IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAUL MEZA, §
§
PLAINTIFF, §
§
V. §
§
INDIVIDUAL PAROLE OFFICERS, IN §
THEIR INDIVIDUAL AND OFFICIAL §
CAPACITIES, BRAD LIVINGSTON, §
EXECUTIVE DIRECTOR OF THE TEXAS §
DEPARTMENT OF CRIMINAL JUSTICE § CAUSE NO. A-05-CA-1008-LY
IN HIS OFFICIAL CAPACITY, AND §
BRIAN COLLIER, DIRECTOR OF THE §
TEXAS DEPARTMENT OF CRIMINAL §
JUSTICE PAROLE DIVISION, IN HIS §
OFFICIAL AND INDIVIDUAL §
CAPACITIES, §

DEFENDANTS.

ORDER

Before the Court are Defendants Livingston and Collier's Motion to Dismiss filed May 22, 2006 (Doc. #12); Plaintiff's Response to Defendants Livingston and Collier's Motion to Dismiss filed June 2, 2006 (Doc. #13); Defendants Livingston and Collier's Supplemental Motion to Dismiss and Reply to Plaintiff's Response filed June 20, 2006 (Doc. #14); Plaintiff's Response to Defendants Livingston and Collier's Supplemental Motion to Dismiss filed July 3, 2006 (Doc. #19); Defendant Collier's Motion to Dismiss and Motion for Rule 7(a) Reply filed June 27, 2006 (Doc. #16), and Plaintiff's Response to Defendants Collier's Motion to Dismiss and Motion for Rule 7(a) Reply filed July 10, 2006 (Doc. #20). The motions and responses were referred to the United States Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States

District Court for the Western District of Texas, as amended. The Magistrate Judge filed his Report and Recommendation on August 28, 2006 (Doc. #26). The parties were notified that objections to the Report and Recommendation were due within ten days after the parties were served with a copy of the Report. On September 11, 2006, Livingston and Collier filed their Objections to the Magistrate's Report and Recommendation (Doc. #29). Plaintiff Raul Meza filed no objection to the Report and Recommendation.

In the Magistrate Judge's Report and Recommendation, the Magistrate Judge recommended that the Court grant Livingston and Collier's Motion to Dismiss (Doc. #12) as to the monetary claims against Livingston and Collier in their official capacities, and deny the motion as to the claims against Livingston and Collier for injunctive relief. The Magistrate Judge further recommended that the Court deny Livingston and Collier's Supplemental Motion to Dismiss (Doc #14). Finally, the Magistrate Judge recommended that the Court deny Collier's motion to dismiss and grant Collier's motion for Rule 7(a) reply (Doc. #16), and order that Meza file a reply in accordance with Rule 7(a) of the Federal Rules of Civil Procedure. When responding to Livingston and Collier's objections, this Court will undertake a *de novo* review of the entire case file in this action. For findings and legal conclusions to which the parties did not object, the Court undertakes a plain-error review. After conducting such a review, the Court finds that the Report and Recommendation filed by the Magistrate Judge is correct and should be approved and accepted by the Court for the reasons stated therein, and the issues not addressed by the Magistrate Judge will be referred for further report and recommendation.

A. Eleventh amendment immunity

Meza does not object to the Magistrate Judge's recommendation that this Court dismiss his claims for monetary relief against Livingston and Collier in their official capacity pursuant to the Eleventh Amendment. Therefore, Meza is barred from attacking on appeal the unobjected-to proposed legal conclusions accepted by the district court, except on grounds of plain error. *See Douglass v. United Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*). Having reviewed the record, this Court finds no plain error and accepts the Magistrate Judge's recommendation to deny Meza's request for monetary damages in the official capacity.

B. Collier's qualified immunity

Regarding Collier's assertion of qualified immunity against suits in his individual capacity, the Magistrate Judge recommended that this Court deny Collier's motion to dismiss and grant Collier's motion for a Rule 7(a) reply. The Magistrate Judge found that Meza's First Amended Complaint does not contain the required specific facts demonstrating Collier's personal involvement, and recommended that Meza file a reply. *See* Fed. R. Civ. P. Rule 7(a).

"When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail. By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations." *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995). This Court finds no error in the Magistrate Judge's Report and Recommendation and will, therefore, order Meza to submit a reply, which shall be tailored to Collier's qualified immunity defenses. *See* Fed. R. Civ. P. Rule 7(a). In particular, Meza shall support each of his claims against Collier with sufficient particularity to establish Collier's personal involvement in the conduct at the time of the alleged unconstitutional acts.

C. Meza's Section 1983 claims are not barred by *Heck v. Humphrey*.

Livingston and Collier object to the Magistrate Judge's recommendation that the Court deny Livingston and Collier's Motion to Dismiss (Doc. #12) and Supplemental Motion to Dismiss (Doc. #14). Meza has brought a cause of action claiming violations of his constitutional and statutory rights. Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000) ("Section 1983"). Livingston and Collier argue that Meza is barred from using Section 1983 to challenge the conditions of his mandatory supervision and the imposition of sex-offender conditions. Livingston and Collier therefore request that the Court deny Plaintiff's claims for prospective injunctive relief. They support their assertion with the principles set forth in *Heck v. Humphrey*, wherein the Supreme Court held that a plaintiff who had been convicted of a crime cannot bring a Section 1983 claim challenging the constitutionality of his conviction or imprisonment unless that conviction had been reversed, expunged, declared invalid, or called into question by federal *habeas corpus*. 512 U.S. 477, 486–87 (1994).

> . . . [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81 (2005). Furthermore, *Heck* also applies to parole proceedings that call into question the "fact or duration of parole." *Jackson v. Vannoy*, 49 F.3d 175 (5th Cir. 1995).

Livingston and Collier assert that the proper method to challenge the fact or duration of parole is through a federal *habeas corpus* proceeding. 28 U.S.C. § 2254 (2000). The Magistrate Judge found that Meza is not challenging the fact or duration of his mandatory supervision, because

if Meza were to prevail on every argument, it does not appear from his complaint that he would be released earlier from his mandatory supervision. Accordingly, the Magistrate Judge held that because Meza's success on his claims would not necessitate a finding that his mandatory supervision or its duration is invalid, Meza's claims are cognizable under Section 1983 and are not barred by *Heck*.

In their objections to the Magistrate Judge's Report and Recommendation, Livingston and Collier cite *Coleman v. Dretke*, in which the court of appeals granted a prisoner's *habeas corpus* petition challenging the revocation of his release on mandatory supervision. 409 F.3d 665, 670 (5th Cir. 2005) (*en banc*). The parole board had imposed sex-offender conditions on Coleman, and his parole had been revoked for failing to submit to sex-offender therapy. *Id.* at 666. Although the Court in *Coleman* granted *habeas corpus* relief, the circuit did not rule that a claim under Section 1983 would be barred. The circuit specifically noted that the two avenues of relief were not mutually exclusive: "[T]here are undoubtedly some instances where a prisoner has the option of proceeding either by petition for habeas corpus or by suits under § 1983." *Id.* at 670.

Moreover, the prisoner in *Coleman* challenged the validity of his parole conditions after his parole was revoked for violation of the challenged conditions, thereby seeking "release from physical confinement in prison." *Id.* at 669. In contrast, Meza is preemptively challenging the conditions of his parole, without any revocation. A successful suit in *Coleman* would "necessarily demonstrate the invalidity of confinement" by challenging the fact or duration in confinement, *see Wilkinson*, 544 U.S. at 81; in contrast, success in Meza's case would not necessarily challenge the fact or duration of the mandatory supervision.

Livingston and Collier argue that unlike prisoners, where the difference between a civil-rights action and a collateral attack is easy to describe, the question for parolees is more "metaphysical." They acknowledge that challenges to the conditions of confinement fall under Section 1983, and attacks on the fact or duration of the confinement fall within the realm of *habeas corpus*. They then argue that the conditions of parole are the confinement, and that it is because of the conditions that parolees remain "in custody" on their unexpired sentences and thus may initiate a *habeas corpus* proceeding while on parole. *See Jones v. Cunningham*, 371 U.S. 236, 242–43 (1963); *see also Maleng v. Cook*, 490 U.S. 488, 491 (1989); *Williams v. Wisconsin*, 336 F.3d 576, 579 (7th Cir. 2003); *Drollinger v. Milligan*, 552 F.2d 1220, 1225 (7th Cir. 1977) (observing that lifting of probation condition frees the prisoner from confinement, "figuratively speaking," by removing restrictive condition).

The cases are inapposite to the case at bar, because both cases exclusively deal with *habeas corpus*. In *Jones* the issue before the Supreme Court was whether a parolee was "in custody" such that the parolee was entitled to invoke the "habeas corpus jurisdiction of the United States District Court" to challenge the constitutionality of his conviction. *Jones*, 371 U.S. at 239. The question in *Maleng* was "whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because" of the use of the prior conviction for sentence enhancement. *Id.* at 490. Neither case pertains to a Section 1983 action; therefore, the authority cited by Livingston and Collier is not controlling.

In their objections to the Magistrate's Report and Recommendation, Livingston and Collier also cite to *Williams v. Wisconsin* and *Drollinger v. Milligan*. These cases were decided prior to the Supreme Court's *Wilkinson* decision and stand for the proposition that the appropriate avenue for

challenging probation or parole conditions is through a federal *habeas corpus* proceeding, not through a claim under Section 1983. *Drollinger*, 552 F.2d at 1225; *Williams*, 336 F.3d at 579. The *Drollinger* court reasoned:

> Because probation is by its nature less confining than incarceration, the distinction between the fact of confinement and the conditions thereof is necessarily blurred. The elimination or substitution, for example, of one of the conditions of . . . probation would free [the probationer] substantially from . . . confinement; figuratively speaking, one of the "bars" would be removed from [the probationer's] cell.

Drollinger, 552 F.2d at 1225; *see also Williams*, 336 F.3d at 579 ("[T]he conditions of parole *are* the confinement. . . . It is because of these restrictions that parolees remain 'in custody' on their unexpired sentences and thus may initiate a collateral attack while on parole."). Significant to the decisions is the view that probation and parole conditions are part of the sentence; by attacking such conditions, the civil-rights plaintiff would essentially be "seeking release from at least part of [the] sentence." *See Drollinger*, 552 F.2d at 1225.

An analysis of *Wilkinson* is instructive to the issue. *Wilkinson* holds that a prisoner could use Section 1983 to challenge the constitutionality of state parole procedures, and a prisoner is not required to seek relief exclusively through *habeas corpus*. *Wilkinson*, 544 U.S. at 84. The state in *Wilkinson* contended that bringing a claim under Section 1983 to challenge the procedures used to deny prisoners parole was improper, as "parole proceedings are part of the prisoners' 'sentences'—indeed, an aspect of the 'sentences' that the § 1983 claims, if successful, will invalidate." *Id.* at 83. The Supreme Court rejected this argument, explaining that *Heck* "uses the word 'sentence' to refer not to prison procedures, but to substantive determinations as to the *length of the confinement*." *Id.* (emphasis added). The *Wilkinson* Court elaborated that it has "repeatedly

permitted prisoners to bring § 1983 actions challenging the conditions of their confinement—conditions that, were [the State] right, might be considered part of the 'sentence.'" *Id.* at 84. *Wilkinson*'s reasoning extends to the case at bar, in that the conditions imposed during mandatory supervision are not part of the sentence. Meza will become a free person when his sentence expires, not by removal of a condition of mandatory supervision.

This Court accepts the Magistrate Judge's Report and Recommendation. The Court holds that attacking the conditions of mandatory supervision, including the imposition of sex-offender conditions, is not a challenge to the fact or duration of the mandatory supervision, and Meza's Section 1983 action is not barred by the *Heck* doctrine.

D. Due process as to imposition of sex-offender conditions and conditions of mandatory supervision

Livingston and Collier further object to the Magistrate Judge's Report and Recommendation on the grounds that there is no justiciable interest in Meza's claim that the imposition of sex-offender conditions deprived him of due-process rights. Defendants argue that the Board of Pardons and Paroles gave Meza one month's notice and the opportunity to be heard. *See Coleman*, 409 F.3d at 670. This issue was raised in Livingston and Collier's Supplemental Motion to Dismiss (Doc #14), in what appears to be little more than an afterthought, and did not address what process is due in the context of imposing sex-offender conditions. Furthermore, the issue was not addressed by the Magistrate Judge's Report and Recommendation. The Court will therefore refer the issue of what process is due in the imposition of sex-offender conditions to the Magistrate Judge for further report and recommendation.

In addition, Livingston and Collier object to the Magistrate Judge's Report and Recommendation on the grounds that Meza has failed to state a claim that rises to the level of a constitutional violation. In particular, they point to Meza's claims of not having prospective employment opportunities screened fast enough and the inability to obtain a driver's license. Although not artfully pleaded, Meza appears to be asserting a constitutional violation under the Equal Protection Clause. *See* U.S. Const. amend. XIV, § 1. In his Amended Complaint, Meza repeatedly compares his status to that of other parolees. For example, his job screening is delayed compared to other parolees; he receives less time than other parolees to search for jobs; he cannot obtain a drivers license, and he has less freedom in formulating a weekly schedule. The equal-protection arguments have not been adequately briefed to this Court and are not addressed in the Magistrate Judge's Report and Recommendation. The Court will therefore refer the equal-protection issues to the Magistrate Judge for further report and recommendation.

IT IS THEREFORE ORDERED that the United States Magistrate Judge's Report and Recommendation filed in this cause is hereby **APPROVED** and **ACCEPTED AS FOLLOWS:**

1. Defendants Livingston and Collier's Objections to Magistrate's Report and Recommendation (Doc. #29) are **OVERRULED**.

2. Defendants Livingston's and Collier's Motion to Dismiss (Doc. #12) is **GRANTED IN PART AND DENIED IN PART AS FOLLOWS**: The Motion is **GRANTED** as to the monetary claims against Livingston and Collier in their official capacities and **DENIED** as to the claims against Livingston and Collier for prospective injunctive relief.

3. Defendants Livingston and Collier's Supplemental Motion to Dismiss (Doc. #14) is **DENIED,** except that the due-process and equal-protection issues raised in Defendants Livingston

and Collier's Objections to Magistrate's Report and Recommendation (Doc. #29) are **REFERRED** to the Magistrate Judge for further report and recommendation.

4. Collier's Motion to Dismiss (Doc. #16) is **DENIED**, and Collier's Motion for Rule 7(a) Reply (Doc. #16) is **GRANTED**.

IT IS FINALLY ORDERED that Meza submit his Rule 7(a) reply **on or before December 21, 2006.**

SIGNED this 5th day of December, 2006.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE