

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

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**JUL 1 1998**

**PATRICK FISHER**  
Clerk

EDWARD RICHARD NEWTON,

Plaintiff-Appellant,

v.

LADON MOTEN, Individually and  
as a Police Officer in the New Mexico  
State Police Department; NEIL  
MERTZ, Individually and as Chief  
Deputy District Attorney for the  
County of Socorro; JEFF LAHANN,  
Individually and as Senior Trial  
Prosecutor for the County of Socorro,

Defendants-Appellees.

No. 97-2212  
(D.C. No. CIV-93-994-JP)  
(D. N.M.)

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**ORDER AND JUDGMENT** \*

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Before **BALDOCK** , **EBEL** , and **MURPHY** , Circuit Judges.

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff seeks leave to appeal *in forma pauperis* the district court's denial of his Fed. R. Civ. P. 60(b) motion, which sought to set aside the court's dismissal of his civil rights action. Plaintiff, who was incarcerated, instituted the underlying action under a false name and then failed to prosecute the action after escaping from prison. The district court subsequently granted defendants' motion to dismiss, which was based on improper service, failure to prosecute, and Rule 11 violations. Almost three years later, plaintiff filed the present Rule 60(b) motion, in which he acknowledged that he had filed the complaint under a false name and explained that he had been unable to prosecute the action after his escape because he was hiding from authorities. The district court denied the Rule 60(b) motion, finding both that it was not filed within a reasonable time and that it was without merit.

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), this court "shall dismiss the case at any time if the court determines that . . . the action or appeal is frivolous or malicious." Based upon our review of the briefs and the record, we conclude that the present appeal is frivolous. Therefore, plaintiff's request to proceed *in forma*

*pauperis* is DENIED and the appeal is DISMISSED as frivolous. Because this appeal is frivolous under § 1915(e)(2)(B), it counts as a “prior occasion[.]” under 28 U.S.C. § 1915(g). Plaintiff is hereby notified that three filings of cases that are dismissed or affirmed on the basis that they are frivolous or fail to state a claim under § 1915(g) will result in him being unable to proceed *in forma pauperis* under the provisions of 28 U.S.C. § 1915.

Entered for the Court

Bobby R. Baldock  
Circuit Judge