PETITION FOR WRIT OF CERTIORARI

APPENDICES

Appendix	Description	Pages
Appendix A	Decision of the U.S. Court of Appeals	A1-A7
Appendix B	Order of the U.S. Court of Appeals Denying Rehearing and Rehearing En Banc	B
Appendix C	Order of the U.S. District Court	C1-C3
Appendix D	Report and Recommendation of the U.S. Magistrate Judge	D1-D7

TAE H. CHON, Plaintiff-Appellant, v. BARRACK OBAMA; GEORGE W. BUSH; JOHN D. ASHCROFT; ERIC H. HOLDER, JR.; LORETTA LYNCH; KEITH OLSON; LYNETTE WINGERT; JOHN MOSEMAN; ELIAH WISDEN; VERNON G. STEJSKAL; BRENDA BEATON; COLLEEN COEBERGH; BRETT TOLMAN; STEWART WALZ; JEFF BRIDGE; TRACY CRENO; SAMUEL ALBA; BRENT BARNES; LINDA SANDERS; RICHARD IVES; JACK FOX; GARY BOWERS; FNU WILLIAMS, Captain; S. WEBSTER; FNU BREWERS, Unit Manager; FNU FLORES, Unit Manager; C. CASTILLO, Unit Manager; J. BESSE, Unit Manager; V. LIMON, Case Manager; L. SILVEIRA, Case Manager; J. HARRIS, Unit Counselor; B. MAGANA, Unit Counselor; D. ESCALANTE, Unit Counselor; J. WEBSTER, Unit Counselor; FNU HEURING, Education Staff; FNU DEGREGORIO, Education Staff; FNU MARSHALL, Education Staff; FNU LEEDHAM, Education Staff; MATHEWS HOSKINS, Education Staff; MATTHEW BROWN, Education Staff; FNU FOSTER, Security Team; FNU MURPHY, Security Team; FNU SUA, Security Team; M. CARRIEDO, Security Team; FNU MILLER, Security Team; FNU HARA, Security Team; FNU BROWN, Security Team, a/k/a FNU Ruelas; FNU BENDA, Security Team; RICHARD GROSS, Medical Clinic; FNU SALANDANAN, D.O. Administrator; FNU RADA; FNU BLITZ; FNU CASINO; FNU TAN; N. MCCALL; MARK SHURTLEFF, Attorney General Office of State of Utah; JOHN SWALLOW; TYLER BOELTER; LOMPOC VALLEY MEDICAL CENTER, a/k/a Lompoc Healthcare Dist.; STEVEN D. REICHEL, M.D.; PHILLIP A. WYNN, M.D.; VISHAL VERMA, M.D.; UNITED STATES OF AMERICA, Defendant-Appellees.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2017 U.S. App. LEXIS 24796

No. 17-4122

December 8, 2017, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

(D.C. No. 2:16-CV-00187-DB-BCW). (D. Utah).Tae H. Chon v. United States, 2017 U.S. Dist. LEXIS 96323 (D. Utah, June 20, 2017)

Counsel Tae H. Chon, Plaintiff - Appellant, Pro se, Herlong, CA.

Judges: Before HARTZ, HOLMES, and BACHARACH, Circuit Judges.

Opinion

Opinion by: Jerome A. Holmes

Opinion

ORDER AND JUDGMENT*

Pro se1 Plaintiff-Appellant Tae Chon, a federal inmate in California, seeks permission to proceed *in forma pauperis* in order to appeal from the district court's dismissal of his complaint, which alleged

Appendix A

violations of federal law pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, and of state law. The district court dismissed Mr. Chon's complaint for failure to state a claim, and Mr. Chon mounts two challenges against that determination on appeal.2 First, Mr. Chon contends that the district court erroneously dismissed several civil claims pertaining to his conviction without first conducting the necessary analysis under the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Second, Mr. Chon asserts that he properly objected to, and therefore preserved his right to challenge, the dismissal of his First Amendment retaliation claim, which he alleges neither the magistrate judge nor the district court properly addressed.

We conclude that Mr. Chon's arguments as to the district court's dismissal of the majority of Mr. Chon's claims are waived. We agree with Mr. Chon, however, that both the magistrate judge and the district court failed to expressly analyze and resolve his First Amendment retaliation claim. Exercising jurisdiction under 28 U.S.C. § 1291, we **grant** Mr. Chon's request to proceed *in forma pauperis*, **affirm in part** as to the district court's dismissal of Mr. Chon's claims under the *Heck* doctrine, and **vacate and remand in part** for further proceedings as to Mr. Chon's First Amendment retaliation claim.

