Pet. App. A

FILED
United States Court of App
Tenth Circuit

May 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LANCEY DARNELL RAY,

Plaintiff - Appellant,

v.

TERRY QUISENBERRY; ANDREW SIBLY; INAS YACOUB; FRED COLSON SMITH, JR.; EDDIE VALDEZ; JORDAN L. CABELKA; GERALD F. NEUWIRTH; KYLE CABELKA; ERIC PFEIFER; LLOYD J. AUSTIN, III,

Defendants - Appellees.

No. 23-6038
(D.C. No. 5:22-CV-00823-D)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Lancey Ray appeals from an order of the district court dismissing Ray's 42 U.S.C. § 1983 complaint. In his complaint, Ray brought claims against numerous

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

state officials, as well as Lloyd Austin, III, in his official capacity as the Secretary of Defense.[1] The matter was referred to a magistrate judge for initial proceedings pursuant to 28 U.S.C. § 636(b)(1)(B). In a thorough report and recommendation, the magistrate judge recommended that the district court dismiss some of the many claims in Ray's complaint without prejudice (those claims unsupported by allegations of wrongdoing and those barred by *Heck v. Humphrey*, 512 U.S. 477 (1994)), and some with prejudice (those barred by absolute judicial immunity and those untimely under Oklahoma's borrowed statute of limitations). Ray filed timely objections to the magistrate judge's report and recommendation. Upon de novo review, 28 U.S.C. § 636(b)(1)(B)-(C), the district court adopted the report and recommendation. Ray appeals.

This court has reviewed de novo Ray's appellate filings, the magistrate judge's report and recommendation, the district court's order, and the entire record on appeal. That review makes clear the judgment entered by the district court is not infected with error. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this

---

[1] The district court dismissed Ray's complaint as it relates to Secretary Austin on the ground the complaint failed to allege any wrongdoing of any kind on the part of Secretary Austin. Furthermore, the district court concluded Ray's belated assertion that he sought "prospective relief to prevent future violations," which was raised for the first time in Ray's objections to the magistrate judge's report and recommendation, was waived. All this being the case, it is also patently clear Secretary Lloyd, a federal official, is not subject to suit under § 1983. *See Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853 (10th Cir. 2016) (holding federal officials are "facially exempt" from the provisions of § 1983 and noting the narrow exception to that rule for active conspiracies in which federal and state officials share a "common unconstitutional goal").

court **AFFIRMS** the judgment of the United States District Court for the Western District of Oklahoma for substantially those reasons set out in the magistrate judge's report and recommendation, dated January 24, 2023, and the district court order, dated March 10, 2023. Furthermore, because Ray has not advanced on appeal "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised," this court **DENIES** his request to proceed in forma pauperis and orders him to immediately remit the entirety of the appellate filing fee. *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Michael R. Murphy
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LANCEY DARNELL RAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-22-823-D**
	)	
TERRY QUISENBERRY et al.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Plaintiff Lancey Darnell Ray, a convicted state prisoner, appearing *pro se* and *in forma pauperis*, has filed a Complaint under 42 U.S.C. § 1983. **(ECF No. 1)**. Chief United States District Judge Timothy D. DeGiusti has referred this matter to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B)-(C). A review of the Complaint has been conducted pursuant to 28 U.S.C. § 1915A(a) and 28 U.S.C. § 1915(e)(2)(B). Based on that review, it is recommended that the Court **DISMISS** the Complaint in its entirety.

I. SCREENING REQUIREMENT

The Court must review each complaint in which a prisoner seeks redress against a governmental entity, officer, or employee and each case in which a plaintiff proceeds *in forma pauperis*. 28 U.S.C. § 1915A(a). The Court is required to dismiss the complaint or any portion of the complaint that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b); *see also Kay v. Bemis,* 500 F.3d 1214, 1217–18 (10th Cir. 2007) (indicating that court uses same analysis for

complaint's sufficiency whether performed sua sponte or pursuant to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)).

II. STANDARD OF REVIEW

The Court must accept Mr. Ray's allegations as true and construe them, and any reasonable inferences to be drawn from them, in the light most favorable to Plaintiff. *See Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). Since Mr. Ray is proceeding *pro se*, his complaint must be construed liberally. *See id.* at 1218. The Court "review[s] the complaint for plausibility; that is, to determine whether the complaint includes enough facts to state a claim to relief that is plausible on its face." *Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009) (quotations and citation omitted). "Plausible" in this context does not mean "likely to be true," but rather refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct," then the plaintiff has not "nudged (his) claims across the line from conceivable to plausible." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility requirement "serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." *Robbins v. Oklahoma,* 519 F.3d 1242, 1248 (10th Cir. 2008).

A complaint fails to state such a claim when it lacks factual allegations sufficient "to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (footnote and citation omitted). Bare legal conclusions in a complaint are not

assumed to be true; legal conclusions "must be supported by factual allegations" to state a claim upon which relief may be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Whether a complaint contains sufficient facts to avoid dismissal is context-specific and is determined through a court's application of "judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *see also Gee v. Pacheco*, 627 F.3d 1178, 1184-85 (10th Cir. 2010) (discussing *Iqbal).*

III. INTRODUCTORY STATEMENT

The underlying events of this action concern the death of M.R.—Mr. Ray's son—who died while residing at Fort Sill, Oklahoma while Mr. Ray was a First Lieutenant in the United States Army stationed there. Mr. Ray was ultimately convicted for first-degree murder for the death of M.R. and in the instant case, Plaintiff alleges various improprieties occurred: (1) as part of the investigation which led to his arrest, (2) at trial, and (3) after trial, during post-conviction proceedings. *See* ECF No. 1.

IV. RELEVANT BACKGROUND AND PLAINTIFF'S COMPLAINT

On June 1, 2012, Mr. Ray was convicted of first-degree murder following a jury trial in Comanche County District Court. *See* State Court Docket Sheet, *State of Oklahoma v. Ray*, Case No. CF-2010-571 (Comanche Co. Dist. Ct. June 1, 2012).[1] The

[1] The Court may take judicial notice of Plaintiff's state court case. *See St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corporation*, 605 F.2d 1169 (10th Cir. 1979) ("federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.").

Oklahoma Court of Criminal Appeals (OCCA) affirmed the conviction on September 24, 2013. *See* State Court Docket Sheet, *Ray v. State of Oklahoma*, Case No. F-2012-538 (Okla. Ct. Crim. App. Sept. 24, 2013).[2] On October 2, 2013, Plaintiff filed a Pro Se Motion to Suspend Sentence pursuant to 22 O.S. § 994. (ECF No. 1:29). On September 19, 2014, Plaintiff filed an Application for Post-Conviction Relief in the Comanche County District Court. (ECF No. 1:32). On November 14, 2014, the Comanche County District Court denied Plaintiff's Application for Post-Conviction Relief. (ECF No. 1:34). On March 18, 2015, the OCCA affirmed the district court's denial. *See* State Court Docket Sheet, *Ray v. State of Oklahoma*, Case No. PC-2014-1053 (Okla. Ct. Crim. App. Mar. 18, 2015).[3]

On September 16, 2022, Plaintiff filed the instant case pursuant to 42 U.S.C. § 1983. (ECF No. 1). As Defendants, Mr. Ray has named:

1. Kyle Cabelka, in his official capacity as Comanche County District Attorney;

2. Eric Pfeifer, in his official capacity as Chief Medical Examiner for the State of Oklahoma;

3. Lloyd Austin, III, in his official capacity as the Secretary of Defense;

4. Gerald Neuwirth, in his official capacity as Comanche County District Court Judge;

5. Andrew Sibly, in his individual capacity as interim Chief Medical Examiner of the State of Oklahoma;

---

[2] Mr. Ray states that the OCCA affirmed the conviction on September 23, 2012. (ECF No. 1:29). But the docket sheet shows the conviction was affirmed September 24, 2012. *See supra.*

[3] Mr. Ray filed two additional Applications for Post-conviction relief and an Application for Judicial Review. See State Court docket sheet, *State of Oklahoma v. Ray*, Case No. CF-2010-571 (Comanche Co. Dist. Ct.). But those pleadings are irrelevant to the instant case.

6. Terry Quisenberry, in his individual capacity as a detective for the Lawton Police Department;

7. Jordan Cabelka, in his individual capacity as Comanche County Assistant District Attorney;

8. Eddie Valdez, in his individual capacity as Comanche County Assistant District Attorney;

9. Fred Colson Smith, Jr., in his individual capacity as Comanche County District Attorney; and

10. Inas Yacoub, in her individual capacity, as a forensic pathologist.

(ECF No. 1:1).

In the Complaint, Mr. Ray alleges:

- Comanche Country District Judge Gerald Neuwirth erred in:

    1. signing the order which had been drafted by Defendant Valdez in response to Plaintiff's Section 994 Motion;

    2. failing to rule on Plaintiff's Section 994 Motion; and

    3. denying Plaintiff's Application for Post-Conviction Relief without an evidentiary hearing.

- Interim Chief Medical Examiner Sibly allowed the investigation into the death of M.R. which violated Plaintiff's 4th Amendment rights;

- Detective Quisenberry:

    1. illegally obtained and disclosed "protected health information"—i.e.—medical records of M.R.;

    2. utilized "inaccurate information" in his probable cause affidavit against Mr. Ray, in violation of the 4th Amendment;
    3. described a prayer said by Mr. Ray in the investigative report and failed to prevent the report from becoming public in violation of Plaintiff's 1st Amendment rights; and

4. "disclosed M.R.'s health information" which "equated to an extrajudicial statement" and exposed Mr. Ray to "bad repute."

- Comanche County Assistant District Attorney Jordan Cabelka erred in:

  1. filing his response to Plaintiff's Application for Post-Conviction Relief and
  2. drafting an order denying relief for the district court to sign which violated Plaintiff's Fourteenth Amendment rights and "equate[d] to an obstruction of justice."

- Assistant District Attorney Valdez:

  1. filed a "duplicitous-disjunctive Amended Information" against Plaintiff in violation of the 14th Amendment;

  2. misled the judge and jury through the introduction of a photograph which Mr. Ray claims was prejudicial and in violation of state and federal law;

  3. failed to prevent Detective Quisenberry's report from becoming public, which, in turn, allowed the publication of Plaintiff's "prayer" in a local newspaper, in violation of Plaintiff's First Amendment rights, the Rules of Professional conduct, and state law; and

  4. fraudulently drafted an order in response to Plaintiff's Section 994 Motion which amounted to fraud and violated the Rules of Professional Conduct.

- District Attorney Smith:

  1. "prosecuted a charge he knew was not supported by probable cause," and

  2. disclosed or allowed disclosure of the Probable Cause affidavit used in Mr. Ray's case which "equated to an extrajudicial statement" that violated the Rules of Professional Conduct and subjected Plaintiff to "bad repute" based on a local newspaper's use of the affidavit in a story regarding the case.

- Forensic pathologist Inas Yacoub:

    1. failed to obtain all of M.R.'s medical records and radiographs prior to conducting the investigation in violation of state law, and

    2. lacked jurisdiction to perform the investigation.

(ECF No. 1:9-15, 21-28, 30-36). Plaintiff seeks compensatory damages, and declaratory and injunctive relief. (ECF No. 1:8-16, 36).

V. DEFENDANTS K. CABELKA, PFEIFER, AND AUSTIN

In the style of the Complaint and when listing the Defendants, Plaintiff names "Kyle Cabelka, Eric Pfeifer, and Lloyd Austin. (ECF No. 1:1). But in the body of the Complaint, Mr. Ray fails to allege any wrongdoing committed by these Defendants. *See* ECF No. 1. The Court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). Mr. Ray's failure to link Defendants K. Cabelka, Pfeifer, and Austin with any of the alleged violations, renders the Complaint legally deficient. *See Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center*, 492 F.3d 1158, 1163 (10th Cir. 2007) (explaining "that, to state a claim in federal court, a complaint must explain what each defendant did to [the pro se plaintiff]; when the defendant did it; how the defendant's action harmed (the plaintiff); and, what specific legal right the plaintiff believes the defendant violated."). As a result, the Court should dismiss the claims against these Defendants, without prejudice, for failure to state a claim. *See Mayfield v. Presbyterian Hosp. Admin.*, 772 F. App'x 680, 686 (10th Cir. 2019) (affirming dismissal when complaint contained "undifferentiated

allegations" that did not "provide fair notice" to defendants because plaintiff had not "attributed specific acts to them").

