

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 30, 2023

Lyle W. Cayce
Clerk

No. 22-40626

ALEX ADAMS,

Plaintiff—Appellant,

versus

LORIE DAVIS; ASHLEE CANTWELL; CAPTAIN UNKNOWN
EMBRA; UNKNOWN WHITFIELD; K. HENRY,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-11

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of January 30, 2023, for want of prosecution. The appellant failed to timely pay the filing fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Rebecca L. Leto

By: _____

Rebecca L. Leto, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

APPENDIX
A.

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

RECEIVED ON 4-19-23

April 12, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

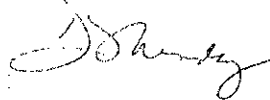
No. 22-40626 Adams v. Davis
 USDC No. 6:20-CV-11

The court has taken the following action in this case:

Appellant's "Appellant's Brief, Brief in Support of IFP, Notice to Court, Motion to Reinstate" filed ONLY as a motion to reinstate this appeal, is hereby DENIED.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

Mr. Alex Adams
Mr. Oscar Esteban Farias

P.S. In light of the above, no further action will be taken on your recently received "Appellant's Brief In Support of IFP, Motion to Present Exhibits Namely, I.T.F.S.A."

AT 7/11/22
B

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

ALEX ADAMS, #1181239,

Plaintiff,

v.

ASHLEE CANTWELL,

Defendant.

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Case No. 6:20-cv-11-JDK-KNM

ORDER DENYING MOTION TO APPEAL *IN FORMA PAUPERIS*

Before the Court is Appellant Alex Adam's motion for leave to appeal *in forma pauperis*. Docket No. 82. The Court entered final judgment on September 6, 2022. Docket No. 80. And Appellant filed his notice of appeal on September 12, 2022. Docket No. 81.

Under 28 U.S.C. §1915(a)(3), leave to proceed *in forma pauperis* on appeal shall be denied if the district court determines that the appeal is not taken in good faith—that is, if the appeal fails to present a non-frivolous issue. *Coppedge v. U.S.*, 369 U.S. 438 (1962); *United States v. Benitez*, 405 F. App'x 930 (5th Cir. 2010) (*per curiam*). An action is frivolous where there is no arguable legal or factual basis for the claim. *Neitzke v. Williams*, 490 U.S. 319 (1989). Similarly, under Federal Rule of Appellate Procedure 24(a)(3)(A), an appellant is ineligible for *in forma pauperis* status if the Court certifies that the appeal is not taken in good faith. An appeal is not taken in good faith where the district court finds no "legal points arguable on the merits." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983), *reh'g denied*, 719 F.2d 787 (5th Cir. 1983).

For reasons explained in the Report and Recommendation (Docket No. 75), and the Order Adopting the Report (Docket No. 79), the Court does hereby **CERTIFY** that Plaintiff's appeal is not taken in good faith—as Plaintiff presents no nonfrivolous issues of appeal. Because Plaintiff's lawsuit raises no legal points arguable on the merits, his appeal is not taken in “good faith.” *Howard*, 707 F.2d at 220. Accordingly, it is **ORDERED** that the Plaintiff/Appellant Alex Adams's motion for leave to proceed *in forma pauperis* on appeal (Docket No. 82) is **DENIED**.

Where a district court certifies that an appeal is not taken in good faith, Appellant may, within the time prescribed by Federal Rule of Appellate Procedure 4, either pay the full filing fee and any relevant costs or contest the certification decision by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit. *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). If Appellant contests the certification decision and the appellate IFP certification is secured, this motion shall be deemed to be a timely notice of appeal.

Should the Appellant challenge the district court's certification that the appeal was not taken in good faith, the motion must be directed solely to the district court's reason for this certification. This motion and deemed notice of appeal shall be a filing for purposes of the Prison Litigation Reform Act and will trigger the financial screening and assessment procedures of the Act. *Baugh*, 117 F.3d at 202. Thus, if the Appellant moves to proceed on appeal *in forma pauperis* with the Fifth Circuit, the prison authorities will be directed to collect the fees as calculated in this order.

Alex Adams, #1181239 is assessed an **initial partial appellate filing fee of \$53.00**. The total appellate filing fee due is \$505.00. Appellant shall pay the remaining balance of the filing fee, \$452.00, in periodic installments. Appellant is required to make payments of 20% of the preceding month's income credited to Appellant's prison account until Appellant has paid the total filing fee. The agency having custody of the prisoner shall collect this amount from the trust fund account or institutional equivalent, when funds are available and when permitted by 28 U.S.C. § 1915(b)(2), and forward it to the clerk of the district court.

