IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DON ALTON HARPER,

Plaintiff,

v. **CASE NO. 11-3122-RDR**

U.S. ATTORNEYS OFFICE, et al.,

Defendants.

O R D E R

This civil "complaint" was filed by an inmate of the United States Penitentiary, Leavenworth, Kansas. The court takes judicial notice of the file in Mr. Harper's criminal case, U.S. v. Harper, Case No. 93-20069, which reveals the following facts. In 1994, Mr. Harper was convicted by a jury in the United States District Court for the District of Kansas of armed bank robbery and using or carrying a firearm during the robbery. He was sentenced to prison terms of 281 months and 60 months, to be served consecutively, and concurrent terms of supervised release. Petitioner appealed his conviction to the Tenth Circuit Court of Appeals (Case No. 94-3104). In 1995, the convictions were affirmed and the matter was remanded for resentencing and an opportunity for allocution. The same sentence was imposed, and petitioner appealed. In 1996, the sentence was affirmed. Then, as the Tenth Circuit aptly summarized in one of its opinions on Mr. Harper's collateral appeals:

> Between 1997 and 2006 Mr. Harper filed a total of five collateral attacks on his convictions, all construed as motions under 28 U.S.C. § 2255, and all denied. While reviewing Mr. Harper's fourth attempt to file a successive motion under § 2255, this court warned that further frivolous motions might result in sanctions. Harper v. United States, No. 06-3303 (10th Cir. Oct. 30, 2006).

> Despite this admonition, Mr. Harper has since filed two more motions under § 2255: one we dismissed last year for failing to show sufficient grounds to merit a successive § 2255 motion, Harper v. United States, No. 06-3424 (10th Cir. Feb. 7, 2007), and one we face today.

U.S. v. Harper, 545 F.3d 1230, 1231-2 (10th Cir. 2008).[1]

Over the years, Mr. Harper has made many attempts to challenge his convictions, and has been repeatedly and plainly advised by courts that his sole remedy for those challenges is a motion pursuant to 28 U.S.C. § 2255. Even though his many attempts were often not styled as § 2255 motions, they were eventually construed as such. After his filing of seven such motions and a warning by the Circuit that future frivolous motions would lead to sanctions, he was sanctioned when his last appeal was denied as frivolous. It is against this background, that the court has reviewed Mr. Harper's latest filing.

Mr. Harper appears to yet again be attempting to challenge his conviction, and again by improper means. In his initial pro se pleading in this case, Mr. Harper explicitly refers to 5 U.S.C. § 702. The Administrative Procedure Act, 5 U.S.C. § 701, et seq., does not provide an independent basis for jurisdiction, but provides

[1] The criminal file which does not have links to the older documents shows that in 1997, Mr. Harper filed a motion which was construed as one pursuant to 28 U.S.C. § 2255 and denied. Petitioner appealed, and in 1998 the appeal was dismissed as not timely filed. In 2000, Mr. Harper filed another motion that was construed as a § 2255 motion and denied. Petitioner appealed to the Tenth Circuit. In 2001, the Circuit vacated the district court order finding the court lacked jurisdiction, but denied "the implied application for authorization to file a second Section 2255 motion." (Case No. 01-3066). In 2003, Mr. Harper filed another § 2255 motion, which was successive. The motion was denied without prejudice based upon the district court's lack of jurisdiction, and was transferred to the Court of Appeals, where it should have been filed in the first instance, for consideration of preauthorization to file a successive motion. In 2006, Mr. Harper apparently submitted a Rule 60(b) motion, which was construed as another attempt to file a successive § 2255 motion, that was transferred to the Tenth Circuit for consideration of preauthorization. In 2007 the Tenth Circuit, after noting that this was Mr. Harper's fifth time seeking authorization to file a second or successive § 2255 motion, denied authorization (Case No. 06-3424). In 2008, Mr. Harper filed another motion that was treated as one under § 2255.

for judicial review of administrative agency action where jurisdiction otherwise exists. See Califano v. Sanders, 430 U.S. 99, 107 (1977)(The APA "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."). Particularly where a complaint might be read as an attack upon the constitutionality of the plaintiff's detention, the APA does not afford any jurisdictional base. See e.g., Billiteri v. United States Board of Parole, 541 F.2d 938, 946 (2d Cir. 1976). The only actual jurisdictional basis asserted by Mr. Harper is 28 U.S.C. § 1331.[2] He makes no mention of § 2255.[3] Since plaintiff explicitly styled his complaint as one under § 1331 after having been repeatedly informed that any challenges to his conviction must be raised in a § 2255 motion, the court finds the conclusion inescapable that Mr. Harper has not simply misunderstood or accidentally misstated the legal basis for this action. For these reasons, the court considers this action only as intentionally styled, that is as a civil complaint.[4] As such, the court finds the complaint is deficient in several respects.