I

In 2007, Mr. Chon was convicted under 21 U.S.C. § 841(c)(2) for possessing pseudoephedrine with knowledge that it will be used to manufacture methamphetamine. On November 10, 2016, while imprisoned for that conviction, Mr. Chon filed the operative complaint with the Utah federal district court, suing the United States and a bevy of more than forty individuals-including Drug Enforcement Administration ("DEA") agents, prison officials, and federal prosecutors. Mr. Chon presented a number of claims, including a Federal Tort Claims Act ("FTCA") claim, claims for abuse of process and fraud, and claims under 42 U.S.C. §§ 1983, 1985, and 1986. *See* R., Vol. II, at 12 (Am. Compl., dated Nov. 10, 2016). Some of the latter civil-rights claims challenge the constitutionality of the governmental actions leading to his conviction; some challenge his post-conviction treatment in custody.

A magistrate judge issued a Report and Recommendation ("R & R") dismissing all of Mr. Chon's claims. *See id.* at 159 (Report and Recommendation, dated Apr. 24, 2017). Mr. Chon filed three sets of objections to the R & R, on May 11, May 15, and June 14, 2017. The district court adopted the R & R in toto over Mr. Chon's objections. *See id.* at 195 (Order Adopting Report and Recommendation, dated June 20, 2017).

The R & R dismissed a large number of Mr. Chon's claims as barred under *Heck v. Humphrey*. *See id.* at 165-66. The magistrate judge found that Mr. Chon was plainly seeking to invalidate his conviction by filing civil tort actions that "would necessarily imply the invalidity of his conviction or sentence," *Heck*, 512 U.S. at 487, in contravention of the Supreme Court's holding that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact of his confinement," *id.* at 481. *See* R., Vol. II, at 166 ("Plaintiff's present suit, in part, clearly seeks to undermine the validity of his conviction and current confinement, as prohibited under *Heck*."). Accordingly, the magistrate judge held that Mr. Chon could not proceed on his §§ 1983, 1985, or 1986 claims, or on his claims for abuse of process and fraud, without first demonstrating that his conviction had been reversed or otherwise invalidated, which Mr. Chon could not do.

The R & R also discussed an event at Lompoc Federal Correctional Institution ("Lompoc FCI") giving rise to Mr. Chon's § 1985 action for Eighth Amendment violations and First Amendment retaliation. Mr. Chon alleged in his complaint that officers at Lompoc FCI forced him to sleep on a "freeway punishment bunk"3 as punishment for filing a habeas petition and "using the court system," and that he suffered severe injuries as a result of falling from the bunk and from receiving shoddy

Appendix A

after-the-fact care from prison doctors. R., Vol. II, at 30. The R & R dismissed the Eighth Amendment claim arising out of these events, but was silent as to the First Amendment retaliation claim. As noted, the district court adopted the magistrate judge's R & R in full, over Mr. Chon's objections, without elaborating on the magistrate judge's analysis.

II

The Supreme Court held in *Heck v. Humphrey* that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. "Thus, 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." *Id.* at 487. If it would, then the *Heck* bar applies, and "the complaint must be dismissed unless the plaintiff can demonstrate that the conviction is already invalidated." *Id.* If, however, "doctrines like independent source and inevitable discovery, and especially harmless error," *id.* at 487 n.7 (citation omitted), would allow the court to recognize a constitutional violation while upholding the conviction itself as constitutional, the *Heck* bar does not apply, and the "action should be allowed to proceed," *id.* at 487.

III

Mr. Chon contends that the district court failed to assess whether his claims under 42 U.S.C. §§ 1983, 1985, and 1986, as well as his abuse-of-process claim would fall within the *Heck* doctrine in the first place. He urges us to hold that the district court neglected to perform the requisite threshold determination mandated by the Supreme Court: namely, that "district court[s] *must* consider whether a judgment in favor of the plaintiff *would necessarily* imply the invalidity of his conviction." *Id.* at 487 (emphases added). Indeed, we have held that "[e]ach of [the plaintiff's] claims must be assessed individually to determine whether [they would be barred under *Heck*]." *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999) (disagreeing with the district court's "blanket application of *Heck* to all of Beck's claims"). Our independent review of the record does lend support to Mr. Chon's view that the district court did not individually assess whether Mr. Chon's claims would necessarily imply the invalidity of his conviction.

However, preservation concerns fatally undercut Mr. Chon's efforts to secure relief on these claims. Although Mr. Chon properly preserved his *Heck* objections as to his abuse-of-process claim, R., Vol. II, at 169 (Obj. to Report and Recommendation, dated May 11, 2017), he waived them by inadequately arguing them on appeal. And, as for Mr. Chon's allegedly *Heck*-barred civil-rights claims, the merits of those claims are not properly before us because Mr. Chon failed to preserve them in the manner that our firm-waiver rule demands. A discussion of these distinct preservation failures follows.

A

Mr. Chon urges us to reconsider the district court's *Heck* determination as to his abuse-of-process claim. We cannot do so because he has failed to adequately articulate why the abuse-of-process claim eludes the *Heck* bar. Specifically, Mr. Chon fails to tell us how any error by the district court in its *Heck* analysis prejudiced him. *See* Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *cf. Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 782 (10th Cir. 2009) ("[E]ven if this court did find that the district court failed to comply with Federal Rule of Civil Procedure 52(a), the error would be harmless and a remand for clarification would not be necessary because we can ascertain from the record the basis for the denial."). And it is well established that "[a]rguments inadequately briefed in the opening brief are waived." *Adler v. Wal-Mart Stores Inc.*, 144 F.3d 664, 679 (10th Cir. 1998). This is true even where the litigant proceeds pro se. *See, e.g.*, *Watkins v. Craft*, 455 F. App'x 853, 854

Appendix A

(10th Cir. 2012) (unpublished) (applying *Adler* to insufficiently-argued pro se claims).

Mr. Chon's averments as to the abuse-of-process claim are minimal. He briefly invokes abuse of process as an issue presented for review, but does not otherwise uphold his "responsibility to tie the salient facts, supported by specific record citation, to [his] legal contentions." *United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n.8 (10th Cir. 1997) (quoting *Schaede v. Boeing Co.*, 72 F.3d 138, *1 [published in full-text format at 1995 U.S. App. LEXIS 35076] (10th Cir. 1995) (unpublished)); *see also Cooper v. Cent. & Sw. Servs.*, 271 F.3d 1247, 1248 n.2 (10th Cir. 2001) (finding waiver of issue identified in the "statement of issues presented for review" but "not further argued"). Although we construe liberally Mr. Chon's pro se pleadings, "we will not 'assume the role of advocate'" and develop his arguments for him. *United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (quoting *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)).

In the absence of adequate appellate briefing, we decline to opine on whether the district court committed reversible error in its analysis of whether Mr. Chon's abuse-of-process claim was properly subject to the *Heck* doctrine. We accordingly uphold the district court's judgment dismissing Mr. Chon's abuse-of-process claim on *Heck* grounds.

B

Mr. Chon's remaining *Heck*-based claims fail on a distinct waiver ground-namely, the firm-waiver rule. "This court has adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions." *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005). Although Mr. Chon filed three sets of timely objections to the R & R, none of them challenged the magistrate judge's (and, thus, the district court's) *Heck* determinations with regard to any of his claims *other than* the abuse-of-process claim discussed *supra*.4

There are two exceptions to the application of the firm-waiver rule: "(1) when a pro se litigant has not been informed of the time period for objecting and the consequences of failing to object, or when (2) the 'interests of justice' require review." *Id.* However, neither exception applies to Mr. Chon's case.

The first exception is unavailing, as the magistrate judge clearly counseled Mr. Chon as to the applicable objection deadlines, and as to the consequences of failing to object to the conclusions reached in her R & R. R., Vol. II, at 168. The second exception is similarly foreclosed. Having requested (and received) a time extension, Mr. Chon was clearly aware of the deadlines to file objections. And, by raising *Heck* objections in the abuse-of-process context, Mr. Chon demonstrated he had the knowledge and ability to object when he desired to do so. Under these circumstances, we are disinclined to give Mr. Chon the benefit of the second exception. *See Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008) (declining to apply the second exception where plaintiff was aware of filing deadline and failed to adequately account for his failure to comply). In light of these facts, we are unpersuaded that the "interests of justice" exception militates in favor of declining to apply the firm-waiver rule.5

***

In sum, Mr. Chon failed to preserve through inadequate appellate briefing his *Heck*-based contentions of reversible error with respect to the district court's ruling regarding his abuse-of-process claim and he cannot proceed on like arguments with respect to his civil-rights claims because they are barred by the firm-waiver rule. We therefore affirm the *Heck* aspect of the district court's judgment.

IV

Appendix A

Mr. Chon also contends that the district court failed to address his First Amendment retaliation claim. We tend to agree.

In his complaint, Mr. Chon alleged that various prison personnel at Lompoc FCI conspired to retaliate against him for "using the court system." R., Vol. II, at 30. The magistrate judge's R & R discussed the events at Lompoc FCI but only ruled on the related Eighth Amendment claim. *See id.* at 166-168. There was no explicit disposition of Mr. Chon's First Amendment retaliation claim. Mr. Chon twice objected to this oversight. First, on May 15, 2017, Mr. Chon filed an objection asserting that "[t]he magistrate overlooked" his § 1985 conspiracy claims, for, *inter alia*, "Claims I-VII" (Claim VII referred to the First Amendment retaliation claim). *Id.* at 176. Then, on June 14, 2017,6 Mr. Chon renewed this contention, specifically asserting that a retaliation claim existed under 42 U.S.C. § 1985. *See id.* at 190.

Mr. Chon's repeated request-that is, for the district court to address what the magistrate judge did not-apparently went unanswered. Although the district court acknowledged receipt of Mr. Chon's objections to the magistrate judge's recommendations, it adopted the R & R without modification-*viz.*, without apparently rectifying the magistrate judge's oversight in failing to consider the First Amendment retaliation claim. *See id.* at 195-196.

As Mr. Chon correctly observes, Federal Rule Of Civil Procedure 72(b)(3) requires the district court to "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Aplt.'s Opening Br. at 8 (citing Fed. R. Civ. P. 72(b)(3)); *see also* 28 U.S.C. § 636(b)(1)(C) (providing that "[a] judge of the court shall make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made"). However, we can discern no indication in the record that the district court recognized Mr. Chon's First Amendment retaliation claim, much less assessed the magistrate judge's handling of it de novo.

Where a district court has failed to resolve a claim, we generally prefer to remand so that the court can address the claim in the first instance. *See Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1227 (10th Cir. 2013) ("Where an issue has not been ruled on by the court below, we generally favor remand for the district court to examine the issue."); *cf. Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). It is certainly preferable for an appellate court considering a claim to have the benefit of "a reasoned district court decision resolving it." *Sylvia v. Wisler*, __ F.3d __-, 2017 U.S. App. LEXIS 23665, *42-43, 2017 WL 5622916, *14 (10th Cir. 2017).

Moreover, absent "unusual circumstances," we "ordinarily remand a case where there is a serious question whether the [district] court conducted the requisite de novo review" of the magistrate judge's report. *Duarte v. Hurley*, 185 F.3d 874, *1 (10th Cir. 1999) (unpublished). Remand is appropriate here because there is-at the very least-a serious question about whether the district court conducted the requisite de novo review of the magistrate judge's report and Mr. Chon's objections thereto with respect to Mr. Chon's First Amendment retaliation claim.

Nor are there unusual circumstances-such as the futility of remand-militating against the application of the general rule. Both Mr. Chon's operative complaint, *see* R., Vol. II, 30-32, and his appellate brief, Aplt.'s Opening Br. at 8, address the merits of his retaliation claim with citation to relevant authority. *Cf. United States v. Hardwell*, 80 F.3d 1471, 1492 (10th Cir. 1996) ("He has waived this issue by failing to make any argument or cite any authority to support his assertion."). And, while it is true that the district court dismissed a large number of defendants related to the Lompoc FCI incident on immunity-based grounds, it is unclear if all potential defendants would be shielded from liability

Appendix A

with respect to Mr. Chon's First Amendment retaliation claim. In view of the circumstances present here, we cannot conclude that remand would be futile, and we are disinclined to delve into a merits-based evaluation of Mr. Chon's First Amendment retaliation claim without the benefit of a reasoned decision from the district court.

V

For the foregoing reasons, we **REMAND** the case to the district court with instructions to **VACATE in part** its judgment and address in the first instance the merits of Mr. Chon's First Amendment retaliation claim, and **AFFIRM in part** the district court's judgment dismissing Mr. Chon's remaining claims under *Heck*.

Because we conclude that Mr. Chon has sufficiently demonstrated "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal," *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991), we **GRANT** his request to proceed *in forma pauperis*. However, we remind Mr. Chon that he must continue making payments until the entire balance of his appellate filing fee is paid.

ENTERED FOR THE COURT

Jerome A. Holmes

Circuit Judge

Footnotes

*

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. 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 Federal Rule Of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

1

We construe the filings of a pro se litigant liberally, *see Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam), but our role is not to serve as his advocate, *see Gallagher v. Shelton*, 587 F.3d 1063, 1067 (10th Cir. 2009).

2

Although Mr. Chon presented four issues for review in his Opening Brief, two issues-as to the district court's qualified-immunity determinations, and its decision to dismiss several Drug Enforcement Administration defendants-are insufficiently briefed and do not warrant our review. Aplt.'s Opening Br. at 6B7. "[W]e routinely have declined to consider arguments that are . . . inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). And "[t]his court has not hesitated to apply this waiver rule to prisoner litigants." *Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012).

3

Unlike typical bunks, "freeway" bunks are located in the walkway between a row of cells and a wall. Mr. Chon claims that he was forced to sleep on a freeway bunk that was approximately five-and-a-half feet off the ground.

4

Read generously, a single sentence in Mr. Chon's third objection to the magistrate judge's R & R might be construed as presenting an argument that the magistrate judge should not have applied the *Heck* doctrine to each of his civil-rights claims. R., Vol. II, at 190 ("Because the presented civil conspiracy abuses the trial process by depriving Chon of rights and privileges guaranteed under U.S. Constitution V and VI (i.e., due process, confrontation, etc.), Hence, "Heck" does not bar his §§ 1985(2) & (3) and 1986 actions."). We observe that "this court has repeatedly instructed that stray sentences like these are insufficient to present an argument." *Eizember v. Trammell*, 803 F.3d 1129, 1141 (10th Cir. 2015). Even construed liberally, Mr. Chon's one-sentence averment was not sufficient to put the district court on notice regarding the nature of his *Heck*-based challenge to the magistrate judge's resolution of his civil-rights claims. *See Lockert v. Faulkner*, 843 F.2d 1015, 1019 (10th Cir. 1988) (holding that district courts "should not have to guess what arguments an objecting party depends on when reviewing a magistrate's report"). It is well-settled law that "only an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate's Act that led us to adopt a waiver rule in the first instance." *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Guided by the foregoing authority, we are not inclined to deviate from application of our firm-waiver rule based on Mr. Chon's one stray sentence.

