

UNITED STATES COURT OF APPEALS **October 4, 2021**
TENTH CIRCUIT **Christopher M. Wolpert**
Clerk of Court

WALTER ALMON PAYTON, also
known as Walter Peyton, Inc.,

Plaintiff - Appellant,

v.

LAURA KELLY, GOVERNOR, in her
official professional and non-professional
individual capacities; DEREK SCHMIDT,
Kansas Attorney General, in his official
professional and non-professional
individual capacities; HUTCHINSON
CORRECTIONAL FACILITY, in its
official professional and non-professional
capacities; JEFF ZMUDA, Secretary of
Corrections, in his official professional
and non-professional individual
capacities; HUTCHINSON
CORRECTIONAL FACILITY, Mailroom,
in its official professional and non-
professional capacities; NATHANAEL S.
TIMM, Mailroom Clerk/Officer,
Hutchinson Correctional Facility, in his
official professional and non-professional
individual capacities; PATTI KEEN,
Senior Administrative Assistant and
Mailroom Supervisor, Hutchinson
Correctional Facility, in her official
professional and non-professional
individual capacities; DAN SCHNURR,
Warden, Hutchinson Correctional
Facility, in his official professional and
non-professional individual capacities;

No. 21-3088

(D.C. No. 5:20-CV-03257-SAC)

(D. Kan.)

MISTI D. KROEKER, Administrative Assistant, Hutchinson Correctional Facility East Unit and South Unit, in her official professional and non-professional individual capacities; CHARLES G. PARKS, East Unit Manager of the East Unit-Unit Teams, Hutchinson Correctional Facility, in his official professional and non-professional capacities; TREVA KOOB, East Unit Supervisor over East Unit-Unit Teams, Hutchinson Correctional Facility, in her official professional and non-professional individual capacities; ELIZABETH ALLAN, East Unit Team, Hutchinson Correctional Facility, in her official professional and non-professional individual capacities; CHERYL SCHLICKEISER, East Unit Team, Hutchinson Correctional Facility, in her official professional and non-professional capacities, also known as Cheryl L. Schlicker; ALEC R. WILSON, Sergeant, Hutchinson Correctional Facility, in his official professional and non-professional capacities; AMANDA STONE, Former Corporal/Current Administrative Assistant, Hutchinson Correctional Facility, in her official professional and non-professional individual capacities; D. CLAY VANHOOSE, Major, Hutchinson Correctional Facility, in his official professional and non-professional individual capacities; BRANDON G. RUIZ, Unit Team Manager, Hutchinson Correctional Facility, in his official professional and non-professional

individual capacities; JESSICA L. BROCK, Unit Team, Hutchinson Correctional Facility, in her official professional and non-professional individual capacities; SCOTT L. HAMBRICK, III, Unit Team, Hutchinson Correctional Facility, in his official professional and non-professional individual capacities; JEFFREY N. PETTIJOHN, Unit Team Supervisor, Hutchinson Correctional Facility, in his official professional and non-professional individual capacities; SEGREGATION REVIEW BOARD, All Unknown/Unnamed Members, in their official professional and non-professional individual capacities; WILLIAM SEYMOUR, JR., East Unit Team, Hutchinson Correctional Facility, East Unit Manager of the East Unit Unit Teams, Hutchinson Correctional Facility, in his official professional and non-professional individual capacities; NATHAN T. RUSH, Unit Team, Hutchinson Correctional Facility, East Unit Manager of the East Unit Unit Teams, Hutchinson Correctional Facility, in his official professional and non-professional individual capacities; JON D. GRAVES, Facility Attorney at Law, Hutchinson Correctional Facility, East Unit Manager of the East Unit Unit Teams, Hutchinson Correctional Facility, in his official professional and non-professional individual capacities; JORDAN C. BELL, Segregation Unit Team Manager, Hutchinson Correctional

Facility, East Unit Manager of the East
Unit Unit Teams, Hutchinson
Correctional Facility, in his official
professional and non-professional
individual capacities,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **BACHARACH, MURPHY, and CARSON**, Circuit Judges.

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.

Proceeding *pro se*, Kansas state prisoner Walter Payton appeals the district court's dismissal of the civil rights complaint he brought pursuant to 42 U.S.C. § 1983. Payton's complaint contained multiple claims based on alleged incidents that occurred during his confinement at the Hutchinson Correctional Facility. Specifically, Payton alleged defendants (1) lost a parcel mailed to him by his

*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.

brother, (2) violated internal prison policies and procedures, and (3) took disciplinary action against him in retaliation for complaints and grievances he filed.

In a detailed Memorandum Order and Order to Show Cause, the district court instructed Payton to show cause why his claims related to the lost parcel should not be dismissed as time barred and why the claims, alternatively, should not be dismissed for failure to state a claim. The court also ordered Payton to show cause why his remaining claims should not be dismissed for failure to state a claim. The district court further gave Payton the opportunity to file an amended complaint curing the defects in his original complaint. The court clearly detailed those defects and instructed Payton his amended complaint should raise only properly joined claims and defendants, allege sufficient facts to state claims for federal constitutional violations, and allege sufficient facts to show personal participation by each named defendant.

Before filing his amended complaint, Payton filed a motion to disqualify the district court judge. The district judge denied the motion in an order dated December 14, 2020. In a second order dated April 21, 2021, the district court dismissed Payton's amended complaint for failure to state a claim, concluding Payton failed to cure the deficiencies identified in the Order to Show Cause.

Payton raises two issues in his appellate brief.¹ He first challenges the denial of his motion to disqualify the district court judge. We “review a district court’s denial of a motion to recuse or disqualify a judge for abuse of discretion.” *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1308 (10th Cir. 2015). Payton’s motion to disqualify was brought pursuant to 28 U.S.C. § 144, which concerns “personal bias or prejudice either against [the moving party] or in favor of any adverse party.” He alleged in the motion that the district court judge “lied” and “changed the facts” when he misinterpreted a factual allegation in Payton’s original complaint.²

When proceeding under 28 U.S.C. § 144, the movant must file an affidavit stating “the facts and the reasons for the belief that bias or prejudice exists.” Payton filed an affidavit but, as the district court correctly ruled, it did not contain the required information. In his appellate brief, Payton alleges for the first time that the district court judge “seems to have a dislike for him, and is always making every attempt to respond for any named defendant(s) in any

¹Although Payton clearly identifies only two issues in his appellate brief, he also appears to assert the district court erred by dismissing his claims as time barred. The problem with any such argument, is that the district court—while noting the claims related to the misplaced parcel were likely time barred—dismissed all Payton’s claims under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim.

²It is not surprising the district court misinterpreted the factual allegation. The sentence crafted by Payton is ambiguous and contains multiple grammatical errors.

complaint that [he] files in the U.S. District Court and that comes before [the judge] without attempting to have those named defendant(s) respond to the alleged allegations against them.” Because federal district courts are required by statute to screen civil rights complaints like the instant complaint filed by Payton, Payton’s appellate argument does not support his obligation to show bias or prejudice on the part of the district court judge. 28 U.S.C. § 1915A (requiring district court to screen “a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity”). Having reviewed Payton’s motion, affidavit, and appellate brief, as well as the district court’s order denying the motion, we conclude the district court did not abuse its discretion in denying the motion to disqualify.

In his second appellate argument, Payton does not directly address the dismissal of his claims for failure to state a claim. He, instead, attacks the ruling indirectly by asserting the district court erred by failing to order the preparation of a *Martinez* report. *See Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978). According to Payton, the factual bases of his claims would be readily apparent if a *Martinez* report had been completed. There was no error in the district court’s failure to order a *Martinez* report. Our “precedent permitting the use of *Martinez* reports from prison authorities does not somehow create a procedural entitlement on behalf of prisoners seeking to avoid dismissal of deficient pleadings under

Rule 12(b)(6).” *Christensen v. Big Horn Cty. Bd. of Cty. Comm’rs*, 374 F. App’x 821, 825 (10th Cir. 2010) (unpublished disposition).

We review **de novo** a dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim. *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999). After considering Payton’s appellate brief; the district court’s well-reasoned order dated April 21, 2021; and the entire appellate record, we agree that Payton has not stated a claim upon which relief can be granted. We, therefore, **affirm** the dismissal of Payton’s complaint for substantially the reasons stated in the district court’s order.³

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

³Because Payton has failed to raise any nonfrivolous argument on appeal, his motion to proceed *in forma pauperis* is **denied** and he is directed to pay the full appellate filing fee forthwith. Further, in its order, the district court informed Payton that he has now accumulated three strikes under the Prison Litigation Reform Act. *See* 28 U.S.C. § 1915(g); *see also Payton v. Ballinger*, 831 F. App’x 898, 902 (10th Cir. 2020) (unpublished disposition). Accordingly, he may not bring a new civil action in federal court without first paying the filing fee in full unless he is “under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).