

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

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

**July 26, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

NICHOLAS JOHN MCDONALD,

Plaintiff - Appellant,

v.

LAKESWOOD POLICE DEPARTMENT;  
JOHN DOE POLICE OFFICER; JOHN  
DOE POLICE OFFICER; JOHN DOE  
POLICE OFFICER,

Defendants - Appellees.

No. 23-1065  
(D.C. No. 1:22-CV-02532-LTB-GPG)  
(D. Colo.)

NICHOLAS JOHN MCDONALD,

Plaintiff - Appellant,

v.

COLORADO DEPARTMENT OF  
CORRECTIONS; TIME  
COMPUTATION,

Defendants - Appellees.

No. 23-1066  
(D.C. No. 1:22-CV-02314-LTB-GPG)  
(D. Colo.)

**ORDER AND JUDGMENT\***

\* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

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Plaintiff Nicholas John McDonald, appearing pro se, appeals from the district court's decision to dismiss without prejudice two separate civil actions that McDonald filed. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the judgments entered by the district court.

I

*Procedural history of Appeal No. 23-1065*

On September 28, 2022, McDonald, who at that time identified himself as a pretrial detainee, filed a pro se prisoner complaint pursuant to 42 U.S.C. § 1983 naming as defendants the Lakewood (Colorado) Police Department and three “John Doe Police Officer[s].” 23-1065 ROA at 4. The complaint alleged that on August 15, 2021, McDonald was arrested at a Walgreens store in Lakewood, Colorado, for having allegedly stolen items from the store. The complaint alleged that five Lakewood police officers participated in his arrest and, during the course of the arrest, “became Hyper Aggressive” and “Beat[] [him] up,” “causing several minor & serious injuries.” *Id.* at 7. The complaint further alleged that the arresting officers exceeded their authority because they continued to arrest him after he produced a receipt for the items in his possession. The complaint sought monetary damages for the alleged constitutional violations.

McDonald sought and was granted leave to proceed in forma pauperis.

On November 10, 2022, the magistrate judge issued an order directing McDonald to file an amended complaint. The order noted that the amended complaint needed to “provide sufficient information about each John or Jane Doe defendant so that the defendant c[ould] be identified for service.” *Id.* at 13–14. “Sufficient information,” the order explained, could potentially “include the date and time of the alleged violation, the job description of the defendant, and exactly what actions the defendant took.” *Id.* at 14. The order also stated that McDonald’s original complaint was “deficient because it d[id] not comply with the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure.” *Id.* The order emphasized that in his amended complaint, McDonald should identify “the specific claims he [wa]s asserting,” “the specific factual allegations that support[ed] each claim,” “against which Defendant or Defendants he [wa]s asserting each claim,” and “what each Defendant did that allegedly violated [McDonald’s] rights.” *Id.* at 14–15. Relevant to this last requirement, the order noted that McDonald’s original complaint “d[id] not provide factual allegations demonstrating each named Defendant’s participation in an alleged constitutional violation.” *Id.* at 15. The order also noted that the original complaint asserted a claim against the Lakewood Police Department, but failed to allege any facts that “show[ed] the existence of a policy or custom that directly caused the violation of a constitutional right.” *Id.* at 17. The order stated that “[i]f [McDonald] wishe[d] to pursue an official capacity claim, he must include allegations that satisfy the standards for municipal liability.” *Id.* The order also included directions to McDonald for clarifying his claims of excessive force and false

arrest. Lastly, the order directed McDonald to file an amended complaint within thirty days and advised him that if he failed to do so, his original complaint would be “dismissed without further notice.” *Id.* at 20.

The magistrate judge’s order directing McDonald to file an amended complaint, which was mailed to the address McDonald had listed at the Jefferson County Detention Facility in Golden, Colorado, was returned as undeliverable. In turn, McDonald did not file an amended complaint as directed by the magistrate judge.

On January 23, 2023, the magistrate judge issued a recommendation that McDonald’s original complaint be dismissed without prejudice. The magistrate judge concluded in the recommendation that McDonald’s original complaint failed to comply with Federal Rule of Civil Procedure 8 because it “fail[ed] to allege specific facts that demonstrated that Defendants violated his constitutional rights.” *Id.* at 25. The magistrate judge further concluded that the original complaint “fail[ed] to allege facts that show[ed] the existence of a policy or custom—by the ‘John Doe’ Officers in their official capacities or the Lakewood Police Department—that directly caused the violation of a constitutional right.” *Id.* Consequently, the magistrate judge concluded that the “claims against the ‘John Doe’ Officers in their official capacities and the Lakewood Police Department [we]re subject to dismissal.” *Id.* As for McDonald’s wrongful arrest claim, the magistrate judge concluded that “McDonald’s scant and undifferentiated allegations claiming he was wrongfully arrested in violation of his rights [we]re insufficient” to state a claim of personal participation on

the part of any of the named defendants. *Id.* at 26. Lastly, the magistrate judge concluded that “McDonald’s vague and conclusory allegations fail[ed] to allege an excessive force or false arrest claim in violation of the Fourth Amendment.” *Id.* For all of these reasons, the magistrate judge recommended that McDonald’s original complaint “be dismissed without prejudice . . . for failure to comply with the pleading requirements of Rule 8.” *Id.* at 29.

On February 6, 2023, McDonald filed written objections to the magistrate judge’s recommendation. McDonald specifically objected to the magistrate judge’s conclusion that the original complaint failed to allege specific facts “to meet [the] standards for stating [a] violation of 4th Amendment.” *Id.* at 30. On that same date, McDonald also filed a motion for reconsideration asking for reconsideration of the magistrate judge’s recommendation and “an extention [sic] of time to allow an Amended Complaint [to] be filed.” *Id.* at 34.

On February 9, 2023, McDonald filed a motion for leave to file an amended complaint. On February 15, 2023, McDonald filed a motion for summary judgment with respect to the claims asserted in his original complaint.

On February 22, 2023, the district court issued an order addressing the magistrate judge’s recommendation and McDonald’s pending motions. The district court began by noting that McDonald “did not receive the Court’s November 10 Order” directing him to file an amended complaint. *Id.* at 42. The district court noted, however, that it had “review[ed] . . . the docket sheet along with docket sheets of [McDonald’s] other active cases” and determined that McDonald “was in and out

of custody at the Jefferson County Detention Facility for periods of time in November 2022, December 2022, and January 2023.” *Id.* Based upon this information, the district court concluded that McDonald “caused th[e] issue” of not receiving the November 10 Order “by failing to file the required notice of change of address.” *Id.*

As for McDonald’s pending motions to reconsider and to amend, the district court concluded that McDonald could “not amend his pleading by adding factual allegations through an objection to the Recommendation.” *Id.* The district court also “reminded” McDonald “that the instant action w[ould] be dismissed without prejudice,” meaning that “if he wishe[d] to pursue his claims, he [could] do so by initiating a new action.” *Id.* at 42–43.

In sum, the district court “accepted and adopted” the magistrate judge’s recommendation, overruled McDonald’s objections to the recommendation, and dismissed McDonald’s original complaint “without prejudice . . . for failure to comply with the pleading requirements of Rule 8.” *Id.* at 43. The district court also denied McDonald leave to proceed in forma pauperis on appeal “without prejudice to the filing of a motion seeking leave to proceed in forma pauperis on appeal” in this court. *Id.*

Judgment in the case was entered on February 22, 2023. McDonald filed a notice of appeal on March 6, 2023.

*Procedural history of Appeal No. 23-1066*

On September 8, 2022, McDonald filed a pro se prisoner complaint pursuant to 42 U.S.C. § 1983 naming as defendants the Colorado Department of Corrections (CDC) and an entity he called “Time Computation.” 23-1066 ROA at 5. McDonald stated in his complaint that “Time Computation” was the CDC “Department tasked with applying appropriate sentence calculations.” *Id.* at 7. In “CLAIM ONE” of the complaint, McDonald alleged that, between 2014 and 2021, the CDC and its “Time Computation” department repeatedly miscalculated his parole eligibility and release dates in connection with several of his Colorado state convictions. The complaint sought relief for this claim in the form of a writ of mandamus “and application of proper time applied to all of [his] sentences.” *Id.* at 10. The complaint also sought money damages from the CDC.

In a separate claim (also titled “CLAIM ONE”), the complaint alleged that on November 1, 2021, McDonald was issued a summons for trespass and criminal mischief, and that during the incident his property was wrongfully seized and he was falsely accused of destroying property. The complaint also alleged that the state court judge improperly denied McDonald’s plea agreement, and also denied McDonald’s multiple requests for a preliminary hearing and for appointment of counsel. The complaint sought relief for this claim in the form of a preliminary injunction ordering McDonald’s release from custody or an adjustment to McDonald’s bond, as well as a preliminary injunction “returning” the matter “back to municipal ordinance violations immediately.” *Id.* at 16.

McDonald sought and was granted leave to proceed in forma pauperis.

On November 16, 2022, the magistrate judge issued an order directing McDonald to file an amended complaint within thirty days in order to address numerous problems with the original complaint. As an initial matter, the magistrate judge concluded “[t]here [we]re legal deficiencies in the . . . [c]omplaint.” *Id.* at 25. The magistrate judge noted in support that the court appeared to “lack[] jurisdiction over [McDonald’s] claims pursuant to the *Younger* abstention doctrine” and that, “[a]lternatively, the rule set forth in *Heck v. Humphrey* may bar his claims.” *Id.* The magistrate judge further noted that “[c]laims challenging the computation of a state sentence must be presented under the habeas corpus statute, 28 U.S.C. § 2241, and such claims must be exhausted in state court.” *Id.* at 25–26. The magistrate judge also noted that “the Eleventh Amendment prohibits [McDonald’s] request for money damages from the Defendants in their official capacities,” and “[t]he ‘Time Computation’ department is not a ‘person’ subject to suit under § 1983.” *Id.* at 26.

The magistrate judge “direct[ed] [McDonald] to file an Amended Prisoner Complaint that clarifi[e]d his claims and complie[d] with the legal directives herein.” *Id.* The magistrate judge also directed McDonald to “allege in a clear, concise, and organized manner what each defendant did to [him], when the defendant did it, how the defendant’s action harmed” McDonald, “what specific legal right [McDonald] believe[d] the defendant violated, and what specific relief [McDonald]” was requesting. *Id.* at 27.



The magistrate judge also noted in his order that it appeared that McDonald's original complaint was subject to dismissal without prejudice pursuant to "the *Younger* abstention doctrine" because it "allege[d] that Colorado state court criminal proceedings [we]re ongoing," "the matter concern[ed] calculation of criminal sentences imposed under Colorado state law," and "there [wa]s no indication that [McDonald] [could not] raise his due process concerns in state court." *Id.* at 29. Consequently, the magistrate judge directed McDonald to "address the *Younger* abstention doctrine in [his] Amended Complaint." *Id.*

The magistrate judge further noted that, under the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), "[j]udgment in th[e] case [could not] enter if it would necessarily imply the invalidity of a criminal conviction or sentence." 23-1066 ROA at 30. The magistrate judge therefore directed McDonald to "address application of the *Heck* rule in the Amended Prisoner Complaint." *Id.*

Lastly, the magistrate judge noted that "[t]he State of Colorado and its entities [we]re immune from liability under § 1983 pursuant to the Eleventh Amendment." *Id.* at 31. The magistrate judge therefore concluded that McDonald's "requests for declaratory or monetary relief against the Defendants in their official capacities [we]re barred by the Eleventh Amendment," but that McDonald could "pursue official-capacity claims for prospective injunctive relief only if there [wa]s a legal basis for such claims." *Id.* at 31–32.

McDonald did not file an amended complaint. Instead, on December 28, 2022, McDonald filed a motion for summary judgment as to the claims asserted in his original complaint. *Id.* at 34.

On January 27, 2023, the magistrate judge issued a recommendation that McDonald's original complaint be dismissed without prejudice "for failure to comply with the pleading requirements of Rule 8." *Id.* at 40.

On February 8, 2023, McDonald filed written objections to the magistrate judge's recommendation. In that pleading, McDonald expressed confusion regarding whether the magistrate judge was "referencing 2 separate cases" filed by McDonald. *Id.* at 43. McDonald also alleged that he failed to receive certain court orders. Lastly, McDonald "ask[ed] . . . the court to explain" if his complaint was "in proper format that pleases the [magistrate judge] when viewing the 2 cases separately and if not [he] c[ould] and w[ould] . . . ask for a Time Extension to formerly [sic] amend complaint." *Id.* at 44.

On February 23, 2023, the district court issued an order adopting the magistrate judge's recommendation, overruling McDonald's objection, and dismissing McDonald's original complaint without prejudice. The district court noted that McDonald "allege[d] that he did not receive the Court's November 16, 2022 Order directing him to file an amended complaint." *Id.* at 48. The district court noted, however, that it had "review[ed] . . . the docket sheet along with docket sheets of [McDonald's] other active cases" and determined that McDonald "was in and out of custody at the Jefferson County Detention Facility for periods of time in

November 2022, December 2022, and January 2023.” *Id.* Based upon this information, the district court concluded that McDonald “caused th[e] issue” of not receiving the November 16 Order “by failing to file the required notice of change of address.” *Id.* at 49. The district court also noted that McDonald could “not amend his pleading by adding factual allegations through an objection to the Recommendation.” *Id.* Finally, reviewing the magistrate judge’s recommendation de novo, the district court “conclude[d] that [it] [wa]s correct” in noting all of the deficiencies in McDonald’s original complaint. *Id.* at 50.

The district court entered final judgment in the case on February 23, 2023. McDonald filed a notice of appeal on March 6, 2023.

## II

Where, as here, a prisoner proceeds in forma pauperis in the district court, the district court “shall dismiss the case at any time if the court determines that . . . the action . . . 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.” 28 U.S.C. § 1915(e)(2)(B). We review de novo orders of dismissal that are issued pursuant to § 1915(e)(2)(B). *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007).

In his appellate briefs, McDonald essentially repeats some of the allegations from his two underlying complaints, as well as some of the objections that he asserted in the district court to the magistrate judge’s recommendation orders. McDonald fails, however, to even acknowledge, let alone offer any serious response

to, the deficiencies in his complaints that were identified by the magistrate judge and the district court. We therefore find no basis for reversing the district court's orders of dismissal. Because the district court dismissed both complaints without prejudice, McDonald remains free to revise his complaints, presumably correcting the deficiencies identified by the district court, and file them anew in the district court.

### III

The judgments in both cases are AFFIRMED. The pending motions for leave to proceed on appeal in forma pauperis are DENIED.

Entered for the Court

Mary Beck Briscoe  
Circuit Judge