[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 18-13800; 18-14984
Non-Argument Calendar

D.C. Docket No. 5:18-cv-00171-MTT-CHW

WASEEM DAKER,

Plaintiff-Appellant.

versus

WARDEN,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Georgia

(February 14, 2020)

Before WILSON, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

APPENDIX A

Waseem Daker, a Georgia prisoner proceeding *pro se*, appeals the district court's dismissal without prejudice of his petition for writ of habeas corpus, 28 U.S.C. § 2254. In the petition, Daker raised claims concerning his placement in disciplinary segregation. The district court construed the petition as a 42 U.S.C. § 1983 complaint and dismissed it pursuant to 28 U.S.C. § 1915(g). On appeal, Daker argues that the district court erred by concluding that his claims were not cognizable under § 2254 and did not demonstrate that he was in imminent danger of serious physical injury, as required by § 1915(g). He also argues that the district court abused its discretion in dismissing his action without giving him notice or an opportunity to amend his complaint.

I.

We review the denial of a § 2254 petition de novo. *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005). Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Under this rule, "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'" *Atl. Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007).

State prisoners have two main avenues of relief on complaints related to their imprisonment under federal law: habeas corpus petitions under § 2254 and complaints under § 1983. *Muhammad v. Close*, 540 U.S. 749, 750 (2004). We have stated that "[t]hese avenues are mutually exclusive: if a claim can be raised in a federal habeas petition, that same claim cannot be raised in a separate § 1983 civil rights action." *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006).

Claims challenging the fact or duration of a sentence fall within the "core" of habeas corpus, while claims challenging the conditions of confinement "fall outside of that core and may be brought pursuant to § 1983." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). Stated another way, if a claim "would not necessarily spell speedier release, that claim does not lie at the core of habeas corpus, and may be brought, if at all, under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011) (internal quotation marks omitted).

The Supreme Court previously speculated that a habeas corpus claim might be actionable where a prisoner is "put under additional and unconstitutional restraints during his lawful custody." *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). However, the Court has never followed that speculation. *Muhammad*, 540 U.S. at 751 n.1. Further, the Court has allowed a claim that a prisoner was denied procedural due process when being placed in disciplinary segregation to proceed under § 1983, although it did not address the cognizability of such claims in those

proceedings. *See Sandin v. Conner*, 515 U.S. 472, 477–87 (1995). Nevertheless, we have specifically held that such claims may proceed in a habeas petition, concluding that "release from administrative segregation . . . . falls into the category of fact or duration of . . . physical imprisonment." *Krist v. Rickets*, 504 F.2d 887, 887–88 (5th Cir. 1974) (internal quotation mark omitted).

Claims that a prison has violated the Eighth Amendment are cognizable under § 1983. *See Thomas v. Bryant*, 614 F.3d 1288, 1303–04 (11th Cir. 2010). Release from custody is generally not an available remedy for a violation of the Eighth Amendment. *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990). However, in *Sheley*, we remanded, in a habeas proceeding, for an evidentiary hearing on an Eighth Amendment claim that the length of an inmate's administrative segregation constituted cruel and unusual punishment. *Sheley v. Dugger*, 833 F.2d 1420, 1428–30 (11th Cir. 1987) (per curiam).

First Amendment claims are also cognizable under § 1983. *See, e.g.*, *Hakim v. Hicks*, 223 F.3d 1244, 1246 (11th Cir. 2000) (addressing a free-exercise claim); *Chapell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) (per curiam) (addressing an access-to-the-courts claim); *Beard v. Banks*, 548 U.S. 521, 527 (2006) (addressing a challenge to restrictions on incoming mail).

Here, the district court erred in concluding that Daker could not challenge his disciplinary segregation in a § 2254 proceeding. Although the Supreme Court

has suggested that such claims might not be cognizable in a habeas proceeding, it has not done so in an opinion that is "clearly on point," so as to overrule our precedent, which says that such claims are cognizable. However, Daker's First and Eighth Amendment claims were cognizable under § 1983 and, therefore, not cognizable under the mutually exclusive remedy of § 2254. Although we allowed an Eighth Amendment claim to proceed under § 2254 in *Sheley*, that inmate was challenging the duration of his segregation as unconstitutional, so that claim was within the "core" of habeas. In contrast, Daker claims only that he was denied adequate food and medical care and was exposed to unsanitary conditions. Accordingly, we vacate the district court's order to the extent that it concluded that Daker's procedural-due-process claim was not cognizable in a § 2254 proceeding, and we remand for further proceedings as to that claim.

II.

We review the denial of leave to proceed in forma pauperis (IFP) for abuse of discretion, but we review the interpretation of § 1915(g) de novo. *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283 (11th Cir. 2016). A district court abuses its discretion if it applies an improper legal standard, fails to follow proper procedures in making its determination, or makes clearly erroneous findings of fact. *Johnson v. Breeden*, 280 F.3d 1308, 1326 (11th Cir. 2002).

