N.D.N.Y.
19-cv-25
Sannes, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of October, two thousand twenty-one.

Present:

John M. Walker, Jr.,
Robert D. Sack,
Susan L. Carney,
Circuit Judges.

Daniel Jones,

Plaintiff-Appellant,

v. 20-3496

Andrew M. Cuomo, New York State Governor, et al.,

Defendants,

Ann Marie T. Sullivan, M.D. Commissioner OMH, et al.,

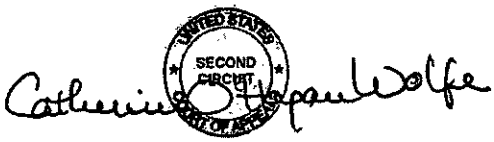
Defendants-Appellees.

Appellant, pro se, moves to reinstate his appeal after the issuance of a mandate dismissing the appeal. Upon due consideration, it is hereby ORDERED that the motion is DENIED because Appellant does not present "exceptional circumstances" warranting the recall of the mandate and the reinstatement of his appeal. *See Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996) (internal quotation marks omitted); *see also* Fed. R. App. P. 2 and Advisory Committee Notes; *Calloway v. Marvel Ent. Grp.*, 854 F.2d 1452, 1475 (2d Cir. 1988), *rev'd in part on other grounds sub nom. Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120 (1989). The appeal is frivolous because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490

Exhibit "A"

U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e)(2).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DANIEL JONES,

Plaintiff, 9:19-cv-0025 (BKS/CFH)

v.

ANN MARIE T. SULLIVAN, et al.,

Defendants.

Appearances:

Plaintiff, pro se:
Daniel Jones
C22582
CNY PC
PO Box 300
Marcy, NY 13403

For Defendant Ann Marie T. Sullivan, Danielle Tope, Jill Grant, Deborah McCulloch, Jeff Nowicki, Danielle Dill, Alyssa Moskal, Danielle Herrman, Robert Schuyler and Felipe Tirado:
Letitia James
Attorney General of the State of New York
Nicholas L. Zaloop
Assistant Attorney General, of Counsel
The Capitol
Albany, NY 12224

For Defendant Fallon:
Peter A. Lauricella
Nicole E. Hainson
Wilson Elser Moskowitz Edelman & Dicker, LLP
200 Great Oaks Boulevard
Suite 228
Albany, NY 12203

Exhibit "B"

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff pro se Daniel Jones, who is presently confined at the Central New York Psychiatric Center (CNYPC) under Article 10 of the New York Mental Hygiene Law, brought this action under 42 U.S.C. § 1983 against Defendants for alleged violations of his constitutional rights arising out of his confinement. (Dkt. No. 9). Defendant Sara Fallon filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on December 18, 2019, and the remaining defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on December 19, 2019. (Dkt. Nos. 36, 38). Plaintiff has not responded to either motion, despite being warned of the consequences of failing to respond. (Dkt. Nos. 37, 39). This matter was referred to United States Magistrate Judge Christian F. Hummel who, on June 5, 2020, issued a Report-Recommendation recommending that both motions to dismiss be granted and that Plaintiff's Amended Complaint be dismissed with prejudice. (Dkt. No. 48).

Plaintiff has filed objections to the Report-Recommendation, (Dkt. No. 56), and Defendant Fallon responded to his objections, (Dkt. No. 57). For the reasons set forth below, the Report-Recommendation is adopted, and the Amended Complaint is dismissed.

II. STANDARD OF REVIEW

This court reviews *de novo* those portions of the Magistrate Judge's findings and recommendations that have been properly preserved with a specific objection. *Petersen v. Astrue*, 2 F. Supp. 3d 223, 228-29 (N.D.N.Y. 2012); 28 U.S.C. § 636(b)(1)(C). "A proper objection is one that identifies the specific portions of the [report-recommendation] that the objector asserts are erroneous and provides a basis for this assertion." *Kruger v. Virgin Atl. Airways, Ltd.*, 976 F. Supp. 2d 290, 296 (E.D.N.Y. 2013) (internal quotation marks omitted).

