

IN THE SUPREME COURT OF THE UNITED STATES

Walter Payton,
Plaintiff-Appellant,

vs.

Case No. (In reference to USCA10# 20-3101)

Richard T. Ballinger, et al.,
Defendants-Appellees.

MOTION TO FILE OF TIME

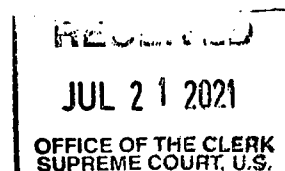
Relief Sought

Walter Payton, Plaintiff-Appellant in the action captioned above, moves the court for leave to file the attached petition for a writ of certiorari, which was due on April 5, 2021.

Grounds for Motion

United States Supreme Court Rule allows this court to extend the time for filing of Walter Payton's petition for a writ of certiorari even though that time has already expired. The affidavit of Walter Payton establishes good cause for the requested extension in this cause because it shows that:

1. The petition for a writ of certiorari for Walter Payton was scheduled be filed with this Court by April 5, 2021.
2. For reasons completely beyond the control of Walter Payton, it was impossible to file Walter Payton's petition for a writ of certiorari within that scheduled time. Timely filing became impossible because [set out facts that preclude timely filing, e.g.,
 - a. The clerk of the U.S. Supreme Court sent a letter dated June 14, 2021, to the Plaintiff-Appellant stating the following: "the above-entitled petition for a writ of certiorari was postmarked May 26, 2021 and received June 7, 2021, the papers are returned for the following reason(s): the petition is out-of-time.



The date of the lower court judgment or order denying a timely petition for rehearing was November 6, 2020. On March 19, 2020, the court issued an order extending the deadline to file any petition for a writ of certiorari due on or after March 19, 2020 to 150 days from the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Therefore, the petition was due on or before April 5, 2021. Rule 13.1, 29.2 and 30.1. When the time to file a petition for writ of certiorari in a civil case (habeas corpus included) has expired, the court no longer has the power to review the petition. Signed by Redmond K. Barnes for Scott S. Harris...";

- b. On or about March 12, 2020, the Kansas Supreme Court issued an Administrative Order, Order No. 2021-PR-020, [in relevant parts] which became effective upon its publication in the Kansas Register on June 9, 2020 (39 Kan. Reg. 755). "This legislation allows me to "issue an order to extend or suspend any deadlines or time limitations established by statute" during any state of disaster emergency pursuant to K.S.A. § 48-924, and amendment thereto, when I determine the order is necessary to secure the health and safety of court users, staff, and judicial officers. Recently, through 2021 Senate Bill 40, § 5, the Legislature ratified and continued in existence the state disaster emergency declared under K.S.A. § 48-924, and amendment thereto, as a result of the COVID-19 health emergency..., from March 12, 2020, through May 28, 2021." (see paragraph 1 of the attachment);
- c. There were times during this COVID-19 health emergency that the correctional institution was on lockdown and the law library was not open for use;

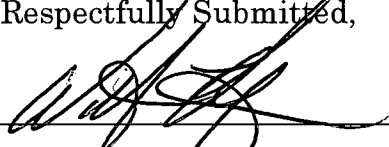
These unavoidable circumstances mean that, without an extension, Walter Payton will be deprived of any real opportunity to file a meaningful petition for a writ of

certiorari, and thus be adequately represented, in the this matter.

3. No prior extension has been requested, and no further request for an extension of time will be sought.

4. Threfore, the Plaintiff-Appellant, Walter Payton, has 150 days from May 28, 2021, to have his writ of certiorari filed within the United States Supreme Court, which he did by filing it as of the date it was received by the United States Supreme Court Clerk's Office 10 days into that 150 days.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'W. Payton', is written over a horizontal line.

Walter Payton, *pro se*,
Plaintiff-Appellant

Dated: 7/6/21

"Kansas Supreme Court Administrative Order 2021-PR-020"

4, which became effective upon its

publication in the Kansas Register on June 9, 2020 (39 Kan. Reg. 755).

This legislation allows me to "issue an order to extend or suspend any deadlines or time limitations established by statute" during any state of disaster emergency pursuant to K.S.A. 48-924, and amendments thereto, when I determine the order is necessary to secure the health and safety of court users, staff, and judicial officers.

