United States Court of Appeals for the Fifth Circuit

No. 21-10280

THEODORE WILLIAM TAYLOR,

Plaintiff—Appellant,

versus

THE KENDALL LAW GROUP, P.L.L.C.; JOSEPH KENDALL, ATTORNEY AT LAW, *in his Individual and his Professional capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-65

Before JONES, DUNCAN and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Theodore William Taylor, federal prisoner # 26966-078, moves for leave to proceed in forma pauperis (IFP) on appeal from the dismissal without prejudice of his pro se civil complaint for lack of subject matter jurisdiction. By moving to proceed IFP, Taylor challenges 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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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).

By failing to address the district court's reasons for dismissing his complaint for lack of subject matter jurisdiction or providing any other reason why the district court's certification is erroneous, Taylor has abandoned any challenge he might have raised regarding the district court's decision. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993); *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Because Taylor has failed to identify any issue of arguable merit, his motion to proceed IFP is DENIED, and his appeal is DISMISSED AS FRIVOLOUS. *See Baugh*, 117 F.3d at 202 n.24; *Howard*, 707 F.2d at 220; *see also* 5TH CIR. R. 42.2.

Our dismissal of Taylor's appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons,* 103 F.3d 383, 387-88 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 535-39 (2015). Taylor is WARNED that if he accumulates three strikes, he will not be able to proceed IFP in any civil action or appeal while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THEODORE WILLIAM TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE KENDALL LAW GROUP PLLC and JOSEPH KENDALL,	)	
	)	
	)	
Defendants.	)	Civil Action No. 3:21-CV-65-C-BN

ORDER

Before the Court are the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, as well as the United States Magistrate Judge's Supplemental Findings, Conclusions, and Recommendation, therein advising that Plaintiff's Complaint should be dismissed for lack of jurisdiction and that Plaintiff's construed Motion for Leave to Amend should be denied.[1]

The Court conducts a *de novo* review of those portions of the Magistrate Judge's report or specified proposed findings or recommendations to which a timely objection is made. 28 U.S.C. § 636(b)(1)(C). Portions of the report or proposed findings or recommendations that are not the subject of a timely objection will be accepted by the Court unless they are clearly erroneous or contrary to law. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

After due consideration and having conducted a *de novo* review, the Court finds that Plaintiff's objections should be **OVERRULED**. The Court has further conducted an

[1] Plaintiff filed objections to the Magistrate Judge's initial Findings, Conclusions, and Recommendation on February 1, 2021. Plaintiff further filed objections to the Magistrate Judge's Supplemental Findings, Conclusions, and Recommendation on March 2, 2021.

independent review of the Magistrate Judge's findings and conclusions, as well as the supplemental findings and conclusions, and finds no error. It is therefore **ORDERED** that the Findings, Conclusions, and Recommendation are **ADOPTED** as the findings and conclusions of the Court. For the reasons stated therein, the Court **ORDERS** that Plaintiff's Complaint be dismissed without prejudice for lack of subject matter jurisdiction and that Plaintiff's construed Motion for Leave to Amend be **DENIED**.

SO ORDERED this 8th day of March, 2021.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THEODORE WILLIAM TAYLOR,	§	
	§	
Plaintiff,	§	
	§	
V.	§	No. 3:21-cv-65-C-BN
	§	
THE KENDALL LAW GROUP PLLC and JOSEPH KENDALL,	§	
	§	
	§	
Defendants.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Plaintiff Theodore William Taylor, a federal inmate incarcerated in this district, has filed this pro se case against his former criminal defense counsel and his law firm for legal malpractice, asserting that his attorney "collected fees exceeding [$120,000] yet failed to establish a legal defense strategy, failed to prepare for jury trial, failed to impeach Government witnesses, failed to introduce defense witnesses, failed to suppress illegal evidence, and failed to bring forward contextual documentation." Dkt. No. 3. And Senior United States District Judge Sam R. Cummings has referred this case to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference.