Properly raised objections must be "specific and clearly aimed at particular findings" in the report. *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009). "[E]ven a pro se party's objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the magistrate's proposal . . . ." *Machicote v. Ercole*, No. 06-cv-13320, 2011 WL 3809920 at *2, 2011 U.S. Dist. LEXIS 95351, at *4 (S.D.N.Y. Aug. 25, 2011) (citation omitted).[1] Findings and recommendations as to which there was no properly preserved objection are reviewed for clear error. *Id.*

III. DISCUSSION

A. Procedural History and Claims Remaining

Plaintiff has been in custody at the CNYPC since December 2017, following a determination that he is a dangerous sex offender requiring civil commitment under Article 10 of the New York Mental Hygiene Law. *See, e.g., Dorsey v. Hogan*, 511 F. App'x 96, 98 (2d Cir. 2013) (describing the process for civil commitment under Article 10).

Plaintiff filed this action on January 7, 2019. (Dkt. No. 1). In reviewing the Complaint under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), and construing it liberally, the Court found that he had raised seven claims including: (1) a claim that Defendant Sarah M. Fallon, the Director of Mental Health Legal Services (MHLS), failed to provide adequate assistance in connection with the commitment proceedings; and (2) First Amendment claims related to the denial of access to the courts. (Dkt. No. 4, at 16). The Court, inter alia, dismissed without prejudice Plaintiff's claims against Defendant Fallon and Plaintiff's First Amendment access-to-court claims. (*Id.* at 39). The Court noted that Defendant Fallon was "not referenced anywhere in the body of the Complaint" and, after detailing the law regarding the constitutional right of access to courts,

[1] The Court has attached a copy of the unpublished decisions cited in this Decision.

actor and that Plaintiff failed to allege her personal involvement in any alleged conspiracy with any state actor. (*See generally* Dkt. No. 36-1). She argued that Plaintiff failed to allege that she "was aware of Plaintiff's civil commitment or request for representation from MHLS," and that there is no allegation that she "was involved in MHLS' determination that representing Plaintiff created a conflict of interest." (*Id.* at 9). She correctly argued that "[t]he personal involvement of a defendant in an alleged constitutional deprivation is a prerequisite to liability for damages under § 1983," citing to applicable law. (*Id.* at 6) (citing, inter alia, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Warheit v. City of New York*, 271 F. App'x 123, 126 (2d Cir. 2008)).

Second, the Court concurs with Magistrate Judge Hummel's determination regarding the Plaintiff's failure to allege personal involvement.[6] In the Amended Complaint Plaintiff alleges that Fallon "was aware of the mandates" of the mental hygiene law entitling Plaintiff to legal services and "failed to afford plaintiff with these rights." (Dkt. No. 9, at 5). Plaintiff, however, does not allege that Fallon had any personal involvement in any decision concerning his representation. As Magistrate Judge Hummel noted, there are no allegations that Plaintiff "ever personally spoke with or communicated with Fallon, in any manner." (Dkt. No. 48, at 15).

Plaintiff alleges that he was initially assigned MHLS to represent him during the Article 10 proceedings for civil management. (Dkt. No. 9, at 5).[7] On April 12, 2012, "MHLS citing conflict of interest"; was relieved by the court; and Plaintiff was appointed an attorney under County Law, Article 18-B for the proceedings. (*Id.*).

[6] Magistrate Judge Hummel did not, as Plaintiff asserts, apply a "heightened pleading standard." (Dkt. No. 56, at 4). The Report-Recommendation cited to and applied the applicable legal standard. (*See* Dkt. No. 48, at 8).

[7] Plaintiff states that "the facts should reflect that [he] was represented by MHLS" for the Article 10 proceeding under Mental Hygiene Law § 10.06(c), not §§ 47.01 and 47.03. (Dkt. No. 56, at 2). The Court recognizes that § 10.06(c) is the relevant provision for appointment of counsel for the Article 10 proceeding, and that §§ 47.01 and 47.03 detail the services MHLS is required to provide to patients. *See ex rel. McReynolds v. Comm'r of Mental Retardation & Dev. Disabilities*, 238 A.D.2d 453 (2d Dep't 1997).