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[2] The clerk sought assistance from the court upon receipt of the complaint and was advised to docket it as a habeas corpus petition. However, it became clear to the court upon reviewing Mr. Harper's extensive litigation history, that he fully intends and contrives to bring this action under § 1331 and not as a habeas petition. The court recognizes herein its statutory obligation to treat habeas claims, no matter how disguised, as second and successive. However, when faced with a plaintiff that insists upon seeking relief in an improper manner, a court is not simply free to ignore a plaintiff's right to choose the type of action upon which he proceeds. The better alternative to this court under the facts and background of this case is to consider and dismiss plaintiff's complaint as he insists. Perhaps this will serve to discourage Mr. Harper from continuing to file frivolous actions.

[3] If this action were liberally construed as yet another successive § 2255 motion, it would be denied for the same reasons as Mr. Harper's previous § 2255 motions.

[4] Of course, if Mr. Harper disagrees with this construction of his complaint, he may so notify the court.

FILING FEE

First, plaintiff has not paid the filing fee, which for a § 1331 complaint is $350.00. Nor has he submitted a motion to proceed without prepayment of fees (IFP motion). Mr. Harper is reminded that under 28 U.S.C. § 1915(b)(1), being granted leave to proceed IFP does not relieve a plaintiff of the obligation to pay the full amount of the filing fee. Instead, it entitles him to pay the fee over time through payments automatically deducted from his inmate trust fund account as authorized by 28 U.S.C. § 1915(b)(2).[5] Furthermore, § 1915 requires that a prisoner seeking to bring a civil action without prepayment of fees submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing" of the action "obtained from the appropriate official of each prison at which the prisoner is or was confined." 28 U.S.C. § 1915(a)(2). This action may not proceed until plaintiff either pays the filing fee in full or submits an IFP motion that is supported by the financial information required by federal law.[6] He will be given time to do so, and is forewarned that if he fails to comply with the provisions of § 1915 in the time allotted, this action may be dismissed without further notice.

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[5] Pursuant to §1915(b)(2), the Finance Office of the facility where plaintiff is currently confined will be authorized to collect twenty percent (20%) of the prior month's income each time the amount in plaintiff's account exceeds ten dollars ($10.00) until the filing fee has been paid in full.

[6] In addition, § 1915(b)(1) requires the court to assess an initial partial filing fee of twenty percent of the greater of the average monthly deposits or average monthly balance in the prisoner's account for the six months immediately preceding the date of filing of a civil action. Once plaintiff provides the requisite financial information, the court shall determine whether or not an initial partial filing fee must be paid.

SCREENING

Because Mr. Harper is a prisoner, the court is required by statute to screen his complaint and to dismiss the complaint or any portion thereof that is frivolous, fails to state a claim on which relief may be granted, or seeks relief from a defendant immune from such relief. 28 U.S.C. § 1915A(a) and (b). Having screened all materials filed, the court finds the complaint is subject to being dismissed for reasons that follow.

The complaint is not upon forms for filing a § 1331 complaint as required by local rule. Plaintiff will be given time in which to submit his complaint upon court-provided forms. If he fails to do so in the time allotted, this action may be dismissed without further notice.

There is no caption on the initial pleading. Thus, plaintiff has not named every party in a caption and properly designated all defendants. Instead, in the body of his "Complaint" he requests that this court "file this complaint against "U.S. Attorney's Office" and Assistant U.S. Attorney (AUSA) Robert S. Streepy. He alleges that the U.S. Attorney's Office prosecuted perjured indictment, used false testimonies, obtained illegal evidence, had a conflict of interest, acted in a dual capacity, "impersonated a judge by electronic means," withheld a trial transcript for 16 years, and violated due process. He states "conviction must be overturned."

Even if the U.S. Attorney's Office and AUSA Streepy were considered properly designated defendants, the court finds that the facts alleged by plaintiff, if any, state no claim against either

defendant. The U.S. Attorneys Office is not an individual, but an agency of the federal government. The United States and its agencies are absolutely immune to suit for money damages. Plaintiff does not request money damages or include any specific prayer for relief. His claims obviously relate to the preparation, trial and appeal of his criminal prosecution. A prosecutor acting within the scope of his duties in initiating and pursuing a criminal prosecution has been granted absolute immunity from civil suit when performing these duties and prosecutorial acts. Imbler v. Pachtman 424 U.S. 409, 427-28 (1976).

If, as it appears, Mr. Harper is simply again seeking to overturn his conviction by improper means and without adhering to the statutory provisions governing second and successive § 2255 motions of which he has been repeatedly informed, then he utterly fails to state a claim for relief under § 1331. As he has also been informed numerous times, § 2255 is his sole remedy for challenging his convictions. Any claim that a conviction is invalid and must be overturned may only be raised in a habeas corpus petition. See Preiser v. Rodriguez, 411 U.S. 475, 504 (1973). Since Mr. Harper is a federal prisoner, his exclusive remedy for such claims is by motion pursuant to 28 U.S.C. § 2255. He may not circumvent Preiser and § 2255 by raising his claims in a civil complaint.

Even if plaintiff stated a valid claim, his lawsuit under § 1331 is premature. In Heck v. Humphrey, 512 U.S. 477, 487 (1994), the United States Supreme Court reasoned that civil actions "are not appropriate vehicles for challenging the validity of outstanding criminal judgments." The Court thus held that a claim for damages

is not cognizable under section 1983[7] if a judgment in plaintiff's favor would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can show that the prior conviction had previously been invalidated. Heck, 512 U.S. at 486-87. Consequently, when a plaintiff files a civil rights action in a federal district court after having been convicted, 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. In Heck, the Supreme Court specifically found:

> in 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.

Id. at 486-87; Muhammad v. Close, 540 U.S. 749, 751 (2004)(Where success in a prisoner's § 1983 damages action would implicitly question the validity of his criminal conviction, "the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence."). "[U]nless the plaintiff can demonstrate that the conviction or sentence has already been invalidated," the complaint must be dismissed. Heck v. Humphrey, 512 U.S. 477, 487 (1994); Edwards v. Balisok, 520 U.S. 641, 648 (1997); see also Beck v. Muskogee Police Dep't, 195 F.3d 553, 557 (10th Cir. 1999).

Finally, the court notes that any actions taken by defendants

[7] The Tenth Circuit has applied the principles established in Heck to claims brought under Bivens. Crow v. Penry, 102 F.3d 1086, 1087 (10th Cir. 1996).

in connection with plaintiff's convictions in 1994, are obviously barred by the applicable statute of limitations, which is two years.

For all the foregoing reasons, the court finds that the complaint in this action is frivolous. It follows that it should be dismissed upon screening, and count as a strike against Mr. Harper under 28 U.S.C. § 1915(g).[8]

IT IS THEREFORE BY THE COURT ORDERED that plaintiff is granted twenty (20) days in which to satisfy the filing fee prerequisites by either submitting the $350.00 filing fee in full or a properly supported motion to proceed without prepayment of fees.

IT IS FURTHER ORDERED that within the same twenty-day period, plaintiff must show cause why this action should not be dismissed as frivolous for the reasons set forth herein, and counted a strike.

The clerk is directed to send plaintiff forms for a § 1331 complaint and for an IFP motion.

IT IS SO ORDERED.

DATED: This 20th day of July, 2011, at Topeka, Kansas.

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[8] Section 1915(g) provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court that is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Id. If Mr. Harper has or acquires two additional strikes, he shall be required to "pay up front for the privilege of filing . . . any additional civil actions," unless he can show "imminent danger of serious physical injury." 28 U.S.C. 1915(g); Jennings v. Natrona County Detention Center, 175 F.3d 775, 778 (10th Cir. 1999); see also Ibrahim v. District of Columbia, 463 F.3d 3, 6 (D.C. Cir. 2006)("Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. 1983 and the Federal Tort Claims Act, most of which concern prison conditions and many of which are routinely dismissed as legally frivolous."); Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996)(citing legislative history); In re Smith, 114 F.3d 1247, 1249 (D.C. Cir. 1997).

s/RICHARD D. ROGERS
United States District Judge