The United States Court of Appeals for the Fifth Circuit set out the applicable background in its decision affirming Taylor's conviction and sentence:

> Theodore "Tad" Taylor and Chia Jean Lee, a married couple who met while earning their degrees at Yale, ran Taylor Texas Medicine in Richardson, Texas. Taylor was the clinic's only doctor while Lee, a nurse by training, was the clinic's office manager. An Eastern District of Texas grand jury indicted the couple for conspiring to distribute controlled

> substances. The indictment alleged that from 2010 through early 2012, Taylor and Lee conspired to illegally prescribe five controlled substances: oxycodone, amphetamine salts, hydrocodone, alprazolam, and promethazine with codeine.
>
> A jury convicted both of them after a seven-day trial. It also made findings about the quantity of drugs the couple distributed, but those quantities did not trigger higher statutory minimum or maximum sentences. See 21 U.S.C. § 841(b)(1)(C). The district court then sentenced Taylor to the 20-year statutory maximum (his Guidelines range would have been higher but for the statutory cap) and Lee to just over 15 years (the bottom of her Guidelines range).

United States v. Lee, 966 F.3d 310, 316 (5th Cir. 2020). And, in denying Taylor's pro se motion for compassionate relief considering the ongoing COVID-19 pandemic, the district court noted that his projected release date is October 24, 2035. See United States v. Taylor, No. 4:17-CR-9(1), 2020 WL 5222797 (E.D. Tex. Sept. 1, 2020).

The undersigned enters these findings of fact, conclusions of law, and recommendation that the Court dismiss Taylor's current civil action for lack of subject matter jurisdiction.

Legal Standards and Analysis

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" Gunn v. Minton, 568 U.S. 251, 256 (2013) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)); see also Bowles v. Russell, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."); Stockman v. Fed. Election Comm'n, 138 F.3d 144, 151 (5th Cir. 1998) ("Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims.").

They must therefore "presume that a suit lies outside this limited jurisdiction,

and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." Howery v. Allstate Ins. Co., 243 F.3d 912, 916 (5th Cir. 2001). Correspondingly, all federal courts have an independent duty to examine their own subject matter jurisdiction. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583-84 (1999) ("Subject-matter limitations ... keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level." (citations omitted)).

Plaintiffs filing in this Court must establish federal jurisdiction. See Butler v. Dallas Area Rapid Transit, 762 F. App'x 193, 194 (5th Cir. 2019) (per curiam) ("[A]ssertions [that] are conclusory [ ] are insufficient to support [an] attempt to establish subject-matter jurisdiction." (citing Evans v. Dillard Univ., 672 F. App'x 505, 505-06 (5th Cir. 2017) (per cuiam); Jeanmarie v. United States, 242 F.3d 600, 602 (5th Cir. 2001))). And, if they do not, the federal lawsuit must be dismissed. See FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Because federal jurisdiction is not assumed, "the basis upon which jurisdiction depends must be alleged affirmatively and distinctly and cannot be established argumentatively or by mere inference." Getty Oil Corp. v. Ins. Co. of N.A., 841 F.2d 1254, 1259 (5th Cir. 1988) (citing Ill. Cent. Gulf R. Co. v. Pargas, Inc., 706 F.2d 633, 636 & n.2 (5th Cir. 1983)); see also MidCap Media Fin., L.L.C. v. Pathway Data, Inc., 929 F.3d 310, 313 (5th Cir. 2019) ("Because federal courts have limited jurisdiction,

parties must make 'clear, distinct, and precise affirmative jurisdictional allegations' in their pleadings." (quoting Getty Oil, 841 F.2d at 1259)).

Under their limited jurisdiction, federal courts generally may only hear a case if it involves a question of federal law or where diversity of citizenship exists between the parties. See 28 U.S.C. §§ 1331, 1332.

Federal question jurisdiction under Section 1331 "exists when 'a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" Borden v. Allstate Ins. Co., 589 F.3d 168, 172 (5th Cir. 2009) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 27-28 (1983)). "A federal question exists 'if there appears on the face of the complaint some substantial, disputed question of federal law.'" In re Hot-Hed Inc., 477 F.3d 320, 323 (5th Cir. 2007) (quoting Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 366 (5th Cir. 1995)). And "this 'creation' test ... accounts for the vast bulk of suits under federal law." Gunn, 568 U.S. at 257 (citation omitted).

In diversity cases, each plaintiff's citizenship must be diverse from each defendant's citizenship, and the amount in controversy must exceed $75,000. See 28 U.S.C. § 1332(a), (b).

"For diversity purposes, state citizenship is synonymous with domicile. A change in domicile requires: '(1) physical presence at the new location and (2) an intention to remain there indefinitely.'" Dos Santos v. Belmere Ltd. P'ship, 516 F. App'x 401, 403 (5th Cir. 2013) (per curiam) (citations omitted); see also Preston v.

