

APPENDIX-A- THE ORDER AND OPINION BY THE FIFTH CIRCUIT COURT OF APPEALS

APRIL 7, 2021

RICKY ESCOBEDO, Plaintiff-Appellant, versus KATHERINE R. GUTIERREZ, Special Agent of the Federal Bureau of Investigation; BRIAN J. ONOFRE, Special Agent with (TFO) of the Federal Bureau of Investigation, Defendants-Appellees.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
842 Fed. Appx. 943; 2021 U.S. App. LEXIS 10013
No. 20-50365 Summary Calendar
April 7, 2021, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeal from the United States District Court for the Western District of Texas. USDC No. 5:19-CV-239. Escobedo v. Gutierrez, 2019 U.S. Dist. LEXIS 159587 (W.D. Tex., Sept. 19, 2019)

Disposition:

IFP MOTION DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.

Counsel Ricky Escobedo, Plaintiff - Appellant, Pro se, Pollock, LA.

Judges: Before DENNIS, SOUTHWICK, and ENGELHARDT, Circuit Judges.

Opinion

{842 Fed. Appx. 943} Per Curiam:*

Ricky Escobedo, federal prisoner # 89282-380, moves to proceed in forma pauperis (IFP) to appeal the denial of his Federal Rule of Civil Procedure 59(e) motion to alter or amend the district court's judgment dismissing his 42 U.S.C. § 1983 civil rights complaint for failure to state a claim.

Escobedo had alleged that the defendants, both special agents with the Federal Bureau of Investigation, were responsible for several unconstitutional searches and seizures of his personal property.

By moving to proceed IFP in this court, Escobedo is challenging the district court's certification that an appeal would not be taken in good faith. See *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). This court's "inquiry is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." {842 Fed. Appx. 944} *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

Escobedo has failed to identify any errors in the district court's analysis and, thus, it is as if he has not challenged the district court's{2021 U.S. App. LEXIS 2} judgments. See *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Although this court liberally construes

pro se filings, even pro se litigants must brief arguments to preserve them. See *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Escobedo has therefore failed to show that his appeal involves "legal points arguable on their merits (and therefore not frivolous)." See *Howard*, 707 F.2d at 220 (internal quotation marks and citation omitted). Escobedo's appeal is without arguable merit and is frivolous. See *id.* at 219-20. Because the appeal is frivolous, it is DISMISSED. See 5th Cir. R. 42.2.

The district court's dismissal of Escobedo's complaint for failure to state a claim counts as a strike under 28 U.S.C. § 1915(g). See *Brown v. Megg*, 857 F.3d 287, 290-92 (5th Cir. 2017). The dismissal of this appeal as frivolous also counts as a strike. See § 1915(g); *Coleman v. Tollefson*, 575 U.S. 532, 135 S. Ct. 1759, 1763-64, 191 L. Ed. 2d 803 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Escobedo is WARNED that if he accumulates a third strike, he may not proceed IFP in any civil action or appeal while he is incarcerated or detained in any facility unless he is in imminent danger of serious physical injury. See § 1915(g).

IFP MOTION DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.

Footnotes

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RICKY ESCOBEDO,
89282-380,

Plaintiff,

v.

**F.B.I. SPECIAL AGENT KATHERINE R.
GUTIERREZ and F.B.I. SPECIAL AGENT
BRIAN J. ONOFRE,**

Defendants.

CIVIL ACTION NO. SA-19-Cv-239-FB

ORDER

Before the Court is Plaintiff Ricky Escobedo's handwritten letter which the Court construes as a Rule 59(e) Motion to Alter or Amend a Judgment, and Request for Appointment of Counsel. (ECF No. 19). Upon consideration, Mr. Escobedo's Rule 59(e) Motion and Request for Appointment of Counsel are **DENIED**. (ECF No. 19).