VI. DEFENDANT NEUWIRTH

Plaintiff has sued Comanche County District Judge Gerald Neuwirth in his official capacity only. *See* ECF No. 1:1. Mr. Ray's claims against Judge Neuwirth involve his actions during two of Plaintiff's post-conviction proceedings. First, as stated, on October 2, 2013, Plaintiff filed a Pro Se Motion to Suspend Sentence pursuant to 22 O.S. § 994. *See* ECF No. 1:29. In response, Plaintiff states Defendant Valdez drafted an order denying relief, citing 22 O.S. § 982 as the controlling authority instead of 22 O.S. § 994. (ECF No. 1:30). Judge Neuwirth apparently signed the order, *see* ECF No. 1:14, which denied Plaintiff relief under Section 982. (ECF No. 1:24, 31). Later, Mr. Ray filed an Application for Post-Conviction relief and Defendant J. Cabelka filed a response, asserting that no genuine issues of material fact existed and no evidentiary hearing was required. (ECF No. 1:33). Judge Neuwirth ultimately denied Plaintiff post-conviction relief without an evidentiary hearing. (ECF No. 1:33)

In the Complaint, Mr. Ray alleges that Judge Neuwirth:

1. erred in signing the order which had been drafted by Defendant Valdez in response to Plaintiff's Section 994 Motion;
2. erred in failing to rule on Plaintiff's Section 994 Motion; and
3. improperly denied Plaintiff's Application for Post-Conviction Relief without an evidentiary hearing.

(ECF No. 1:14, 31, 33-34). The Court should dismiss these claims as being barred by judicial immunity.

In most cases, judicial immunity precludes litigants from suing judges in their official capacity. *See Stump v. Sparkman*, 435 U.S. 349, 355–57 (1978). Immunity is only overcome in two situations: (1) when judges act outside their official capacity, or (2) when they act within their official capacity but do so "in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991). Here, the Court should conclude that Plaintiff's claims against Judge Neuwirth are barred by judicial immunity. Although Mr. Ray alleges that Judge Neuwirth "acted in the clear absence of jurisdiction" by signing an order which cited the wrong statutory authority (Section 982 instead of Section 994), the Court should reject this argument. In *Stump v. Sparkman*, 435 U.S. 349 (1978), the Court explained the distinction of acting in "excess" of jurisdiction and "the clear absence" of the same:

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

435 U.S. at 357, n. 7. Based on this illustration, the Court should reject Plaintiff's argument that Judge Neuwirth acted "in clear absence" of all jurisdiction when he signed the order denying Plaintiff relief following his Section 994 Motion. Judge Neuwirth acted well within his jurisdiction as a district court judge who signed an order regarding a criminal matter in a case assigned to him. Accordingly, the Court should

dismiss Plaintiff's claims against Judge Neuwirth with prejudice as barred by judicial immunity. *See Rojas v. Meinster*, 785 F. App'x 616, 617 (10th Cir. 2019) (affirming dismissal with prejudice based on absolute judicial immunity).

VII. REMAINING DEFENDANTS

As discussed, Plaintiff raises various claims against the remaining defendants. *See supra*. Based on the nature of these claims, and in accordance with the analysis below, the Court should conclude: (1) some of the claims are premature and should be dismissed without prejudice and (2) some of the claims are barred by the statute of limitations and should be dismissed with prejudice.

As mentioned, a multitude of Plaintiff's claims relate to the investigation and events surrounding his first-degree murder conviction. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court addressed the question of when a prisoner may bring a § 1983 claim relating to his or her conviction or sentence. The Court held:

> 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. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (footnotes omitted). Thus, for § 1983 claims challenging the validity of a conviction or sentence, *Heck* delays the rise of the cause of action until the conviction or sentence has been invalidated. Because the cause of action does not accrue until such time, the applicable statute of limitations does not begin to run until

that time. *See Heck,* 512 U.S. at 489–90. In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Court extended *Heck* to apply to cases involving a request for equitable relief as well. See Wilkinson, 544 U.S. at 81-82 ("[A] state prisoner's § 1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)-*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." (emphasis in original)).

In assessing whether a *Heck* bar applies, the Court must assess each claim individually—it is entirely possible that some factual allegations may be barred by *Heck* while others are not. *See Hooks v. Atoki*, 983 F.3d 1193, 1201 (10th Cir. 2020) (allowing the plaintiff's claims to proceed based on two alleged uses of force but finding that *Heck* barred claims on four other alleged uses of force). In cases where a claim is not deemed premature under *Heck*, claims may still be barred by the statute of limitations. "State statutes of limitations applicable to general personal injury claims supply the limitations periods for § 1983 claims, but federal law governs the time of accrual of § 1983 claims." *Beck v. City of Muskogee Police Dep't,* 195 F.3d 553, 557 (10th Cir. 1997). (citations omitted). The claim accrues when the plaintiff knows, or should know, that his or her rights have been violated. *Kripp v. Luton*, 466 F.3d 1171, 1175 (10th Cir. 2006). Section 1983 claims are "best characterized as personal injury actions" and as a result, the Court should apply the period of limitations from the state's personal-injury statute. *Mondragón v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008). The statute of limitations applicable to Plaintiff's Section 1983 claims

in this case is two years, as set forth in 12 O.S. § 95(3). *See Burkley v. Correctional Healthcare Management Of Oklahoma, Inc.*, 141 F. App'x 714, 715, 2005 WL 1595699, at *1 (10th Cir. 2005); *Meade v. Grubbs,* 841 F.2d 1512, 1522 (10th Cir. 1988). To determine the applicability of *Heck*, an analysis of each claim against the remaining defendants is necessary.

A. Defendant Sibly

Plaintiff seeks liability against Defendant Sibly for "allow[ing] the investigation of the death of M.R." which "deprived [Plaintiff] of liberty in violation of the Fourth Amendment 'unreasonable seizure' guarantee." (ECF No. 1:11); *see also* ECF No. 1:21. Based on allegations throughout the Complaint, it is clear that Plaintiff believes that the State of Oklahoma should have never been allowed to investigate M.R.'s death because he was the dependent of a United States Army officer. *See*, e.g. ECF No. 1:8 (requesting injunctive relief enjoining the State of Oklahoma Office of the Medical Examiner from "conducting forensic pathological investigations . . . on a civilian dependent of a member of the armed forces."). Instead, Plaintiff believes that such investigations ought to be reserved for the Armed Forces Medical Examiner. *See* ECF No. 1:15. Liberally construing this claim, it appears as though Plaintiff believes that the investigation performed by Defendant Sibly ultimately led to his arrest and subsequent conviction.

In *Heck*, the Court explained that a Fourth Amendment "unreasonable seizure" claim that ultimately resulted in the defendant being convicted is not always subject

to being barred as premature, absent the invalidation of the underlying conviction. The Court explained:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, *see Murray v. United States*, 487 U.S. 533, 539, 108 S. Ct. 2529, 2534, 101 L. Ed. 2d 472 (1988), and especially harmless error, *see Arizona v. Fulminante*, 499 U.S. 279, 307-308, 111 S. Ct. 1246, 1263-1264, 113 L. Ed. 2d 302 (1991), such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, *see Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308, 106 S. Ct. 2537, 2543, 91 L. Ed. 2d 249 (1986), which, we hold today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Heck, 512 U.S. at 487 n.7. Here, the Court should conclude this this exception applies and *Heck* does not bar Mr. Ray's claim against Defendant Sibly. Mr. Ray's argument with Defendant Sibly is jurisdictional only—Plaintiff believes that Defendant Sibly did not have jurisdictional authority to "allow" an investigation into M.R.'s death. Success on this claim would simply mean that Defendant Sibly did not have the authority to conduct or authorize an investigation into M.R.'s death. But such a finding would not necessarily imply the invalidity of Plaintiff's conviction. Because Mr. Ray has not alleged any other actual compensable injury related to Defendant Sibly's "allowing" the investigation, the Court should conclude that the *Heck* bar does not apply.

Even so, the Court should conclude that Plaintiff's claim against Defendant Sibly is barred by the statute of limitations. As stated, Mr. Ray's claim accrued when he had

knowledge of Defendant Sibly's actions[4] and the applicable statute of limitations in this case is two years. Here, Mr. Ray does not provide the date of the forensic investigation. But Mr. Ray does state that Defendant Sibly was interim Chief Medical Examiner during 2010. (ECF No. 1:21). Assuming that Defendant Sibly investigated M.R.'s death during 2010, or at the very latest at some point prior to Mr. Ray's conviction in 2012, the two year statute of limitations on this claim has long since expired. As a result, the Court should conclude that Mr. Ray's claim against Defendant Sibly should be dismissed with prejudice. *See Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010) (affirming dismissal with prejudice of claims barred by the applicable statute of limitations).

B. Detective Quisenberry

Plaintiff alleges that Defendant Quisenberry:

1. illegally obtained and disclosed "protected health information"—i.e.—medical records of M.R.;

2. utilized "inaccurate information" in his probable cause affidavit against Mr. Ray, in violation of the 4th Amendment;

3. described a prayer said by Mr. Ray in the detective's investigative report and failed to prevent the report from becoming public in violation of the 1st Amendment; and

4. "disclosed M.R.'s health information" which "equated to an extrajudicial statement" and exposed Mr. Ray to "bad repute."

(ECF No. 1:9, 23, 24, 26).

As to the first allegation, Plaintiff claims that Defendant Quisenberry obtained medical records of M.R. in violation of HIPPA, the Posse Comitatus Act, the 4th and

[4] *See supra, Kripp.*

14th Amendment. (ECF No. 1:10). Again, Plaintiff apparently believes that only a representative of the United States Army was legally capable of obtaining M.R.'s medical records because he was a dependent of Plaintiff, an Army officer. *See* ECF No. 1:23-24. But as with Defendant Sibly, this argument is essentially "jurisdictional"—a finding in Plaintiff's favor on this claim would not necessarily undermine his conviction because by Plaintiff's own admission, the records could have been obtained by someone other than Detective Quisenberry and utilized in the prosecution against Mr. Ray. As a result, the Court should conclude that *Heck* does not bar this claim against Defendant Quisenberry. However, because the actions occurred sometime after M.R.'s death (December 23, 2010, see ECF No. 1:22) and before Plaintiff's conviction (June 1, 2012, *see supra*), the claim is barred by the two year statute of limitations and should be dismissed with prejudice. *See supra*.

Plaintiff's second claim against Defendant Quisenberry is that he utilized "inaccurate information" in his probable cause affidavit that implied Mr. Ray had beaten M.R. with a "wooden cutting board" and "a piece of wood." (ECF No. 1:24). According to Plaintiff, the "inaccurate information" "was critical to finding of probable cause for an arrest for murder" and absent the information, the detective would have lacked probable cause to arrest Mr. Ray. (ECF No. 1:24).

It has long been clearly established that knowingly arresting a defendant without probable cause, leading to the defendant's subsequent confinement and prosecution, violates the Fourth Amendment's proscription against unreasonable searches and seizures. S*ee e.g., Gerstein v. Pugh,* 420 U.S. 103, 114, (1975) ("[T]he

Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). According to Mr. Ray, absent the allegedly inaccurate information in the probable cause affidavit, he would not have been detained and then arrested for murder and ultimately convicted. (ECF No. 1:24). If these allegations are true, they would "necessarily imply the invalidity of his conviction or sentence." *See supra*, *Heck*. Thus, the Court should conclude that this claim against Defendant Quisenberry is barred as premature under *Heck*. *See Butler v. Butierres*, 58 F. App'x 457, 459 (10th Cir. 2003) (affirming district court's dismissal of claim that plaintiff had been arrested without probable cause as barred by *Heck).* The dismissal should be without prejudice. *See Fottler v. U.S.*, 73 F.3d 1064, 1065 (10th Cir. 1996) ("When a § 1983 claim is dismissed under *Heck*, the dismissal should be without prejudice.").

Third, Plaintiff alleges that in his investigative report, Detective Quisenberry described a prayer that Plaintiff had said while detained. (ECF No. 1:28). According to Mr. Ray, Defendant Quisenberry "abruptly and crudely informed Ray of the death of his son," whereupon Plaintiff "took a knee, bowed his head, and whispered a prayer." (ECF No. 1:28). Plaintiff states that in his report, Detective Quisenberry wrote that after he told Plaintiff that his son was dead, "Lancey Ray then lowered his head and prayed 'lord heavenly father [sic][5] forgive me for my sins.' " (ECF No. 1:28, n. 16). According to Plaintiff, this statement, as part of Detective Quisenberry's report, was made public, and was thereafter printed as part of a newspaper article three days

[5] Alteration in original. *See* ECF No. 1:28, n. 16.

before the trial was scheduled to begin. (ECF No. 1:28). Plaintiff alleges that the disclosure violated his First Amendment right to Freedom of Religion as well as "Religious Privilege" protected by state law. (ECF No. 1:28). Plaintiff does not allege, however, that had the information not been disclosed, whether accurate or not, that he would not have been convicted. As a result, the Court should conclude that this claim is not barred by *Heck*. However, because the statement was allegedly made by Defendant Quisenberry in his report on December 23, 2010 and printed in a local newspaper on January 28, 2012, the Court should conclude that this claim is barred by the applicable two year statute of limitations because Mr. Ray did not file the Complaint until September 2022. *See* ECF No. 1.

Finally, Plaintiff alleges that Detective Quisenberry disclosed M.R.'s "health information" which "equated to an extrajudicial statement" which exposed Mr. Ray to "bad repute." (ECF No. 1:26). On December 28, 2010, a local newspaper published an article which described M.R.'s hospital visit and surrounding details of his injuries and subsequent death. (ECF No. 1:25-26). Mr. Ray argues that the basis for the article was Detective Quisenberry's "disclosure" of M.R.'s "health information" through information gleaned from the investigative report and/or probable cause affidavit. (ECF No. 1:25-26). Plaintiff alleges that as a result of Detective Quisenberry's actions, Plaintiff was "exposed to obloquy i.e. bad repute." (ECF No. 1:26).

In this fourth and final claim against Detective Quisenberry, Plaintiff has failed to allege a violation of federal law. Instead, the allegations most closely resemble a claim for libel under Oklahoma State law. *See* 12 O.S. § 1441. The statute of limitations

on such claims is one year. *See* 12 O.S. § 12-95(A)(4). Because the newspaper article was dated December 28, 2010, which is when Plaintiff presumably became aware of the same, the Court should conclude that this claim is dismissed with prejudice as barred by the

statute of limitations.

C. Defendant J. Cabelka

Plaintiff alleges that Defendant J. Cabelka's actions during post-conviction proceedings violated: (1) state law, (2) the 1867 U.S. Treaty with the Kiowa and Comanche, (3) the 4th Amendment, and (4) the 14th Amendment. (ECF No. 1:13-14). Specifically, Plaintiff alleges that Defendant J. Cabelka erred by:

1. filing his response to Plaintiff's Application for Post-Conviction Relief in which he stated there were no issued of material facts which would require an evidentiary hearing and

2. drafting an order for the district court to sign denying Plaintiff post-conviction relief which stated there were no issues of material fact which would require an evidentiary hearing.

(ECF No. 1:13-14, 33-34). By these arguments, Plaintiff apparently believes he was erroneously denied an evidentiary hearing on his Application for Post-Conviction Relief. Success on these claims, therefore, would not necessarily imply the invalidity of his conviction, but instead entitle to him to an evidentiary hearing, the outcome of which is unknown at this stage. Even though the claims against J. Cabelka would not barred by *Heck*, the Court should conclude that they are barred by the applicable two year statute of limitations, as Mr. Cabelka's response and drafted order were submitted to

the court November 14, 2014, over 8 years ago. The dismissal of the claims against J. Cabelka should be with prejudice. *See supra.*

D. Defendant Valdez

Plaintiff alleges that Assistant District Attorney Valdez:

1. filed a "duplicitous-disjunctive Amended Information" against Plaintiff in violation of the 14th Amendment;

2. misled the judge and jury through the introduction of a photograph which Mr. Ray claims was prejudicial and in violation of state and federal law;

3. failed to prevent Detective Quisenberry's report from becoming public, which, in turn, allowed the publication of Plaintiff's "prayer" in a local newspaper, in violation of Plaintiff's First Amendment rights, the Rules of Professional conduct, and state law; and

4. fraudulently drafted an order in response to Plaintiff's Section 994 Motion which amounted to fraud and violated the Rules of Professional Conduct.

(ECF No. 1:15, 20, 27-30).

First, Mr. Ray alleges that that Defendant Valdez filed a "duplicitous-disjunctive Amended Information" against Plaintiff which violated the 14th Amendment because it alleged "three distinct underlying felony offenses." (ECF No. 1:27). Second, Plaintiff alleges that Defendant Valdez misled the judge and jury through the introduction of a photograph which Mr. Ray claims was prejudicial. (ECF No. 1:20). Collectively, these allegations constitute claims for malicious prosecution in violation of the 14th Amendment. In *Heck*, the plaintiff also raised malicious prosecution claims and the court stated that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck, 512 U.S.* at 484. As a result, the court found that the plaintiff's § 1983

claim necessarily required him to prove the unlawfulness of his conviction or confinement and was thus barred. *Id.* at 490. The Court should reach the same conclusion with respect to Mr. Ray's malicious prosecution claims against Defendant Valdez. As a result, those claims should be dismissed without prejudice, as premature under *Heck*.

Third, Plaintiff alleges that Defendant Valdez "failed to prevent the contents of Quisenberry investigative report describing 1LT Ray's prayer, from being made public," in violation of Rule 3.8f of the Rules of Professional Conduct and state and federal law recognizing a right to Freedom of Religion. (ECF No. 1:28-29). Although Mr. Ray does not explain how, exactly, his religious rights were violated through publication of Mr. Ray's prayer in a local newspaper, the Court should conclude that success on this claim would not necessarily invalidate his conviction. As a result, the Court should conclude that this claim is not barred by *Heck*. Even so, the Court should dismiss this claim against Defendant Valdez as barred by the two year statute of limitations because the newspaper article was published on January 28, 2012, thereby giving Plaintiff knowledge of the basis for this claim against Defendant Valdez as of that date.

Fourth, Plaintiff alleges that Defendant Valdez, in response to Plaintiff's Pro Se Motion for Suspension of Sentence under 22 O.S. § 994, drafted an Order for Judge Neuwirth to sign which referenced 22 O.S. § 982 as the controlling authority instead of 22 O.S. § 994. (ECF No. 1:30). Plaintiff alleges that Defendant Valdez' actions violate the Rules of Professional Conduct and the Due Process Clause. (ECF No. 1:30). The Court should conclude that a claim based on a typographical error in citing the

statutory authority in a response brief during post-conviction proceedings would not necessarily imply the invalidity of Mr. Ray's conviction. As a result, the Court should conclude that the *Heck* bar does not apply. But because the error was allegedly made on October 3, 2013, *see* ECF No. 1:30, the Court should conclude that any related claim in this Court is barred by the two year statute of limitations. *See supra.*[6] Thus, the Court should dismiss this claim against Defendant Valdez with prejudice. *See supra.*

E. Defendant Smith

Plaintiff alleges that District Attorney Smith:

1. "prosecuted a charge he knew was not supported by probable cause," and
2. disclosed or allowed disclosure of the Probable Cause affidavit used in Mr. Ray's case which "equated to an extrajudicial statement" that violated the Rules of Professional Conduct and subjected Plaintiff to "bad repute" based on a local newspaper's use of the affidavit in a story regarding the case.

(ECF No. 1:24-25).[7] The first claim alleges malicious prosecution which is subject to a *Heck* bar. *See supra.* This claim should be dismissed without prejudice. *See supra.* The

---

[6] The two year statute of limitations would apply to the federal claim, but the undersigned makes no finding regarding the potential viability of a claim for violation of the Rules of Professional Responsibility.

[7] Plaintiff also seeks monetary damages against Defendant Smith "because of his conduct as a supervisor regarding the acts complained of herein." (ECF No. 1:13). But Mr. Ray does not explain who Defendant Smith allegedly supervised and what "acts" he should be held liable for in a supervisory role. *See* ECF No. 1:13. Thus, the Court need not consider these allegations. *See Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center*, 492 F.3d 1158, 1163 (10th Cir. 2007) (explaining "that, to state a claim in federal court, a complaint must explain what each defendant did to [the pro se plaintiff]; when the defendant did it; how the defendant's action harmed (the plaintiff); and, what specific legal right the plaintiff believes the defendant violated.").

second claim would not be barred by *Heck*, *see supra* (discussion of similar allegations against Defendants Quisenberry and Valdez) but should be dismissed with prejudice as barred by the two year statute of limitations.

F. Defendant Yacoub

Defendant Yacoub performed a forensic investigation into M.R.'s death and Plaintiff alleges that she:

1. failed to obtain all of M.R.'s medical records and radiographs prior to conducting the investigation and

2. lacked jurisdiction to perform the investigation.

(ECF No. 1:11, 35-36). Plaintiff alleges that Dr. Yacoub's actions violate HIPPA, and the 4th and 14th Amendments. (ECF No. 1:11).

Plaintiff first argues that Dr. Yacoub's investigation or lack thereof was incomplete, and that as a direct result, he was arrested and ultimately convicted. (ECF No. 1:35-36). Because his conviction has not yet been invalidated, the Court should conclude that this claim is barred as premature under *Heck*.

Plaintiff's second argument is that Defendant Yacoub lacked jurisdiction in the first instance to perform the forensic investigation on M.R. (ECF No. 1:35). As with Defendant Sibly, *see supra*, Plaintiff believes that the investigation ought to have been performed by a member of the Armed Forces Medical Examiner's Office and not Dr. Yacoub. *See* ECF No. 1:34-35. But as with the claim against Defendant Sibly, a jurisdictional challenge of this sort would not necessarily imply the invalidity of Mr. Ray's ultimate conviction. As a result, the Court should conclude that the *Heck* bar does not apply. Even so, the Court should conclude that the jurisdictional claim against

Defendant Yacoub is barred by the statute of limitations because the forensic examination occurred more than two years prior to when Plaintiff filed the Complaint in September 2022. As a result, the Court should conclude that this claim should be dismissed with prejudice. *See supra.*

VIII. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

The Court should dismiss the following claims without prejudice:

1. all claims against Defendants K. Cabelka, Austin, and Pfeifer;

2. the claim against Defendant Quisenberry that he utilized "inaccurate information" in his probable cause affidavit against Mr. Ray, in violation of the 4th Amendment;
3. the claims against Defendant Valdez that he: (a) filed a "duplicitous-disjunctive Amended Information" against Plaintiff in violation of the 14th Amendment and (b) misled the judge and jury through the introduction of a photograph which Mr. Ray claims was prejudicial and in violation of state and federal law;

4. the claim against Defendant Smith which alleges that he "prosecuted a charge he knew was not supported by probable cause;" and

5. the claim against Defendant Yacoub which alleged that she failed to obtain all of M.R.'s medical records and radiographs prior to conducting the investigation.

The Court should dismiss the following claims with prejudice:

1. all claims against Defendant Neuwirth;

2. the claim against Defendant Sibly;

3. the claims against Defendant Quisenberry which alleged that he: (a) illegally obtained and disclosed medical records of M.R.; (b) described a prayer said by Mr. Ray in the detective's investigative report and failed to prevent the report from becoming public in violation of the 1st Amendment; and (c) "disclosed M.R.'s health information" which "equated to an extrajudicial statement" and exposed Mr. Ray to "bad repute;"

4. the claims against Defendant J. Cabelka, alleging that he erred by: (a) filing his response to Plaintiff's Application for Post-Conviction Relief in which he stated there were no issued of material facts which would require an evidentiary hearing and (b) drafting an order for the district court to sign denying Plaintiff post-conviction relief which stated there were no issues of material fact which would require an evidentiary hearing;

5. the claims against Defendant Valdez that he: (a) failed to prevent Detective Quisenberry's report from becoming public, which, in turn, allowed the publication of Plaintiff's "prayer" in a local newspaper, in violation of Plaintiff's First Amendment rights, the Rules of Professional conduct, and state law and (b) fraudulently drafted an order in response to Plaintiff's Section 994 Motion which amounted to fraud and violated the Rules of Professional Conduct;

6. the claim against Defendant Smith that he disclosed or allowed disclosure of the Probable Cause affidavit used in Mr. Ray's case which "equated to an extrajudicial statement" that violated the Rules of Professional Conduct and subjected Plaintiff to "bad repute" based on a local newspaper's use of the affidavit in a story regarding the case; and

7. the claim against Defendant Yacoub that she lacked jurisdiction to perform the investigation.

Adoption of this Report and Recommendation will moot Plaintiff's Motion for Order titled, "Motion and Brief to Consolidate Actions **(ECF No. 12)**.

Plaintiff is hereby advised of his right to object to this Report and Recommendation. *See* 28 U.S.C. § 636; s*ee also, e.g., Farrar v. Whitlock*, No. CIV-13-988-M, 2013 WL 6162994 at *4, n.1 (W.D. Okla. Nov. 22, 2013) (unpublished district court order) (noting plaintiff's objection to the recommendation to sua sponte dismiss his 1983 claims as untimely would serve as his opportunity to be heard on the issue (*citing Smith v. Dorsey*, No. 93-2229, 1994 WL 396069 at *3 (10th Cir. July 29, 1994)). Any objection must be filed with the Clerk of the District Court by **February 10, 2023.** *See* 28 U.S.C. § 636(b)(1); and Fed. R. Civ. P. 72(b)(2). Failure

to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

IX. STATUS OF THE REFERRAL

This Report and Recommendation disposes of all issues referred to the undersigned magistrate judge in the captioned matter.

ENTERED on January 24, 2023.

Shon T. Erwin

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LANCEY DARNELL RAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-22-823-D
	)	
TERRY QUISENBERRY, et al.	)	
	)	
Defendants.	)	

ORDER

Plaintiff Lancey Darnell Ray, a state prisoner, brought this action pursuant to 42 U.S.C. § 1983 against Defendants Kyle Cabelka, Eric Pfiefer, Lloyd Austin, III, Gerald Neuwirth, Andrew Sibly, Terry Quisenberry, Inas Yacoub, Jordan Cabelka, Eddie Valdez, and Fred Colson Smith, Jr.[1] The matter was referred to United States Magistrate Shon T. Erwin for initial proceedings in accordance with 28 U.S.C. § 636(b)(1)(B) and (C).

On January 26, 2021, the magistrate judge issued a report and recommendation, where he recommended that the Court dismiss Plaintiff's complaint in its entirety. See [Doc. No. 14]. Plaintiff timely filed an objection. [Doc. No. 15]. After conducting a de novo review of the issues at hand, the Court agrees with the conclusions and recommendations in the report as set forth herein.

[1]Plaintiff sued Defendants K. Cabelka, Pfiefer, Austin and Neuwirth in their official capacities, and sued Defendants Sibly, Quisenberry, Yacoub, J. Cabelka, Valdez, and Smith in their individual capacities.

Discussion

I. Defendants K. Cabelka, Pfiefer, and Austin

The magistrate judge recommends that the claims against Kyle Cabelka, Eric Pfeifer, and Lloyd Austin, III be dismissed without prejudice for failure to state a claim. Plaintiff concedes that, in his complaint, he fails to allege any wrongdoing committed by these Defendants. See Obj. to R. & R. at 5 ("Plaintiff agrees with the magistrate judge's report . . . [and] does not allege any violations occurred under the watch of the defendants named above."). Instead, Plaintiff now argues that he "seeks prospective relief to prevent future violations respective to each office" held by these Defendants. Id. at 6.

Plaintiff's objection is an attempt to introduce new arguments. But "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996). Therefore, the Court finds that Plaintiff's objection should be overruled.

II. Defendants Sibly, Yacoub, J. Cabelka, Quisenberry and Valdez

The magistrate judge recommends that the claims against Andrew Sibly, Inas Yacoub, Jordan Cabelka, Terry Quisenberry and Eddie Valdez be dismissed, as they are either (1) premature pursuant to Heck v. Humphrey, 512 U.S. 477 (1994), or (2) barred by the applicable statute of limitations.[2]

[2] The magistrate judge recommends dismissal without prejudice regarding any claims which are premature under Heck. As for any time-barred claims, the magistrate judge recommends dismissal with prejudice.

In his complaint, Plaintiff requests relief in the form of "compensatory damages" against Defendants Sibly, Yacoub, Quisenberry, and Valdez, and "additional nominal damages" against Defendants Valdez and J. Cabelka pursuant to 42 U.S.C. § 1983. See Compl. [Doc. No. 1 at 30]. In his objection, Plaintiff claims that the magistrate judge improperly applied Heck under these circumstances. But Plaintiff's argument is misguided, as Heck squarely applies here. In Heck, the Court held:

> [W]hen 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 compliant must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (emphasis in original). Plaintiff, a state prisoner, seeks damages against Defendants Sibly, Yacoub, J. Cabelka, Quisenberry, and Valdez pursuant to § 1983. Thus, the magistrate judge properly applied Heck to determine whether Plaintiff's claims against these Defendants were premature.

Plaintiff's argument that the magistrate judge improperly applied the statute of limitations set forth in Okla. Stat. tit. 12, § 95(3) is similarly flawed. Although his claims arise under federal law, it is well settled that the applicable statute of limitations for a claim under § 1983 "is drawn from the personal-injury statute of the state in which the federal district court sits." Mondragon v. Thompson, 519 F.3d 1078, 1082 (10th Cir. 2008); see Burkley v. Correctional Healthcare Mgmt. of Okla., Inc., 141 F. App'x 714, 715 (10th Cir.

2005) (applying Okla. Stat. tit. 12, § 95(3) to a plaintiff's § 1983 claims).[3] For these reasons, the Court finds that these objections should be overruled.