Where a prisoner has, on three or more previous occasions, brought an action or appeal that was dismissed as frivolous, malicious, or failing to state a claim, he is prohibited from bringing another civil action without paying the filing fee unless he is under imminent danger of serious bodily injury. 28 U.S.C. § 1915(g). A prisoner with three such "strikes" against him is only entitled to proceed without payment of court fees if he is in imminent danger of serious injury at the time that he files his suit. *Medberry v. Butler*, 185 F.3d 1189, 1192–93 (11th Cir. 1999). A prisoner's allegation of past imminent danger is insufficient to invoke the imminent-danger exception. *Id.* at 1193. When determining whether a plaintiff has met his burden of proving that he is in imminent danger of serious physical injury, his complaint is construed liberally, and his allegations are accepted as true. *Brown v. Johnson*, 387 F.3d 1344, 1349–50 (11th Cir. 2004). The issue is not whether each specific physical condition or symptom complained of might constitute serious injury, but "whether his complaint, as a whole, alleges imminent danger of serious physical injury." *Id.* at 1350.

Daker's allegations regarding his weight loss and the food provided to inmates in disciplinary segregation, the presence of "fecal projections," the adequacy of dental and medical care, and the denial of outdoor exercise do not establish that he was under imminent danger of serious injury at the time that he

filed his suit. Accordingly, the district court did not abuse its discretion in determining that Daker was not entitled to proceed IFP.

III.

When an inmate is barred from proceeding IFP under § 1915(g), the full filing fee must be paid at the time that the prisoner initiates his suit. *Vanderberg v. Donaldson*, 259 F.3d 1321, 1324 (11th Cir. 2001). Accordingly, when a district court denies leave to proceed IFP pursuant to § 1915(g), it must dismiss the complaint without prejudice, without giving the inmate an opportunity to arrange payment of the fee. *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) (per curiam).

"Due process does not always require notice and the opportunity to be heard before dismissal." *Vanderberg*, 259 F.3d at 1324. A dismissal without prejudice is usually not an abuse of discretion, as the petitioner can simply re-file his action. *See, e.g.*, *Dynes v. Army Air Force Exch. Serv.*, 720 F.2d 1495, 1499 (11th Cir. 1983) (per curiam) (finding no abuse of discretion where dismissal for failure to file a court-ordered brief was without prejudice). However, if an order has the effect of precluding a plaintiff from refiling his claim due to the running of the statute of limitations, then the dismissal is tantamount to a dismissal with prejudice. *Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. 1981).

When "a more carefully drafted complaint" might state a claim, the plaintiff must be given a chance to amend. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (per curiam). However, a district court need not allow an amendment where (1) "there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies" through prior amendments; (2) amending the complaint would prejudice the opposing party; or (3) "amendment would be futile." *Id.*

The district court did not abuse its discretion in dismissing Daker's pleading without giving him an opportunity to amend because district courts are required to dismiss a three-striker's suit once IFP is denied. In any event, amendment would have been futile, as even Daker's allegations on appeal are insufficient to demonstrate imminent danger of serious physical injury. Furthermore, the district court's dismissal was without prejudice. Although Daker asserts that the dismissal was effectively with prejudice, he did not elaborate on that assertion, and our review of the record has not revealed any reason why he would be prevented from bringing his claims in a new § 1983 proceeding.

Accordingly, we affirm the dismissal of Daker's properly construed § 1983 claims, and we vacate and remand in part as to Daker's procedural due-process claim relating to his segregation for further proceedings that are consistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WASEEM DAKER,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Case No. 5:18-cv-00171-MTT-CHW**
	:	
WARDEN GREGORY MCLAUGHLIN,	:	
	:	
Respondent.	:	

ORDER

Petitioner Waseem Daker, an inmate currently confined at Macon State Prison, has filed a pleading using the Court's standard form petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pet., ECF No. 1. In the body of his pleading, Petitioner states that he brings civil rights claims under 42 U.S.C. § 1983 and is entitled to proceed under 28 U.S.C. § 2241. Pet. 1, ECF No. 1-1. Petitioner seeks to challenge the conditions of his confinement and raises a Fourteenth Amendment due process claim, First Amendment free speech claims, First Amendment access to courts claims, First Amendment religious exercise claims, a claim arising under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and Eighth Amendment deliberate indifference to serious medical needs claims.

As discussed below, these claims are not cognizable in a habeas action, and to the extent that Petitioner's pleading can be construed as arising under § 1983, he is barred from proceeding *in forma pauperis* as he has accumulated three strikes for purposes of 1915(g).

APPENDIX B

Accordingly, the instant action is **DISMISSED WITHOUT PREJUDICE.**

I. Petitioner Cannot Proceed Under 28 U.S.C. § 2254 or § 2241

Although Petitioner primarily styles this case as a habeas action brought under § 2254 or § 2241, the substance of his filing challenges the conditions of his confinement. "Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983." *Hill v. McDonough*, 547 U.S. 573, 578 (2006). "These avenues are mutually exclusive: if a claim can be raised in a federal habeas petition, that same claim cannot be raised in a separate § 1983 civil rights action." *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 643 (2004)). "The line of demarcation between a § 1983 civil rights action and a § 2254 habeas claim is based on the effect of the claim on the inmate's conviction and/or sentence." *Id.* "Challenges to the validity of any confinement or to the particulars affecting its duration are the province of habeas corpus." *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). "Such claims fall within the 'core' of habeas . . . [b]y contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core and may be brought pursuant to § 1983 in the first instance." *Nelson,* 541 U.S. at 643 (citing *Muhammad*, 540 U.S. at 750 and *Preiser*, 411 U.S. at 498-99).

In this case, Petitioner seeks to challenge the conditions of confinement he experiences in Tier II administrative segregation at Macon State Prison and primarily seeks return to general population. Petitioner does not seek speedier or immediate release, does not challenge his sentence and conviction, and his claims for relief implicate neither. Therefore, the appropriate cause of action for Petitioner's claims is a civil rights complaint under § 1983.

In three separate locations on the Petition, Petitioner has handwritten "does not challenge [his] conviction or sentence but [his] segregation/solitary confinement, *Medberry v. Crosby*, 351 F.3d 1049, 1053 (11th Cir. 2003)." Pet. 1, 4-5, ECF No. 1. To the extent that Petitioner has cited *Medberry* for the proposition that he may challenge his placement in administrative segregation through a petition for writ of habeas corpus, his reliance is misplaced. In *Medberry*, the Eleventh Circuit held that "'it is proper for a district court to treat a petition for release from administrative segregation as a petition for a writ of habeas corpus' because '[s]uch release falls into the category of "fact or duration of. . . physical imprisonment' delineated in *Preiser v. Rodriguez*."'" *Medberry*, 351 F.3d at 1053 (ellipsis in original) (quoting *Krist v. Ricketts*, 504 F.2d 887, 887-88 (5th Cir. 1974)). *Medberry*, however, concerned a challenge to a Florida inmate's loss of gain time credits resulting from prison disciplinary proceedings. *Tedesco v. Sec'y for Dep't of Corr.*, 190 F. App'x 752, 755 (11th Cir. 2006) ("In *Medberry*, we held that a state prisoner may file a habeas corpus petition to challenge the loss of gain time as a result of state prison

disciplinary proceeding that allegedly violates his due process right under 28 U.S.C. § 2241."). Because gain time credits implicate the duration of an inmate's confinement, a due process claim based on a deprivation of gain time credits is "a proper subject for a federal habeas corpus proceeding." *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

Petitioner is not incarcerated in Florida; he is in the custody of the Georgia Department of Corrections. The Georgia Department of Corrections does not award gain time credits for good behavior, and Petitioner does not allege that he has lost gain time credits as a result of disciplinary proceedings. Therefore, Petitioner's civil rights claims do not affect the duration of his confinement. Instead, even if Petitioner prevailed on all of his claims and received all the relief demanded, "the duration of his sentence will not be shortened by one moment." *McKinnis v. Mosely*, 693 F.2d 1054, 1057 (11th Cir. 1982). Accordingly, Petitioner's claims do not fall within the core of habeas, and are properly brought in a Section 1983 action. *See id.* (determining that challenge to administrative segregation which did not implicate duration of confinement should have been reviewed under Section 1983)[1]; *Jaske v. Hanks*, 27 F. App'x 622, 623 (7th Cir. 2001) (affirming dismissal of habeas petition challenging sentence to disciplinary segregation because

[1]Petitioner argues that while he is confined in Tier II he is deprived of the ability to participate in programs and activities that would be considered by the parole board. Petitioner does not have a liberty interest in parole, or in participating in programs which the parole board may view positively. *See Beister v. Lanier*, 249 F. App'x 782, 783 (11th Cir. 2007); *Miller v. Nix*, 346 F. App'x 422 (11th Cir. 2009); *Kramer v. Donald*, 286 F. App'x 674 (11th Cir. 2008); *Moody v. Daggett*, 429 U.S. 78 (1976).

"disciplinary segregation affects the severity rather than the duration of custody"); *Davis v. U.S. Dep't of Justice*, 180 F. App'x 404, 405 (3d Cir. 2006) ("A sanction of disciplinary segregation [] does not implicate the fact or length of confinement.").

II. Three Strikes

Petitioner's claims are not cognizable in a habeas action and are properly raised in a civil rights complaint under § 1983. "When *a pro se* habeas corpus petition may be fairly read to state a claim under the Civil Rights Act, it should be so construed." *McDonald v. Bates*, 23 F. App'x 828, 828 (9th Cir. 2001); *Carson v. Johnson*, 112 F.3d 818, 820-21 (5th Cir. 1997) (affirming district court's treatment of purported habeas petition as a claim brought under § 1983); *United States v. Jordan*, 915 F.2d 622, 624-25 (11th Cir. 1990) ("Federal Courts have long recognized that they have an obligation to look behind the label of a motion filed by a pro se inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework."). Therefore, the Court will analyze Petitioner's claims under 42 U.S.C. § 1983. So construed, Petitioner is barred from proceeding *in forma pauperis* as he has accumulated three strikes under 1915(g), and he failed to pay the entire filing fee upon initiating this suit. Therefore, his Complaint must be dismissed.

Federal law prohibits a prisoner from bringing a civil action in federal court *in forma pauperis*

> if [he] has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that

> was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). This is known as the "three strikes provision." Under § 1915(g), a prisoner incurs a "strike" any time he has a federal lawsuit or appeal dismissed on the grounds that it is frivolous or malicious or fails to state a claim. *Medberry*, 185 F.3d at 1193. If a prisoner incurs three strikes, his ability to proceed *in forma pauperis* in federal court is greatly limited and leave may not be granted unless the prisoner shows an "imminent danger of serious physical injury." *Id.*