BACKGROUND

Ricky Escobedo executed his original section 1983 Complaint on February 18, 2019, alleging FBI Special Agents Brian Onofre and Katherine R. Gutierrez violated his constitutional rights. (ECF No. 1). On May 15, 2019, plaintiff Escobedo was ordered to show cause why his section 1983 Complaint should not be dismissed. (ECF No. 5). Plaintiff Escobedo was advised the FBI agents were not state actors, he failed to allege facts to support a claim pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), his claim that he was illegally searched on October 6, 2016, was barred by the statute of limitations, the warrant established probable cause for the May 19, 2017, search, and his request for release was not a remedy he was entitled to under section 1983. (*Id.*).

In response to the Court's Order, plaintiff Escobedo filed an amended section 1983 Complaint, purporting to sue FBI Special Agents Onofre and Gutierrez pursuant to *Bivens*, 403 U.S. 388, based on the same facts previously alleged. (ECF No. 6). On January 13, 2020, plaintiff filed a Motion for Summary Judgment, maintaining he was entitled to judgment as a matter of law on his claims. (ECF No. 14). On March 9, 2020, the Court dismissed plaintiff's Motion for Summary Judgment as moot and dismissed his amended section 1983 Complaint with prejudice pursuant to §§ 1915(e)(2)(B)(i)–(ii) and 1915A(b)(1) of Title 28 of the United States Code for failure to state a non-frivolous claim. (ECF No. 16). A Final Judgment, dismissing plaintiff's claims was entered the same day. (ECF No. 17).

On March 26, 2020, plaintiff executed a handwritten letter which the Court construes as a Rule 59(e) Motion to Alter or Amend a Judgment. FED. R. CIV. P. 59(e). For reasons set forth in this Court's Order dismissing plaintiff's claims with prejudice (ECF No. 16), plaintiff's Rule 59(e) Motion is **DENIED**. (ECF No. 19). Plaintiff's request for appointment of counsel is also **DENIED**. (*Id.*).

It is so ORDERED.

SIGNED this 1st day of April, 2020.



FRED BIERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

**RICKY ESCOBEDO,
89282-380,**

Plaintiff,

V.

**F.B.I. SPECIAL AGENT KATHERINE R.
GUTIERREZ and F.B.I. SPECIAL
AGENT BRIAN J. ONOFRE,**

Defendants.

CIVIL ACTION NO. SA-19-CV-239-FB

ORDER OF DISMISSAL

Before the Court are Plaintiff Ricky Escobedo's Amended Complaint (ECF No. 6), and Motion for Summary Judgment (ECF No. 14). Mr. Escobedo, who is proceeding *pro se* and was previously granted leave to proceed *in forma pauperis*, is currently housed at the Karnes County Correctional Center. (ECF No. 8). Upon consideration, Mr. Escobedo's Amended Complaint (ECF No. 6) is **DISMISSED WITH PREJUDICE** pursuant to sections 1915(e)(2)(B)(i)–(ii) and 1915A(b)(1) for failure to state a non-frivolous claim, and his Motion for Summary Judgment (ECF No. 14) is **DISMISSED AS MOOT**.

BACKGROUND

On July 2, 2019, a jury found Ricky Escobedo guilty of conspiracy to interfere with commerce by threats or violence; conspiracy to distribute methamphetamine, cocaine and heroin; possession with intent to distribute cocaine; possession of a firearm in furtherance of drug trafficking; being a felon in possession of firearm; and conspiracy to possess firearms in furtherance of drug trafficking. *United States v. Escobedo*, No. SA-17-CR-391-XR-10 (W.D. Tex.) (ECF No. 1407). On January 16, 2020, Ricky Escobedo was sentenced to imprisonment for three hundred (300) months. (ECF No. 1873).

In his original section 1983 Complaint, executed on February 18, 2019, Mr. Escobedo sued FBI Special Agents Brian Onofre and Katherine R. Gutierrez alleging:

- They ordered San Antonio police to search and seize Escobedo's vehicle without probable cause on October 6, 2016 and April 28, 2017, resulting in the seizure of Escobedo's wallet containing \$400 cash.
- They ordered the search of Escobedo's residence on May 19, 2017, pursuant to a warrant signed by U.S. Magistrate Judge Henry J. Bemporad that was invalid because the affidavit in support contains misrepresentations and facts that fail to support probable cause.
- On December 13, 2017, they illegally searched and seized attorney-client information from Escobedo while he was in federal custody.

(ECF No. 1). As relief, Mr. Escobedo requested the return of his property, damages, and dismissal of the charges against him. (*Id.*).

On May 15, 2019, Ricky Escobedo was ordered to show cause why his section 1983 Complaint should not be dismissed. (ECF No. 5). Mr. Escobedo was advised the FBI agents were not state actors; he failed to allege facts to support a claim pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); his claim that he was illegally searched on October 6, 2016, was barred by the statute of limitations; the warrant established probable cause for the May 19, 2017 search; and his request for release was not a remedy he was entitled to under section 1983. (*Id.*).

In response to the Court's Order, Mr. Escobedo amended his complaint. (ECF No. 6). Based on the same facts previously alleged, Mr. Escobedo now purports to sue FBI Special Agents Onofre and Gutierrez pursuant to *Bivens*, 403 U.S. 388. (*Id.*). Plaintiff seeks the “Exclusionary Rule” where the examination of illegally seized material and retrieved information leads to a criminal prosecution

on pending charges”¹; the return of his property seized on May 19, 2017; reimbursement in the amount of \$5,000.00 for damages caused to his residence during the execution of the search warrant; \$9,500.00 for his mental anguish and suffering; an injunction prohibiting defendants from interfering with his attorney/client communications; and an investigation regarding the defendants’ actions in other cases. (*Id.*).

APPLICABLE LAW

According to 28 U.S.C. § 1915A(b)(1), this Court is required to screen any civil complaint in which a prisoner seeks relief against a government entity, officer, or employee and dismiss the complaint if the court determines it is frivolous, malicious, or fails to state a claim on which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B) (directing court to dismiss case filed *in forma pauperis* at any time if it is determined that action is (i) frivolous or malicious, or (ii) fails to state claim on which relief may be granted).

An action is frivolous where there is no arguable legal or factual basis for the claim. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). “A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges a violation of a legal interest which clearly does not exist.” *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir. 1999) (internal quotation and citation omitted). A complaint is factually frivolous when “the facts alleged are ‘fantastic or delusional scenarios’ or the legal theory upon which a complaint relies is ‘indisputably meritless.’” *Eason v. Thaler*, 14 F.3d 8, n.5 (5th Cir. 1994) (quoting *Neitzke*, 490 U.S. at 327–28).

In evaluating whether a complaint states a claim under sections 1915A(b)(1) and 1915(e)(2)(B), this Court applies the same standards governing dismissals pursuant to Rule 12(b)(6).

¹ In his Original Complaint, Ricky Escobedo sought “Exclusionary Rule and dismissal with prejudice, including arrest record expunged (state and federal).” (ECF No. 1 at 8). Mr. Escobedo appears to seek dismissal of his charges based on his contention that the evidence used against him was obtained by way of a Fourth Amendment violation.

See DeMoss v. Crain, 636 F.3d 145, 152 (5th Cir. 2011); *see also* FED. R. CIV. P. 12(b)(6). To avoid dismissal under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56, 570 (2007)); *see* FED. R. CIV. P. 12(b)(6). These factual allegations need not be detailed but “must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A conclusory complaint—one that fails to state material facts or merely recites the elements of a cause of action—may be dismissed for failure to state a claim. *See id.* at 555–56.

APPLICATION

As set out above, a plaintiff’s complaint is considered frivolous and subject to dismissal if it fails to state a claim on which relief can be granted. The Court finds Mr. Escobedo has failed to state a non-frivolous claim upon which relief may be granted. Thus, his *Bivens* claims are subject to dismissal with prejudice. *See* 28 U.S.C. §§ 1915(e)(2)(B)(i)–(ii), 1915A(b).

1. *Heck* barred

Seeking monetary damages, Mr. Escobedo sued FBI Special Agents Onofre and Gutierrez alleging they ordered the search of his home and vehicles without probable cause and further, illegally seized attorney-client information while he was in federal custody. (ECF No. 6). Plaintiff states he previously “tried to resolve and exhaust[] alternative litigation before filing this cause of action” by filing motions to suppress on March 16, 2018, and February 14, 2019, and has “exhausted all relief.” (*Id.*).

However, claims brought under 42 U.S.C. § 1983 challenging the legality of a conviction are barred pursuant to the Supreme Court’s decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) (“Heck”). The *Heck* doctrine prohibits a cause of action under section 1983 unless the conviction or sentence

which form the basis for the plaintiff's complaint has been reversed or set aside. *Id.* at 489. The Fifth Circuit has stated that section 1983 claims challenging the existence of probable cause are essentially collateral attacks on the validity of a criminal judgment. *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir. 1995). Such attacks run afoul of *Heck*'s "policy of finality" and are barred. *Connors v. Graves*, 538 F.3d 373, 378 (5th Cir. 2008). Furthermore, the *Heck* doctrine has been extended to *Bivens* causes of action. *Stephenson v. Reno*, 28 F.3d 26, 27–8 (5th Cir. 1994).

In this instance, the crux of Ricky Escobedo's complaint is that defendants FBI Special Agents Onofre and Gutierrez made false statements to secure search warrants that resulted in his arrest and conviction. Assuming Mr. Escobedo could prove defendants made false statements to secure the search warrants in question, such success would necessarily call into question Mr. Escobedo's conviction. If the Court were to grant Mr. Escobedo damages or his requested injunctive relief for his alleged false arrest under the facts of this case, such a ruling would necessarily implicate the validity of his federal conviction in *United States v. Escobedo*, No. SA-17-CR-391-XR-10 (W.D. Tex.). See *Sappington v. Bartee*, 195 F.3d 234, 237 (5th Cir. 1999) (holding *Heck* bars recovery under a false arrest theory because a "conviction for aggravated assault necessarily implies that there was probable cause for his arrest at that point in time"); *Wells*, 45 F.3d at 95 (holding *Heck* bars recovery for false arrest when there is probable cause for any of the charges made and plaintiff's "proof to establish his false arrest claim, i.e., that there was no probable cause to arrest . . . would demonstrate the invalidity of [plaintiff's] conviction"). Accordingly, pursuant to *Heck*, Ricky Escobedo must first demonstrate his conviction or sentence has been reversed, invalidated, or expunged before bringing an action under either section 1983 or *Bivens*. See *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (section 1983); *Stephenson*, 28 F.3d at 27–8 (*Bivens*).

Plaintiff has failed to make such a showing. The Court takes judicial notice of *United States v. Escobedo*, No. SA-17-CR-391-XR-10 (W.D. Tex.) and notes Mr. Escobedo's conviction remains valid. Consequently, Ricky Escobedo's *Bivens* claims are "legally frivolous" within the meaning of 28 U.S.C. § 1915, *see Hamilton*, 74 F.3d at 103, and subject to dismissal "with prejudice to their being asserted again until the *Heck* conditions are met." *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir.1996).

2. Plaintiff's habeas claim

Plaintiff also seeks dismissal of his criminal cases. However, a federal prisoner who challenges the fact or duration of his confinement and seeks immediate or more timely release must first pursue relief through habeas corpus rather than a civil rights action. *Spina v. Aaron*, 821 F.2d 1126, 1128 (5th Cir. 1987). Consequently, to the extent Mr. Escobedo continues to seek dismissal of his criminal convictions, his section 1983 Complaint is **DISMISSED WITHOUT PREJUDICE**.

3. Plaintiff's request for return of seized property

Plaintiff also seeks the return of property seized from his residence on May 19, 2017. The record reflects that on November 6, 2019, the Government filed a Motion for Preliminary Order of Forfeiture (ECF No. 1770), which the Court granted (ECF No. 1773). On January 16, 2020, the Court entered its Judgment wherein the Preliminary Order of Forfeiture became final and the following items were forfeited: \$6,790.00, more or less in U.S. Currency; miscellaneous jewelry; Bersa .380, Serial Number: F19218; and any related ammunition and firearm accessories. (*Id.*).

On January 22, 2020, Plaintiff filed a Notice of Appeal, seeking to challenge the Court's Judgment. (ECF No. 1873). Generally, an appeal of a judgment determining the entire action divests the district court of jurisdiction over any further matters for that action "except in aid of the appeal or to correct clerical errors." *United States v. Pena*, 713 F. App'x 271, 272–73 (5th Cir. 2017)

(quoting *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984)). In this case, the Judgment includes the Order of Forfeiture; therefore, this Court lacks jurisdiction to consider Ricky Escobedo's motion. Accordingly, Mr. Escobedo's request for the return of property is **DISMISSED**.

4. Plaintiff's request for reimbursement

Plaintiff also seeks to hold defendants responsible for damages to his home resulting from the execution of the search warrant by San Antonio Police officers. While excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, *see United States v. Ramirez*, 523 U.S. 65, 71 (1998), Mr. Escobedo has not alleged sufficient facts to demonstrate the destruction of property in this case was excessive or unnecessary. Moreover, Mr. Escobedo does not allege that FBI Special Agents Onofre and Gutierrez damaged his property; instead, he seeks to hold them vicariously liable for the conduct of unidentified state actors. As previously noted, Mr. Escobedo is barred by the *Heck* doctrine from pursuing a *Bivens* claim for damages until his convictions have been set aside. In any event, even if Mr. Escobedo were not so barred, the defendants here cannot be held liable for another's actions. *See, e.g., Iqbal*, 556 U.S. at 676 ("a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution").

Consequently, Ricky Escobedo's request for damages is **DISMISSED**.

5. Plaintiff's request for injunctive relief

Finally, Ricky Escobedo seeks an injunction prohibiting defendants from interfering with his attorney/client communications, along with an order investigating the defendants' actions in other cases. (*Id.*) For reasons previously stated, Mr. Escobedo is barred by *Heck* from seeking monetary damages in a *Bivens* action unless he demonstrates his conviction or sentence has been reversed or set aside. *See Heck*, 512 U.S. at 486–87; *Stephenson*, 28 F.3d at 27. Further, the *Heck* holding has

been extended to civil rights actions seeking declaratory or injunctive relief as well as damages. *See Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Clarke v. Stalder*, 154 F.3d 186, 190–91 (5th Cir.1998). Accordingly, Ricky Escobedo's request for injunctive relief is also **DISMISSED**.

CONCLUSION

Ricky Escobedo was given an opportunity to amend his complaint to correct the deficiencies set out in this Court's prior Show Cause Order and was unable to do so. (ECF Nos. 5 and 6). Based on the analysis set out above, the Court finds that none of the claims set out in Mr. Escobedo's Amended Complaint are sufficient to state a claim pursuant to *Bivens*. His claims are frivolous and as such, subject to dismissal. *See* 28 U.S.C. §§ 1915(e)(2)(B)(i)–(ii), 1915A(b).

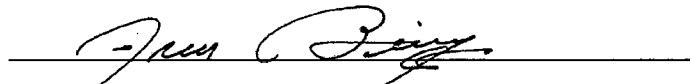
Accordingly, **IT IS HEREBY ORDERED** that Ricky Escobedo's Amended Complaint is **DISMISSED WITH PREJUDICE** pursuant to §§ 1915(e)(2)(B)(i)–(ii) and 1915A(b)(1) of Title 28 of the United States Code for failure to state a non-frivolous claim.

To the extent Mr. Escobedo seeks dismissal of his criminal convictions, Ricky Escobedo's Amended Complaint is **DISMISSED WITHOUT PREJUDICE**.

Additionally, **IT IS ORDERED** that Mr. Escobedo's Motion for Summary Judgment (ECF No. 14) is **DISMISSED AS MOOT**, and this case is now **CLOSED**.

It is so ORDERED.

SIGNED this 9th day of March, 2020:


FRED BIERY
UNITED STATES DISTRICT JUDGE

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