Recently, through 2021 Senate Bill 40, § 5, the Legislature ratified and continued in existence the state of disaster emergency declared under K.S.A. 48-924, and amendments thereto, as a result of the COVID-19 health emergency for all 105 counties of Kansas, from March 12, 2020, through May 28, 2021. 2021 Senate Bill 40 became effective upon its publication in the Kansas Register on March 25, 2021 (40 Kan. Reg. 369).

Additionally, through 2021 House Bill 2227, the Legislature again amended K.S.A. 20-172. Under this legislation, my authority to issue an order extending or suspending any deadlines or time limitations established by statute will expire on June 30, 2022. This legislation also dictates time computation when deadlines and time limitations resume. 2021 House Bill 2227 became effective upon its publication in the Kansas Register on March 30, 2021 (40 Kan. Reg. 381).

Again today, I act under the authority granted to me by K.S.A. 20-172, and amendments thereto. I do so in connection with the statewide state of disaster emergency as a result of the COVID-19 health emergency declared by the Governor under K.S.A. 48-924, and amendments thereto, and ratified and continued by the Legislature through 2 May 28, 2021, as stated in K.S.A. 48-924b, and amendments thereto. For the same reason I have entered previous orders suspending deadlines and time limitations, I take the following action to secure the health and safety of court users, staff, and judicial officers.

I order the following:

All deadlines and time limitations remain suspended through April 14, 2021

1. Administrative Orders 2021-PR-009, 2021-PR-001, 2020-PR-130, 2020-PR 113, 2020-PR-107, and 2020-PR-101 are incorporated herein by reference,

reissued, and remain in effect under the state of disaster emergency ratified and continued by K.S.A. 48-924b, and amendments thereto, and as amended by this order. The suspensions of statutes of limitation, statutory time standards, deadlines, and time limitations—including those suspending the time to bring a defendant to trial established by K.S.A. 2020 Supp. 22-3402, and amendments thereto, and K.S.A. 12-4501—in each Administrative Order listed in the bulleted list in numbered paragraph 1 of Administrative Order 2020-PR-101 are continued through April 14, 2021.

Most deadlines and time limitations resume April 15, 2021

2. On April 15, 2021, except as stated in numbered paragraph 3:

• Deadlines and time limitations (including statutes of limitation and statutory time standards) suspended under this order and my prior administrative orders resume.

• The portions of this order and my prior administrative orders suspending deadlines and time limitations (including statutes of limitation and statutory time standards) are terminated for purposes of time calculation under 2021 House Bill 2227 §1(d).

On April 15, 2021, certain deadlines and time limitations remain suspended

3. On and after April 15, 2021, deadlines and time limitations (including statutes of limitation and statutory time standards) set out in the following statutes remain suspended:

- K.S.A. 22-3402, and amendments thereto;
- K.S.A. 22-4303, and amendments thereto;
- K.S.A. 60-1501, and amendments thereto;
- K.S.A. 60-1507, and amendments thereto; and
- K.S.A. 61-3002(b), and amendments thereto.³

This order does not impact rights under the United States and Kansas Constitutions.

This order also has no impact on the effect of 2021 House Bill 2078, which, if approved by the Governor, becomes effective when published in Kansas Register.

Exempting a case from suspension

4. While a suspension of a statutory deadline or time limitation is in place under numbered paragraphs 1 or 3, numbered paragraphs 5 and 6 explain how a court may exempt a case from suspension. Numbered paragraphs 5 and 6 do not apply to the following:

- a. Deadlines or time limitations under K.S.A. 22-3402, and amendments thereto; and
- b. Statutes of limitation.

5. Any appellate justice or judge, judge of the district court, or hearing officer may exempt a case from the suspension of a statutory deadline or time limitation by:

- a. Entering an order in a case or issuing a notice of hearing that imposes a deadline or time requirement; and
- b. Specifically stating that the deadline or time requirement is not subject to the suspension of time in this order.

6. While a suspension of a statutory deadline or time limitation is in place, no action may be dismissed for lack of prosecution or for the failure to meet a statutory deadline, except when a court has:

- a. Invoked the exception in numbered paragraph 5; and
- b. Issued an order to show cause why the action should not be dismissed.

