No. 20-270

In The Supreme Court Of The United States

IRMA ROSAS,

Petitioner,

v.

R.K. KENZIE CORPORATION d/b/a McDONALD'S; DARDEN RESTAURANTS INCORPORATED d/b/a OLIVE GARDEN RESTAURANT; RED LOBSTER HOSPITALITY, LLC d/b/a RED LOBSTER SEAFOOD RESTAURANT; and McDONALD'S CORPORATION d/b/a McDONALD'S,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A CIVIL COMPLAINT CAN BE DISMISSED SOLELY PURSUANT TO *GEORGE v. SMITH*, 507 F.3d 605 (7TH CIR. 2007)

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PETITION FOR WRIT OF CERTIORARI

Irma Rosas ("Rosas"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming dismissal of Rosas' claims with prejudice is found at *Rosas v. R.K. Kenzie Corp.*, 799 Fed. App'x 933, 2020 U.S. App. LEXIS 10690 (7th Cir. 2020). The minute entry dismissing Rosas' claims with prejudice, *Rosas v. R.K. Kenzie Corp.* et al., No. 1:19-cv-00005, (N.D. Ill., Sept. 16, 2019) is not published. (*See* App'x at 7-10).

JURISDICTION

The opinion of the court of appeals affirming dismissal was decided on April 06, 2020. Rosas' petition for rehearing was denied on April 29, 2020.

This petition is timely filed pursuant to Supreme Court Rule 14.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

(1) Federal Rule of Civil Procedure 21 provides,

> [m]isjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

(2) Federal Rule of Civil Procedure 41(b) provides,

> [i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule [...] operates as an adjudication on the merits.

STATEMENT OF THE CASE

Rosas did not work from January 2014 to November 2017 due to mental illness: major depression resulting from trauma. (App. Br. at 6). During that time she set on a journey of self-healing. (*Id.*). By November 2017, she felt better to return to work as a teacher. (*Id.*). To do so, however, she needed employment so she could reinstate her professional educator license, and purchase work clothes and teaching materials. (*Id.*). She decided to work at McDonald's for the first time. (*Id.*). Her time at McDonald's (R.K. Kenzie Corporation) ("Kenzie") would be short-lived for she, within a nine (9) month span, would go on to hold employment with three other businesses in the food service industry: Darden Restaurants Incorporated ("Darden"), Red Lobster Hospitality, LLC ("Red Lobster"), and McDonald's Corporation ("McDonald's"). (App. Br. at 6-7). She never imagined that these employers would violate her constitutional rights the way they did. (App. Br. at 7).

These employers discriminated against

Rosas because (1) she was Mexican-origin and (2) over 40 years old, (3) she complained about the discriminatory practices against her and her co-workers, and then was subjected to retaliation, and (4) she continued developing carpel tunnel syndrome and instead of accommodating her medical restrictions, she was constructively terminated. (App. Br. at 7). Rosas' journey of self-healing was affected. (App. Br. at 7).

Rosas filed her original complaint against Kenzie and after its motion to dismiss, the court granted leave to amend. (App. Br. at 8). For the first amended complaint, Rosas added Darden and McDonald's as defendants. (App. Br. at 8). After Kenzie's motion to dismiss, the court granted leave to amend again. (App. Br. at 8). For the second amended complaint, Rosas added Red Lobster as a defendant. (App. Br. at 8).

When Red Lobster moved to dismiss and compel arbitration, Rosas filed a third amended complaint as her response. (App. Br. at 8). The court granted defendants' motions to strike and to dismiss it. (App. Br. at 10). The court's minute

entry stated, "as this [c]ourt has previously advised [Rosas], [her] pleading improperly joins unrelated claims against unrelated [d]efendants in violation of George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007)" and gave her "one final opportunity to amend her complaint to cure this legal deficiency". (App. Br. at 10).

Rosas filed the fourth amended complaint with an expanded introduction that argued for maintaining defendants joined, using rules of civil procedure and precedent. (App. Br. at 10, 20). However, the court ordered Rosas to either respond to the motions to strike and to dismiss or to file a motion for leave to file a fifth amended complaint (with a proposed complaint attached). (App. Br. at 10).

Rosas filed the motion and proposed fifth amended complaint. (App. Br. at 11). The court's minute entry read, in part, Rosas "has no intention of revising her pleading to comply with this [c]ourt's prior orders and no intention of curing the deficiencies this [c]ourt has noted numerous times." (App. Br. at 27). The court denied the motion for

leave to amend and dismissed Rosas' claims with prejudice. (App. Br. at 6).

Rosas appealed claiming that the district court abused its discretion when it stated that she was violating *George*. (App. Br. at 15-25). If defendants were allegedly misjoined, she argued, Federal Rule of Civil Procedure 21 controlled. (App. Br. at 25-26). It also abused its discretion by characterizing Rosas as not complying with court orders and not making any efforts to find counsel on her own. (App. Br. at 27-30). For the latter, she argued, 28 U.S.C. § 1654 controlled. (App. Br. at 30-31).

In its opinion, the panel basically argued that, "misjoinder alone is not grounds for dismissal, [...] but the district court dismissed [Rosas'] case based on her repeated failure to cure her complaint's deficiencies." (App'x at 6). The panel affirmed and Rosas' petition for rehearing and rehearing en banc was denied. (App'x at 1-6; Docs. 31-32). She now seeks review of that opinion by this Court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE QUESTION WHETHER A CIVIL COMPLAINT CAN BE DISMISSED SOLELY PURSUANT TO *GEORGE v. SMITH*, 507 F.3d 605 (7TH CIR. 2007)

> THE COURT: [A] problem with [your complaint] has to do with what's called a George problem ... You're combining different claims that would not necessary – normally be within the same case. (Doc. 91: Tr., p. 3 at 21-25).
>
> THE COURT: ... Have you read the George case?
>
> ROSAS: I have.
>
> THE COURT: ... You need to find an attorney to help you respond to these motions and correct the problems that I've identified for you. If you do not, your case will be over because it's illegal what you're doing. You can't combine the different things. Your case is in violation of George. Okay ... (Doc. 113: Tr., p. 4 at 20-25; p. 5 at 1-7).

The district court's comments left Rosas continually revisiting *George v. Smith*, 507 F.3d 605 (7th Cir. 2007) and attempting to decipher what exactly she was violating. However it appears, now more than ever, that what was "illegal" was the Seventh Circuit's ruling in *George* altogether.

A. The Dismissal Of A Misjoined Action Runs Counter To Rule 21

The *George* court invoked Federal Rule 18 and 20. (*George*, 507 F.3d 605 at 607). The court, however, stopped short by not invoking Federal Rule of Civil Procedure 21 to its argument. As such, *George* creates an inter-circuit split.

Most circuits agree that misjoinder of parties is not a ground for dismissing an action. FED. R. CIV. P. 21. The Second Circuit is one such circuit. *See Clay v. Martin*, 509 F.2d 109 (2nd Cir. 1975) ("the presence of "improper parties" was [ ] an invalid basis for dismissal of the complaint. Misjoinder, if any, does not justify such an extreme sanction."); *Riles v. Semple*, 763 Fed. Appx. 32 (2nd Cir. 2019) ("dismissal is not the appropriate remedy

for misjoinder.").

The Third Circuit is another such circuit. *See Sabolsky v. Budzanoski*, 457 F.2d 1245 (3rd Cir. 1972) ("Misjoinder or non-joinder of parties is not ground for dismissal."); *Atwell v. Lavan*, 135 Fed. Appx. 545 (3rd Cir. 2005) (same); *Mincy v. Klem*, 303 Fed. Appx. 106 (3rd Cir. 2008) (courts "may not dismiss actions where there has been a misjoinder of parties."); *Deen-Mitchell v. Lappin*, 514 Fed. Appx. 81 (3rd Cir. 2013) (same).

The Fifth Circuit is no exception. *See Tuft v. Texas*, 397 Fed. Appx. 59 (5th Cir. 2010) (finding "[T]he district court abused its discretion 'when it dismissed [the] entire action."); *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516 (5th Cir. 2010) (finding that "it was error to have dismissed the entire action for misjoinder.").

The Sixth Circuit agrees that misjoinder of parties is not a ground for dismissing an action. FED. R. CIV. P. 21. *See Martinez v. Litteral*, 2018 U.S. App. LEXIS 30486 (6th Cir. 2018) ("Misjoinder of parties is not a ground for dismissing an action."); *Roberts v. Doe*, 2017 U.S. App. LEXIS

14313 (6th Cir. 2017) (concluding that the district court abused its discretion by dismissing the action due to misjoinder of the parties.); *Annabel v. Mich. Dep't of Corr.*, 2017 U.S. App. LEXIS 19441 (6th Cir. 2017) ("because the district court had dismissed all of Annabel's other claims when it dismissed those claims for improper joinder, the end result was dismissal of his entire case, a result not permitted by Rule 21.").

The Eighth Circuit is another such circuit. *See Carter v. Schafer*, 273 Fed. Appx. 581 (8th Cir. 2008) ("misjoinder of parties was not a ground for dismissing an action.").

The Ninth Circuit is no exception. In *Bishop v. Harrington*, 2013 U.S. Dist. LEXIS 67042 (E.D. Cal., May 10, 2013), the magistrate judge cited *George*, invoked Rules 20 and 18, and ordered plaintiff "to amend his complaint" that "set[ ] forth unrelated claims which [did not] violate joinder rules." (at *5). Then in *Bishop v. Harrington*, 586 Fed. Appx. 386 (9th Cir. 2014), the Ninth Circuit held that "misjoinder of parties [wa]s not a proper ground for dismissing an action. *See* Fed. R. Civ. P.

21". (at 387).

In *Williams v. Cal. Dep't of Corr. & Rehab.*, 2009 U.S. Dist. LEXIS 135366 (E.D. Cal., June 22, 2009), the magistrate judge cited *George* and invoked Rules 18 and 20, and ordered "complaint [be] dismissed with leave to amend". (at *6). Then in *Williams v. Cal. Dep't of Corr. & Rehab.*, 467 Fed. Appx. 672 (9th Cir. 2012), the Ninth Circuit held that "the district court's dismissal of the complaint in its entirety was not proper, even if the complaint had misjoined defendants. Fed. R. Civ. P. 21". (at 674).

In *Allen v. Christianson*, 2010 U.S. Dist. LEXIS 118967 (E.D. Cal., Nov. 09, 2010), the magistrate judge cited *George* and invoked Rule 18, and recommended that "the deficiencies ... [were] not capable of being cured by [another] amendment, and therefore ... action [should] be dismissed in its entirety." (at *18). Then in *Allen v. County of Stanislaus*, 478 Fed. Appx. 446 (9th Cir. 2012), the Ninth Circuit held that the "district court [ ] erred in dismissing with prejudice the claims from Allen's complaint that are unrelated to

his claim for inadequate medical care against Dr. Cheung. Federal Rule of Civil Procedure 21". (at 446).

The three magistrate judges in these *pro se* actions (*Bishop, Williams, Allen*) (cited *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and/or *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) to the want of *Erickson v. Pardus*, 551 U.S. 89 (2007).

According to docket entries with the Eastern District of California, Bishop never consented to or declined of jurisdiction of U.S. Magistrate Judge. Williams consented to it. Allen, however, declined of jurisdiction.

The Tenth and Eleventh Circuits agree that misjoinder of parties is not a ground for dismissing an action. FED. R. CIV. P. 21. *See Nasious v. City & County of Denver*, 415 Fed. Appx. 877 (10th Cir. 2011) ("To remedy misjoinder, ... the court has two remedial options".); *Dakar v. Head,* 730 Fed. Appx. 765 (11th Cir. 2018) (holding that the "district court misapplied Rule 21 by dismissing Dakar's amended complaint in its entirety.").

Even the Seventh Circuit agrees. *See Lee v.*

Cook County, 635 F.3d 969 (7th Cir. 2011) (district court erred by dismissing mis-joined claims); *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680 (7th Cir. 2012) (violations of Rules 18 and 20 should be solved [...] under Fed. R. Civ. Pro. 21"); *UWM Student Ass'n v. Lovell*, 888 F.3d 854 (7th Cir. 2018) ("The proper remedy for violations of Rule[ ] ... 20 is severance or dismissal without prejudice, not dismissal with prejudice."). The *Lee*, *Wheeler*, and *UWM Student Ass'n* courts cited *George* but it must be highlighted that they also extended their analyses to include what was missing there, Rule 21.

For instance, in *Wilson v. Scott*, 718 Fed. Appx. 438 (7th Cir. 2018), the Seventh Circuit noted,

> [t]he judge quoted *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007), for the uncontroversial proposition that "Unrelated claims against different defendants belong in different suits." But "[m]isjoinder is not a ground for dismissing an action." FED. R. CIV. P. 21. Rather, when a district judge determines that a plaintiff has

> misjoined parties, the judge should severe [sic] the complaint into multiple suits or dismiss the excess defendants. (at 440). (internal citation omitted).

George, therefore, has a shortcoming that warrants invoking Rule 21.

The Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit agree that misjoinder of parties is not a ground for dismissing an action. FED. R. CIV. P. 21. Unlike these circuits, however, there are two circuits where misjoinder of parties are grounds for dismissing an action.

The First Circuit is one circuit that fails to invoke Rule 21 similar to *George*. In *Rice v. Spencer*, 2014 U.S. Dist. LEXIS 74359 (D. Mass., May 29, 2014), the magistrate judge cited *George*, invoked Rules 8, 18, and 20, and drew on *Twombly* and *Iqbal*. He recommended that plaintiff file an amended complaint, which would be opened as a new case. The court adopted the report and recommendations and dismissed the case noting that the amended complaint "violated the joinder rules". (Doc. 56). The *pro se* plaintiff appealed. The

First Circuit affirmed. (*Rice v. Spencer*, No. 14-2004, unpublished (1st Cir. 2014)).[1]

Review of the civil docket with the District of Massachusetts revealed that plaintiff never consented to or declined of jurisdiction of U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c)(1).

The Fourth Circuit is another circuit that fails to invoke Rule 21 similar to *George*. In *Sirleaf v. United States*, 2018 U.S. Dist. LEXIS 163719 (E.D. Va., Sept. 24, 2018), the court cited *George* and found [that] Plaintiff's second particularized complaint did not comply with the rules regarding joinder and ordered plaintiff to file a new

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[1] Other cases where *George* was dictum in the district courts of the First Circuit are: *Chase v. Lincoln Chafee*, 2011 U.S. Dist. LEXIS 149061, (D. R.I., Dec. 09, 2011), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 149063 (D. R.I., Dec. 28, 2011); *Levesque v. Fort Devens Fed. Med. Ctr.*, 2017 U.S. Dist. LEXIS 197159 (D. Mass., June 05, 2017); *Griffin v. Wrenn*, 2018 U.S. Dist. LEXIS 115325 (D. N.H., April 03, 2018), *report and recommendation adopted, Griffin v. N.H. Dep't of Corr.*, 2018 U.S. Dist. LEXIS 114402 (D. N.H., July 05, 2018); *Tatro v. Citigroup, Inc.*, 2012 U.S. Dist. LEXIS 43226 (D. R.I., March 14, 2012); *Renkowicz v. Mici*, 2020 U.S. Dist. LEXIS 23396 (D. Mass., Feb. 11, 2020); *Cross v. DOC Sheriff Office of Suffolk Cty. House of Corr.*, 2019 U.S. Dist. LEXIS 180370 (D. Mass., Oct. 17, 2019); *Enwonwu v. Dep't of Homeland Sec. ICE*, 2019 U.S. Dist. LEXIS 215552 (D. Mass., Dec. 16, 2019).

complaint. (at *4). Then in *Sirleaf v. United States*, 2018 U.S. Dist. LEXIS 192005 (E.D. Va., Nov. 8, 2018), the same events occurred. (at *4). Both times, *Twombly* was cited. *Pro se* plaintiff appealed. In *Momolu v. Sirleaf*, 770 Fed. Appx. 43, 2019 U.S. App. LEXIS 13015 (4th Cir. 2019)[2], the Fourth Circuit dismissed the appeal and remanded to amend complaint *again*.

In *Sheridan v. Shekita*, 2016 U.S. Dist. LEXIS 191008 (E.D. N.C., Oct. 31, 2016), the court cited *George* and invoked Rules 8 and 20, plaintiff's claims were dismissed without prejudice, ordered case to be closed, and a blank section 1983 form complaint be sent to plaintiff. The court cited *Erickson*[3], *Twombly*, and *Iqbal*. The *pro se* plaintiff appealed. Then in *Sheridan v. Shekita*, 678 Fed.

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[2] Shares the same citation with *United States v. Hernandez-Carbajal. Allen*, 740 Fed. Appx. 801, 2018 U.S. App. LEXIS 30498 (4th Cir. 2018) shares same citation with *United States v. Shifflet*.

[3] "Erickson ... does not undermine the "requirement that a pleading contain 'more than labels and conclusions.'" *Giarratano v. Johnson*, 521 F.3d 298, 304 n.5 (4th Cir. 2008). (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 [...] (2007)". (*Sheridan*, 2016 U.S. Dist. LEXIS 191008 at 1.).

Appx. 145 (4th Cir. 2017), the Fourth Circuit affirmed in four sentences.[4]

Not only do the First and Fourth Circuits fail to invoke Rule 21 to supplement *George*, it appears that they circumvent it by dismissing complaints—in some cases multiple times—and order *pro se* litigants to cure the misjoinder. This scenario is similar to the events in the instant matter.

> The district court's minute entry read,
>
> this [c]ourt gave Plaintiff leave to amend her complaint to address any deficiencies, and specifically cautioned Plaintiff to research George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). 28.

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[4] *George* was dictum in other cases in the Fourth Circuit. *See Allen v. Ingram*, 740 Fed. Appx. 801, 2018 U.S. App. LEXIS 30498 (4th Cir. 2018); *Nixon v. Doe*, 2016 U.S. App. LEXIS 13403 (4th Cir. 2016); *Jehovah v. Clarke*, 2015 U.S. App. LEXIS 22252 (4th Cir. 2015); *Nunn v. N.C. Legis.*, 620 Fed. Appx. 173, 2015 U.S. App. LEXIS 18174 (4th Cir. 2015); *Assa'ad-Faltas v. Carter*, 610 Fed. Appx. 245 (4th Cir. 2015); *Negron-Bennett v. McCandless*, 2014 U.S. App. LEXIS 9805 (4th Cir. 2014); *Williams v. Bowen*, 553 Fed. Appx. 311 (4th Cir. 2014); *Davis v. Castelloe*, 463 Fed. Appx. 179, 2012 U.S. App. LEXIS 2033 (4th Cir. 2012); *Versatile v. Kelly*, 2012 U.S. App. LEXIS 20741 (4th Cir. 2012); *Muhammad v. Stapleton*, 2012 U.S. App. LEXIS 18002 (4th Cir. 2012); *Coles v. McNeely*, 2012 U.S. App. LEXIS2948 (4th Cir. 2012).

> ... [T]his [c]ourt has previously advised her, Plaintiff's pleading improperly joins unrelated claims against unrelated Defendants in violation of George v. Smith [...] ("multiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2.") (Doc. 79).

The citation, however, requires the contextualization found in the following sentence. (*George* at 607).

There are several differences between George and Rosas. One, Rosas has never been a prisoner. As such, the Prison Litigation Reform Act does not apply to her. Two, Rosas did not file her complaint *in forma pauperis*. Three, the district court never provided an analysis of Rosas' claims.

As for this third issue, *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 647 (6th Cir. 2006) is relevant. The *Moore* court expressed no opinion,

> on whether the district court was correct in its brief conclusion that plaintiffs' lawsuit constitutes 'several lawsuits ... roll[ed] into one.' On this

> record, we are unable to ascertain whether the conduct alleged by the plaintiff 'arises out of the same ... series of transactions or occurrences,' as required by Federal Rule of Civil Procedure 20(a) ... Furthermore, we cannot review the district court's weighing of the applicable factors in these determinations, because the record is devoid of the necessary analysis. Accordingly, we conclude that, based on the existing record, the district court also erred in its resolution of this issue. (*Moore* at 647).

In short, the absence of an analysis of claims and failure to resolve the issue(s) by the court warrants no opinion.

Moreover, the district court "never specified [Rosas] was not in compliance with [any] rule[ ] of procedure, and *George*, inarguably, [did] not qualify as a rule of procedure." (App. Br. at 26). The court circumvented Rule 21.

Rule 21 is basic. It provides that "[m]isjoinder of parties is not a ground for dismissing an action" and the following sentences provide remedial options for "the court". FED. R.

CIV. P. 21. The onus of the remedial options is not on the plaintiff.

Yet, the district court expected Rosas to cure the misjoinder and jeopardize the statutes of limitation to her claims. (App. Br. at 26-27; App. Pet. at 6). Before the motion for leave to file the fifth amended complaint, her claims were, in part, pursuant to Title VII of the Civil Rights Act of 1964. The 90-day limitation to file a complaint as per the EEOC had already expired on some of her claims. (*See Strandlund v. Hawley*, 532 F.3d 741 (8th Cir. 2008) (holding that "the dismissed arrestees' claims should have been severed, rather than dismissed, to avoid prejudicing ... the applicable statutes of limitations.").

The Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits uphold the textual interpretation of Rule 21. It also appears that to these circuits interpret "dismissal" to include both dismissals with and without prejudice. As for the latter, the Sixth Circuit explained it best.

In *Martinez v. Litteral*, 2018 U.S. App. LEXIS 30486 (6th Cir. 2018), the Sixth Circuit

explained,

> the Eastern District [of Kentucky] dismissed Martinez's complaint without prejudice pursuant to 28 U.S.C. §§ 1915(e) and 1915A, finding, without conducting an analysis of any particular claim, that the complaint failed to state a claim upon which relief may be granted and that Martinez otherwise improperly joined multiple unrelated claims in the same action. The court instructed Martinez that he could file a new complaint that addressed his complaint's deficiencies in a separate action. Rather than file a new complaint, Martinez appealed the district court's dismissal order. (at *1-2). (internal citation omitted).

As such, the Sixth Circuit held that "[t]he district court's misjoinder finding d[id] not provide a basis for upholding the district court's order. 'Misjoinder of parties is not a ground for dismissing an action. Fed. R. Civ. P. 21.". (*Martinez* at 5 n.1). Not only did the Sixth Circuit echo its ruling in *Moore*, it questioned the validity of an order dismissing a complaint without prejudice. (*See* App. Pet. at 5-6).

When the district court dismissed Rosas'

claims without prejudice (fourth amended complaint) and with prejudice (proposed fifth amended complaint), it also did not explain its legal reasoning. *Snider v. Melindez*, 199 F.3d 108 (2nd Cir. 1999) (stating in dicta, that a judgment "should clearly state the reasons for the dismissal, including whether the dismissal is because the claim is 'frivolous,' 'malicious,' or 'fails to state a claim'"). Instead, it chose to characterize Rosas as "defiant" and left her to conclude that her claims were dismissed with prejudice pursuant to Rule 41(b). (App. Br. at 26, 31; App. Pet. at 11). There was no clarity.

The dismissal of her claims pursuant to Rule 41(b) meant she could not consider filing another complaint pursuant to Section 1983, as proposed in the fifth amended complaint.

The Seventh Circuit's order affirming invoked Rule 21 to supplement *George*. Yet it opined,

> Judge Blakey warned Rosas, over andover, that she courted dismissal of her case if she did not respond to the joinder problem. Even pro se litigants

> must follow procedural rules. (App'x at 6).

To argue that the court warned Rosas "over and over" does not "provide a basis for upholding the district court's order. 'Misjoinder of parties is not a ground for dismissing an action.' Fed. R. Civ. P. 21.". (*Martinez* at 5 n.1).

B. The Dismissal Of Any Claim Within An Action Does Not Count As A Strike Under 28 U.S.C. § 1915(g)

In *George*, the court opined that,

> [w]hen a prisoner does file a multi-claim, multi-defendant suit, the district court should evaluate each claim for the purpose of § 1915(g). *Boriboune* observed: "when *any claim* in a complaint or appeal is 'frivolous, malicious, or fails to state a claim upon which relief may be granted', all plaintiffs incur strikes" (391 F.3d at 855; emphasis added). George thus incurs two strikes in this litigation—one for filing a complaint containing a frivolous claim, another for an appeal raising at least one frivolous objection to the district court's ruling. (at 607-608).

The *George* court—as did the *Boriboune* court—interpreted 'claim' and 'action' as though their textual meanings were synonymous.

The Fifth Circuit has interpreted § 1915(g) in much the same way. *Comeaux v. Cockrell*, 72 Fed. Appx. 54, 55 (5th Cir. 2003) (counting as a strike the dismissal of claims as malicious where remaining claims were later dismissed for prisoner's failure to comply with court orders); *Patton v. Jefferson Corr., Ctr.*, 136 F.3d 458, 463-64 (5th Cir. 1998) (counting as a strike the dismissal of a claim where the suit included an exhausted habeas claims that was dismissed without prejudice). A 'claim' and an 'action' are *not* synonymous.

For its treatment of the word 'action', *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005) is notable. The Ninth Circuit addressed whether 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act ("PLRA") required courts to dismiss an entire action because an action included one or more unexhausted claims. In relevant part, § 1997e(a) provides that "[n]o action shall be bought by a

prisoner ... until such administrative remedies as are available are exhausted." The *Lira* court's analysis focused on the use of the word 'action' within § 1997e(a), and concluded that the use of the word did not indicate that inclusion of an exhausted claim would result in dismissal of the entire complaint. (*Id.* at 1171-72.) The Ninth Circuit's decision explains that 'action' in the PLRA refers to the case as a whole. (*Id.* at 1173.)

George creates an inter-circuit split here too. The Second Circuit has maintained the textual interpretation of § 1915(g). *See Snider v. Melindez*, 199 F.3d 108 (2nd Cir. 1999) (describing the dismissal referred to in the three-strikes provision of § 1915(g) as "one that finally terminates the action because of a determination that it ultimately cannot succeed."); *Escalera v. Samaritan Vill.*, 938 F.3d 380 (2nd Cir. 2019) (concluding that case was "not properly considered a strike under the PLRA because the district court dismissed one of Escalera's claims under a non-§ 1915(g) ground.").

The Third and Fourth Circuits have also maintained the textual interpretation of § 1915(g).

(*See Byrd v. Shannon*, 715 F.3d 117 (3rd Cir. 2013) (holding a prisoner's "entire action or appeal" must be dismissed on a § 1915(g) ground to count as strike); *Tolbert v. Stevenson*, 635 F.3d 646 (4th Cir. 2011) (concluding that "§ 1915(g) requires that a prisoner's entire 'action or appeal' be dismissed on enumerated ground in order to count as a strike.").

The Eighth, Ninth, and D.C. Circuits havebeen no exception to the textual interpretation of § 1915(g). *See Powells v. Minnehaha County Sheriff Dep't*, 198 F.3d 711 (8th Cir. 1999) (concluding that strike against prisoner was improperly counted because suit stated a claim that was improperly dismissed.); *Thompson v. DEA*, 492 F.3d 428 (D.C. Cir. 2007) ("Section 1915(g) speaks of the dismissal of 'actions and appeals,' not 'claims.'"); *Washington v. L.A. Cty. Sheriff's Dep't*, 833 F.3d 1048 (9th Cir. 2016) ("mixed dismissals do not constitute strikes unless the entire action is dismissed for a qualifying reason under the PLRA").

The Second, Third, Fourth, Eighth, and Ninth Circuits uphold the text meaning of 'action'

of 28 U.S.C. § 1915(g) and *George* creates an inter-circuit split.

What also must be reckoned with is *State ex rel. Henderson v. Raemisch*, 2010 WI App 114, 329 Wis. 2d 109, 790 N.W.2d 242, 2010 Wisc. App. LEXIS 567 (4th Dist. 2010). The court revealed that,

> the State urges us [judges] to adopt the Seventh Circuit's approach to the counting of strikes [under the federal PLRA but that] the State also suggests we [judges] should interpret the three-strikes provision of Wisconsin's PLRA expansively to curb prisoner litigation [...] and limiting taxpayer subsidy of prisoner litigation. (*State ex rel. Henderson* at ****126-127). (internal citations omitted).

Not only does the state tell judges what to do, it appears that Wisconsin's PLRA violates the due process clause of the 5th and 14th Amendments.

While it cannot be concluded that this applies to the federal judges and the PLRA, an explanation for a high number of dismissals of complaints filed by prisoners is telling. (*See* n.1).

An explanation for them not appealing probably for fear of incurring strikes, is also telling. (*Id.*). The shortcomings of *George* were cited in all of them.

C. The Analyses Of George's Arguments By The Seventh Circuit

According to the *George* court, only three of George's arguments called for analysis.[5]

i. The Atlas

The first argument was plaintiff's allegations that his first amendment rights were violated when he was denied delivery of an *atlas*. The court, however, questioned the true identity of the atlas and held that,

> [p]laintiffs need not plead facts. *See Erickson v. Pardus*, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), but they must give enough detail to illuminate the nature of the claim and allow defendants to respond. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (*Id.*),

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[5] On 07/06/2020, George's complaints and appellate docket were not on PACER.

which apparently George had not done.

In actuality, this Court held that,

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 [...] (2007)". (*Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

Simply, the citations are anything but similar.

This Court also held that,

> when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.* Supra, at 555-556 [...] (2007)". (*Id.*).

The *George* court did not accept that the atlas was truly as the plaintiff had labeled it, an atlas. That an atlas can be "worrisome" borders on the ridiculous, especially when atlases were already available to prisoners in the library and could be used in their cells. (*George* at 608).

The court's argument was misplaced.

ii. The Newsletter

The second argument was plaintiff's allegations that his first amendment rights were violated when he was denied delivery of a newsletter that encouraged prisoners to raise money from each other. By the court's own admission,

> George says that this exclusion violates the first amendment, but he does not cite (and we could not find) any case holding that prisons must allow the entry of literature that encourages prisoners to raise money in violation of prisons' internal controls on the exchange of funds. (*George* at 609).

The court addressed this novelty by claiming that this Court said, "prisons' legitimate concerns about security and administration deserve respect, even when the subject is the printed word. See, e.g. *Beard v. Banks*, 548 U.S. 521, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006)." (*Id.*). Exactly where this Court made such statement or alluded to such statement in *Beard* is not immediately evident.

What this Court did elucidate was that,

> [i]t is indisputable that this prohibition on the possession of newspapers and photographs infringes upon respondent's First Amendment rights. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the rights to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought ...". (*Id.* at 543). (internal citations omitted).

It would appear that newsletters fall within "the spectrum of knowledge"—even if George would be prevented later from actually fund-raising.

What must be stressed about *Beard* is that this Court considered whether a Pennsylvania prison policy, that denied newspapers, magazines, and photographs to a group of specially dangerous and recalcitrant inmates, violated the First Amendment. George was incarcerated in the State of Wisconsin and if he had library privileges, it can be presumed that he was neither "dangerous" nor

"recalcitrant". The court's argument was misplaced here again.

George also maintained that the prison prevented him from speaking to the public-at-large about placing advertisements in newspapers. (*George* at 609). The court explained,

> [n]either the complaint nor any of George's other filings tells us whether the advertisements would have contained political commentary, lonely-heart announcements (another potential source of scams), or offers to acquire contraband. To repeat our point about the "atlas": a plaintiff who offers nothing but generalities by the time a case is in the court of appeals cannot expect to prevail. (*Id.*).

The analysis of *Erickson* for the atlas is applicable here as well. The court's argument was misplaced again.

iii. Absolute v. Qualified Immunity

The third argument was George's claims against the defendants, members of the discipline committee, who handled his grievances concerning the events covered by the complaint. The court held

that defendants were not entitled to absolute immunity but eligible for qualified immunity and cited *Cleavinger v. Saxner*, 474 U.S. 193 (1985). (*George* at 609). The court then referenced George's alleged argument to hold that "[r]uling against a prisoner on an administrative complaint does not cause or contribute to the violation." (*Id.)*. The analysis, however, fell short.

This Court explained that members of a discipline committee do not qualify for absolute immunity because they "are not professional hearing officers, as are [ ] administrative law judges" or "parole board members" (*Cleavinger* at 203-204). Instead, members of the discipline committee are "prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties" and "employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision." (*Id.* at 204). As such, they are eligible for qualified immunity.

The members of the discipline committee, so said this Court,

> work with the [ ] fellow employee who

> lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They *thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee.* (*Id.*). (emphasis added).

Undeniably, they have *motive* to rule against a prisoner and contribute to the violation. However, it seems that administrators and wardens also have motive.

In *Hoban v. Godinez*, 502 Fed. Appx. 574 (7th Cir. 2012), Hoban argued that the district court "did not address—that the correctional officers retaliated against [him] for suing jail officials." (at 578). The court found alleged retaliation and deliberate-indifference claims against the correctional officers, and against Anderson, the administrator who denied his request for protective custody despite knowing the risk of attack by gang members.

As to the rest of the defendants, the court opined that,

> Section 1983 limits liability to public employees "for their own misdeeds, and not for anyone else's". Hoban faults the warden and the Director of IDOC for not overruling Anderson. But top-level administrators are entitled to relegate to others like Anderson the primary responsibility for specific prison functions without becoming vicariously liable for the failing of their subordinates. *Id.* Likewise, those who review administrative decisions of others, like the prison grievance officer and the members of the Review board whom Hoban has also sued, are not liable either. [...] *George v. Smith* [...] (*Hoban* at 578-579). (internal citations omitted.).

Three issues must be discussed here. First, if Anderson was eligible for qualified immunity, by default so was Randy Pfister, the warden who is responsible for reviewing the decision of his direct administrative subordinate. A warden is the "captain of the *entire* ship" and "passing the buck" to avoid liability, is unacceptable. Hoban went from having no meritorious claims at the prison level to having some meritorious claims at the appellate

level, which is telling.

Second, by waiving liability against the "prison grievance officer" and the "members of the Review board", the *Hoban* court granted them absolute immunity, contrary to this Court's ruling in *Cleavinger*.

Third, the *Hoban* court contradicts its own dicta. Although "an individual must be personally responsible for a constitutional deprivation in order to be liable, personal responsibility is not limited to those who participate in the offending act..." (*Childress v. Walker*, 787 F.3d 433, 439-440 (7th Cir. 2015)). "Liability extends to those who, having a duty under the Constitution to the plaintiff, act[ ], or fail[ ] to act with a deliberate or reckless disregard of plaintiff's constitutional rights." (*Id.* at 440). (internal quotation omitted). "Liability can also attach if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." *Id.* (internal quotation omitted).

In *Gevas v. Mitchell*, 492 Fed. Appx. 654 (7th Cir. 2012), the court held that Gevas "allege[d] no

personal involvement by the warden outside of the grievance process" for untreated dental pain, and claim had been properly dismissed for failing to state a claim against the warden. (*Gevas* at 660, 656). "An inmate's correspondence to a prison administrator may ... establish a basis for personal liability under § 1983 where that correspondence provides sufficient knowledge of a constitutional deprivation." *Arce v. Barnes*, 662 Fed. Appx. 455, 459 (7th Cir. 2016). Personal involvement during the grievance process should have been enough to place the warden on notice of constitutional violations.

The judgment of the district court dismissing defendants Dr. William Selmer and Dr. Jacqueline Mitchell was vacated and remanded against them. The court cited *George* to affirm the dismissal of all other defendants.

Dr. Jacqueline Mitchell was *again* a defendant in *Smego v. Mitchell*, 723 F.3d 752 (7th Cir. 2013) for the same allegations of untreated dental pain, this time at a different location. The court vacated and remanded against Dr. Mitchell,

Ms. Lawshea and Dr. Lochard.

George was cited by the Tenth Circuit in *Arocho v. Nafziger*, 367 Fed. Appx. 942 (10th Cir. 2010). Arocho alleged that Warden Wiley wrongfully denied a grievance he had filed regarding his Hepatitis C treatment. The court ruled that the warden was properly dismissed because the claim was, similar to *Hoban*, not actionable. The court explained that,

> [the Tenth Circuit] has repeatedly held, albeit in unpublished decisions, "that 'the denial of ... grievances alone is insufficient to establish personal participation in the alleged constitutional violations.'" [...] accord *George v. Smith*". (*Arocho* at 956).

Unlike *Hoban*, however, the *Arocho* court further explained,

> [w]e do not mean to rule out the possibility where the office denying a grievance has an independent responsibility for the wrong in question and the grievance provides the necessary notice of the wrong or the effective means to correct it. (*Id.*).

That this possibility was not ruled out is key and must be contended. The court also opined, "the complaint fail[ed] to allege grounds on which Warden Wiley could be held responsible for the medical decisions involved here." (*Id.*). As such, Arocho had failed to allege sufficient facts. By drawing on the theory of "supervisory liability", as discussed by this Court in *Iqbal*, it held Arocho to heightened pleading standards—similar to his claims against defendant Nafziger. (*Arocho* at 954).

The court of appeals "affirmed the dismissal with prejudice of the claims against defendant Wiley", reversed the dismissal of the claims against defendant Lappin, and directed that on remand Arocho be provided the opportunity to amend his pleadings to state, "if possible", "a legally sufficient claim against defendant Nafziger." (*Id.* at 957).

Now to the heinous acts of *Whitten v. Clarke*, 2017 U.S. Dist. LEXIS 146224 (W.D. Va., Sept. 11, 2017). Whitten engaged in a physical altercation with a weapon with his cellmate Brown. (*Whitten* at *2). According to Whitten, Officer Lawson stood at the door and maced them through the food tray

slot. Then he alleged he called for assistance and Officers Cooke and Gunter arrived and the cell door was opened. He further alleged that someone separated them and that he was on his stomach on the ground when Officer Gunter released his K-9 on him. All three officers, he alleged, did nothing as the K-9 mauled him. Whitten was taken to the emergency room where he received between 58-90 sutures.

Whitten alleged that Warden Fleming and Major Anderson arrived on scene. (*Whitten* at *3). He argued that they, along with K.M. Fleming, an institutional investigator, Ravizee, the institutional ombudsman, and Elam, a regional ombudsman, failed to properly investigate and/or discipline Gunter for the "illegal mauling". (*Id.* at *4).

As for VDOC Director Clarke, Whitten alleged he "became aware of the incident after 'a serious incident report' (SIR) was filed" and of which he "[wa]s responsible for reviewing". (*Id.*). He also claimed that Clarke "failed to 'acknowledge' security video footage of the incident" and in doing

so "approve[d] such illegal practices". (*Id.*).[6] Citing *George*, the court opined that under § 1983, "inmates do not have a constitutionally protected right to access the grievance procedure, *see, e.g.*, *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994)." (*Id.* at *12-13).

Three issues must be discussed. First, just as with *Arocho*, denying prisoners access to the grievance process violates PLRA (42 U.S.C. § 1997e(a)). (*See Porter v. Nussle*, 534 U.S. 516, 532 (2002) (holding that the phrase "prison conditions" encompasses "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.")). Second, by deliberately withholding evidence and negating discovery requests not only point to conduct of a person(s) acting under color of law, but also to collusion between administration and subordinates. As such, the district court was mistaken.

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[6] Whitten filed several motions to compel discovery; none were honored. (*Whitten* at *15).

The district court then elaborated that in order to set forth a claim for supervisory liability under § 1983, a plaintiff must show the *Shaw* elements. (W*hitten* at *14 n.4). Whitten's claims for supervisory liability rested on Bert, a German Shepherd trained to attack on command by Gunter, his handler.

It must be underscored that the record does not indicate that Brown received any sutures from Bert's mauling. This fact points to the truthfulness of Whitten's allegations that Gunter released Bert on him when Whitten and Brown had already been separated. By receiving between 58-90 sutures, it can be concluded that Bert was on Whitten for a while.

The district court granted defendants' motion for summary judgment in part as to Whitten's claims against defendants Clarke, Anderson, Fleming, Ravizee, and Elam. It was denied as to Whitten's claims against defendants Gunter, Cooke, and Lawson. The case proceeded to trial by jury.

Judgment was entered in favor of defendants

and Whitten appealed. The Fourth Circuit held that Gunter "released his dog on Whitten in a good faith effort to restore discipline rather than maliciously and sadistically to cause harm." (*Whitten v. Gunter*, 757 Fed. Appx. 234 (4th Cir. 2018)). The court affirmed.

In *Jones v. Western Tidwater [sic] Reg'l Jail*, 2016 U.S. Dist. LEXIS 85839 (E.D. Va., June 30, 2016), Jones, a Black Rastafarian, arrived at Western Tidewater Regional Jail ("WTRJ") on March 15, 2015. (*Jones* at *9). At that time, he informed medical staff that he was on "high blood pressure and heart" medication, which they began administering to him. (*Id.*).

After not feeling well on March 22nd, Jones was evaluated by medical staff and his blood pressure was "dangerously low".[7] (*Id.*). Dr. Leroy Graham ordered that Jones' "medication [be] put on hold until his blood pressure resumed to a normal range of 140/90 and placed Plaintiff on a vegetarian diet." (*Id.*). Once his blood pressure reached 140/90,

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[7] The record is silent whether Jones received medication for his dangerously low blood pressure.

HCTZ would be continued. (*Id.*).

A month later, Jones signed an inmate Self-Medication Contract. (*Id.*).

On July 16, 2015, Jones complained to medical staff that he was having chest pains and trouble breathing. (*Jones* at *10). He was taken to the emergency room at Sentara OBICI Hospital by ambulance. (*Id.*)

On July 31st, Jones submitted a grievance in which he complained that medical staff at WTRJ had "deprived him of [the] medications he had been taking prior to his arrival at the jail." (*Jones* at *11). Lorman Butler, Health Services Administrator at WTRJ, responded to his grievance by stating, in part,

> Your blood pressure was ***65/39 - 88/65*** ... you [were] on self medication program from 4/21/15 until 7/24/15 with all of your medications. (*Id.*).

This statement was false as will be discussed below.

In regards to Butler, the district court opined,

> the record reflects that Butler's only involvement was to answer Plaintiff's grievances concerning his medications. However, imply "[r]uling against a prisoner on an administrative complaint does not cause or contribute to the [constitutional] violation." *George v. Smith* [...]". Moreover, Butler was entitled to rely on Dr. Graham's opinion as to the proper course of treatment for Plaintiff. (*Jones* at *15-16) (internal citations and quotation omitted).

Indeed Butler was entitled to rely on Graham's opinion, an opinion that specifically required "the proper course of treatment" to be the monitoring of Jones' blood pressure. According to medical records filed by WTRJ at the district court, Jones' blood pressure was checked *once* from March 23, 2015 to April 20, 2015 (Doc. 60-1 at 26). As the Health Services Administrator at WTRJ, Butler was in charge of health services.

It is unknown how the district court reconciled the fact that on May 08, 2015, Jones' blood pressure was "144/90". (Doc. 60-1 at 27). Or the fact that on June 24, 2015, Butler signed-off on

Jones' "Medical Services Request" which documented that on June 22, 2015, Jones' blood pressure was "153/97" (Doc. 60-1 at 47). His blood blood pressure was advancing towards dangerously high levels. All signs pointed to Butler's deliberate indifference towards Jones.

As for Graham, the district court opined that,

> Plaintiff simply [had] provided no evidence that Dr. Graham subjectively recognized that Plaintiff faced a substantial risk of harm from discontinuing all medications except HCTZ, much less sufficient evidence to create a genuine issue of material facts on this issue. (*Jones* at *20).

Two issues must be discussed here. The first issue is that the district court held *pro se* Jones to the heightened pleading standards of *Twombly* and *Iqbal*. (Doc. 64 at 15; Doc. 13-2 at 21).

The second issue is that Graham discontinued all medications *including HCTZ* on March 22, 2015. (*Jones* at *9). The record indicates that "warning labels" were placed on the

Medication Administration Records that read, "All BP MEDS on HOLD per DR. Graham until BP reaches 140/90". (Doc. 60-1 at 38-40). (caps in originals).

It was not until April 21, 2015, that Dr. Graham prescribed HCTZ 12.5MG. (Doc. 60-1 at 42, 46). The record indicates that Jones also received SIMVASTATIN 20MG[8] and another dose of HCTZ (25MG). (*Id.* at 44-45).

On July 16, 2015, Jones was taken to the emergency room. Nurse Blonshine's "Medical Incident Report" noted that Jones was "standing at door saying ***'[I] can not breathe'*** ... [with] heavy perspiration ... unable to sit ... BP 176/78 ... [and] [a]udible fluid noted in lungs." (Doc. 60-1 at 49). (emphases added). Nurses Johnson and Coles reiterated the facts. (*Id.* at 50-51).

At the hospital, Jones was diagnosed with cardiomyopathy, ischemic, systolic congestive heart failure, NYHA class 2 (HCC0, and CHF (congestive heat failure) (HCC). (Doc. 60-1 at 55). He was discharged on July 20, 2015. (*Id.* at 53). "Pursuant

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[8] Jones alleged he did not suffer from high cholesterol.

to Dr. Graham's medical order, the WTRJ's medical staff began administering Plaintiff's heart and high blood pressure medication to him daily, as prescribed on July 24, 2015." (*Jones* at *10-11). (internal brackets omitted). Actually, medical records indicate that it was not until "July 28, 2015" when Graham issued the prescriptions. (Doc. 60-1 at 65). Therefore, Jones received all his medications from July 16th to July 20th—at the hospital—and then they were stopped for eight days again until they all resumed on July 28th, almost four (4) months after arriving at WTRJ. This countered Butler's response to Jones' grievance.

Graham prescribed *exactly* what the emergency room doctors prescribed Jones. (Doc. 60-1 at 53-54). This fact bolsters Jones' claims of "deliberate indifference". The district court opined that,

> [t]he mere fact that the doctor did not follow the exact prescription that a previous doctor found appropriate does not demonstrate deliberate indifference. The Court cannot second-

> guess the jail doctor's medical judgment that Plaintiff's medication should be changed. Moreover, the fact that staff at Sentara Obici Hospital prescribed medications that Plaintiff had previously taken before his arrival does not reflect deliberate indifference by Dr. Graham. (*Jones* at *19-20). (internal citations and brackets omitted).

The court's argument was gravely mistaken.

As documented by doctors at Senatra Obici Hospital, Jones had cardiologists while incarcerated in Colorado and Pennsylvania. (Doc. 60-1 at 54). *Two sets of doctors* who presumably conducted extensive tests in order to prescribe or continue Jones on all of his medications. *Then the doctors at Senatra* ran procedures, diagnostic studies, and consulted physicians and agreed to prescribe Jones all of his medications again. (Doc. 60-1 at 53-55). There is nothing in the record that indicates that Graham sent Jones to a cardiologist and/or for extensive testing. Graham simply took a BLACK, DREAD-WEARING MAN off his life-saving medication.

Graham stated that,

> [t]here was a significant change in Plaintiff's medical condition after Plaintiff signed his Inmate Self-Medication Contract, and that as a result of such change and Plaintiff's failure to take his medications as he contracted to do. (*Jones* at *20).

All of Jones' medications were placed on hold on March 22, 2015. At the district court, Jones adamantly held defendants were using the Self-Medication Contract against him and asserted that he "[had] been on self-medication for over 5 years...in the Bureau of Prisons...way before [he] entered the Western Tidewater Region[al] Jail." (Doc. 66 at 5-6). There was validity to his statement.

According to medical records, medical staff maintained a "Self Medication Program: Medication Receipt" log. (Doc. 60-1 at 45). There were a total of five (5) entries: 4-21-15 for HCTZ 12.5 mg; 6-04-15 for HCTZ 12.5 mg; 6-09-15 HCTZ 25 mg; 6-09-15 SIMVASTATIN; and 7-10-15 HCTZ 25 mg. (*Id.*). A nurse and Jones signed each time. It

is unclear from the record how many pills Jones was administered each time.

Graham and Butler's "deliberate indifference to [Jones'] serious medical need" was disturbingly glaring. (*Jones*, at *13). Yet, the court granted their motion for summary judgment. (Jones at *27).

> In considering a motion for summary judgment under Rule 56, a court must view the record as a whole and draw all reasonable inferences in the light most favorable to the nonmoving party. *Whitten v. Clarke*, 2017 U.S. Dist. LEXIS 146224 at *8 (W.D. Va., Sept. 11, 2017).

The district court did not view the record as a whole much less draw all reasonable inferences in the light most favorable to Jones.

Jones appealed and the Fourth Circuit affirmed in four sentences. (*Jones v. Butler*, 671 Fed. Appx. 60 (4th Cir. 2016)).

Perhaps this Court stands to build upon *Cleavinger v. Saxner*, 474 U.S. 193, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985) as it relates to absolute and qualified immunity under § 1983.

As it relates to the instant matter, the panel affirmed pursuant to Rule 41(b) (App'x at 6). The Third Circuit explained Rule 41(b) best in *Mincy v. Klem*, 303 Fed. Appx. 106 (3rd Cir. 2008). The court opined,

> Dismissals under Rule 41(b) are "only appropriate in limited circumstances" [...] because the are "drastic" and "extreme measures" that should only be reserved for cases where there has been "'flagrant bad faith' on the [...] part of the plaintiffs." *Poulis*, 747 F.2d at 867-68 (quoting *Nat'l Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). (*Mincy* at **4-5).

Again, the district court provided no analysis of Rosas' claims. As such, there can be no flagrant bad faith on her part.

Moreover, Rosas was never sanctioned. (App. Doc. at 31). (*See Tweed v. Florida*, 151 Fed. Appx. 856 (11th Cir. 2005) (finding that although plaintiff was warned by the court, the court never "discussed a lesser sanction than dismissal with prejudice.").

The panel also did not address all of Rosas' arguments: (1) the inaccurate transcript, (2) Gordon Waldron practicing law at the Pro Se Help Desk without a license, and (3) 28 U.S.C. § 1654. (App. Br. at 10-11, 16, 29-31; App. Pet. at 14). The district court's dismissal was an unsigned minute entry. (*Id.* at 11). The judgment was also unsigned. (Doc. 101). Still to be contended was how—during Gov. Pritzker's COVID-19 EXECUTIVE ORDER NO. 8 on March 21, 2020—Rosas was prevented from filing a reply brief by the "[c]ourt". (*See* App'x at 13-19).

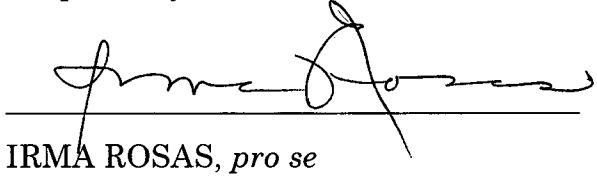
It appears that what Rosas was doing at the district court was not illegal. The court abused its discretion and acted prejudicial towards her. Then the Seventh Circuit affirmed that abuse and prejudice. *George* was used to intentionally violate her rights guaranteed by the U.S. Constitution, a fact that continues to happen to other *pro se* litigants.

CONCLUSION

For the foregoing reasons, Rosas respectfully requests that the Petition for Writ of Certiorari be granted.

Dated: August 24, 2020

Respectfully submitted,



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