state criminal proceedings. As such, he has not stated a cognizable habeas claim. See, e.g., Allen v. Vannoy, 659 F. App'x 792, 809 (5th Cir. 2016) ("Conclusory arguments cannot serve as a basis for habeas relief."); Hudson v. Quarterman, 273 F. App'x 331, 343 (5th Cir. 2008) ("Mere conclusory allegations are insufficient to raise a constitutional issue in a habeas proceeding."). It would therefore be preferable for him to file a formal habeas corpus petition on the proper form, setting forth his claims with particularity. However, if he wishes to seek such relief, he is cautioned that he must comply with the statute of limitations, see 28 U.S.C. § 2244(d), and the requirement that he exhaust his remedies in the state courts, see 28 U.S.C. § 2254(b)(1).

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