Rules governing time computation when deadlines and time limitations resume

7. Time computation for all deadlines and time limitations (including statutes of limitation and statutory time standards) resuming on April 15, 2021, is

governed by K.S.A. 20-172, as amended by 2021 House Bill 2227, and any further amendments thereto. Under 2021 House Bill 2227, §1(d):

- "For a deadline or time limitation that was extended or suspended" because of an administrative order I issued, on April 15, 2021, "a person shall have the same number of days to comply with the deadline or time limitation as 4 the person had when the deadline or time limitation was extended or suspended"; and

- "for a deadline or time limitation that did not begin to run" because of an administrative order I issued, on April 15, 2021, "a person shall have the full period provided by law to comply with the deadline or time limitation."

Authorizations to use two-way telephonic and electronic audio-visual communication are not impacted by this order

8. This order does not impact the portions of my Administrative Orders authorizing two-way telephonic and electronic audio-visual communication in court proceedings, including 2021-PR-021.

Conflicts

9. If a conflict exists between this order and previous administrative orders, this order controls.

Order Duration

10. This order will remain in effect until my further order or this order's expiration under the terms of K.S.A. 20-172, and amendments thereto.

Dated this 30th day of March 2021.

MARLA LUCKERT

Chief Justice

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 6, 2020

**Christopher M. Wolpert
Clerk of Court**

WALTER PAYTON,

Plaintiff - Appellant,

v.

RICHARD T. BALLINGER, Former
Sedgwick County District Court Judge for
the Eighteenth Judicial District, in his
official professional and nonprofessional
individual capacities, et al.,

Defendants - Appellees.

No. 20-3101
(D.C. No. 5:20-CV-03092-SAC)
(D. Kan.)

ORDER

Before **PHILLIPS, MURPHY, and McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 14, 2020

**Christopher M. Wolpert
Clerk of Court**

WALTER PAYTON,

Plaintiff - Appellant,

.v.

RICHARD T. BALLINGER, Former Sedgwick County District Court Judge for the Eighteenth Judicial District, in his official professional and nonprofessional individual capacities; RONALD S. TROLLOPE, Detective for the Wichita Police Department, in his official professional and nonprofessional individual capacities; KIMBERLY T. PARKER, Assistant Sedgwick County District Attorney for the Eighteenth Judicial District, in her official professional and nonprofessional individual capacities; COUNTY OF SEDGWICK, in its official professional and nonprofessional individual capacities; DAVID W. KENNEDY, District Court Judge, Former Sedgwick County District Court Judge for the Eighteenth Judicial District, in his official professional and nonprofessional individual capacities; SEDGWICK COUNTY EIGHTEENTH JUDICIAL DISTRICT OF KANSAS, in its official professional and nonprofessional individual capacities; WICHITA POLICE DEPARTMENT, in its official professional and nonprofessional individual capacities; CITY OF WICHITA, in its official professional and nonprofessional individual capacities; KANSAS SUPREME COURT, in its official professional and nonprofessional individual capacities; KANSAS COURT

No. 20-3101

(D.C. No. 5:20-CV-03092-SAC)
(D. Kan.)

OF APPEALS, in its official professional and nonprofessional individual capacities; NOLA T. FOULSTON, Former Sedgwick County District Attorney for the Eighteenth Judicial District, in her official professional and nonprofessional individual capacities; MARK BENNETT, Current Sedgwick County District Attorney for the Eighteenth Judicial District, in his official professional and nonprofessional individual capacities; (FNU) (LNU) (1), All Unknown/Unnamed Individuals, Co-conspirators with the City of Wichita, Sedgwick County, and Eighteenth Judicial District, in their official professional and nonprofessional individual capacities; (FNU) (LNU) (2), All Attorneys of Record of Appearance for Walter (aka: "Manuel") Payton, Co-conspirators with the Eighteenth Judicial District, in their official professional and nonprofessional individual capacities,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **PHILLIPS, MURPHY, and McHUGH**, Circuit Judges.

Walter Payton, a Kansas state prisoner proceeding pro se, appeals the district court's dismissal of his Amended Complaint. The district court screened Payton's Amended Complaint under 28 U.S.C. § 1915A and relied on both bases identified in that section to dismiss: (1) failure to state a claim upon which relief may be granted, and (2)

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

seeking monetary damages from a defendant who is immune from suit. The district court also dismissed on (mistaken) grounds that Payton had not paid the initial partial filing fee as ordered by the court. Payton moves to proceed in forma pauperis (“IFP”) on appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal of Payton’s claims and grant his motion to proceed IFP.

BACKGROUND

In 1998, a jury convicted Payton of two counts of statutory rape and one count of rape. *See Payton v. State*, 274 P.3d 46, No. 105,822, 2012 WL 1352837, at *1 (Kan. Ct. App. Apr. 12, 2012) (unpublished table decision). For this, the court imposed a 712-month sentence. *Id.* On direct appeal, the Kansas Court of Appeals affirmed Payton’s conviction and sentence. *Id.* Since then, Payton has sought, and failed, to invalidate his conviction through state and federal actions, including through successive 28 U.S.C. § 2254 petitions. *See, e.g., Payton v. Werholtz*, 523 F. App’x 506, 506-07 (10th Cir. 2013) (unpublished); *Payton*, 274 P.3d 46, 2012 WL 1352837, at *1.

On March 25, 2020, Payton commenced this action, suing state and local governmental officials and employees. He alleged that named defendants violated his Sixth and Fourteenth Amendment rights in connection with DNA evidence relating to the rapes. For these violations, Payton sought monetary damages and more DNA testing.

The district court read Payton’s Complaint as asserting claims under 42 U.S.C. § 1983. Screening the Complaint under 28 U.S.C. § 1915A, the district court concluded that it failed to state a claim. The district court ordered Payton to show cause for why his claims should not be dismissed, or alternatively, if Payton chose, to file an amended

complaint. Addressing Payton's IFP motion, the district court ordered Payton to submit an initial partial filing fee of \$117 by May 7, 2020 and to pay the remaining balance of the \$350 filing fee in installments.

On May 5, 2020, Payton filed an Amended Complaint, adding defendants and claims. This time, Payton also asserted Fourth and Eighth Amendment claims, as well as state-law claims. In addition to the relief sought in his first Complaint, he requested "immediate release[] from the custody of the Secretary of the Kansas of Department of Corrections and all future prosecution in this matter." R. at 50.

The district court dismissed the Amended Complaint on three independent bases: (1) failure to pay the partial filing fee, (2) failure to state a claim, and (3) seeking monetary relief from defendants who are immune from suit. Further, the district court declined to exercise supplemental jurisdiction over the remaining state-law claims. Accordingly, in response to Payton's "Request A Certificate of Appealability," while still construing Payton's Amended Complaint as asserting § 1983 claims, the district court denied a certificate of appealability.¹ The district court certified that an appeal would not be taken in good faith under 28 U.S.C. § 1915(a)(3) for the reasons given in its orders dismissing the Complaint and Amended Complaint.

¹ Throughout these proceedings, the district court understood that Payton filed a suit for civil damages, not a habeas petition, but the court took the precaution of denying a certificate of appealability because Payton fashioned this filing as such (a "Request A Certificate of Appealability"). Payton indicates on appeal that he does not bring a habeas petition and following and agreeing with this assertion, we treat this case as one for relief under § 1983.

On May 26, 2020, Payton filed a notice of appeal. He attached ledgers showing that he in fact had paid on April 7, 2020 \$117 for “FF Fees Initial” and paid on May 12, 2020 \$16 for “Cash Federal Fil.” *Id.* at 79–80. On May 27, 2020, the district court filed a notice acknowledging that Payton had in fact paid the initial partial filing fee on April 22, 2020 and that the clerk’s office had mistakenly failed to docket the payment.

DISCUSSION

I. Section 1915A

A. Dismissal for Failure to State a Claim

We review de novo a district court’s order under § 1915A dismissing a complaint for failure to state a claim for relief. *See Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009) (citation omitted). Under the *Heck* doctrine, a state prisoner cannot pursue § 1983 relief premised on the invalidity or duration of the prisoner’s confinement. *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005); *see generally Heck v. Humphrey*, 512 U.S. 477 (1994). So when determining whether such a prisoner may pursue a claim seeking redress from a governmental entity or officer or employee, a court must consider whether a judgment in the prisoner’s favor would “necessarily imply the invalidity of his conviction or sentence.” *Heck*, 512 U.S. at 487. If so, the court must dismiss the complaint if the conviction or sentence has not been invalidated. *See id.*

The district court properly applied the *Heck* doctrine to Payton’s claims. As noted, his claims challenge the validity of his rape convictions. Indeed, he requests DNA retesting, release from custody, and release from further prosecution. But his conviction remains intact despite his multiple state and federal challenges. *See, e.g., Payton*, 523

F. App'x at 506–07; *Payton*, 274 P.3d 46, 2012 WL 1352837, at *1. Hence, Payton's § 1983 claims are yet another attempt to attack this conviction.

B. Dismissal Because of Defendants' Immunity

Additionally, the district court properly concluded that several named defendants are immune from suit. Payton sues two Kansas state judges, but judges are generally immune from suit. *See Mireles v. Waco*, 502 U.S. 9, 11 (1991). Though the law recognizes exceptions to judicial immunity, *see id.* at 11–12, Payton has not alleged facts that meet an exception.

Payton also sues three Kansas prosecutors, but prosecutors are similarly immune from § 1983 claims for activities “intimately associated with the judicial . . . process,” such as initiating and prosecuting criminal cases. *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir. 1994) (internal quotation marks omitted and alteration in original) (quoting *Pfeiffer v. Hartford Fire Ins.*, 929 F.2d 1484, 1489 (10th Cir. 1991)). Because Payton bases his claims on such activities, prosecutorial immunity precludes suit against these defendants.

Finally, Payton sues the State of Kansas and several state entities. Kansas has not waived its Eleventh Amendment immunity to § 1983 suits in federal court, *see Jones v. Courtney*, 466 F. App'x 696, 700 (10th Cir. 2012) (unpublished), so these defendants also enjoy immunity.²

² The district court also dismissed Payton's Amended Complaint on grounds that he does not allege how several defendants personally participated in violating his rights, does not allege that the defendants' defense attorneys acted under color of state law, and

Because the district court dismissed all of Payton’s federal-law claims, the district court acted within its discretion in refusing to exercise supplemental jurisdiction over Payton’s state-law claims. *See Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1238–39 (10th Cir. 2020).

II. Prison Litigation Reform Act (“PLRA”) & IFP Motion

Payton also filed a motion to proceed IFP. Under 28 U.S.C. § 1915(g), a prisoner cannot bring civil actions or appeals under IFP status if the prisoner has three or more times had an action or appeal dismissed as “frivolous” or “malicious” or for “fail[ing] to state a claim upon which relief may be granted” (*i.e.*, has three or more strikes), “unless the prisoner is under imminent danger of serious physical injury.” Dismissal for failure to state a claim under § 1915A counts as a strike. *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1177 (10th Cir. 2011) (abrogated on other grounds). The district court’s dismissal of the § 1983 claims because they were *Heck* barred is a strike and that strike was immediately effective. *See Coleman v. Tollefson*, 575 U.S. 532, 135 S. Ct. 1759, 1763–64 (2015); *Jones v. Smith*, 109 F. App’x 304, 309 (10th Cir. 2004) (unpublished). This single strike does not preclude Payton from proceeding IFP on this appeal. But we assess another strike for our dismissal of this appeal because we

has not overcome the bar against due process claims for DNA testing. Additionally, the district court concluded that some named defendants, as subordinate governmental units, do not have capacity to sue or be sued. We need not address each of these bases because we “may affirm on any ground” supported by the record. *Sherman v. Klenke*, 653 F. App’x 580, 595–96 (10th Cir. 2016) (unpublished) (internal quotation marks omitted) (quoting *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1256 (10th Cir. 2011)).

agree with the district court's application of *Heck*. See *Hafed*, 635 F.3d at 1177. We caution Payton to consider his suits going forward to avoid accumulating that third strike.

For this appeal, we grant Payton's motion to proceed IFP.

CONCLUSION

For the reasons stated above, we AFFIRM dismissal of the Amended Complaint, GRANT Payton's request to proceed IFP and assess Payton his second strike under the PLRA.

Entered for the Court

Gregory A. Phillips
Circuit Judge

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