Tenet Healthsystem Mem+ Med. Ctr., 485 F.3d 793, 797-98 (5th Cir. 2007) ("In determining diversity jurisdiction, the state where someone establishes his domicile serves a dual function as his state of citizenship.... Domicile requires the demonstration of two factors: residence and the intention to remain." (citing Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954))).

And "[t]he basis for diversity jurisdiction must be 'distinctly and affirmatively alleged.'" Dos Santos, 516 F. App'x at 403 (quoting Mullins v. TestAmerica, Inc., 564 F.3d 386, 397 (5th Cir. 2009)). Indeed, the United States Court of Appeals for the Fifth Circuit "has stated that a 'failure to adequately allege the basis for diversity jurisdiction mandates dismissal.'" Id. (quoting Stafford v. Mobil Oil Corp., 945 F.2d 803, 805 (5th Cir. 1991)); see also Hollinger v. Home State Mut. Ins. Co., 654 F.3d 564, 571 (5th Cir. 2011) (per curiam) ("Evidence of a person's place of residence ... is prima facie proof of his domicile." (citations omitted)); Stine, 213 F.2d at 448 ("Residence alone is not the equivalent of citizenship, although the place of residence is prima facie the domicile.").

First, Taylor's civil suit does not involve a federal question. He cites a section of the federal criminal code pertaining to an appeal by the government in a criminal case, 18 U.S.C. § 3731, but does not explain how that federal statute or any other provision of federal law establishes a cause of action here. And, while Taylor brings legal malpractice allegations against his former criminal defense attorney, doing so does not allege "a violation of a 'right' afforded to [Taylor] under federal law," such that he brings claims under 42 U.S.C. § 1983. Thurman v. Med. Transp. Mgmt., Inc.,

982 F.3d 953, 956 (5th Cir. 2020) (citation omitted).

"'Section 1983 liability results when a "person" acting "under color of" state law, deprives another of rights "secured by the Constitution" or federal law.'" Id. (quoting Doe v. United States, 831 F.3d 309, 314 (5th Cir. 2016) (quoting, in turn, 42 U.S.C. § 1983)). A criminal defense attorney is not a state actor. See Polk Cnty. v. Dodson, 454 U.S. 312, 324-25 (1981); see also Mills v. Criminal Dist. Court No. 3, 837 F.2d 677, 679 (5th Cir. 1988) ("[P]rivate attorneys, even court-appointed attorneys, are not official state actors, and generally are not subject to suit under section 1983."); Sellers v. Haney, 639 F. App'x 276, 277 (5th Cir. 2016) (per curiam) ("The district court properly concluded that Sellers's defense attorneys were not state actors." (citing Dodson, 454 U.S. at 317-18)). And "a claim of legal malpractice" does "not arise from the United States Constitution or federal statutes or treaties, [to] provide the Court with federal question jurisdiction over the claims." Castaneda v. Lucas, No. EP-19-CV-185-PRM-MAT, 2019 WL 4935445, at *3 (W.D. Tex. July 24, 2019), rec. accepted, 2019 WL 4729426 (W.D. Tex. Sept. 27, 2019).

Taylor also has not "'distinctly and affirmatively alleged'" a "basis for diversity jurisdiction," Dos Santos, 516 F. App'x at 403, by establishing complete diversity. The only evidence in the record or of which the Court may take judicial notice reflects that all parties are Texas citizens. Cf. Pardue v. Pardue, 37 F.3d 630, 1994 WL 558868, at *1 (5th Cir. Sept. 20, 1994) (per curiam) ("Ordinarily, courts presume that '[a] prisoner does not acquire a new domicile in the place of his imprisonment, but retains the domicile he had prior to incarceration.'" (quoting Polakoff v. Henderson, 370 F.

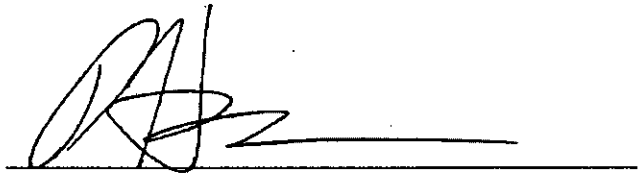
Supp. 690, 693 (N.D. Ga. 1973), aff'd, 488 F .2d 977 (5th Cir. 1974) (adopting district court's reasoning))).

