United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 6, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 21-1221

ANDREW JOHNSTON,
Plaintiff-Appellant,
v.

FRANCES WARD and REBECCA R. PALLMEYER,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 20-cv-07247

Andrea R. Wood,
Judge.

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing *en banc* on November 22, 2021. No judge in regular active service has requested a vote on the petition for rehearing *en banc,* and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore **DENIED.**

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 20, 2021*
Decided October 20, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

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ORDER

Andrew Johnston, a federal prisoner, appeals the dismissal of his civil suit against the judge who presided over his criminal trial and her court reporter. He alleges

* We have agreed to decide this case without oral argument because the brief and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

that they violated his constitutional rights during the proceedings. The district court dismissed the complaint as barred by *Heck v. Humphrey*. 512 U.S. 477 (1994). We affirm.

After we upheld his conviction for attempted bank robbery, see *United States v. Johnston*, 814 Fed. App'x 142, 144 (7th Cir. 2020), cert. denied, 141 S. Ct. 1257, 1257–58 (2021), Johnston brought this action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the presiding judge and her court reporter. He alleged that during his criminal trial, the judge ordered the court reporter to alter the proceedings' transcripts by omitting key portions of testimony favorable to him. These omissions, he added, violated his Fifth Amendment right to due process and reflected judicial bias that entitled him to acquittal as a matter of law.

At screening, the district court determined that the suit was premature because Johnston's claim, if true, would necessarily invalidate his conviction. See *Heck*, 512 U.S. at 487. To the extent that any omissions in the transcript resulted from the judge's rulings, the court added that the doctrine of judicial immunity conferred absolute immunity on her.

On appeal, Johnston presses his *Bivens* claim without any discussion of the district court's *Heck* analysis. We have long held that similarities between *Bivens* actions and suits under 42 U.S.C. § 1983 warrant the application of *Heck* to *Bivens* claims. See *Clemente v. Allen*, 120 F.3d 703, 705 (7th Cir. 1997). A ruling that a judge was biased would "necessarily imply the invalidity" of a prior conviction. *Heck*, 512 U.S. at 487; *Edwards v. Balisok*, 520 U.S. 641, 647 (1997). Unless and until his conviction is set aside,[1] Johnston may not seek damages for alleged judicial bias. *Savory v. Cannon*, 947 F.3d 409, 417–18 (7th Cir. 2020) (en banc).

One final matter warrants discussion. In our December 2019 order denying Johnston's petition for a writ of mandamus, we warned Johnston—for a third time—that "further frivolous filings may result in the imposition of sanctions and a filing bar." *United States v. Johnston*, No. 19-3376 (7th Cir. Dec. 13, 2019). This appeal is frivolous. Johnston knew when he appealed that the district court had found his claim *Heck*-barred, but he appealed anyway without even addressing *Heck* in his brief. We order Johnston to show cause within fourteen days why he should not be sanctioned $1,000 for filing a frivolous appeal, the nonpayment of which will result in this court directing

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[1] Johnston's petition for habeas corpus relief has been denied, and his appeal is pending. *Johnston v. United States*, No. 21 C 02720, 2021 WL 2550071, at *1 (N.D. Ill. June 22, 2021), appeal docketed, No. 21-2257 (7th Cir. July 8, 2021).

the clerks of all federal courts in this circuit to return unfiled any papers submitted by him or on his behalf until he pays the sanction in full. See *Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Andrew Johnston,

Plaintiff(s),

v.

Frances M Ward, et al,

Defendant(s).

Case No. 1:20-cv-07247
Judge Andrea R. Wood

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

Defendant(s) shall recover costs from plaintiff(s).

☒ other: in favor of Defendants Frances M Ward, Rebecca R. Pallmeyer and against Plaintiff Andrew Johnston.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Andrea Wood.

Date: 1/11/2021

Thomas G. Bruton, Clerk of Court

David Lynn , Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANDREW JOHNSTON (#22712424),	)	
	)	
Plaintiff,	)	
	)	No. 20-cv-07247
v.	)	
	)	Judge Andrea R. Wood
FRANCES M. WARD, et al.,	)	
	)	
Defendants.	)	