If Appellant moves to proceed on appeal *in forma pauperis* with the Fifth Circuit, the clerk shall mail a copy of this order to the appropriate person or entity responsible for collecting and remitting to the district court interim filing payments on behalf of prisoners, as designated by the facility in which the prisoner is currently or subsequently confined.

So **ORDERED** and **SIGNED** this 18th day of November, 2022.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

APPENDIX
6

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 17, 2023

#1181239
Mr. Alex Adams
CID McConnell Prison
3001 S. Emily Drive
Beeville, TX 78102-0000

No. 22-40626 Adams v. Davis
USDC No. 6:20-CV-11

Dear Mr. Adams,

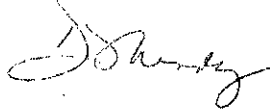
We have received your multi titled document "Appellant Brief, Brief in Support of IFP, Notice to Court, Motion to Reinstate." This item has been filed as a motion to reinstate **this** appeal **only**. This appeal was dismissed on January 30, 2023, for failure to pay the filing fee. Although you assert that monies have been deducted from your inmate account for this appeal, there is no evidence of this reflected on the district court's docket sheet. Additionally, a hold is sent to the trust fund department to have the filing fee deducted from your inmate account as the funds become available, only if a challenge to the district court's November 18, 2022, order denying your motion for IFP is made. We have no record of a motion to proceed IFP having been filed in this particular appeal. To any extent funds have been deducted for this appeal from your account, any attempt to secure a potential refund of those funds will need to be directed to the district court.

No further action will be taken on the request to reinstate since you have not remedied the original default. We will resume the processing of a motion to reinstate only upon receipt of proof that the default has been remedied.

The Court normally will not reinstate a case dismissed by the clerk under **5TH CIR. R. 27.1.6** unless the default is remedied within 45 days from the date of dismissal. (See I.O.P. following **5TH CIR. R. 27**)

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "L. Cayce", written over a horizontal line.

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Mr. Oscar Esteban Farias

APPROVED
D

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

November 14, 2022

Mr. David O'Toole
U.S. District Court, Eastern District of Texas
211 W. Ferguson Street
Room 106
Tyler, TX 75702

No. 22-40626 Adams v. Davis
USDC No. 6:20-CV-11

Dear Mr. O'Toole,

Enclosed, please find pro se's motion for leave to proceed in forma pauperis which was sent to this court. Please notify us when you have acted on the motion.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

Enclosure

cc: Mr. Alex Adams
Mr. Oscar Esteban Farias

APPENDIX
E

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

October 20, 2022

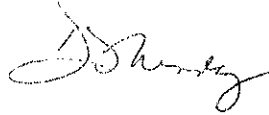
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-40626 Adams v. Davis
 USDC No. 6:20-CV-11

The court has granted an extension of time to and including November 28, 2022 to pay the filing fee or file a motion to proceed in forma pauperis with the district court in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

Mr. Alex Adams
Mr. Oscar Esteban Farias

P.S. to Mr. Adams, we do not provide forms for filings in the district court.

APPENDIX
F

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

October 11, 2022

#1181239
Mr. Alex Adams
CID McConnell Prison
3001 S. Emily Drive
Beeville, TX 78102-0000

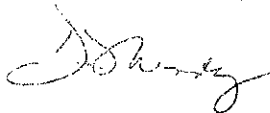
No. 22-40626 Adams v. Davis
USDC No. 6:20-CV-11

Dear Mr. Adams,

We received your "Election of Options Form" indicating you were granted leave to proceed in forma pauperis (IFP) by the district court, Tyler division. We take no action on this form because is it incorrect. You have not been granted permission to proceed IFP for this appeal. You were instead, granted IFP for the filing of the initial complaint instead. As a result, the filing fee for this appeal remains due by November 14, 2022. Failure to address the filing fee within the time provided will result in the dismissal of the appeal for failure to prosecute. See 5th Cir. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Mr. Oscar Esteban Farias

APPENDIX
6

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

December 01, 2022

#1181239
Mr. Alex Adams
CID McConnell Prison
3001 S. Emily Drive
Beeville, TX 78102-0000

No. 22-40626 Adams v. Davis
USDC No. 6:20-CV-11

Dear Mr. Adams,

We have docketed the appeal as shown above, and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See **FED. R. APP. P.** and **5TH CIR. R.** 27 for guidance. We will not acknowledge or act upon documents not authorized by these rules.

The district court denied you in forma pauperis (IFP) status under 28 U.S.C. § 1915(a)(3) and **FED. R. APP. P.** 24(a). You have 30 days from the date of the district court's order to pay the full \$505.00 fees to the **district court clerk**, or to challenge the district court's denial of IFP status. If you challenge the decision, you must apply to this court for IFP and include a brief supporting your position. Your brief may only discuss the reasons why you think the district court's denial of IFP was wrong. If you do not pay the full fees or file a motion and brief with this court, we will dismiss your appeal without further notice, **5TH CIR. R.** 42.3.

All counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" naming all parties represented within 14 days from this date, see **FED. R. APP. P.** 12(b) and **5TH CIR. R.** 12. This form is available on our website www.ca5.uscourts.gov. Failure to electronically file this form will result in removing your name from our docket. Pro se parties are not required to file appearance forms.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The

"Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

ATTENTION ATTORNEYS: Direct access to the electronic record on appeal (EROA) for pending appeals will be enabled by the U S District Court on a per case basis. Counsel can expect to receive notice once access to the EROA is available. Counsel must be approved for electronic filing and must be listed in the case as attorney of record before access will be authorized. Instructions for accessing and downloading the EROA can be found on our website at <http://www.ca5.uscourts.gov/docs/default-source/forms/instructions-for-electronic-record-download-feature-of-cm>. Additionally, a link to the instructions will be included in the notice you receive from the district court.

Sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. Access to sealed documents will continue to be provided by the district court only upon the filing and granting of a motion to view same in this court.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

ATTENTION: If you are filing Pro Se (without a lawyer) you can request to receive correspondence from the court and other parties by email and can also request to file pleadings through the court's electronic filing systems. Details explaining how you can request this are available on the Fifth Circuit website at <http://www.ca5.uscourts.gov/docs/default-source/forms/pro-se-filer-instructions>. This is not available for any pro se serving in confinement.

Special guidance regarding filing certain documents:

General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm to the United States or its interests. Before uploading any matter as a sealed filing, ensure it has not been designated as HSD by a district court and does not qualify as HSD under General Order No. 2021-1.

A party seeking to designate a document as highly sensitive in the first instance or to change its designation as HSD must do so by motion. Parties are required to contact the Clerk's office for guidance before filing such motions.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters

must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc: Mr. Oscar Esteban Farias
Mr. David O'Toole

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 22-40626

Alex Adams,

Plaintiff - Appellant

v.

Lorie Davis; Ashlee Cantwell; Captain Unknown Embra; Unknown
Whitfield; K. Henry,

Defendants - Appellees

APPENDIX
H



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 17, 2022

Alex Adams TDCJ #1181239
William G. McConnell Unit
3001 Emily Drive
Beeville, TX 78102

CMRRR 7021 2720 0002 0452 8037

Re: ***Alex Adams v. Ashlee Cantwell, et al.,***
6:20-cv-11; U.S.D.C., Eastern District of Texas, Tyler Division

Dear Mr. Adams:

Enclosed is a courtesy copy of Defendant Ashlee Cantwell's Response to Plaintiff's Motion to Proceed *In Forma Pauperis* on Appeal for the above-referenced matter that was electronically filed on this date.

Sincerely,

Sherry Hightower

Sherry Hightower, Legal Secretary to
OSCAR FARIAS | Assistant Attorney General
Law Enforcement Defense Division
(512) 463-2143/ Fax: (512) 936-2109 | OSCAR.FARIAS@oag.texas.gov

/slh

Encl:

x: File

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

ALEX ADAMS, TDCJ NO. 1181239,
Plaintiff,

v.

ASHLEE CANTWELL,
Defendant.

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CIVIL ACTION NO. 6:20-cv-00011

**DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION TO PROCEED *IN FORMA PAUPERIS* ON APPEAL**

COMES NOW Defendant Ashlee Cantwell ("Defendant"), who files this response in opposition to Plaintiff Alex Adams' motion to proceed *in forma pauperis* on appeal. ECF No. 82.