Recommendation

The Court should dismiss this action for lack of subject matter jurisdiction.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: January 15, 2021



DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THEODORE WILLIAM TAYLOR,	§	
	§	
Plaintiff,	§	
	§	
V.	§	No. 3:21-cv-65-C-BN
	§	
THE KENDALL LAW GROUP PLLC and JOSEPH KENDALL,	§	
	§	
	§	
Defendants.	§	

SUPPLEMENTAL FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Plaintiff Theodore William Taylor, a federal inmate incarcerated in this district, filed this pro se case against his former criminal defense counsel and his law firm for legal malpractice, asserting that his attorney "collected fees exceeding [$120,000] yet failed to establish a legal defense strategy, failed to prepare for jury trial, failed to impeach Government witnesses, failed to introduce defense witnesses, failed to suppress illegal evidence, and failed to bring forward contextual documentation." Dkt. No. 3.

Senior United States District Judge Sam R. Cummings referred this case to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference.

And, because Taylor has neither alleged a federal question –notably against his former attorney under 42 U.S.C. § 1983 – nor established a basis for diversity jurisdiction, the undersigned recommended, on January 15, 2021, that the Court dismiss this action for lack of subject matter jurisdiction [Dkt. No. 4] (the Initial

FCR).

After entry of the Initial FCR, Taylor filed a Formal Response to Magistrate Judge's January 15, 2021 Findings, Conclusions, and Recommendations [Dkt. No. 5], confirming that he does not allege diversity jurisdiction but seeking leave to amend his complaint to add a claim against the named defendants under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which affords a cause of action against federal actors that mirrors but is not "'the substantial equivalent of [Section] 1983,'" applicable to state actors. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (citation omitted).

As explained in the Initial FCR, Taylor may not bring a Section 1983 claim against his former defense counsel because he is not a state actor. "By the same token, defense attorneys in a federal criminal case are not federal actors and thus cannot be sued under Bivens...." E.g., Martinez v. Sullivan, No. 5:17cv201, 2019 WL 4493583, at *2 (E.D. Tex. Apr. 15, 2019) (citations omitted), rec. adopted, 2019 WL 4469171 (E.D. Tex. Sept. 18, 2019); see also Solesbee v. Nation, No. 3:06-cv-333-D, 2008 WL 244343, at *1 (N.D. Tex. Jan. 29, 2008) ("Regarding Solesbee's criminal lawyer (a criminal lawyer is rarely considered a federal actor due to his role as defense counsel), the usual remedy is through a suit for legal malpractice. That is a claim that is based on state law, not federal law, and is[– absent diversity jurisdiction –]litigated in state court...."); cf. Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020) ("Bivens was the product of an 'ancien regime' that freely implied rights of action. That regime ended long ago. Today, Bivens claims generally are limited to the circumstances of the

Supreme Court's trilogy of cases in this area...." (citations omitted)).

The claim that Taylor seeks to add is therefore subject to summary dismissal.

And a court may "refuse leave to amend if ... the complaint as amended would be subject to dismissal." Varela v. Gonzales, 773 F.3d 704, 707 (5th Cir. 2014) (quoting Ackerson v. Bean Dredging, LLC, 589 F.3d 196, 208 (5th Cir. 2009); internal quotation marks omitted); see also Legate v. Livingston, 822 F.3d 207, 211 (5th Cir. 2016) (While "the language of [Federal Rule of Civil Procedure 15(a)] 'evinces a bias in favor of granting leave to amend,' ... a district court need not grant a futile motion to amend." (quoting Lyn-Lea Travel Corp. v. Am. Airlines, Inc., 283 F.3d 282, 286 (5th Cir. 2002) (quoting, in turn, Chitimacha Tribe of La. v. Harry L. Laws Co., 690 F.2d 1157, 1162 (5th Cir. 1982)); citation omitted)); Stem v. Gomez, 813 F.3d 205, 215-16 (5th Cir. 2016) ("When an amended complaint would still 'fail to survive a Rule 12(b)(6) motion,' it is not an abuse of discretion to deny the motion'" for leave to amend. (quoting Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368, 378 (5th Cir. 2014))).

Leave to amend should therefore be denied. And the Court should still dismiss this case for lack of subject matter jurisdiction.

Recommendation

For the reasons above and for the reasons set out in the Initial FCR, the Court should deny the construed motion for leave to amend and dismiss this action for lack of subject matter jurisdiction.

A copy of these findings, conclusions, and recommendation shall be served on

all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: February 11, 2021

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

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