III. Defendant Neuwirth

The magistrate judge recommends that the claims against former Comanche County District Court Judge Gerald Neuwirth be dismissed under the doctrine of judicial immunity. Plaintiff argues that judicial immunity does not apply because he is seeking injunctive and declaratory relief against Defendant Neuwirth. Specifically, Plaintiff clarifies that he seeks relief in the form of requiring Defendant Neuwirth to "(1) hear his timely filed, pending [motion brought under Okla. Stat. tit. 22, § 994], and (2) address [his] allegation of legally insufficient evidence therein." Obj. to R. & R. at 3. But "[j]udicial officers are explicitly immunized not only against damages but also against suits for injunctive relief under 42 U.S.C. § 1983." Ysais v. New Mexico, 373 F. App'x 863, 866 (10th Cir. 2010). To the extent Defendant seeks declaratory relief, his claims also must fail. See id. at 866 ("A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act."); see also Utah Animal Rts. Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1266 (10th Cir. 2004)

[3] Plaintiff also disputes the magistrate judge's determination of the accrual date regarding his claims against Defendant Quisenberry, but fails to provide any authority or argument in support of his position. In addition, Plaintiff argues that his claims against Defendant Valdez should be allowed to proceed pursuant to "the Medicine Lodge Treaty of 1867 between the United States and the Kiowa and Comanche Indians," but fails to articulate how this treaty undermines the magistrate judge's determination that Plaintiff's claims are premature under Heck or time-barred under the applicable statute of limitations. Obj. to R. & R. at 10.

("[A] declaratory judgment action involving past conduct that will not recur is not justiciable."). Accordingly, the Court finds that Plaintiff's objection should be overruled.

IV. Defendant Smith

In his report and recommendation, the magistrate judge acknowledged Plaintiff's claim for monetary damages against Defendant Smith "because of his conduct as a supervisor regarding the acts complained of" in the complaint. Compl. at 13. But because Plaintiff "does not explain who Defendant Smith allegedly supervised and what 'acts' he should be held liable for in a supervisory role," the magistrate judge concluded that "the Court need not consider these allegations." R. & R. at 21 (citing Nasious v. Two Unknown B.I.C.E. Agents, at Araphaoe Cnty. Just. Ctr., 492 F.3d 1158, 1163 (10th Cir. 2007) ("[T]o state a claim in federal court, a complaint must explain what each defendant did to [the plaintiff]; when the defendant did it; how the defendant's action harmed [the plaintiff]; and, what specific legal right the plaintiff believes the defendant violated.")).

Although Plaintiff objects to the magistrate judge's recommendation, he fails to present any persuasive argument or authority that would cause the Court to reject the magistrate judge's conclusion. To the extent Plaintiff attempts to introduce new arguments in his objection, the Court again notes that "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." Marshall, 75 F.3d at 1426.

Conclusion

The Court, having conducted a de novo review after assessing the entirety of the report and recommendation and the case record, finds that Plaintiff's Objection [Doc. No.

15] should be overruled. The Report and Recommendation [Doc. No. 14] is **ADOPTED** as set forth herein.

IT IS THEREFORE ORDERED that the following claims are **DISMISSED WITHOUT PREJUDICE:**

- All claims against Defendants K. Cabelka, Austin, and Pfeifer;
- the claim against Defendant Quisenberry that he utilized "inaccurate information" in his probable cause affidavit against Plaintiff, in violation of the Fourth Amendment;
- the claims against Defendant Valdez that he: (a) filed a "duplicitous-disjunctive Amended Information" against Plaintiff in violation of the Fourteenth Amendment; and (b) misled the judge and jury through the introduction of a photograph which Plaintiff claims was prejudicial and in violation of state and federal law;
- the claim against Defendant Smith which alleges that he "prosecuted a charge he knew was not supported by probable cause;" and
- the claim against Defendant Yacoub which alleges that she failed to obtain all of the victim's medical records and radiographs prior to conducting the investigation.

IT IS FURTHER ORDERED that the following claims are **DISMISSED WITH PREJUDICE:**

- All claims against Defendant Neuwirth;
- the claim against Defendant Sibly;
- the claims against Defendant Quisenberry which allege that he: (a) illegally obtained and disclosed medical records of the victim; (b) described a prayer said by Plaintiff in the detective's investigative report and failed to prevent the report from becoming public in violation of the First Amendment; and (c) "disclosed [the victim's] health information" which "equated to an extrajudicial statement" and exposed Plaintiff to "bad repute;"
- the claims against Defendant J. Cabelka, alleging that he erred by: (a) filing his response to Plaintiff's Application for Post-Conviction Relief in which he stated

there were no issues of material facts which would require an evidentiary hearing; and (b) drafting an order for the district court to sign denying Plaintiff post-conviction relief which stated there were no issues of material fact which would require an evidentiary hearing;

- the claims against Defendant Valdez that he: (a) failed to prevent Detective Quisenberry's report from becoming public, which, in turn, allowed the publication of Plaintiff's "prayer" in a local newspaper, in violation of Plaintiff's First Amendment rights, the Rules of Professional conduct, and state law; and (b) fraudulently drafted an order in response to Plaintiff's Section 994 Motion which amounted to fraud and violated the Rules of Professional Conduct;

- the claim against Defendant Smith that he disclosed or allowed disclosure of the Probable Cause affidavit used in Plaintiff's case which "equated to an extrajudicial statement" that violated the Rules of Professional Conduct and subjected Plaintiff to "bad repute" based on a local newspaper's use of the affidavit in a story regarding the case; and

- the claim against Defendant Yacoub that she lacked jurisdiction to perform the investigation.

A separate judgment of dismissal shall be entered.

IT IS FURTHER ORDERED that Plaintiff's Motion and Brief to Consolidate Actions [Doc. No. 12] is **DENIED AS MOOT.**

IT IS SO ORDERED this 10th day of March, 2023.

TIMOTHY D. DeGIUSTI
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LANCEY DARNELL RAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-22-823-D
	)	
TERRY QUISENBERRY, *et al.*	)	
	)	
Defendants.	)	

JUDGMENT

In a separate order, the Court adopted the Report and Recommendation [Doc. No. 14] of United States Magistrate Judge Shon T. Erwin. For the reasons stated therein, the Court dismissed the claims presented in Plaintiff's complaint as set forth in the Court's Order.

ENTERED this 10th day of March, 2023.

TIMOTHY D. DeGIUSTI
Chief United States District Judge

FILED
United States Court of Appeal
Tenth Circuit

July 31, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LANCEY DARNELL RAY,

Plaintiff - Appellant,

v.

TERRY QUISENBERRY, et al.,

Defendants - Appellees.

No. 23-6038
(D.C. No. 5:22-CV-00823-D)
(W.D. Okla.)

ORDER

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

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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