**I.
STATEMENT OF THE CASE**

Plaintiff Alex Adams ("Adams") is an inmate confined by the Texas Department of Criminal Justice ("TDCJ") currently housed at the McConnell Unit in Beeville, Texas. Proceeding *pro se* and *in forma pauperis*, Plaintiff filed suit on January 8, 2020, pursuant to 42 U.S.C § 1983 alleging that various violations of his constitutionally protected rights had occurred. ECF No. 1. Plaintiff specifically claims that Defendant Cantwell used excessive force against him in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.* at 5.

On May 14, 2020, the Court recommended that Adams' claims against Defendants Whitfield, Embra, Henry, and Davis should be dismissed, with prejudice, for failure to state a claim upon which relief can be granted. ECF No. 14. The court also recommended that Adams' claims of excessive force against Defendant Cantwell should proceed. *Id.* On June 18, 2020, the Court adopted the report and recommendations. ECF No. 25. On September 29, 2020, Adams filed

an interlocutory appeal. ECF No. 33. On October 6, 2020, the Court issued an order administratively closing the case pending the resolution of Adams' interlocutory appeal. On December 8, 2020, the Court reopened the case. ECF No. 40.

On September 13, 2021, Defendant filed her motion for summary judgment under seal. ECF No. 55. On August 2, 2022, the Court recommended that Defendant's motion for summary judgment be granted, and that Plaintiff's civil action be dismissed. ECF No. 75. On September 6, 2022, the Court issued its Order adopting the report and recommendation. ECF No. 79. That same day, the Court entered final judgement. ECF No. 80.

On September 12, 2022, Adams filed his notice of appeal. ECF No. 81. Adams then filed his motion to proceed *in forma pauperis* ("IFP") on appeal on November 8, 2022. ECF No. 102. This response in opposition now follows:

II. ARGUMENT

A. Adams' Motion to Proceed *In Forma Pauperis* is Insufficient Under Federal Rule of Appellate Procedure 24(a)(1) and 28 U.S.C. § 1915(a) because he has not shown that he intends to present any non-frivolous issue on appeal.

"A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court." *Jeffery v. Walker*, 113 F.3d 527, 528 (5th Cir. 1997) (citing *Jackson v. Stinnett*, 102 F.3d 132, 136 (5th Cir.1996)). Rule 24 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1915(a) operate to govern applications to proceed IFP by inmates. Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party who desires to proceed on appeal *in forma pauperis* shall file a motion in the district court together with an affidavit that (1) shows his inability to pay fees and costs, (2) claims an entitlement to redress, and (3) states the issues which the party intends to present on appeal. Fed. R. App. P. 24(a)(1).

Plaintiff filed his motion to proceed *in forma pauperis* on November 8, 2022. ECF No. 82. This motion is lacking the necessary information under Federal Rule of Appellate Procedure 24(a)(1). In particular, Plaintiff's motion fails to show his inability to pay fees and costs. A party wishing to proceed *in forma pauperis* on appeal, is required to submit an affidavit "that [he] is unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a)(1). When the party wishing to proceed *in forma pauperis* on appeal is a prisoner, they are required to submit a certified copy of their trust fund account statement in addition to the affidavit required under paragraph (1). 28 U.S.C. § 1915(a)(2). While Plaintiff includes a certified copy of his trust fund account statement for the preceding six months and an affidavit declaring that he is "unable to pay in advance the filing fee for said proceedings," his affidavit fails to detail all of the required information.

Plaintiff does not state that he is entitled to redress or what issues he intends to present on appeal. Fed. R. App. P. 24(a)(1)(B)-(C). Under 28 U.S.C. § 1915(a), this Court may refuse to certify an appeal for *in forma pauperis* status if it is not taken in good faith. This Court will be unable to make that determination without the information required by Rule 24(a). *Langston v. Leblanc*, 402 Fed. Appx. 976, 977 (5th Cir. 2010) (affirming district court's holding that appeal was not taken in good faith where inmate failed to state what issues he intended to present on appeal); *see also Young v. Dallas Indep. Sch. Dist.*, 3:16-CV-543-N (BT), 2018 WL 4403463, at *1 (N.D. Tex. Aug. 3, 2018), report and recommendation adopted, 3:16-CV-543-N (BT), 2018 WL 4386276 (N.D. Tex. Sept. 14, 2018) ("Without this basic information [required by Fed. R. App. P. 24(a)(1)(C)], the Court cannot begin to examine whether Plaintiff's appeal is taken in good faith.").

