

# UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## William Mercer v. United States

514 F. App'x 455 (5th Cir. 2013) · No. 12-30762 · Decided February 21, 2013

### SUMMARY

The Fifth Circuit dismissed William Mercer's pro se Bivens appeal as frivolous. Although the district court improperly dismissed the complaint sua sponte for failure to exhaust administrative remedies, dismissal was proper on the alternative ground that the claims were frivolous. The court also imposed the 28 U.S.C. § 1915(g) three-strikes bar and warned Mercer about further sanctions.

### CASE DETAILS

|                       |                                                                                                                                                                                   |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States Court of Appeals for the Fifth Circuit                                                                                                                              |
| WRITING FOR THE COURT | Per Curiam; Davis; Barksdale; Elrod                                                                                                                                               |
| JURISDICTION          | Federal                                                                                                                                                                           |
| DECIDED               | February 21, 2013                                                                                                                                                                 |
| DOCKET                | 12-30762                                                                                                                                                                          |
| DISPOSITION           | dismissed                                                                                                                                                                         |
| PROCEDURAL POSTURE    | Pro se federal prisoner appealed the dismissal of his Bivens complaint for failure to exhaust administrative remedies and, alternatively, as frivolous under 28 U.S.C. § 1915(e). |
| STANDARD OF REVIEW    | Dismissal of a prisoner's complaint for failure to exhaust administrative remedies is reviewed de novo.                                                                           |
| PRECEDENTIAL VALUE    | unpublished and nonprecedential                                                                                                                                                   |
| PARTIES               | William Mercer v. United States of America, W.A. Sherrod, United States Bureau of Prisons, Staff of United States Penitentiary Pollock, Officer Willis, Officer Muffet            |

### TOPICS

[civil rights](#) [prisoners rights](#) [appellate procedure](#) [sanctions](#) [section 1983](#)

### PRACTICE AREAS

[prisoner civil rights](#) [federal civil procedure](#) [appellate procedure](#) [remedies](#)

## QUESTIONS PRESENTED

1. Whether the district court could sua sponte dismiss Mercer's complaint for failure to exhaust administrative remedies before the Government filed a responsive pleading.
2. Whether the complaint and appeal were frivolous and therefore subject to dismissal without requiring exhaustion.
3. Whether Mercer's retaliation claims were frivolous because he failed to allege a specific constitutional injury.
4. Whether the district court incorrectly treated the instant complaint as one of seven actions decided at the same time.
5. Whether dismissal of the complaint and appeal as frivolous triggered the three-strikes restriction under 28 U.S.C. § 1915(g).

## HOLDINGS

1. The district court erred by sua sponte dismissing Mercer's claims for failure to exhaust administrative remedies absent a responsive pleading from the Government because failure to exhaust is an affirmative defense, not a pleading requirement.
2. The district court was authorized to dismiss the claims as frivolous without first requiring exhaustion of administrative remedies.
3. Mercer's retaliation claims were frivolous because he failed to allege a specific constitutional injury.
4. Mercer abandoned the claims concerning alleged mail and document tampering because he failed to address the district court's grounds for rejecting them on appeal.
5. Both the district court's dismissal of the complaint and the Fifth Circuit's dismissal of the appeal as frivolous counted as strikes under 28 U.S.C. § 1915(g), and Mercer was barred from proceeding in forma pauperis in future civil actions or appeals while incarcerated unless he was in imminent danger of serious physical injury.

## KEY QUOTATIONS

*“Because failure-to-exhaust is an affirmative defense—not a pleading standard—the district court erred in sua sponte dismissing Mercer’s claims on this basis absent a responsive pleading from the Government.”* (514 F. App'x at 455)

*“Because the appeal is frivolous, it is dismissed.”* (514 F. App'x at 456)

## FACTUAL BACKGROUND

Mercer, a federal prisoner proceeding pro se, filed a Bivens complaint alleging that prison officials tampered with or delayed his mail and legal documents and retaliated against him. He contended that documents establishing exhaustion of administrative remedies had been lost or destroyed by prison officials. He did not address on appeal the district court's determination that he failed to show prejudice from the alleged tampering or his conclusory retaliation allegations, and he failed to allege a specific constitutional injury for retaliation based on delay in receiving his objections.

## PROCEDURAL HISTORY

The Western District of Louisiana dismissed Mercer's complaint sua sponte for failure to exhaust administrative remedies and alternatively as frivolous. The Fifth Circuit held that the exhaustion dismissal was procedurally improper but affirmed the alternative basis for dismissal by dismissing the appeal as frivolous and imposing the three-strikes bar under 28 U.S.C. § 1915(g).

## DISPOSITION

dismissed

## CASES CITED

- *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)
- *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999)
- *Jones v. Bock*, 549 U.S. 199, 212-14, 216 (2007)
- *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007)
- *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993)
- *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995)
- *Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996)
- *Holloway v. Hornsby*, 23 F.3d 944, 946 (5th Cir. 1994)