5

Even absent application of the firm-waiver rule, we would still not reach the merits of Mr. Chon's *Heck*-based arguments with respect to his civil-rights claims because-through inadequate appellate briefing-Mr. Chon has waived these arguments. *See, e.g.*, *Bronson*, 500 F.3d at 1104. Mr. Chon does not articulate *how* any of his civil-rights claims might survive *Heck*. He does not present argument as to how-for example, by operation of doctrines like inevitable discovery or harmless error, *Heck*, 512 U.S. at 487 n.7-his particular causes of action might *not* necessarily invalidate the bases of his conviction. Without the benefit of developed argumentation as to how Mr. Chon's many claims might fare under *Heck*, we "cannot make arguments for him," *United States v. Yelloweagle*, 643 F.3d 1275, 1284 (10th Cir. 2011), and would not reach the issue.

6

Although Mr. Chon's third set of objections was filed on June 14, 2017, two days after the district court's extended deadline of June 12, 2017, Mr. Chon's filing was timely pursuant to the prison mailbox rule. Fed. R. App. P. 4(c)(1); *see also Price v. Philpot*, 420 F.3d 1158, 1164 (10th Cir. 2005) (prison mailbox rule applies to an inmate's filing of a civil-rights complaint).

Appendix A

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

TAE H. CHON,

Plaintiff - Appellant,

v.

BARRACK OBAMA, et al.,

Defendants - Appellees.

No. 17-4122

ORDER

Before **HARTZ, HOLMES**, and **BACHARACH**, 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

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

TAE H. CHON, Plaintiff, vs. USA, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
2017 U.S. Dist. LEXIS 96323
Case No. 2:16-cv-187 BCW-DB
June 20, 2017, Decided
June 21, 2017, Filed

Editorial Information: Prior History

Chon v. United States, 2017 U.S. Dist. LEXIS 95940 (D. Utah, Apr. 24, 2017)

Counsel Tae H. Chon, Plaintiff, Pro se, LOMPOC, CA.
Judges: Dee Benson, United States District Judge.

Opinion

Opinion by: Dee Benson

Opinion

ORDER ADOPTING REPORT AND RECOMMENDATION

Before the Court is the Report and Recommendation issued by United States Magistrate Judge Brooke C. Wells on April 24, 2017, recommending that Plaintiff's Verified Amended Complaint be dismissed under 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim upon which relief can be granted.

The parties were notified of their right to file objections to the Report and Recommendation within fourteen (14) days after receiving it. On May 8, Plaintiff Tae H. Chon filed a motion requesting an extension of time, seeking to have until June 12, 2017 to file his objections to the Report and Recommendation. On May 10, 2017, the Court granted Plaintiff's motion stating "Plaintiff shall file his Objection to the Magistrate's Report and Recommendation on or before June 12, 2017." (Dkt. No. 40.)

On May 11, 2017, Plaintiff filed his "Objections to Report and Recommendation." (Dtk. No. 41.) On May 15, 2017 Plaintiff filed an additional document captioned, "Objections II to Report and Recommendation." (Dkt. No. 43.) Finally, on June 14, 2017, Plaintiff filed "Objections III to Report and Recommendation." (Dkt. No. 44.)

Having reviewed all relevant materials, including Plaintiff's series of *pro se* objections, the record that was before the magistrate judge, and the reasoning set forth in the magistrate judge's Report and Recommendation, the court agrees with the analysis and conclusion of the magistrate judge.

Accordingly, the court ADOPTS the Report and Recommendation and Plaintiff's Verified Amended Complaint is DISMISSED under 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

DATED this 20th day of June, 2017.

/s/ Dee Benson

Dee Benson

United States District Judge

Appendix C

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

TAE H. CHON, Plaintiff, vs. USA, et al., Defendants.	JUDGMENT IN A CIVIL CASE Case No. 2:16-cv-187 BCW-DB Judge Dee Benson

IT IS ORDERED AND ADJUDGED

that Plaintiff's action is dismissed for failure to state a claim upon which relief can be granted.

DATED this 22nd day of June, 2017.

Dee Benson
United States District Judge

TAE H. CHON, Plaintiff, v. U.S.A., et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
2017 U.S. Dist. LEXIS 95940
Case No. 2:16-cv-187-DB-BCW
April 24, 2017, Decided
April 24, 2017, Filed

Editorial Information: Subsequent History

Adopted by, Dismissed by Tae H. Chon v. United States, 2017 U.S. Dist. LEXIS 96323 (D. Utah, June 20, 2017)

Editorial Information: Prior History

Chon v. United States, 2016 U.S. Dist. LEXIS 140227 (D. Utah, Aug. 29, 2016)

Counsel Tae H. Chon, Plaintiff, Pro se, LOMPOC, CA.
Judges: Brooke C. Wells, United States Magistrate Judge. District Judge Dee Benson.

Opinion

Opinion by: Brooke C. Wells

Opinion

REPORT AND RECOMMENDATION

Plaintiff Tae H. Chon, an inmate at the Lompoc federal correctional institution, filed this *pro se* civil rights suit under 42 U.S.C. § 1983. Plaintiff was granted leave to proceed *in forma pauperis* under 28 U.S.C. § 1915.1 On June 30, 2016, the case was referred to Magistrate Judge **Brooke Wells** by District Judge Dee Benson.2 In August 2016, this Court reviewed Plaintiff's initial complaint and issued a report and recommendation that Plaintiff's complaint be dismissed if Plaintiff failed to cure noted deficiencies within thirty (30) days.3 Judge Benson thereafter adopted this Court's report and recommendation.4 Complying with this Court's order, Plaintiff filed an Amended Complaint on October 3, 2016,5 and a second Verified Amended Complaint ("Complaint") on November 10, 2016.6 This case is now before the Court for screening of Plaintiff's Verified Amended Complaint7 in accordance with 28 U.S.C. § 1915(e)(2).

ANALYSIS

I. Screening Standard

Under 28 U.S.C. § 1915(e)(2)(B), a court shall dismiss any claims in a complaint filed *in forma pauperis* if they are frivolous, malicious, or fail to state a claim upon which relief may be granted. "Dismissal of a *pro se* complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him opportunity to

Appendix D

amend."8 When reviewing the sufficiency of a complaint the Court "presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff."9

Because Plaintiff is proceeding *pro se* the Court must construe his pleadings liberally and hold them to a less stringent standard than formal pleadings drafted by lawyers.10 However, "[t]he broad reading of the plaintiff's complaint does not relieve [him] of the burden of alleging sufficient facts on which a recognized legal claim could be based."11 While Plaintiff need not describe every fact in specific detail, "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be granted."12

II. Plaintiff's Allegations

Plaintiff's Complaint identifies approximately nine grounds upon which he requests relief, many of which are interrelated. The Court has done its best to parse out Plaintiff's separate claims. First, Petitioner complains of the use of the confidential informant ("CI") in his underlying case. Second, the Plaintiff argues that the government owed him an obligation to inform him of the law relating to distribution of pseudoephedrine (referred to by Plaintiff as the "retail distributor exception"). Third, Plaintiff alleges that the government improperly targeted Asian-American store owners. Fourth, Plaintiff alleges prosecutorial misconduct which prevented him from receiving a fair trial. Fifth, Plaintiff alleges the search warrant was issued without probable cause and based on fabricated and false statements. Sixth, Plaintiff alleges that his rights to a fair and direct appeal were violated. Seventh, Plaintiff alleges that he has been subjected to cruel and unusual punishment related to an injury that occurred when he fell out of his upper bunk bed and the alleged failure to provide proper medical treatment.

Plaintiff's Complaint names more than 40 individuals including, but not limited to, former Presidents Barrack Obama and George W. Bush, and Utah Attorney Generals Mark Shurtleff and John Swallow. It also generally names unknown Drug Enforcement Agency and Federal Bureau of Prisons staff.

Plaintiff seeks release from custody and expungement of his conviction, and more than $8,500,000.00 in monetary damages for bodily injuries and lost earnings.

III. Sufficiency of Plaintiff's Complaint

a. Improper Defendants

i. Fails to Allege Specific Allegations Against Certain Defendants

The Complaint must clearly state what each individual defendant did to violate Plaintiff's civil rights.13 Plaintiff fails to allege specific allegations that would support a claim upon which relief could be granted against the following defendants: Brent Barnes, Tracy Creno, Mark Shurtleff, John Swallow, Steve Webster, Mr. Brewers, J. Webster, D. Escalante, Mr. Heuring, Mr. Marshall, J. Morales, Ms. Blitz, and Mr. Rada.

Plaintiff has already been given an opportunity to amend his Complaint to comply with Rule 8 of the Federal Rules of Civil Procedure, and has failed to specifically allege how each of these individuals violated Plaintiff's rights. Accordingly, the Court recommends that the following defendants be DISMISSED: Brent Barnes, Tracy Creno, Mark Shurtleff, John Swallow, Steve Webster, Mr. Brewers, J. Webster, D. Escalante, Mr. Heuring, Mr. Marshall, J. Morales, Ms. Blitz, and Mr. Rada.

ii. Sovereign Immunity

To the extent that Plaintiff is suing defendants in their official capacity his claims are barred by the doctrine of sovereign immunity. It is well settled that suits filed against federal government employees acting in their official capacities must be construed as suits against the United States.14

However, "the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."15 Moreover, "[w]aivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed."16

Plaintiff does not allege that the United States has waived its immunity from suit in this instance. Further, Plaintiff fails to allege specific allegations that would support a claim upon which relief could be granted against these defendants. Thus, the Court concludes that it lacks subject matter jurisdiction to hear Plaintiff's claims against the following named federal defendants in their official capacities and recommends that those claims be DISMISSED: John D. Ashcroft, Eric Holder, Jr., Loretta Lynch, George W. Bush, and Barrack Obama.

iii. Respondeat Superior

To state a viable civil rights claim under 42 U.S.C. § 1983 a plaintiff must allege facts showing an "affirmative link" between the harm allegedly suffered and the actions of each named defendant.17 Moreover, liability for civil rights violations cannot be based on *respondeat superior*; in other words, a defendant may not be held liable merely because of his or her supervisory position.18 Thus, administrative or supervisory officials cannot be named as defendants in a § 1983 action without specific allegations showing that they were personally and directly involved in violating the plaintiff's rights.

In addition to failing to plead any specific allegations related to the following defendants, they were also acting within their supervisory capacity, and this Court recommends that these defendants be DISMISSED: John Moseman (a DEA supervisor), Captain Williams (a supervisor at FCI Lompoc), Lieutenant Foster (a supervisor at FCI Lompoc), Mr. Salandanan (administrator at FCI Lompoc), Linda Sanders (FCI Lompoc warden), and Richard Ives (FCI Lompoc warden).

iv. Prosecutorial Immunity

A prosecutor acting within the scope of his duties enjoys absolute immunity from suit under § 1983.19 Absolute immunity does not extend to actions that are primarily investigative or administrative in nature, unless those acts are necessary for the prosecutor to fulfill his function as an officer of the court.20 Acts outside the scope of the prosecutor's role as advocate for the government are entitled only to qualified "good faith" immunity.21

Plaintiff has failed to allege any actions with specificity that the following defendants acted outside the scope of their duties. Accordingly, this Court recommends that the following defendants be DISMISSED: Brenda Beaton, Coleen Coebergh, Vernon Stejskal, Stewart Walz, and Brett Tolman.

v. Judicial Immunity

The Supreme Court has recognized "a general principle of highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequence to himself.'"22 "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'"23

Here, Plaintiff claims that U.S. Magistrate Judge Samuel Alba violated his rights when he terminated Plaintiff's "Motions to Compel Evidence" without an opportunity to be heard, thus depriving Plaintiff of due process. Contrary to Plaintiff's assertion, the hearing on Plaintiff's Motions to Compel Evidence was terminated at the request of his counsel.24 Nothing alleged by Plaintiff shows that Magistrate Judge Alba should be deprived of his judicial immunity. Accordingly, this Court

recommends that any claims against Magistrate Judge Samuel Alba be DISMISSED.

b. Failure to State a Claim

i. Heck Doctrine

A substantial portion of Plaintiff's Complaint seeks to invalidate his conviction and current confinement. In *Heck v. Humphrey*,25 the Supreme Court held that a § 1983 suit cannot be used to undermine the validity of one's conviction or confinement.26 *Heck* also bars § 1983 claims for damages where "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction."27 "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 18 U.S.C. § 2254."28

Plaintiff's present suit, in part, clearly seeks to undermine the validity of his conviction and current confinement, as prohibited under *Heck*. Plaintiff's Complaint implicitly seeks a determination that various aspects of his conviction (i.e., search and seizure, use of a confidential informant, failure to apply the "retail distributor exception," prosecutorial misconduct, lack of a fair trial) were unconstitutional. Plaintiff's direct appeal was unsuccessful, as well as his § 2255 motion. Plaintiff cannot prove that his conviction and sentence have been invalidated on direct appeal or otherwise, thus prohibiting his current claims related to his conviction and confinement under *Heck*. Accordingly, Plaintiff is unable to state a viable claim for relief under 42 U.S.C. § 1983, and this Court recommends that Plaintiff's Claims I-VI, Abuse of Process Claim, and Fraud Claim be DISMISSED.29

ii. Eight Amendment

Plaintiff alleges that the prison staff improperly placed him in a freeway upper bunk from which he fell and was injured, and he also claims that prison staff interfered with his medical care following the fall. Specifically, Plaintiff complains that he was placed in a "freeway upper bunk" rather than a regular upper bunk, and that while he was sleeping in the freeway30 bunk he fell and was injured. Plaintiff does not allege that the prison staff pushed him out of the upper bunk or caused him to fall, he merely alleges liability based on the prison staff assigning him a freeway upper bunk. After Plaintiff fell, the prison staff took Plaintiff to the local hospital to be examined. At the hospital Plaintiff was x-rayed and given a CT scan, after which Plaintiff was diagnosed by Dr. Wynn with a shoulder contusion and prescribed Ibuprofen 600 for pain. Within a few hours of leaving the hospital Plaintiff was seen by Dr. Gross at the Bureau of Prisons Health Services. Dr. Gross reviewed the ER records and spoke with the radiologist who reviewed the CT scan. Dr. Gross confirmed that all ER tests were normal, and also found that Plaintiff had discomfort moving his shoulder for which he prescribed additional medicine and issued a lower bunk slip for one month.

From what the Court can interpret from Plaintiff's Complaint, it appears Plaintiff is asserting liability against the prison staff for placing him in an upper bunk, but not actually causing his fall, claiming the doctors did not fully assess his injuries, and that the doctors were improperly influenced by the prison staff.

"For a prison official's action to violate the Eighth Amendment, two requirements must be met. First, the inmate must be deprived of a serious need. Second, the official must act with deliberate indifference to the inmate's health or safety. An official's failure to act is with deliberate indifference when that official is 'aware of facts from which the inference could be drawn that a substantial risk of

serious harm exists, and ... also draw[s] the inference.'"31

Here, Plaintiff's allegations fail to state a claim under the Eight Amendment. Plaintiff has not alleged that he was deprived of a serious need, and when he was in need of medical attention for his fall, the prison staff immediately brought him to the hospital for treatment. From what Plaintiff has alleged, there was no indifference to Plaintiff's health or safety at any time. Plaintiff's assertion that he was somehow subjected to cruel and unusual punishment is without merit. Thus, the Court finds that Plaintiff's Eighth Amendment claim is legally frivolous.32 Accordingly, this Court recommends that Plaintiff's Eighth Amendment claim be DISMISSED.

ORDER

Based on the foregoing, the Court hereby RECOMMENDS that Plaintiff's Verified Amended Complaint be DISMISSED under 28 U.S.C. 1915(e)(2)(B) for failure to state a claim on which relief can be granted.

NOTICE

The Court will send copies of this Report and Recommendation to all parties, who are hereby notified of their right to object.33 The parties must file any objection to this Report and Recommendation within fourteen (14) days of service thereof.34 Failure to object may constitute waiver of the objections upon subsequent review.

DATED this 24 April 2017.

/s/ Brooke C. Wells

Brooke C. Wells

United States Magistrate Judge

Footnotes

1

Docket no. 3.

2

Docket no. 18.

3

Docket no. 25.

4

Docket no. 28.

5

Docket no. 27.

6

Docket no. 31.

7

Docket no. 31.

8

Appendix D

Perkins v. Kan. Dep't. of Corr., 165 F.3d 803, 806 (10th Cir. 1999).
9

Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991).
10

Id.
11

Id.
12

Id.
13

See Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976) (stating personal participation of each named defendant is essential allegation in a civil rights action).
14

See Kentucky v. Graham, 473 U.S. 159, 166-67, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).
15

Lehman v. Nakshian, 453 U.S. 156, 160, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981).
16

United States v. Nordic Vill., Inc., 503 U.S. 30, 33, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992) (citations omitted).
17

Anaya v. Crossroads Managed Care Sys. Inc., 973 F. Supp. 1228, 1248 (D. Colo. 1997) (citation omitted), *rev'd on other grounds*, 195 F.3d 584 (10th Cir. 1999).
18

See West v. Atkins, 487 U.S. 42, 54 n. 12, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996) ("[S]upervisor status by itself is insufficient to support liability. . . . Rather, '[p]ersonal participation is an essential allegation in a § 1983 claim.'") (internal citation omitted).
19

Imbler v. Pachtman, 424 U.S. 409, 420, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).
20

Pfeiffer v. Hartford Fire Ins., 929 F.2d 1484, 1490 (10th Cir. 1991).
21

Rex v. Teeples, 753 F.2d 840, 843 (10th Cir. 1985).
22

Stump v. Sparkman, 435 U.S. 349, 355, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978) (*citing Bradley v. Fisher*, 80 U.S. 335, 347, 20 L. Ed. 646 (1871)).
23

Id. at 356-57 (*citing Bradley*, 80 U.S. at 351).
24

USA v. Chon, 2:01cr487-TS (D. Utah), Docket no. 72.

Appendix D

25

512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).
26

Id. at 480-82 ("[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact of his confinement and seeks immediate or speedier release, even though such claim may come within the literal terms of § 1983.").
27

Id. at 481-82.
28

Id. at 486-87 (footnote omitted).
29

For clarity, this also dismisses all claims against the following defendants: Lynette Wingert, Keith Olson, Eliah Wisden, "Unknown #s' Named DEA Agents/Staff/Narcotic Task Force Officers," "Unknown #s' Named federal officers," and "Unknown named U.S. Marshal of DI Lynette Wingert's Spouse".
30

A "freeway" is the walkway between a row of cells and a wall. Apparently a "freeway bunk" is a bunk bed that is along the wall next to a walkway as opposed to a bunk bed in a cell. *See Navarro v. Harrington*, 2012 U.S. Dist. LEXIS 105918, 2012 WL 3071221 *1 (C.D. Cal. 2012).
31

Campbell v. Singh, 496 Fed.Appx. 774, 777 (10th Cir. 2012) (*quoting Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)) (internal citations omitted).
32

Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (A claim is legally frivolous if it is premised on an "indisputably meritless legal theory.")
33

See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).
34

Id.