Because Plaintiff's motion to proceed *in forma pauperis* on appeal fails to comply with 28 U.S.C. § 1915(a) and the mandatory requirements under Fed. R. App. P. 24(a)(1), Plaintiff's

motion should be denied. *See Leal v. Quarterman*, SA-07-CA-214-RF, 2008 WL 11424217, at *2 (W.D. Tex. Jan. 23, 2008) (denying motion to proceed in forma pauperis where petitioner failed to state issues he intended to present on appeal); *United States v. Bays*, 3:13-CR-357-B (01), 2015 WL 13310054, at *2 (N.D. Tex. May 5, 2015) (same); *Gresham v. Well Fargo Bank, N.A.*, 4:13-CV-711, 2015 WL 11145815, at *1 (E.D. Tex. June 17, 2015) (same).

B. Adams' appeal is not taken in good faith.

An appeal may not be given IFP if the district court certifies in writing that the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3). “The ‘good faith’ requirement ... ‘is established by the presentation of any issue that is not plainly frivolous.’” *Hayes v. United States*, 258 F.2d 400, 401–02 (5th Cir.1958) (internal citation omitted). This requires the Court to examine the merits of the appeal but does not require the demonstration of probable success on appeal. *Jones v. Frank*, 622 F.Supp. 1119, 1120 (W.D.Tex.1985). “The [c]ourt's inquiry is limited to whether the appeal involves ‘legal points arguable on their merits (and therefore not frivolous).’” *Id.*

Here, rather than raising any errors regarding the Court's analysis in his notice of appeal, Adams instead argues that the Court, “manipulate[d],” rules by ordering him to amend his Original Complaint, in an attempt to, “throw out,” “deliberately ignore,” and, “supersede,” the claims presented in his Original Complaint to, “suppress the truth.” ECF No. 81 at 3-6. Adams also contends he did not have copies of his grievances and other exhibits to attach to his Amended Complaint, and that the McConnell Unit mail room staff refused to sign green cards or follow TDCJ policy. *Id.* at 1-3. Adams similarly failed to raise substantive objections to Judge Mitchell's Report and Recommendation prior to its adoption. *See* ECF No. 79.

Because Adams fails to allege any errors that can be supported on appeal, Adams' appeal presents no issue arguable on its merits and is therefore frivolous and not taken in good faith.

**III.
CONCLUSION**

For these reasons, Defendants request that the Court deny Plaintiff Alex Adams' motion to proceed *in forma pauperis* on appeal and certify that his appeal is not taken in good faith.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN E. COWLES
Deputy Attorney General for Civil Litigation

SHANNA E. MOLINARE
Chief, Law Enforcement Defense Division

/s/ OSCAR FARIAS
OSCAR FARIAS
Assistant Attorney General
Law Enforcement Defense Division
Attorney-In-Charge
State Bar No. 24109177
Oscar.Farias@oag.texas.gov

Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2143 (Phone No.)
(512) 370-9814 (Fax No.)

ATTORNEYS FOR DEFENDANT

NOTICE OF ELECTRONIC FILING

I, **OSCAR FARIAS**, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing, **Defendant's Response to Plaintiff's Motion to Proceed *In Forma Pauperis* on Appeal**, in accordance with the Electronic Case Files System of the Eastern District of Texas, on November 17, 2022.

/s/ OSCAR FARIAS
OSCAR FARIAS
Assistant Attorney General

CERTIFICATE OF SERVICE

I, **OSCAR FARIAS**, certify that on November 17, 2022, a true and correct copy of foregoing **Defendant's Response to Plaintiff's Motion to Proceed *In Forma Pauperis* on Appeal** was served on Plaintiff by Certified Mail, Return Receipt Requested, as follows:

Alex Adams, TDCJ #01181239
William G. McConnell Unit
3001 Emily Drive
Beeville, TX 78102
Plaintiff Pro Se

CM/RRR: 7021 2720 0002 0452 8037

/s/ OSCAR FARIAS
OSCAR FARIAS
Assistant Attorney General

APPENDIX I

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

September 19, 2022

#1181239
Mr. Alex Adams
CID McConnell Prison
3001 S. Emily Drive
Beeville, TX 78102-0000

No. 22-40626 Adams v. Davis
USDC No. 6:20-CV-11

Dear Mr. Adams,

We have docketed your appeal with the 5th Circuit number shown above. Please use this number in all future contact with the court. **If you have more than one appeal, you will have to comply with the instructions below for each appeal.** Read this letter carefully because you have 45 days to make two decisions **and** to notify us what you want to do, or we may dismiss your appeal without further notice:

The Prison Litigation Reform Act, 28 U.S.C. § 1915, generally requires you to make arrangements to pay the \$505.00 filing fees before this court will consider your appeal. Knowing that you must pay for your appeal, the **first decision** you must make is if you want to continue with your case. If you do not want to continue, you may voluntarily dismiss your appeal now using the attached Form 1. When we get your Form 1 we will dismiss your case and you do not have to do anything more.

If you want your case to continue, the **second decision** you must make is how you will pay the fees. You may either:

(1) Make a one time payment of \$505.00 to the **district court clerk**; or,

(2) Apply to the **district court** for permission to appeal in forma pauperis (IFP). If you want this option you should contact the district court for specific instructions and any forms they have, and should contact your prison authorities for instructions how to get a "certified trust fund account statement." Also, if your prison requires them, you must sign consent forms and authorizations to have money taken from your account. You must send these forms to the district court, along with your motion to proceed on appeal in forma pauperis, your certified trust fund account statement and any other required documents. If the **district court** grants you permission to appeal IFP, you will have to pay an "initial partial filing fee"

calculated by the court. You must pay this initial fee from your inmate trust fund account. If your account does not have enough money to pay the full initial fee, all money in your account will be collected and the remainder taken when more funds exist. After this initial fee is paid, you still will have to pay the rest of the \$505.00 fee from your prison trust fund account.

If you have not already paid the full filing fee to the district court, or applied to the district court for permission to appeal IFP, **you should do so immediately.**

You have **45 days from the date of this letter** to tell us what your decision is on your case. If you want to dismiss your case, send us a completed Form 1. If you want to continue your case, send us a completed Form 2 showing us how you are going to pay for your appeal. If you are using Form 2, please read it very carefully, and then mark one of the three boxes on it. **You must complete and return either Form 1 or Form 2 to us within 45 days of the date of this letter or we may dismiss your appeal without further notice.**

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

Special guidance regarding filing certain documents:

General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm to the United States or its interests. Before uploading any matter as a sealed filing, ensure it has not been designated as HSD by a district court and does not qualify as HSD under General Order No. 2021-1.

A party seeking to designate a document as highly sensitive in the first instance or to change its designation as HSD must do so by motion. Parties are required to contact the Clerk's office for guidance before filing such motions.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may

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

TYLER DIVISION

ALEX ADAMS, #1181239

§

VS.

§

CIVIL ACTION NO. 6:20cv11

ASHLEE CANTWELL

§

ORDER

Before the Court is Plaintiff's motion for the appointment of counsel, (Dkt. #66), in this pending civil rights lawsuit. While difficult to decipher, Plaintiff states that he needs help, has documented everything, but "most of all [he] need[s] to be appointed [counsel]."

However, "[t]here is no automatic right to the appointment of counsel in a section 1983 case. A district court is not required to appoint counsel in the absence of 'exceptional circumstances' which are dependent on the type and complexity of the case and the abilities of the individual pursuing that case." *Cupit v. Jones*, 835 F.2d 82, 86 (5th Cir. 1987). This request for counsel does not allege sufficient facts from which this Court can determine that appointment of counsel, based on exceptional circumstances, is necessary at this time. The Court has determined that this case is not unduly complicated requiring the appointment of counsel at this stage. *See Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985). Accordingly, it is

ORDERED that Plaintiff's motion for the appointment of counsel, (Dkt. #66), is **DENIED**—subject to reconsideration if it is later determined that counsel is necessary.

So ORDERED and SIGNED this 28th day of February, 2022.



K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE

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

TYLER DIVISION

ALEX ADAMS, #1181239

§

VS.

§

CIVIL ACTION NO. 6:20cv11

ASHLEE CANTWELL

§

ORDER

Before the Court is Defendant Cantwell's motion to substitute attorney, (Dkt. #64), in this pending civil rights proceeding. Counsel for the Defendant explains that representation has been administratively reassigned and requests that the Clerk of Court remove former counsel Wood from the docket in this case. The request is reasonable. Accordingly, it is

ORDERED that Defendant's motion to substitute attorney, (Dkt. #64), is **GRANTED**.

The Clerk of Court is instructed to remove former counsel Wood from the docket in this case.