When Plaintiff arrived at CNYPC, in December 2017, after he had been found to be a dangerous sex offender requiring civil confinement, counsel for MHLS, Michael H. McCormick, informed Plaintiff that MHLS would be unable to provide representation because there was a conflict of interest. (*Id.* at 9).[8] Plaintiff alleges that he wrote to MHLS attorney McCormick in June 2018 about filing a petition under 10.09(f) "seeking discharge and/or release"; that McCormick indicated that he would have to speak to his supervisor, who Plaintiff believes is Elizabeth Fortino; and that after McCormick consulted with his supervisor, McCormick filed a motion for assignment of counsel for Plaintiff's upcoming annual hearing scheduled for November 21, 2018. (*Id.* at 6-7).

Plaintiff alleges that Fallon "was aware" that residents at CNYPC such as Plaintiff "were not being provided legal representation in accordance" with Mental Hygiene Law §§ 47.01 and 47.03. (*Id.* at 19). There are, however, no facts alleged to support this conclusory allegation. Plaintiff basis his belief based on "personal conversations with other residents housed at CNYPC," who stated that they do not have legal representation because of a conflict with MHLS. (*Id.*). But there are no allegations of complaints by other residents, or facts from which it could be inferred that Fallon knew of the issue. Plaintiff alleges that Fallon and her subordinates created a policy and procedure limiting motions for reassignment to article 10 proceedings under Mental Hygiene Law § 10.08. (*Id.*). However, as Magistrate Judge Hummel found, this allegation is too conclusory to plausibly state a claim. (Dkt. No. 48, at 16). *See Gantt v. Ferraro*, No. 15-cv-7661, 2018 WL 4636991, at *7, 2018 U.S. Dist. LEXIS 166689, at *14 (S.D.N.Y. Sept. 27, 2018).[9]

[8] The record does not reflect what the conflict was; Plaintiff characterizes it as "an alleged conflict of interest which prevented their representation based on N.Y.S. Rules of Professional Conduct." (*Id.* at 17).

[9] Plaintiff states that he has attached "Exhibit I" "which shows that it is the policy of MHLS that when a 'conflict of interest' exist [sic] they are not permitted to provide legal representation to residents at CNYPC." (Dkt. No. 56, at 5).

Finally, the fact that this Court permitted the claim against Defendant Fallon to proceed, following review under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), does not prevent the Court from granting her motion to dismiss under Fed. R. Civ. P. 12(b)(6) at this stage of the proceedings. A court's initial screening under § 1915(e) and/or § 1915A does not preclude a later dismissal under Fed. R. Civ. P. 12(b)(6). *Cusamano v. Sobek*, 604 F. Supp. 2d 416, 434-35 (N.D.N.Y. 2009). In its screening decision, the Court specifically noted that it expressed "no opinion as to whether these claims can withstand a properly filed motion to dismiss." (Dkt. No. 10, at 17). Having now reviewed Fallon's motion to dismiss and Magistrate Judge Hummel's thorough analysis, the Court concludes that the claim does not survive because Plaintiff has failed to plausibly allege that Fallon was personally involved in any constitutional violation.

2. First Amendment Access- to-Courts Claims

"[C]ivilly committed patients at the [CNYPC], like convicted inmates, enjoy a First Amendment right of meaningful access to the courts." *McChesney v. Hogan*, No. 9:08-cv-0163, 2010 WL 3602660, at *12, 2010 U.S. Dist. LEXIS 92948, * 37 (N.D.N.Y. Aug. 17, 2010) (citing *Lane v. Carpinello*, No. 9:07-cv-0751, 2009 WL 3074344, at *24 n.26, 2009 U.S. Dist. LEXIS 88345, at *84 n. 26 (N.D.N.Y. Aug. 31, 2009) (stating that the right of access to the courts stems from the First Amendment and the analysis is the same whether concerning a prisoner inmate or the involuntarily committed), *report & recommendation adopted*, 2009 WL 3074314, 2009 U.S. Dist. LEXIS 88341 (N.D.N.Y. Sept. 24, 2009)), *report & recommendation adopted*, 2010 WL 3584360, 2010 U.S. Dist. LEXIS 92738 (N.D.N.Y. Sept. 7, 2010); *Mallgren v. American*

There was no such exhibit attached to the objections or to the Amended Complaint. In any event, even if it were attached and the Court could consider this extrinsic evidence, a policy precluding MHLS from representing residents when there is a conflict of interest does not further Plaintiff's claim that Fallon knew of the conflict here and failed to provide for other counsel for Plaintiff or that she adopted a policy limiting motions for reassignment to Article 10 proceedings.

Psychiatric Ass'n, Nos. 13-cv-2211, 13-cv-2214, and 13-cv-2215, 2014 WL 978457, at *7-8, 2014 U.S. Dist. LEXIS 32227, at *22 (E.D.N.Y. Mar. 11, 2014) ("Prisoners, detainees, and individuals subject to civil commitment have a First Amendment right of access to the courts and a number of derivative rights, including the right to access legal materials and legal research and to send and receive legal mail." (citing *Dorsey*, 511 F. App'x at 101).

To establish a constitutional violation based on denial of access to the courts, a plaintiff must show that the defendant's conduct was deliberate and malicious and that the defendant's actions resulted in an actual injury to the plaintiff. *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003). The actual injury element requires a showing that the defendant's conduct frustrated the plaintiff's efforts to pursue a non-frivolous legal claim. *Lewis v. Casey*, 518 U.S. 343, 351-53 (1996); *Dorsey*, 511 F. App'x at 101. "To satisfy the requirement that the underlying claim not be frivolous, a plaintiff must describe the claim well enough for the court to determine whether the claim had an arguable basis in either law or fact." *Zeigler v. New York*, 948 F. Supp. 2d 271, 294 (N.D.N.Y. 2013) (quoting *Rosario v. Fischer*, No. 11-cv-4617, 2012 WL 4044901, at *7, 2012 U.S. Dist. LEXIS 133502, at *19 (S.D.N.Y. Aug. 28, 2012), *report-recommendation adopted* 2012 WL 6681695, 2012 U.S. Dist. LEXIS 182325 (S.D.N.Y. Dec. 20, 2012)).

Plaintiff objects to Magistrate Judge Hummel's determination that the Amended Complaint fails to plausibly allege actual injury with respect to either his attempt to appeal to the Supreme Court in *Jones III* or with respect to his Article 78 petition. Having considered this issue de novo, the Court agrees with the Report-Recommendation. Plaintiff has failed to plausibly allege that any inadequacies in the law library, photocopy policy or telephone policy frustrated his efforts to pursue a nonfrivolous claim. In *Jones III*, the time to file a writ of certiorari in the Supreme Court had expired before Plaintiff was confined at CNYPC. (Dkt,. No.

9, ¶ 103). In December 2017, while Plaintiff was at CNYPC, the Supreme Court "returned [his] documents as they were untimely." (*Id.* ¶ 103). Although Plaintiff was able to speak to a clerk in the Supreme Court to get "instruction on how to proceed," Plaintiff alleges that the "useless" law library at CNYPC delayed his filing of another petition for a writ of certiorari, "with the proper motion" -- a motion seeking permission to file an untimely petition. (*Id.* ¶¶ 105, 106). That motion was denied, and there is no suggestion that any delay in filing the motion led to the denial. (*Id.* ¶ 105). In any event, given the Second Circuit's ruling in *Jones II*, dismissing Plaintiff's appeal as lacking an arguable basis in either law or fact, the Amended Complaint fails to plausibly allege that Plaintiff had a non-frivolous claim to appeal to the Supreme Court in *Jones III*.

With respect to Plaintiff's Article 78 litigation, Plaintiff alleges that the Defendants' photocopy policy, requiring indigent residents to pay for their own photocopies, led to his submission of an outdated "poor person application," and the denial of that application. (Dkt. No. 9, ¶ 99). The Court concurs in Magistrate Judge Hummel's determination that the Amended Complaint is "bereft of any facts establishing that the claim underlying his Article 78 proceeding was meritorious"; there is no allegation regarding the impact of this denial on any such claim; and the denial of a "poor person application," without more does not demonstrate actual harm. (Dkt. No. 48, at 23-24). The Court notes that the Defendants' motion to dismiss clearly challenged the sufficiency of the Amended Complaint's allegations regarding actual injury. (*See, e.g.*, Dkt. No. 38-1, at 16-17 (arguing, inter alia "Plaintiff does not allege that [the Article 78 petition] was denied or how the denial of his "poor person application" prejudiced him)). To

this date, in his objections, Plaintiff has failed to provide any basis for a finding of actual injury. (Dkt. No. 56).[10]

3. Mail Tampering Claims

Plaintiff objects to the recommendation that his mail tampering claim be dismissed. (Dkt. No. 56, at 10-15). Having reviewed Plaintiff's objections de novo, the Court agrees that the mail tampering claims must be dismissed for the reasons stated in the Report-Recommendation. Plaintiff has alleged three instances of mail interference. He alleges that: (1) a letter dated January 29, 2019, addressed to Plaintiff from Plaintiff's attorney, was returned to the attorney stamped "refused unable to forward"; (2) a legal mail package delivered by "the package room staff" on February 19, 2019, contained nothing inside; and (3) a legal mail package that Plaintiff received on March 25, 2019, had been opened after purportedly having "been delivered to another resident by mistake." (Dkt. No. 56, at 11; *see* Dkt. No. 9, ¶¶ 57-62, 68). Plaintiff does not identify any defendant as having intentionally interfered with his mail or even named any defendant in these allegations. (Dkt. No. 9, ¶¶ 57-62, 68). In his preliminary identification of the Defendants, Plaintiff alleges that the John Doe mailroom clerk (now identified as Schuler) "is responsible for the overall operation of receiving and sending mail out of the facility," and that the John Doe Package Room Officer "is responsible for incoming and outgoing packages at the facility." (Dkt. No. 9, ¶¶ 14, 15). Neither defendant, however, is named in any tampering allegations. (Dkt. No. 9, ¶¶ 57-62, 68). As Magistrate Judge Hummel noted, the claims against Schuler and Tirado must be dismissed because neither are mentioned in the body of the Amended Complaint and there are no facts alleged plausibly suggesting their

[10] Because the Court finds that the Amended Complaint fails to state an access-to-courts claim based on the failure to plausibly allege actual injury, the Court has not considered Plaintiff's objection to Magistrate Judge Hummel's conclusion that the Amended Complaint fails to plausibly allege that the Defendants acted deliberately or maliciously.

personal involvement. (Dkt. No. 48, at 26). And the supervisory claims against McCulloch, Moskal and Hermann must be dismissed because Plaintiff failed to establish any underlying constitutional violation. (*Id.* at 27).

4. Leave to Amend

Plaintiff asks that he be given leave to file an amended complaint "if necessary." (Dkt. No. 56, at 15). In general, leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). A pro se plaintiff should be "grant[ed] leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated[,]" but leave to amend may be properly denied as "futile." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). Here, Plaintiff has already been given an opportunity to amend his complaint following this Court's initial screening, (Dkt. No. 4), and he has not identified any factual allegations that he could add that would make his claims plausible. *E.g.*, *Hayden v. Cty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied.") Accordingly, Plaintiff's request for leave to amend is denied as futile.

5. Adoption of the Report-Recommendation

The Court has reviewed the remaining portions of the Report-Recommendation for clear error and found none. Accordingly, the Report-Recommendation is adopted.

6. Plaintiff's Pending Motions

In light of the dismissal of the Amended Complaint, Plaintiff's pending motions, for a preliminary injunction and for reconsideration of the denial of temporary injunctive relief, are denied as moot. *Brown v. Connell*, No. 07-cv-1261, 2007 WL 4555933, at *2, 2007 U.S. Dist. LEXIS 93061, at *4 (N.D.N.Y. Dec. 19, 2007).

IV. CONCLUSION

For these reasons, it is hereby

ORDERED that Magistrate Judge Hummel's Report-Recommendation (Dkt. No. 48) is **ADOPTED**; and it is further

ORDERED that Defendants' motions to dismiss (Dkt. Nos. 36 and 38) are **GRANTED** and plaintiff's Amended Complaint is **DISMISSED with prejudice**; and it is further

ORDERED that Plaintiff's motion for preliminary injunction (Dkt. No. 53) and motion for reconsideration (Dkt. No. 58) are **DENIED** as moot; and it is further

ORDERED that the Clerk serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: September 29, 2020
Syracuse, New York

Brenda K. Sannes
U.S. District Judge

2007 WL 4555933
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Thurman BROWN, Plaintiff,
v.
Susan A. CONNELL, Defendant.

No. 9:07-CV-1261 (TJM)(RFT).

Dec. 19, 2007.

Attorneys and Law Firms

Thurman Brown, pro se.

DECISION and ORDER

THOMAS J. McAVOY, Senior District Judge.

*1 The Clerk has sent to the Court a civil rights complaint, together with an application to proceed *in forma pauperis*, submitted for filing by plaintiff Thurman Brown, who is currently incarcerated at Oneida Correctional Facility. Dkt. Nos. 1, 2. Plaintiff has also filed a motion for injunctive relief. Dkt. No. 3. For the reasons stated below, plaintiff's complaint is dismissed pursuant to 28 U.S.C. § 1915(e)(2).

I. Background

In his *pro se* complaint, plaintiff alleges that he is being illegally detained at Oneida Correctional Facility because criminal charges against him were terminated. Dkt. No. 1. Plaintiff seeks earlier release from incarceration and monetary damages. *Id.* at 6.

II. Discussion

Turning to plaintiff's *in forma pauperis* application, the Court finds that plaintiff may properly commence this action *in forma pauperis* because plaintiff sets forth sufficient economic need. Dkt. No. 2.

The Court must now consider whether the case should be dismissed pursuant to 28 U.S.C. § 1915(e). Section 1915(e)(2) directs that when a plaintiff seeks to proceed *in forma pauperis*, the Court:

> (2) [S]hall dismiss the case at any time if the court determines that-* * *
>
> (B) the action ... (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2). Thus, even if a plaintiff meets the financial criteria to **commence** an action *in forma pauperis*, it is the Court's responsibility to determine that a complaint may properly be maintained in the District before it may permit the plaintiff to **proceed** with his or her action *in forma pauperis*. *Id.*

Plaintiff brought this action under 42 U.S.C. § 1983 ("Section 1983"). Section 1983 establishes a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *German v. Fed. Home Loan Mortg. Corp.*, 885 F.Supp. 537, 573 (S.D.N.Y.1995) (citing *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983)) (footnote omitted); *see also Myers v. Wollowitz*, No. 95-CV-0272, 1995 WL 236245, *2 (N.D.N.Y. Apr. 10, 1995) (McAvoy, C.J.) (Section 1983 "is the vehicle by which individuals may seek redress for alleged violations of their constitutional rights.").

A. Earlier release from incarceration

To the extent that plaintiff seeks to alter the fact or duration of his custody, he is advised that such relief may only be obtained by way of a habeas corpus petition brought pursuant to 28 U.S.C. § 2254. *See id.*; *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973) ("[c]ongress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity" of their underlying criminal conviction); *see also Channer v. Mitchell*, 43 F.3d 786, 787 (2d Cir.1994) ("habeas corpus-not a § 1983 action-provides the sole federal remedy where a state prisoner challenges the fact or duration of his imprisonment ....") (citing *Preiser*).

B. Monetary damages

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of June, two thousand twenty-one.

Daniel Jones,

Plaintiff - Appellant,

v.

Ann Marie T. Sullivan, et al.,

Defendants- Appellees.

ORDER

Docket No. 20-3496

Appellant, *pro se*, moves for an extension of time to file a motion to recall the mandate that complies with the Notice of Defective Filing issued May 4, 2021, and includes all overdue forms.

IT IS HEREBY ORDERED that the motion for extension of time is DENIED as unnecessary. Appellant has now submitted all required forms for this appeal. The motion to recall the mandate and reinstate the appeal will be determined in the ordinary course.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

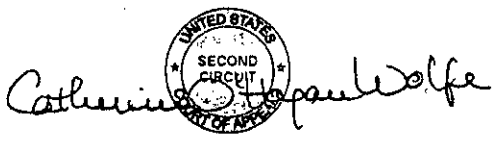


Exhibit "L"

W.D.N.Y.
16-cv-771
Skretny, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of June, two thousand twenty-one.

Present:

Barrington D. Parker,
Raymond J. Lohier, Jr.,
Steven J. Menashi,
Circuit Judges.

Daniel Jones,

Plaintiff-Appellant,

v. 20-2174

Andrew M. Cuomo, New York State Governor, et al.,

Defendants-Appellees.

Appellant, pro se, moves for leave to proceed in forma pauperis ("IFP") and appointment of counsel. Upon due consideration, it is hereby ORDERED that the IFP motion is DENIED as unnecessary because the district court did not revoke Appellant's IFP status. *See* Fed. R. App. P. 24(a)(3). It is further ORDERED that the motion for appointment of counsel is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe

Exhibit "M"

20-2174
Jones v. Cuomo

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

AUGUST TERM 2020
No. 20-2174

DANIEL JONES,
Plaintiff-Appellant,

v.

ANDREW M. CUOMO, NEW YORK STATE GOVERNOR, BRIAN S. FISCHER, COMMISSIONER OF DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, SANDY HAMLIN, ADMINISTRATIVE ASSISTANT, DONNA HALL, ACTING ASSOCIATE COMMISSIONER, OFFICE OF MENTAL HEALTH, COURTNEY BUTLER, LICENSED CLINICAL SOCIAL WORKER, OFFICE OF MENTAL HEALTH, KATRINA COLISTRA, DOCTOR OF PSYCHOLOGY, NAOMI HARRINGTON, DIRECTOR, OFFICE OF MENTAL HEALTH, MELINDA BUCKEY, OFFICE OF MENTAL HEALTH,
Defendants-Appellees.[*]

On Motion for Restoration of Fees

SUBMITTED: FEBRUARY 10, 2021
DECIDED: JUNE 22, 2021

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[*] The Clerk of Court is directed to amend the caption as set forth above.

BACKGROUND

I

Convicted of sexual abuse and attempted rape, Daniel Jones was incarcerated in a New York state prison from 1992 to 2012. Days before his scheduled release on March 9, 2012, the New York State Attorney General petitioned for Jones's civil confinement under Article 10 of New York's Mental Hygiene Law ("MHL"). Jones has since been confined pursuant to that petition.

The MHL provides that the New York State Office of Mental Health shall designate a case review team to screen sex offenders who are approaching the end of their terms of imprisonment to determine whether an offender "requir[es] civil management." N.Y. Mental Hyg. Law § 10.05. A sex offender requires civil management if he or she "suffers from a mental abnormality," defined as a "condition, disease or disorder . . . that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct." *Id.* § 10.03. If the case review team makes that determination, the New York State Attorney General may file "a sex offender civil management petition in the supreme court or county court of the county where the respondent is located." *Id.* § 10.06(a). If a jury (or the court if a jury trial is waived) finds that the sex offender suffers from a "mental abnormality," the court must then decide whether the "mental abnormality involve[s] such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the [sex offender] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility." *Id.* § 10.07(f). If the court answers this question in the affirmative, the sex offender is

"committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement." *Id.* If the "mental abnormality" falls below this standard, the sex offender must instead adhere to "a regimen of strict and intensive supervision and treatment." *Id.*

II

In 2016, Jones brought suit under 42 U.S.C. § 1983, challenging the constitutionality of aspects of his commitment proceedings and his confinement itself. After granting Jones IFP status, the district court dismissed his claims against the state and assistant attorneys general, concluding that Jones failed to allege their personal involvement and that, in any event, those defendants were entitled to immunity from suit. The district court then granted the remaining defendants' motion to dismiss under Rule 12(b)(6) on the ground that Jones's claims were time-barred. Jones filed a timely appeal.

When Jones filed his appeal, our court instructed him to submit a Prisoner Authorization Form so that, pursuant to the PLRA, the filing fee and other court costs could be deducted from his institutional patient account at Central New York Psychiatric Center ("CNYPC"). Failure do to so, the court said, would result in the dismissal of his appeal. In response, Jones submitted multiple letters arguing that he was not a "prisoner" under the PLRA and that the PLRA's fee deduction provisions therefore did not apply to him. Nevertheless, he completed and returned the requested Prisoner Authorization Form. Jones now moves for restoration of the fees deducted from his institutional patient account.

DISCUSSION

We grant Jones's motion for restoration of fees. Jones was not a "prisoner" under the PLRA when he filed this lawsuit and should not have been required to pay a filing fee on appeal.

The PLRA provides that a "prisoner" with IFP status who brings a lawsuit or files an appeal must still pay a filing fee, which is to be deducted in installments from the prisoner's account. 28 U.S.C. § 1915(b). The PLRA defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." *Id.* § 1915(h). "Read broadly, this language could arguably be interpreted to include" all individuals "who are currently detained and who have in the past been accused of, convicted of, or sentenced for a criminal offense." *Page v. Torrey*, 201 F.3d 1136, 1139 (9th Cir. 2000) (emphasis omitted). As we have previously indicated, however, "[t]he natural reading of the text of the PLRA is that, to fall within the definition of 'prisoner,' the individual in question must be *currently detained as a result of* an accusation, conviction, or sentence for a criminal offense." *Gibson v. City Municipality of New York*, 692 F.3d 198, 202 (2d Cir. 2012) (internal quotation marks and alteration omitted) (quoting *Page*, 201 F.3d at 1139).[1] In other words, "§ 1915(h) differentiates between 'criminal'

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[1] *See also Michau v. Charleston Cnty.*, 434 F.3d 725, 727 (4th Cir. 2006) (holding that a detainee is not a "prisoner" under the PLRA because his "detention ... is not the result of a violation of criminal law, or of the terms of parole, probation, or a pretrial diversionary program"); *Merryfield v. Jordan*, 584 F.3d 923, 927 (10th Cir. 2009) (holding that a detainee is not a

detainees—i.e., individuals detained *pursuant to* an accusation or conviction of a violation of a criminal statute, or relatedly a violation of parole or probation—and other detainees." *Jackson v. Johnson*, 475 F.3d 261, 267 (5th Cir. 2007) (emphasis added).

"[T]he relevant time at which a person must be 'a prisoner' within the meaning of the PLRA in order for the Act's restrictions to apply is 'the moment the plaintiff files his complaint.'" *Gibson*, 692 F.3d at 201 (quoting *Harris v. City of New York*, 607 F.3d 18, 21-22 (2d Cir. 2010)). When Jones filed this lawsuit, he was not detained pursuant to his earlier crimes but pursuant to a determination that he poses a danger to the public. While Jones's convictions for sex offenses serve as a prerequisite for that determination, that determination is—and by law must be—predicated on the additional conclusion that he "suffers from a mental abnormality" that renders him dangerous and in need of "care, treatment, and control." N.Y. Mental Hyg. Law § 10.07. Thus, Jones was not a "prisoner" under the PLRA when he filed this lawsuit. In so concluding, we join other circuits that have held that an individual detained pursuant to a civil sex offender confinement statute is not a "prisoner" under the PLRA. *See Michau*, 434 F.3d at 727; *Merryfield*, 584 F.3d at 927; *Page*, 201 F.3d at 1140; *Troville v. Venz*, 303 F.3d 1256, 1260 (11th Cir. 2002). We therefore grant Jones's motion and direct the Clerk of Court to refund

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"prisoner" under PLRA because "his civil commitment and detention are not the result of a 'violation of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program'") (alteration omitted).

Jones's patient account at CNYPC with the full amount of funds that our court has withdrawn and to cease further collections.[2]

* * *

Because Jones was not a "prisoner" under the PLRA when he filed his lawsuit, we **GRANT** his motion for restoration of fees deducted from his patient account and direct the Clerk of Court to refund those fees and to cease further collections.

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[2] In *Goins v. Decaro*, we stated that a "prisoner" seeking to recoup funds already collected under the PLRA "encounters the barrier of sovereign immunity, since the debited funds have become the property of the United States." 241 F.3d 260, 261 (2d Cir. 2001). Unlike Jones, the appellant in *Goins* was a "prisoner" under the PLRA, which authorized the fee deductions he sought to reverse. The fees that Jones seeks to recoup, by contrast, were wrongly taken from his patient account. Whatever role sovereign immunity plays in preventing a prisoner from compelling a court to refund fee deductions authorized by statute, it does not prevent us from deciding to return funds that were erroneously deducted. We have previously refunded parties' accounts when PLRA fees were improperly deducted from habeas petitioners seeking to overturn criminal convictions, to whom the PLRA does not apply, *Jones v. Smith*, 720 F.3d 142, 145 (2d Cir. 2013). *See, e.g.*, Motion Order, *Northup v. Hudson*, No. 13-2687 (2d Cir. Nov. 24, 2014), ECF No. 65. Other circuits have also refunded the accounts of detainees from whom PLRA fees were improperly deducted. *See Fetzer v. Sec'y, Fla. Dep't of Children & Families*, No. 20-11139, 2020 WL 5625172, at *1 (11th Cir. Aug. 13, 2020); *Davis v. Fuselier*, No. 00-30554, 2001 WL 360709, at *1 (5th Cir. Mar 15. 2001).

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