A review of court records on the Federal Judiciary's Public Access to Court Electronic Records ("PACER") database reveals that Petitioner has filed at least three federal lawsuits that have been dismissed as frivolous, malicious, or for failure to state a claim. *Daker v. Mokwa*, No. 2:14-cv-00395 (C.D. Cal. 2014) (dismissing case under 28 U.S.C. § 1915(e)(2)(B) and finding claims were frivolous and failed to state a claim upon which relief may be granted)[2]; *Daker v. Warren*, Case No. 13-11630 (11th Cir. Order dated Mar. 4, 2014) (three-judge panel dismissing appeal as frivolous); *Daker v. Warden*, Case No. 15-13148 (11th Cir. Order dated May 26, 2016) (three-judge panel dismissing appeal as frivolous); *Daker v. Commissioner*, Case No. 15-11266 (11th Cir. Order dated Oct. 7, 2016) (three-judge panel dismissing appeal as frivolous); *Daker v. Ferrero*, Case No. 15-

[2]"The district court did not err, however, in concluding that . . . *Daker v. Mokwa*, No. 2:14-cv-395 (C.D. Cal. filed Jan. 16, 2014), counted as a strike." *Daker v. Head*, 2018 WL 1684310, at *2 (11th Cir. 2018).

13176 (11th Cir. Order dated Nov. 3, 2016) (three-judge panel dismissing appeal as frivolous); *Daker v. Governor*, Case No. 15-13179 (11th Cir. Order dated Dec. 19, 2016) (three-judge panel dismissing appeal as frivolous). The Eleventh Circuit has also previously determined that "[w]hile confined, Daker has filed at least three appeals that [the Eleventh Circuit] dismissed as frivolous." *Daker v. Robinson*, Case No. 17-11940 (11th Cir. Order dated Oct. 4, 2017) ("[T]his Court's Clerk is directed to list Daker as a 'three-striker' under the Prison Litigation Reform Act in this Court for purposes of future matters.").

Because of this, Petitioner may not proceed *in forma pauperis* unless he can show that he qualifies for the "imminent danger" exception in § 1915(g). *Medberry*, 185 F.3d at 1193. The Court is therefore now required to review the facts alleged in the Petition to determine whether an imminent danger exists and warrants an exception to the three strikes rule. When reviewing a *pro se* complaint for this purpose, the district court must accept all factual allegations in the complaint as true and view all allegations of imminent danger in the movant's favor. *Brown v. Johnson*, 387 F.3d 1344, 1347 (11th Cir. 2004); *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

The imminent danger exception applies only in "genuine emergencies" when (1) "time is pressing," (2) the "threat or prison condition is real and proximate," and (3) the "potential consequence is serious physical injury." *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002). Thus, to satisfy this provision, a prisoner must allege specific facts that

describe "an ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury." *Sutton v. Dist. Attorney's Office*, 334 F. App'x 278, 279 (11th Cir. 2009) (quoting *Brown*, 387 F.3d at 1350). Vague, factually unsupported, and general allegations do not suffice, nor do allegations of past injuries. *See Martin v. Shelton,* 319 F.3d 1048, 1050 (8th Cir. 2003).

Petitioner does not allege that he is under an imminent danger of serious physical injury. The majority of his claims also do not implicate a risk of physical danger, much less one that is serious and imminent. Petitioner's claims regarding the processes which keep him confined in Tier II, restrictions on freedom of speech and access to books and newspapers, restrictions on his access to the law library and legal materials, restrictions on his ability to attend prayer service and religious holidays, and restrictions on his visitation and privileges do not arguably demonstrate an imminent danger of serious physical injury as they do not implicate a risk to Petitioner's health or safety. Petitioner's remaining claims concerning exposure to human waste, denial of adequate food, and deficiencies in his medical care arguably concern his health and safety. The Petition taken as a whole and construed in his favor, however, does not show that he is in an imminent danger of serious physical injury.

Petitioner's allegations concerning inadequate nutrition are that a lunchtime milk, a "Vitamin C Beverage," and late-night fruit are often missing from Petitioner's 2800 calorie diet. Pet. 15-17, ECF No. 1-1. Petitioner does not allege that missing 330 calories a week,

by his estimation, from his "2800 calorie diet and HS Snack" somehow results in an imminent danger to Petitioner. Rather, he alleges that he was underweight in the past. Moreover, Petitioner's allegations are generalized and primarily concern what occurs in the Georgia Department of Corrections and "Tier II/III" generally. The factual allegations concerning what has actually occurred to Petitioner, rather than what "often happens" in Georgia prisons, largely concerns past events at Georgia State Prison. *Id.* at 15.[3] Concerning Macon State Prison, where Petitioner is currently confined and was confined at the time he filed this action, Petitioner states that "At GDCP, GSP, and MSP, the Food Service department that prepares lockdown trays often does not send the Vitamin C Beverage to the lockdown units." *Id.* According to Plaintiff, the diet has "likely contributed" to six sinus infection he has suffered since being placed in Tier II.[4] Pet. 17, ECF No. 1-1.

Petitioner's allegations concerning inadequate medical care are equally general and broadly describe what "often" occurs at Tier II/III dorms throughout the Georgia prison system. *Id.* at 17-18. Concerning medical care Petitioner himself has received or failed to receive, Petitioner merely states that he had surgery on his right wrist in August 2017 and was not permitted to attend one follow-up appointment two days later. *Id.* at 17. Petitioner

[3]". . . maintain a custom in the GDC and at GSP." *Id.* "At GSP, the Food Service department that prepares . . . ." *Id.*

[4]According to Plaintiff, he was placed in the SMU while incarcerated at Georgia Diagnostic and Classification Prison beginning in October 2012. Pet. 2, ECF No. 1-1.

does not allege that he suffered an injury as a result. In the "denial of adequate dental care on Tier II/II" portion of his pleading, Petitioner also alleges that in December 2016, a dentist's note recognized that Petitioner complained that his teeth were sensitive to temperature, and she recommended Sensodyne to Petitioner. Pet. 18, ECF No. 1-1. There is absolutely no indication that absent Sensodyne, Petitioner is at risk of serious injury. Indeed, Petitioner does not even allege that his teeth hurt, except as reflected in the purported dentist records from 2016.

Finally, Petitioner alleges that he is exposed to feces because other inmates, who Petitioner refers to as projectors, throw their bodily fluids out of their cells. *Id.* at 18-20. Petitioner states that he often has to endure the stench of feces and the "concomitant health risks." *Id.* at 19. Petitioner, however, also alleges that the feces cleaned up orderlies, although it may take hours or overnight for them to do so.[5] *Id.* Petitioner does not allege that he himself has been projected on or is prevented from cleaning it up should a projector project onto Petitioner or into his cell. Indeed, it appears Petitioner alleges projectors primarily target each other and then the smell wafts over to Petitioner. See *id.* at 19. This does not demonstrate an imminent danger to his safety. Moreover, Petitioner has been alleging since at least January 2017 that other inmates confined in administrative segregation throw their feces in the dorm. *See Daker v. Dozier*, 2017 WL 3037420, at *4

[5]In this section of his Petition, he also alleges that "[o]ften the pill call nurses will not enter a dorm with a projection." *Id.* at 19. Petitioner does not allege that he specifically has missed a medication as a result.

(M.D. Ga. 2017). In that time, Petitioner has been confined in at least three separate prison facilities. Pet. 2, ECF No. 1-1. He does not allege that this has occurred at Macon State Prison in the one-month period since he was transferred from Georgia State Prison.

Taking the Petition as a whole, as the Court is required to do, Petitioner has failed to satisfy the imminent danger standard. Most of Petitioner's allegations are generalized and appear to primarily concern what occurs in general throughout the Georgia Department of Corrections. Courts have repeatedly held that such generalized allegations are insufficient to satisfy the imminent danger standard. See *Daker v. Dozier*, 2017 WL 3037420 (M.D. Ga. 2017); *Daker v. Dozier*, 2018 WL 582581 (S.D. Ga. 2018); *Daker v. Dozier,* 2017 WL 3037420 (M.D. Ga. 2017). Where Petitioner has presented specific examples of events personal to him, they largely concern past events and risks that occurred sometime in the past. A past threat of serious physical injury is insufficient to plead imminent danger. *O'Connor v. Suwannee Corr. Inst.*, 649 F. App'x 802, 804 (11th Cir. 2016). Finally, allegations of sensitive teeth and occasional sinus infections, of "often" missing a fruit or drink with a meal or snack, and of confinement in the same dorm with inmates that throw their feces are insufficient to show that Petitioner is in an imminent danger of serious physical injury. Accordingly, Petitioner does not qualify under the imminent danger exception.

III. Conclusion

As discussed above, Petitioner seeks to proceed in this action under 28 U.S.C. § 2241, 28 U.S.C. § 2254, and 42 U.S.C. § 1983. Petitioner, however, does not challenge his conviction or contest the duration of his confinement. Instead, Petitioner seeks to raise multiple civil rights claims based on the conditions of his confinement. Therefore, to the extent that Petitioner seeks to proceed under § 2241 or §2254, his claims are not cognizable. Petitioner cannot proceed under § 1983 either, as he has failed to pay the $400.00 filing fee[6] and has accumulated three strikes for purposes of 1915(g) in the event that he wishes to proceed *in forma pauperis*. Accordingly, this action is **DISMISSED WITHOUT PREJUDICE.**

SO ORDERED, this 18th day of July, 2018.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

[6]Petitioner cannot circumvent the provisions of 1915(g) by styling his Section 1983 civil rights complaint as an action brought under § 2254. This includes the filing fee applicable to civil rights cases. "He must pay the filing fee at the time he initiates suit." *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WASEEM DAKER,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Case No. 5:18-cv-00171-MTT-CHW**
	:	
WARDEN GREGORY MCLAUGHLIN,	:	
	:	
Respondent.	:	

ORDER

Petitioner Waseem Daker, an inmate confined at Macon State Prison, filed a *pro se* action using the Court's standard habeas form for use by prisoners proceeding under 28 U.S.C. § 2254. In the body of his pleading, Petitioner raises multiple claims challenging the conditions of his confinement attendant to his placement in administrative segregation and seeks to proceed under 28 U.S.C. § 2241, 28 U.S.C. § 2254, and 42 U.S.C. § 1983. After reviewing his claims, the Court found that they are not cognizable in an application for writ of habeas corpus and are properly brought in a civil rights complaint under 42 U.S.C. § 1983. Petitioner, however, is barred from proceeding *in forma pauperis* under 28 U.S.C. 1915(g) and failed to pay the Court's filing fee. Consequently, on July 18, 2018, the Court dismissed this action without prejudice. Order of Dismissal, ECF No. 3. Thereafter, Petitioner filed a motion for access to case authorities (ECF No. 5), a motion to vacate (ECF No. 6), and a motion for leave to appeal *in forma pauperis* (ECF No. 11). Petitioner's motions are **DENIED** as follows.

APPENDIX C

I. Motion to Vacate

In Petitioner's motion to vacate brought under Rule 59(e), he argues that (1) the Court erred by finding that his claims for relief are not cognizable in a habeas action, (2) the Court erred by failing to provide Petitioner notice prior to dismissing this action, and (3) Petitioner is entitled to a certificate of appealability. Under the local rules, motions for reconsideration "shall not be filed as a matter of routine practice." M.D. Ga. L.R. 7.6. "The only grounds for granting [a Rule 59] motion are newly discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (alteration in original).

Petitioner primarily argues that his claims for relief are cognizable in a habeas action, and the Court erred by determining his claims were properly brought under 42 U.S.C. § 1983. The Court construed this same argument from the many references to *Medberry v. Crosby*, 351 F.3d 1049 (11th Cir. 2003) in the Petition and rejected it. Motions for reconsideration "cannot be used to 'relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.'" *Wilchombe v. Teevee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (citing *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)). Accordingly, Petitioner's attempt to bolster the arguments the Court construed from his Petition, rehash arguments, or refine or improve his reasoning is not a valid basis for reconsideration.

Furthermore, Petitioner's argument is without merit. As the Court discussed in the order of dismissal, the United States Supreme Court has distinguished challenges to prison

disciplinary proceedings affecting the conditions of a prisoner's confinement, which are properly brought under § 1983, from challenges to prison proceedings which may impact the duration of a prisoner's confinement and are thus properly brought through a petition for writ of habeas corpus. *Wolff v. McDonnell,* 418 U.S. 539, 554 (1974). In doing so, the Supreme "Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005); *see also Edwards v. Balisok*, 520 U.S. 641 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994). "[C]onstitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside [the core of habeas] and may be brought pursuant to § 1983 in the first instance." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (citing *Muhammad v. Close*, 540 U.S. 749, 750 (2004) and *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)).[1]

Of course, some cases implicate both § 1983 relief and the core of habeas. Such cases concern claims for damages which also affect the duration of a prisoner's confinement or challenge the validity of a prisoner's conviction. When a prisoner brings

[1]In *Muhammad*, the Supreme Court observed that it had "never followed the speculation in *Preiser* . . . that such a prisoner subject to 'additional and unconstitutional restraints might have a habeas claim independent of § 1983.'" 540 U.S. at 751 n.1

a claim that falls within the literal terms of § 1983, "§ 1983 must yield to the more specific federal habeas statute with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *Nelson*, 541 U.S. at 643 (citing *Preiser*, 411 U.S. at 489). This is not one of those cases. Rather, it is a prisoner's challenge to administrative proceedings that cannot "be construed as seeking a judgment at odds with his conviction or with the State's calculation of time to be served in accordance with the underlying sentence," and it has raised "no claim on which habeas relief could [be] granted on any recognized theory." *Muhammad*, 540 U.S. at 754. "[H]abeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement" or the duration of confinement. *Dotson,* 544 U.S. at 81; *see also Pittman v. Tucker*, 213 F. App'x 867, 869 (11th Cir. 2007) (per curiam) (discussing *Muhammad* and holding that claims which do not contest "the validity of [a plaintiff's] underlying conviction" and do not "affect the time [a plaintiff] would serve related to his conviction," are not *Heck*-barred).

Petitioner attempts to distinguish *Muhammad, Hill, Nelson*, and other cases relied on by this Court in the order of dismissal based on the factual contexts in which they arose. Petitioner also relies on *Sheley v. Dugger*, 833 F.2d 1420 (11th Cir. 1987) and several cases from the former Fifth Circuit that considered conditions of confinement claims in the context of an appeal from denial of a habeas petition. The Eleventh Circuit has since determined that habeas relief is not the appropriate vehicle for raising claims which

challenge the conditions of a prisoner's confinement. *Vaz v. Skinner*, 634 F. App'x 778, 781 (11th Cir. 2015) (per curiam). Moreover, since the cases relied on by Petitioner were decided, the Supreme Court has "declared [] in no uncertain terms, that when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at the 'core of habeas corpus,' and may be brought, if at all, under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011).

In this Circuit, a lawsuit which does not contest the underlying conviction or the "State's calculation of time to be served in accordance with the underlying sentence" does not "implicate a claim that [is] cognizable in a habeas action."[2] *Roberts v. Wilson*, 259 F. App'x 226, 228 (11th Cir. 2007) (per curiam). Section 1983 and habeas relief are "mutually exclusive: if a claim can be raised in a federal habeas petition, that same claim cannot be raised in a separate § 1983 civil rights actions." *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) (citing *Nelson,* 541 U.S. at 643); *Thomas v. McDonough*, 228 F. App'x 931, 932 (11th Cir. 2007) ("The Court in *Wilkinson* held that claims like [Petitioner's] are cognizable under § 1983. Because § 1983 and § 2254 are mutually exclusive, [Petitioner's] claims cannot be brought under § 2254."); *Miller v. Nix*, 346 F.

[2]Some Circuit Courts of Appeal have suggested that claims of a type similar to Petitioner's may be brought in a habeas action. *See e.g. Poree v. Collins*, 866 F.3d 235 (5th Cir. 2017); *Thompson v. Choinski*, 525 F.3d 205 (2d Cir. 2008); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242 n.5 (3d Cir. 2005); *Aamer v. Obama*, 742 F.3d 1023 (D.C.C. 2014). Petitioner's arguments reflect the reasoning in some of these cases. He argues recent Supreme Court cases such as *Heck* and *Muhammad* delineate the limits of § 1983 but not the limits of habeas. Like the Eleventh Circuit, the Ninth and Seventh Circuits have determined or suggested that § 1983 and habeas are mutually exclusive. *See Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016); *Richmond v. Scibana*, 387 F.3d 602, 605 (7th Cir. 2004). Both Circuits have further determined that challenges to placement in administrative segregation are not cognizable in habeas. *Nettles*, 830 F.3d at 922; *Jaske v. Hanks*, 27 F. App'x 622, 623 (7th Cir. 2001).

App'x 422, 423 (11th Cir. 2009) ("Because habeas and civil rights actions are mutually exclusive, the district court did not err by determining that Miller's claims cannot be brought in a petition for writ of habeas corpus." (internal citations omitted)). Both the Supreme Court and the Eleventh Circuit characterize a due process challenge to a prisoner's placement in administrative segregation as a "conditions of confinement" claim. *See e.g. Sandin v. Conner*, 515 U.S. 472 (1995); *Quintanilla v. Bryson*, 730 F. App'x 738 (11th Cir. 2018); *Al-Amin v. Donald*, 165 F. App'x 733 (11th Cir. 2006); *Delgiudice v. Primus*, 679 F. App'x 944 (11th Cir. 2017); *Turner v. Warden, GDCP*, 650 F. App'x 695 (11th Cir. 2016). Indeed, in *Quintanilla*, a case cited by Petitioner, the Eleventh Circuit addressed under § 1983 a due process claims challenging a prisoner's placement in the Georgia Department of Corrections tier program.

Similar to *Quintanilla*, Petitioner also raises a Fourteenth Amendment due process claim under *Sandin,* challenging his confinement in the Georgia Department of Corrections tier program. He additionally raises a First Amendment free speech claim, First Amendment religious exercise claims, a claim arising under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and Eighth Amendment deliberate indifference to serious medical needs claims. As observed in the order of dismissal, Petitioner explicitly states that he is not challenging his underlying conviction or the duration of his sentence, and his claims implicate neither. Petitioner could receive all the relief he seeks and the duration of his sentence would not be altered by one day and the validity of his conviction would not be implicated. Petitioner's civil rights claims are not cognizable in

a habeas action. *See Goodman v. Warden*, 687 F. App'x 788, 788-89 (11th Cir. 2017) (per curiam) (prisoner challenges to conditions of confinement, including claim that prisoner was entitled to less restrictive confinement, "are raised properly in a 42 U.S.C. § 1983 civil action not in a habeas proceeding" (citing *McNabb v. Comm'r Ala. Dep't of Corr.*, 727 F.3d 1334, 1344 (11th Cir. 2013))); *Chamblee v. Florida*, 2018 WL 4654712, at *3 (11th Cir. 2018) (quoting 28 U.S.C. § 2254(a)) (stating that "[u]nder the federal habeas statute . . . a state habeas petitioner may challenge only the state-court judgment 'pursuant to' which the petitioner is being held 'in custody'"). Petitioner is not entitled to Rule 59 relief on this ground.

After determining that Petitioner's claims are not cognizable in a habeas action, rather than dismiss his pleading for that reason, the Court considered under what statute Petitioner's claims might arise.[3] *See Cruitt v. Ala.*, 647 F. App'x 909 (11th Cir. 2016) (per curiam) (vacating and remanding case where district court dismissed access-to-courts claim brought in § 2254 petition and failed to construe the action as arising under § 1983); *Muhammad v. Williams-Hubble*, 380 F. App'x 925, 926 (11th Cir. 2010) (per curiam) (construing claims raised in a purported habeas petition concerning deprivation of constitutional rights perpetrated by federal officers as a *Bivens* lawsuit); *Hall v. Warden, FCC Coleman-USP*, 571 F. App'x 826, 828 (11th Cir. 2014). The Court construed

[3]"Under Habeas Corpus Rule 4, if 'it plainly appeals from the petition . . . that the petitioner is not entitled to relief in the district court,' the court must summarily dismiss the petition without ordering a responsive pleading." *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (ellipsis in original).

Petitioner's conditions of confinement claims as brought in a civil rights complaint under 42 U.S.C. § 1983. Civil rights complaints brought by prisoners are subject to the Prison Litigation Reform Act of 1995 (PLRA), which requires the Court to screen prisoner filings to identify cognizable claims and dismiss the complaint if it is frivolous, malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915A. Furthermore, under the PLRA, if a prisoner has three federal lawsuits or appeals dismissed on these grounds, he may not proceed *in forma pauperis* unless he shows that he is under an imminent danger of serious physical injury at the time he filed his complaint. *Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999); *see also* 28 U.S.C. § 1915(a). In this case, the Court concluded that Petitioner has acquired three strikes for purposes of 1915(g) and does not qualify to proceed under the imminent danger exception. As Petitioner failed to pay the filing fee and is barred from proceeding *in forma pauperis*, the Court dismissed his Petition without prejudice pursuant to 28 U.S.C. § 1915(g), per the procedure established by the Eleventh Circuit. *See Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) (per curiam).

Prior to dismissing his pleading, the Court did not *sua sponte* invite Petitioner to amend his pleading. Petitioner argues that this was error and cites *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011), for the proposition that a district court must provide notice to a litigant prior to *sua sponte* dismissal. *Tazoe* concerns a *sua sponte* dismissal based on *forum non conveniens*, which the Eleventh Circuit analogized to a dismissal under 28 U.S.C. § 1404(a). *Id.* at 1336. Neither *forum non conveniens* nor 28 U.S.C. § 1404(a)

are applicable to the reason for dismissal in this case, and the standard discussed in *Tazoe* is inapplicable. The same standard does not apply to the context and posture of this case, and the court is not required to *sua sponte* grant leave to amend prior to dismissing an action *without* prejudice. *Quinlan v. Personal Transport Services Co.*, 329 F. App'x 246, 249 (11th Cir. 2009) (per curiam) ("But we never have stated that a district court *sua sponte* must allow a plaintiff an opportunity to amend where it dismisses a complaint *without prejudice*." (emphasis added) (citing *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991))). Additionally, leave to amend should be provided *sua sponte*—prior to dismissal *with* prejudice—only where "a *pro se* plaintiff's complaint if more carefully drafted, might state a claim." *Jemison v. Mitchell*, 380 F. App'x 904, 906 (11th Cir. 2010) (per curiam). Petitioner's pleading is detailed, researched, and well-articulated. A more carefully drafted Petition on the facts of this case would not render his claims cognizable in a habeas action and would not entitle Petitioner to proceed *in forma pauperis*. Consequently, this ground for relief provides no basis for reconsideration, and Petitioner is not entitled to Rule 59 relief.

In Petitioner's motion to vacate, he also requests a certificate of appealability. Although Petitioner filed his pleading on the Court's standard form petition for prisoners proceeding under 28 U.S.C. § 2254, the Court determined that his claims arise under 42 U.S.C. § 1983, and according to the federal judiciary's Public Access to Court Electronic Records online database, the Eleventh Circuit docketed his appeal as "Prisoner—Civil Rights." *Daker v. McLaughlin*, No. 18-13800 (11th Cir. docketed Sept. 7, 2018). It is

not necessary to obtain a certificate of appealability in order to appeal the denial of relief in a 42 U.S.C. § 1983 action.[4]

II. Motion for Access to Case Authorities

In Petitioner's motion for access to case authorities, he requests that "the court []order that Respondent shall provide Petitioner with paper copies of any opinions cited by the court in its dismissal order, or alternatively, for the court to do the same." Mot. for Access 23, ECF No. 5. The basis for Petitioner's request essentially amounts to a restatement of the First Amendment claim raised in Petitioner's initial pleading. Petitioner is not entitled to proceed with his claim at this time. Furthermore, the Eleventh Circuit has "never held that a prisoner's right of access to the courts entitles a prisoner-plaintiff, even one proceeding *in forma pauperis*, to free copies of court documents, including his own pleadings." *Jackson v. Fla., Dep't of Financial Services*, 479 F. App'x 289, 292-93 (11th Cir. 2012) (per curiam) (citing *Harless v. U.S.*, 329 F.2d 397, 398-99 (5th Cir. 1964)). Accordingly, Petitioner's motion for access to case authorities (ECF No. 5) is **DENIED.**

[4]In his motion to vacate, Petitioner points out that a habeas petition he filed in the Southern District of Georgia contesting his placement in administrative segregation and the conditions of his confinement at Georgia State Prison was allowed to proceed under Rule 4. *Daker v. Allen*, 6:17-cv-00023 (S.D. Ga. filed Feb. 3, 2017). In that case, the Magistrate Judge originally recommended dismissing the action upon determining that habeas relief was unavailable for Petitioner's claims. Petitioner objected, and the Magistrate Judge vacated the recommendation upon determining that Daker "potentially" raised some claims appropriately brought in a § 2254 action. The Magistrate Judge did not offer substantive analysis of the issue nor determine that Petitioner's claims are cognizable in a habeas action.

III. Motion for Leave to Appeal *in Forma Pauperis*

Plaintiff has filed a motion to proceed *in forma pauperis* on appeal. ECF No. 11. As was noted in the Court's July 18, 2018 Order (ECF No. 3), Plaintiff has accumulated more than three strikes under 28 U.S.C. § 1915(g).

The Prison Litigation Reform Act provides that a prisoner may not bring a civil action or **appeal** a civil judgment

> if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

Because Plaintiff has had more than three complaints and/or appeals dismissed as frivolous in the past and has made no showing of "imminent danger of serious physical injury," his motion to proceed *in forma pauperis* on appeal is hereby **DENIED**.

If Plaintiff wishes to proceed with his appeal, he must pay the entire appellate filing fee, which is $505.00.

Consequently, Petitioner's motion for leave to appeal *in forma pauperis* (ECF No. 11) is **DENIED**.

CONCLUSION

Because Petitioner has failed to satisfy the standard under Rule 59, Petitioner's motion to vacate (ECF No. 6) is **DENIED**. Petitioner's motion for access to case authorities (ECF No. 5) and motion for leave to appeal *in forma pauperis* (ECF No. 11)

are also **DENIED**.

SO ORDERED, this 25th day of October, 2018.

S/Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13800-CC ; 18-14984 -CC

WASEEM DAKER,

Plaintiff - Appellant,

versus

WARDEN,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

BEFORE: WILSON, WILLIAM PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant, Waseem Daker, is DENIED.

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APPENDIX D

APPENDIX E

This case involves Title 28, United States Code ("U.S.C.") § 2254, which provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)
>
> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)

APPENDIX E

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a

State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a

ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89–711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104–132, title I, § 104, Apr. 24, 1996, 110 Stat. 1218.).