So ORDERED and SIGNED this 16th day of February, 2022.


K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE

APPENDIX
K



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 14, 2022

Alex Adams TDCJ #1181239
TDDCJ-Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75861

CMRRR 7018 0680 0001 3688 7030

Re: *Alex Adams v. Ashlee Cantwell, et al.*,
6:20-cv-11; U.S.D.C., Eastern District of Texas, Tyler Division

Dear Mr. Adams:

Enclosed is a courtesy copy of Defendant Ashlee Cantwell's Motion to Substitute Attorney-In-Charge with the proposed for the above-referenced matter that was electronically filed on this date.

Sincerely,

Sherry Hightower

Sherry Hightower, Legal Secretary to
OSCAR FARIAS | *Assistant Attorney General*
Law Enforcement Defense Division
(512) 463-2143/ Fax: (512) 936-2109 | OSCAR.FARIAS@oag.texas.gov

/slh

Encl:

x: File

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

ALEX ADAMS, TDCJ NO. 1181239,
Plaintiff,

v.

ASHLEE CANTWELL,
Defendant.

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CIVIL ACTION NO. 6:20-cv-00011

**DEFENDANT ASHLEE CANTWELL'S
MOTION TO SUBSTITUTE ATTORNEY-IN-CHARGE**

Defendant Ashlee Cantwell ("Defendant") respectfully files this motion to substitute attorney-in-charge. The above-styled case has been administratively assigned to Assistant Attorney General Oscar Farias. Previous counsel for Defendant, Colin Wood, is no longer employed with the Law Enforcement Defense Division of the Office of the Attorney General.

Defendant respectfully requests that the Court grant this motion to substitute, thereby replacing former Assistant Attorney General Colin Wood with Assistant Attorney General Oscar Farias as the attorney of record for Defendant, and requests all pleadings, orders, and correspondence continue to be sent to the Office of the Attorney General, Law Enforcement Defense Division, P.O. Box 12548, MC-012, Austin, Texas 78711-2548 and to the email below for Oscar Farias. It is further requested Colin Wood be removed from all electronic notices for this case.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
Deputy Attorney General

GRANT DORFMAN

Deputy First Assistant Attorney General

SHAWN E. COWLES

Deputy Attorney General for Civil Litigation

SHANNA E. MOLINARE

Division Chief

Law Enforcement Defense Division

/s/ OSCAR FARIAS

OSCAR FARIAS

Assistant Attorney General

Law Enforcement Defense Division

State Bar No. 24109177

Office of the Attorney General

P. O. Box 12548, Capitol Station

Austin, Texas 78711

(512) 463-2143 (Phone No.)

(512) 370-9814 (Fax No.)

oscar.farias@oag.texas.gov

ATTORNEYS FOR DEFENDANT

NOTICE OF ELECTRONIC FILING

I, **OSCAR FARIAS**, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing a true and correct copy of the above and foregoing, **Defendant Ashlee Cantwell's Motion to Substitute Attorney-In-Charge**, in accordance with the Electronic Case Files System of the Eastern District of Texas Tyler Division on February 14, 2022.

/s/ OSCAR FARIAS
OSCAR FARIAS
Assistant Attorney General

CERTIFICATE OF SERVICE

I, **OSCAR FARIAS**, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing, **Defendant Ashlee Cantwell's Motion to Substitute Attorney-In-Charge**, has been served by placing it in United States mail, on February 14, 2022, addressed to:

Alex Adams, TDCJ No. 1181239
TDCJ Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75884
Plaintiff *Pro Se*

CM/RRR: 7018 0680 0001 3688 7030

/s/ OSCAR FARIAS
OSCAR FARIAS
Assistant Attorney General

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

ALEX ADAMS, TDCJ NO. 1181239,
Plaintiff,

v.

ASHLEE CANTWELL,
Defendant.

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CIVIL ACTION NO. 6:20-cv-00011

ORDER

On this day, the Court considered Defendant Ashlee Cantwell's Motion to Substitute Attorney-In-Charge. Defendant's motion is hereby GRANTED.

It is ORDERED that Assistant Attorney General Oscar Farias shall be entered as the lead Attorney-In-Charge for Defendant Ashlee Cantwell ("Defendant"). It is further ORDERED that Colin Wood shall be removed as an attorney of record in this case.

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

ALEX ADAMS, #1181239,

Plaintiff,

v.

ASHLEE CANTWELL,

Defendant.

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Case No. 6:20-cv-11-JDK-KNM

**ORDER ADOPTING THE REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

Plaintiff Alex Adams, a Texas Department of Criminal Justice inmate proceeding pro se, filed this civil rights lawsuit pursuant to 42 U.S.C. § 1983. The case was referred to United States Magistrate Judge K. Nicole Mitchell for findings of fact, conclusions of law, and recommendations for disposition.

Before the Court is Defendant Cantwell's motion for summary judgment. Docket No. 55. On August 2, 2022, Judge Mitchell issued a Report recommending that the Court grant the motion and dismiss Plaintiff's claims with prejudice. Docket No. 75. A copy of this Report was sent to Plaintiff.

Rather than filing objections, Plaintiff filed several miscellaneous motions that neither address the substance of Judge Mitchell's Report nor the underlying claim in this lawsuit. See Docket Nos. 76–78. The Court determines that such filings cannot be construed as objections to Judge Mitchell's Report because Plaintiff does not specifically reference or challenge the Report and, instead, claims the case was

“overturned.” Docket No. 76 at 2; *see Nettles v. Wainwright*, 677 F.2d 404, 410 n.8 (5th Cir. 1982) (en banc) (explaining that frivolous, conclusory, or general objections need not be considered by the district court), *overruled on other grounds by Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415 (5th Cir. 1996) (en banc); *see also Valez-Pedro v. Thermo King De Puerto Rico, Inc.*, 465 F.3d 31, 32 (1st Cir. 2006) (explaining that an objecting party must put forth more than “[c]onclusory allegations that do not direct the reviewing court to the issues in controversy.”).

This Court reviews the findings and conclusions of the Magistrate Judge de novo only if a party objects within fourteen days of service of the Report and Recommendation. 28 U.S.C. § 636(b)(1). In conducting a de novo review, the Court examines the entire record and makes an independent assessment under the law. *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc), *superseded on other grounds by statute*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

Here, Plaintiff did not properly object in the prescribed period. The Court therefore reviews the Magistrate Judge’s findings for clear error or abuse of discretion and reviews the legal conclusions to determine whether they are contrary to law. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989), *cert. denied*, 492 U.S. 918 (1989) (holding that, if no objections to a Magistrate Judge’s Report are filed, the standard of review is “clearly erroneous, abuse of discretion and contrary to law”).

Having reviewed the Magistrate Judge’s Report and the record in this case, the Court finds no clear error or abuse of discretion and no conclusions contrary to

law. Accordingly, the Court hereby **ADOPTS** the Report and Recommendation of the United States Magistrate Judge (Docket No. 75) as the findings of this Court. The Court hereby **GRANTS** Defendant Cantwell's motion for summary judgment (Docket No 55) and **DISMISSES** Plaintiff's claims in this case with prejudice.

So **ORDERED** and **SIGNED** this **6th** day of **September, 2022**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

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

ALEX ADAMS, #1181239,

Plaintiff,

v.

ASHLEE CANTWELL,

Defendant.

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Case No. 6:20-cv-11-JDK-KNM

FINAL JUDGMENT

The Court, having considered Plaintiff's case and rendered its decision by opinion issued this same date, hereby enters **FINAL JUDGMENT**.

It is **ORDERED** that Plaintiff's claims are **DISMISSED** with prejudice. All pending motions are **DENIED** as moot.

The Clerk of Court is instructed to close this case.

So **ORDERED** and **SIGNED** this 6th day of September, 2022.


JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

APPENDIX
M

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

January 30, 2023

Mr. David O'Toole
U.S. District Court, Eastern District of Texas
211 W. Ferguson Street
Room 106
Tyler, TX 75702

No. 22-40626 Adams v. Davis
USDC No. 6:20-CV-11

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc w/encl:

Mr. Alex Adams
Mr. Oscar Esteban Farias

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 30, 2023

Lyle W. Cayce
Clerk

No. 22-40626

ALEX ADAMS,

Plaintiff—Appellant,

versus

LORIE DAVIS; ASHLEE CANTWELL; CAPTAIN UNKNOWN
EMBRA; UNKNOWN WHITFIELD; K. HENRY,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-11

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of January 30, 2023, for want of prosecution. The appellant failed to timely pay the filing fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Rebecca L. Leto

By: _____

Rebecca L. Leto, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT