

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION**

**DAVID GARLAND ATWOOD, II,**

**PLAINTIFF**

**VERSUS**

**CIVIL ACTION NO. 2:14CV202-KS-MTP**

**SHERIFF BEN FORD, et al.**

**DEFENDANTS**

**MEMORANDUM OPINION AND ORDER OF PARTIAL DISMISSAL**

This cause is before the Court, *sua sponte*, for consideration of dismissal. Having reviewed Plaintiff's complaint [1], together with his response [7] to this Court's order [6] seeking additional information concerning his claims, the Court finds as follows:

**I. FACTUAL BACKGROUND**

*Pro se* plaintiff David Garland Atwood, an inmate in the custody of the Federal Bureau of Prisons (BOP), who is currently incarcerated at the Federal Correctional Institution El Reno, in El Reno, Oklahoma, brought this complaint challenging two arrests and the conditions of his confinement in the jails of Covington County, the City of Collins and Rankin County, Mississippi. The named Defendants are former Covington County Sheriff Ben Ford, Covington County Sheriff Stann Smith, Covington County Deputy Holbrooke, Covington County Detective Pamela Wade Smith, Covington County Deputy Angie Diehl, Nurse Practitioner for Covington County James Shivers, Covington County Unknown Deputy #1, and Covington County Unknown Deputy #2, referred to herein collectively as "the Covington County defendants." Plaintiff also sued a Collins, Mississippi, Unknown Police Officer. From Rankin County, Plaintiff sued Sheriff Ronnie Pennington, Captain Eddie Thompson, and Detective Tommy Moss, referred to herein as "the Rankin County defendants." Finally, Plaintiff sued federal

Probation Officer William Jay Simpson, Federal Bureau of Investigation (“FBI”) Special Agent Kevin Sanderson, and FBI Forensic Examiner Wayne Mitchell, referred to herein as “the federal defendants.”

Plaintiff alleges that on August 16, 2011, while on federal probation, he was arrested by Detective Pamela Wade Smith of the Covington County Sheriff’s Department, and charged with enticement of a minor in violation of Mississippi law. [1] at 5. Plaintiff claims that Detective Smith took two cell phones from him at the time of his arrest and turned them over to FBI Special Agent Sanderson and Defendant FBI Forensic Examiner Mitchell. *Id.* Plaintiff alleges that to date Covington County Deputy Holbrooke, Sheriff Smith, Probation Officer Simpson, Special Agent Sanderson and Forensic Examiner Mitchell have failed to return those phones, despite having been requested by Plaintiff to do so. [1] at 17-18; [7] at 4-5. Plaintiff further claims that Deputy Holbrooke stated that the phones were lost. [1] at 17.

On August 16, 2011, while awaiting processing after his arrest, Plaintiff claims to have been handcuffed to a chair at the Covington County Jail for eighteen hours with no bathroom break, food or water by Sheriff Ben Ford, Detective Diehl, Detective Smith and Unknown Deputy #1. [1] at 6; [7] at 1. Then, according to Plaintiff, Defendant Unknown Deputy #1 forced him into a holding tank with other inmates, despite Plaintiff having warned that defendant, as well as Deputy Diehl and Detective Smith, that another inmate had told Plaintiff he would be assaulted if not placed in protective custody. [1] at 6. Plaintiff claims that he was then assaulted when placed in the holding tank. *Id.* The next morning, Plaintiff alleges that he told defendant Unknown Deputy #2 about the assault, but this Defendant rejected Plaintiff’s request to be moved. *Id.* at 7. Plaintiff alleges that he also told both former Covington County Sheriff

Ford and Detective Smith about the assault, and that he needed medical attention, which was not provided. *Id.*

Plaintiff claims that on August 17, 2011, he was assaulted a second time in the holding cell, because one inmate told the other inmates that Plaintiff reported the first incident. *Id.* Plaintiff states that after the second assault he was taken that same day or the next day to see Defendant Shivers, a nurse practitioner serving the inmates of the Covington County Jail, but Defendant Shivers failed to provide medication for a previously diagnosed and life threatening condition. *Id.* at 7-8. After his visit to Defendant Shivers, Plaintiff was placed in a segregated cell. *Id.* at 8.

On August 19, 2011, Plaintiff asserts that he was transferred to the Rankin County, Mississippi Jail. *Id.* Plaintiff claims Rankin County charged him with felony exploitation of a minor, but that those charges were eventually dropped. *Id.* at 8-10. Plaintiff alleges that Defendant Detective Moss of the Rankin County Sheriff's Department investigated and made the arrest, which Plaintiff contends was unlawful. [1] at 8-9. Plaintiff claims that while he was incarcerated at the Rankin County Jail, Defendants Sheriff Pennington and Captain Thompson refused to allow him access to the law library or outside recreation. *Id.* Plaintiff also alleges that Captain Thompson confiscated and destroyed some of his legal documents. *Id.* at 10.

On October 31, 2011, Plaintiff alleges that he was transferred to the Collins, Mississippi City Jail, where Defendant Unknown Police Officer ignored his request for medical attention. *Id.* at 10. After several days, Plaintiff was transferred back to the Covington County Jail and Defendant Unknown Deputy #1 placed Plaintiff back in the holding cell with others. *Id.* 10-11. Plaintiff claims he was assaulted a third time before being moved back to a segregated cell. *Id.*

at 11. Plaintiff saw Defendant Shivers again, but claims that he remained ill. *Id.* Plaintiff alleges that Sheriff Ford told him there was no money to take inmates to the doctor. *Id.* Plaintiff claims to have suffered for two months, until Sheriff Stann Smith took over as sheriff and he was taken to see Defendant Shivers a third time. *Id.*

On January 23, 2012, Plaintiff alleges that he was taken into federal custody because his federal probation officer, Defendant Simpson, had a warrant issued based on the Covington County charges. *Id.* at 12. Plaintiff's probation was ultimately revoked.

Plaintiff characterizes his claims as false imprisonment, false arrest, malicious prosecution, deliberate indifference to medical needs, failure to protect, lack of access to law library, lack of access to courts, lack of outdoor recreation, confiscation and destruction of legal work, and replevin for confiscation of the phones. [1] at 1, 18. Plaintiff seeks compensatory damages, nominal damages and punitive damages. [1] at 24-25.

## **II. STANDARD OF REVIEW**

Title 28 U.S.C. §1915 applies to prisoners proceeding *in forma pauperis* in this Court. Section 1915(e)(2), provides that "the court shall dismiss the case at any time if the court determines that . . .(B) the action or appeal -- (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." The Court has permitted the Plaintiff to proceed *in forma pauperis* (IFP) in this action [2], thus his Complaint is subject to *sua sponte* dismissal pursuant to 28 U.S.C. § 1915(e)(2).

## **III. STATUTE OF LIMITATIONS**

All Plaintiff's claims brought pursuant to 42 U.S.C. § 1983 against the county defendants and the City of Collins Police Officer, as well as those brought against the federal defendants pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1999), are subject to Mississippi's three year statute of limitations. See *Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5<sup>th</sup> Cir. 1999); *Hubbard v. Mississippi Conference of United Methodist Church*, 138 F. Supp. 2d 780, 782 (S.D. Miss. 2001). Plaintiff signed his complaint on October 28, 2014, though it was not filed with this Court until December 30, 2014. [1]. "For pleadings submitted by prisoners acting pro se, the Fifth Circuit has recognized that a 'mailbox rule' applies and that the date when prison officials receive the pleading from the plaintiff for delivery to the court is considered the time of filing for limitations purposes. *Cooper v. Brookshire*, 70 F.3d 377, 379 (5<sup>th</sup> Cir. 1995). It may reasonably be inferred that a prisoner delivered his petition to the prison officials for mailing on the date he signed it. See *United States v. O'Kaine*, 971 F.Supp. 1479, 1480 (S.D. Ga. 1997)." *Punch v. State of Louisiana*, 1999 WL 562729, \*2 n.3 (E.D. La. July 29, 1999)(unpublished).

Even allowing Plaintiff the full benefit of the mailbox rule, claims pre-dating October 28, 2011, are time barred unless tolled. In his response [7] to the Court's order requesting additional information about his claims, Plaintiff asserts various excuses for having failed to file this action earlier, but none warrant tolling of the statute of limitations as to any denial of medical treatment claims or failure to protect claims against the Covington County defendants for actions or events that took place prior to October 28, 2011. Plaintiff was or should have been aware of those injuries and their connection to acts of Defendants at the time the incidents allegedly occurred, and therefore the statute of limitations began to run on August 16, 2011, with respect to the

denial of medical care and failure to protect claims arising from Plaintiff's first three day period of incarceration in the Covington County Jail. *See Walker v. Epps*, 587 F. Supp. 2d 763, 768 (N.D. Miss. 2008).

#### IV. CLAIMS AGAINST THE FEDERAL DEFENDANTS

##### A. HECK BAR

Revocation of Plaintiff's federal probation has been affirmed on appeal. *United States v. Atwood*, 581 F. App'x 455 (5<sup>th</sup> Cir. Sept. 9, 2014), and Plaintiff's *petition for writ of certiorari* denied by the United States Supreme Court. *See United States v. Atwood*, 5:04-cr-17-HTW-FKB (S.D. Miss.) at Docket No. 185. Plaintiff contends that he was arrested on the federal probation violation based on the charges filed against him in Covington County, but that ultimately the federal court concluded that the federal government had not met its burden as to the ground of the revocation petition concerning the Covington County conviction or the ground alleging the Plaintiff left the jurisdiction without permission.<sup>1</sup>

However, Plaintiff's *Bivens* claims against the federal defendants for false arrest, false imprisonment and malicious prosecution would in this instance undermine the validity of his revocation and are therefore barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), which prohibits challenges to a criminal judgment *via* a civil lawsuit. *See Jackson v. Vannoy*, 49 F.3d 175, 177 (5<sup>th</sup> Cir. 1995)(*Heck* bar applies to probation revocation); *Stephenson v. Reno*, 28 F.3d 26, 27 (5<sup>th</sup>

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<sup>1</sup>Plaintiff alleges that initially the revocation petition stated only that he had enticed a minor in Covington County but was later amended to add four additional grounds for revocation. The Court found Plaintiff guilty of three of the five grounds for revocation alleged, but not on the ground of enticing a minor and having subsequently been convicted of contributing to the delinquency of a minor, or on the ground of having left the jurisdiction without permission. [1] at 12, 14.

Cir. 1994)(*Heck* bar applies to Bivens claims by federal prisoners). As this Court has previously noted, Plaintiff alleges that his federal probation was revoked as a result of his guilty plea in Covington County. *Atwood v. Hood*, 2012 WL 6892724 ,\*1 n. 1 (S.D. Miss. Nov. 20, 2012). A judgment against the federal defendants in this case to the effect that Plaintiff was falsely arrested or imprisoned, or maliciously prosecuted, would necessarily impugn the validity of his revocation. Moreover, Plaintiff currently has a pending Petition for Habeas Corpus relief challenging the Covington County conviction, but that conviction, which Plaintiff notes has been affirmed by the Mississippi Supreme Court, [1] at 13, has not been overturned. *Atwood v. Hood*, 2:13cv242-KS-MTP (S.D. Miss.).

*B. ROOKER-FELDMAN, PARRATT HUDSON*

Plaintiff's claims against Defendants Sanderson, Mitchell and Simpson for return of his cell phones also fail. Plaintiff states in his complaint that he sought return of his cell phones through state court proceedings, and relief was ultimately denied by the Mississippi Supreme Court. *See In re David Garland Atwood, II*, No. 2014-M-0712 (Miss. August 20, 2014). Plaintiff's claim in this Court for return of the phones is barred by both the *Rooker-Feldman* doctrine and the *Parratt-Hudson* doctrine. The *Rooker-Feldman* doctrine prohibits a federal court from considering a collateral attack on a state court judgment. *See District Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The *Parratt-Hudson* doctrine prohibits a federal court claim for the random and unauthorized deprivation of personal property by state officials when state law provides an adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986).

The Fifth Circuit has applied the *Parratt-Hudson* doctrine to federal prisoners as well. *See Sun v. U.S.*, 49 F.3d 728, 1995 WL 103351, at \*6 (5th Cir. March 1, 1995); *See Salter v. Nickerson*, 2013 WL 866198, at \*9 (E.D. Tex. Jan. 25, 2013) report and recommendation adopted, No. 5:12CV22, 2013 WL 866475 (E.D. Tex. Mar. 7, 2013).

## **V. COVINGTON COUNTY DEFENDANTS**

As stated *supra*, all claims concerning any action or event taking place prior October 28, 2011, are time barred. The Court will issue a separate order concerning issuance of process with respect to Plaintiff's claims arising after October 28, 2011.

As also noted *supra*, Plaintiff currently has a pending Petition for Habeas Corpus relief challenging the Covington County conviction, but his conviction has not been overturned. *Atwood v. Hood*, 2:13cv242-KS-MTP (S.D. Miss.). Plaintiff's false arrest, false imprisonment and malicious prosecution claims are therefore barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

Plaintiff claims against Sheriff Smith and Deputy Holbrooke are barred by the *Rooker-Feldman* doctrine and the *Parratt-Hudson* doctrine, discussed *supra*.

## **VI. UNKNOWN POLICE OFFICER**

A separate order will issue concerning issuance of process with respect to Plaintiff's denial of medical attention claim against Unknown Police Officer #1.

## **VII. RANKIN COUNTY DEFENDANTS**

A separate order will issue concerning issuance of process with respect to Plaintiff's claims against these Defendants since it is not clear at this juncture whether those claims are time barred.



## VIII. CONCLUSION

Based on the foregoing, it is hereby ordered that Plaintiff's conditions of confinement claims against former Covington County Sheriff Ben Ford, Covington County Sheriff Stann Smith, Covington County Deputy Holbrooke, Covington County Detective Pamela Wade Smith , Covington County Deputy Angie Diehl, Nurse Practitioner for Covington County James Shivers, Covington County Unknown Deputy #1, and Covington County Unknown Deputy #2, arising from his incarceration in the Covington County, Mississippi Jail from August 16, 2011 to August 19, 2011, are hereby dismissed with prejudice as barred by the statute of limitations.

Plaintiff's claims against Defendant Sheriff Smith and Defendant Deputy Holbrooke concerning his cell phones are dismissed with prejudice.

Plaintiff's claims against Probation Officer William Jay Simpson, FBI Special Agent Kevin Sanderson, and FBI Forensic Examiner Wayne Mitchell for false arrest, false imprisonment and malicious prosecution are dismissed without prejudice. Plaintiff's claims against these defendants concerning his cell phones are dismissed with prejudice.

Process with respect to the remaining Defendants and remaining claims will be addressed by separate order.

SO ORDERED this, the 9<sup>th</sup> day of June, 2015.

*s/ Keith Starrett*  
UNITED STATES DISTRICT JUDGE