ORDER

Based on information included in Plaintiff's late-filed trust fund account report [6], his application for leave to proceed *in forma pauperis* [3] is granted, subject to the below warnings. The Court orders the trust fund officer at Plaintiff's place of incarceration immediately to deduct $42.20 from Plaintiff's account for payment to the Clerk of Court as an initial partial payment of the filing fee and to continue making monthly deductions in accordance with this Order. The Clerk of Court shall send a copy of this Order to: (1) Plaintiff; (2) the trust fund officer at the facility having custody of Plaintiff; and (3) the Court's Fiscal Department. Summonses shall not issue. Plaintiff's motion for vacatur of 11/25/2020 order [7] is denied. Plaintiff's complaint [1] is dismissed pursuant to 28 U.S.C. § 1915A. The dismissal is without prejudice to Plaintiff seeking relief through the federal criminal appeals process or appropriate postconviction proceedings, or in another civil rights lawsuit if and when his conviction is invalidated. Because Plaintiff's complaint is legally frivolous, the dismissal of this case counts as one of his three allotted dismissals under 28 U.S.C. § 1915(g). The Clerk shall enter Judgment in favor of Defendants. Civil case terminated.

STATEMENT

Plaintiff Andrew Johnston, a federal prisoner now in Tucson-USP, brings this *pro se* civil rights action invoking *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as to alleged transcript errors relating to his criminal case. He initiated this case in the Northern District of Indiana, but that court transferred the case to this District for further proceedings. (Dkt. No. 3.) Now before this Court are Johnston's application seeking leave to proceed *in forma pauperis* ("IFP"), his complaint for initial review, and his motion to vacate the order transferring the case to this District.

Johnston's Motion to Vacate

The Court first addresses Johnston's challenge to the transfer of this case to this District without prior notice. There is no error here. Johnston does not argue (nor can the Court see how he could) that the transfer was improper. The provisions of 28 U.S.C. § 1391 "govern the venue of all civil actions brought in district courts of the United States." 28 U.S.C. § 1391(a)(1). Under § 1391(b), a civil action may only be brought in:

> (1) a judicial district in which any defendant resides . . . ; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . .; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

The allegations in this case do not meet any part of that test as to the Northern District of Indiana, where Johnston originally filed this case. Johnston may not—despite dislike, distrust, or even any purported fear of potential bias—avoid the venue rules set by federal statute. "[Federal venue provisions] alone define whether venue exists in a given forum." *A. Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 56 (2013). And as Johnston has been warned, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States,* 510 U.S. 540, 555–56 (1994). Finally, to the extent Johnston requests copies of any rulings by the Court, those will be sent to him as a matter of course, rendering an order for such relief unnecessary.

Johnston's IFP Application

The Prison Litigation Reform Act ("PLRA") requires all prisoners to pay the full filing fee. *See* 28 U.S.C. § 1915(b)(1). If an inmate cannot pay the $400.00 district court filing fee upfront, he may submit a sworn IFP application (requesting to pay the fee over time), along with a certified trust fund account statement covering the six months preceding his submission of the complaint. 28 U.S.C. §§ 1915(a)(2), (b)(1), (b)(2). If the IFP application is granted after a review of the inmate's submissions, a $50.00 administrative portion of the fee is waived, leaving the inmate to owe a filing fee of $350.00, which must be paid through an initial partial filing fee based on his recent income and ongoing "monthly payments of 20 percent of the preceding month's income credited to [his] account." 28 U.S.C. §§ 1915(b)(1), (b)(2). Installment payments are assessed using a per-case approach. Thus, each time the inmate's monthly balance exceeds $10.00, the trust fund account custodian at his place of incarceration must deduct 20% of his account balance for ***each*** case and appeal in which he is granted leave to proceed IFP and has not yet satisfied the filing fee (up to 100% of the inmate's income). *See* 28 U.S.C. § 1915(b)(2); *Bruce v. Samuels*, 577 U.S. 82, 87 (2016) ("[Section] 1915(b)(2) calls for simultaneous, not sequential, recoupment of multiple filing fees.").

Johnston originally asked the Court to use financial information submitted in an earlier case, something the Court cannot do because it did not cover the correct six-month period; Johnston shortly thereafter submitted useable account information for the correct period. (Dkt. No. 2 at 3; Dkt. No. 6 at 1–2.) Johnston's financial supplement is borderline because Johnston's $211.00 in average monthly deposits suggests that he could afford to prepay the $400.00 ($402.00 for cases filed on or after December 1, 2020) filing fee. Johnston also (incorrectly) asserted "none" in response to a question regarding assets he might be able to put toward the filing fee and that he has received no "gifts" or other sources of income in recent months when, in fact, he receives an average of more than $200 per month. Given the circumstances, including the timeline of events here, the Court in its discretion will permit Johnston to pay the filing fee in installments for this case. Johnston should, however, be aware that his income is such that he may be deemed non-indigent—in other words, able to prepay the filing fee—for any future lawsuits. Moreover, as this Court's form IFP application warns, "a false statement may result in the dismissal of [his] claims or other sanctions." (Dkt. No. 3 at 2); *see also* 28 U.S.C. § 1915(e)(2)(A).

This time, Johnston's application for leave to proceed *in forma pauperis* is granted despite its deficiencies. Pursuant to 28 U.S.C. § 1915(b)(1), (2), the Court orders: (1) Johnston to immediately pay (and the facility having custody of him to automatically remit) $42.20 to the Clerk of Court for payment of the initial partial filing fee and (2) Johnston to pay (and the facility having custody of him to automatically remit) to the Clerk of Court twenty percent of the money he receives for each calendar month during which he receives $10.00 or more, until the $350 filing fee is paid in full. The Court directs the trust fund officer to ensure that a copy of this order is mailed to each facility where Johnston is housed until the filing fee has been paid in full. All payments shall be sent to the Clerk of Court, United States District Court, 219 South Dearborn Street, Chicago, Illinois 60604, attn: Cashier's Desk, 20th Floor, and should clearly identify Johnston's name and the case number assigned to this case.

Initial Review of Johnston's Complaint

The Court begins by noting a facial deficiency with Johnston's complaint. Pursuant to district rules, civil rights complaints by *pro se* litigants are required to "be on forms supplied by the Court." *See* N.D. Ill. L.R. 81.1. Johnston did not use the Court's required form, and he has not included all information required by that form, including a complete litigation history. Johnston is warned that in the future he must use the Court's required complaint form and completely and accurately fill it out, or risk sanctions, including dismissal of the lawsuit. The Court, in this instance, overlooks the deficiency due to Johnston having filed this case in another jurisdiction and proceeds to review the complaint's content.

Under 28 U.S.C. § 1915A, the Court is required to screen prisoners' complaints and to dismiss any complaint, or any claim therein, if the Court determines that the complaint or claim is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant. *See Jones v. Bock,* 549 U.S. 199, 214 (2007); *Turley v.*

Rednour, 729 F.3d 645, 649 (7th Cir. 2013). Courts screen prisoners' complaints applying the same standard as for motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Maddox v. Love*, 655 F.3d 709, 718 (7th Cir. 2011). A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citation omitted). The statement also must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," which means that the pleaded facts must show there is "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When screening a *pro se* plaintiff's complaint, the Court construes the plaintiff's allegations liberally. *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam). The Court also must "accept all well-pleaded facts as true and draw reasonable inferences in the plaintiff's favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

A search of the Public Access to Court Electronic Records ("PACER") database reveals that, throughout and even beyond his recent federal criminal proceedings, Johnston has raised at least fifteen unsuccessful appellate challenges (mostly seeking writs of mandamus) and garnered three warnings against frivolous filings from the appellate court. *See United States v. Johnston*, Nos. 19-1624, 19-3376 (7th Cir. Dec. 13, 2019) (denying petition for mandamus, affirming denial of request for release pending appeal, and "warn[ing] Johnston, for a third time, that frivolous filings may result in the imposition of sanctions and a filing bar"); *United States v. Johnston*, 814 F. App'x 142, 144, 147 (7th Cir. 2020) (affirming what appears to have been Johnston's third bank robbery-related conviction). In this case, which represents yet another side challenge to the underlying criminal proceedings, Johnston alleges that, on March 9, 2020, he discovered that proceedings transcripts from January 12, 2018 and January 9, 2019 were incorrect, lacking portions of the testimony that were "favorable to [Johnston]" and some of his objections to testimony or evidence. (Dkt. No. 1 at 1–2.) Johnston chiefly attributes those transcript issues to presumed rulings of the presiding judge, Chief Judge Rebecca Pallmeyer, given the court reporter's "lack [of] a motive and or the knowledge to target such a specific portion of the proceedings;" Johnston assumes that the court reporter "would need to be directed to change the[]" transcripts. (*Id.* at 2–3.) He nevertheless seeks monetary damages of $14,000 from the court reporter, Frances M. Ward, along with "a preliminary injunction . . . that prohibits Pallmeyer from sitting on any current or future cases involving [Johnston]." (*Id.* at 3, 4.)

Unlike plaintiffs who can invoke 42 U.S.C. § 1983 to bring claims against state or local officials alleged to have violated their rights, to bring individual-capacity claims against individual federal officials, a plaintiff must pursue remedies recognized under *Bivens* (or some other federal law). In *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855, 1859 (2017), the Supreme Court emphasized that a *Bivens* remedy has been approved in only three instances: (1) a Fourth Amendment claim against federal agents for handcuffing a man in his home without a warrant, *Bivens*, 403 U.S. at 388; (2) a Fifth Amendment gender discrimination claim against a congressman for firing his female administrative assistant, *Davis v. Passman*, 442 U.S. 228 (1979); and (3) an Eighth Amendment

claim against prison officials for failing to treat a prisoner's asthma, *Carlson v. Green*, 446 U.S. 14 (1980). *See also Farmer v. Brennan,* 511 U.S. 825 (1994) (addressing Eighth Amendment failure to protect claim by federal prisoner). The Supreme Court then urged lower courts to use caution before extending the *Bivens* remedy to any new context. *Abbasi,* 137 S. Ct. at 1857. "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new," and the district court should examine potentially meaningful differences, which the Court listed. *Id.* at 1859–60.

This Court is unaware of any post-*Abbasi* precedential authority finding a *Bivens* remedy for transcript omissions on similar facts, and Johnston notably does not indicate what harm, if any, flowed from the alleged omissions. It is, however, unnecessary to resolve that issue. Assuming that a *Bivens* remedy might be recognized for some nontrivial transcript omissions in criminal proceedings and that Johnston alleges such nontrivial omissions, *see Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (explaining that it is "appropriate in many cases" to "dispos[e] of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy"), Johnston still cannot proceed because such a claim amounts to a challenge to his conviction or ongoing incarceration.

Heck v. Humphrey instructs that when a prisoner "seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. 477, 487 (1994); *Clemente v. Allen*, 12 F.3d 703, 705 (7th Cir. 1997) ("agree[ing]" with other circuits that have held that "*Heck* applies to *Bivens* actions") (citations omitted). Until the relevant conviction or sentence has been invalidated, the cause of action for damages, or even certain declaratory or injunctive relief, does not accrue. *Heck*, 512 U.S. at 490; *Edwards v. Balisok*, 520 U.S. 641, 645 (1997) (holding that challenges to procedures employed in underlying proceeding, without direct challenge to result, still necessarily could "imply the invalidity of the judgment" that would undermine conviction and are improper).

Johnston's accusations of judicial bias and "mistranscri[ptions] in the most pertinent, material, and substantive portions of the entire case" (Dkt. No. 1 at 3) that allegedly "deprive[d] him of an acquittal as a matter of law and/or reversal of the denial of acquittal on appeal" overtly undermine his still-valid conviction and present incarceration in violation of *Heck*. After all, "[w]hat claim [could] plaintiff have against the court reporter[] that is independent of a challenge to the accuracy of those transcripts except as a basis to . . . challenge his conviction[]?" *Tatum v. Cimpl*, No. 14-cv-690-jdp, 2016 WL 3963250, at *2 (W.D. Wis. July 21, 2016); *see also Bradshaw v. Jayaraman*, 205 F.3d 1339 (Table), 1999 WL 1206870, at *2 (6th Cir. 1999) (unpublished disposition) (holding that Federal Tort Claims Act and *Bivens* claims against court reporter and others for allegedly falsified guilty plea transcript were *Heck*-barred and that the "district court properly dismissed the complaint . . . without allowing [plaintiff] to amend" or "first allowing discovery"); *Sussman v. Giordano*, Civil No. 11-6111 (SRC), 2012 WL 2936141, at *2 (D.N.J.

July 18, 2012) (holding that plaintiff's claims "that his conviction should be invalidated on appeal were he to have the missing transcript . . . challenge the validity of [his] federal conviction" and were *Heck*-barred); *Tatum*, No. 14-cv-690-jdp, 2016 WL 3963250, at *1–2 (declining to alter or amend judgment dismissing case against judges, clerks, and court reporters for actions during criminal proceedings as barred by *Heck* and absolute judicial immunity and declining to entertain request for declaratory relief where plaintiff could object within case and on appeal).

Finally, "[t]he doctrine of judicial immunity . . . confers complete immunity from suit" to a judge for "acts performed by the judge in the judge's judicial capacity." *Dawson v. Newman*, 419 F.3d 656, 660–61 (7th Cir. 2005) (internal quotation marks, citations, and emphasis omitted). "A judge will not be deprived of immunity because the action [s]he took was in error, was done maliciously, or was in excess of h[er] authority; rather [s]he will be subject to liability only when [s]he has acted in the clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (internal quotation marks omitted). Johnston alleges that the transcript omissions resulted from Judge Pallmeyer's rulings, but she is absolutely immune from suit as to those omissions.[1]

Johnston may yet have remedies available to him—while the Court expresses no opinion on the potential success of such endeavors, he is free to raise issues regarding his criminal case within appellate proceedings challenging his conviction or sentence (although the Seventh Circuit has already affirmed Johnston's conviction, *Johnston*, 814 F. App'x at 147), or to pursue collateral review of the proceedings. *United States v. Flagg*, 481 F.3d 946, 950 (7th Cir. 2007) ("The proper method for challenging a conviction and sentence is through direct appeal or collateral review."). Johnston is encouraged to conduct legal research before deciding whether and when to pursue collateral review.

Johnston may not, however, proceed with this case. The Court has considered whether it might be possible for him to amend his complaint and continue with this case. *Tate v. SCR Med. Transp.*, 809 F.3d 343, 346 (7th Cir. 2015). But as Johnston's claims are legally frivolous, amendment would be futile. The dismissal of this case counts as a dismissal under 28 U.S.C. § 1915(g). *See Conroy v. Henry*, No. 16-CV-750-JPG, 2017 WL 1346636, at *7 (S.D. Ill. Apr. 12, 2017) ("A complaint that is barred by *Heck* is considered legally frivolous and counts as a strike under 28 U.S.C. § 1915(g).") (citing *Moore v. Pemberton*, 110 F.3d 22, 24 (7th Cir. 1997)); *Woods v. McHale*, No. 14 CV 5689, 2014 WL 4803107, at *2 (N.D. Ill. Sept. 26, 2014) (collecting cases holding that § 1983 suits barred by *Heck* are legally frivolous and thus warrant strikes under § 1915(g)); *see also Kapordelis v. Carnes*, 482 F. App'x 498, 499 (11th Cir. 2012) (holding that the "district court did not abuse its discretion in denying Kapordelis's *Bivens* claim [against appellate judges for alleged bias] as frivolous"); *Paul v. Marberry*, 658 F.3d 702, 704 (7th Cir.

[1] The Seventh Circuit, of course, already sweepingly denied Johnston's claims that Chief Judge Pallmeyer was biased, emphasizing that "[a]dverse rulings by a judge neither constitute bias nor demonstrate a need for recusal." *Johnston*, 814 F. App'x at 147. Johnston could and should have raised the issue of any improper transcripts (or related judicial rulings) in his direct appeal, which was pending when he insists he discovered the purported omissions.

2011) (internal citations omitted) ("A dismissal is a dismissal, and provided that it is on one of the grounds specified in section 1915(g) it counts as a strike, whether or not it's with prejudice."). The case will be terminated and judgment will be entered. The dismissal is without prejudice to Johnston seeking relief through the federal criminal appeals process or appropriate postconviction proceedings, or in another civil rights lawsuit if and when his conviction is invalidated.

Given Johnston's litigation history, the Court takes this opportunity to warn him against frivolous, duplicative, or malicious filings. The Court may, of course, sanction improper conduct within cases; and Federal Rule of Civil Procedure 11, which applies even to unrepresented litigants, also may provide for sanctions. "Frivolous or legally unreasonable arguments . . . may incur [a] penalty" for violation of Rule 11.[2] *Berwick Grain Co. v. Ill. Dep't of Agric.*, 217 F.3d 502, 504 (7th Cir. 2000). "[F]or Rule 11 purposes a frivolous argument is simply one that is baseless or made without a reasonable and competent inquiry[.]" *Id.* (internal quotation marks and citations omitted). Rule 11 applies to *pro se* litigants as well as litigants represented by attorneys. Fed. R. Civ. P. 11(b). Rule 11(c) allows the Court to sanction a party for violation of Rule 11(b). "The very point of Rule 11 is to lend incentive for litigants 'to stop, think and investigate more carefully before serving and filing papers[.]'" *Berwick Grain Co.*, 217 F.3d at 505 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990)). Johnston may be sanctioned and also may be referred to the Executive Committee of the Northern District of Illinois for filing restrictions for any abusive, frivolous, or needlessly repetitive filings or for engaging in improper conduct in any case.

This Order bring the present case to an end—at least in its present form. If Johnston wishes to appeal, he must file a notice of appeal with this Court within 30 days of the entry of judgment. *See* Fed. R. App. P. 4(a)(1). If Johnston appeals, he will be liable for the $505.00 appellate filing fee regardless of the appeal's outcome. *See Evans v. Ill. Dep't of Corr.*, 150 F.3d 810, 812 (7th Cir. 1998). If the appeal is found to be non-meritorious, Johnston could be assessed another "strike" under 28 U.S.C. § 1915(g). If a prisoner accumulates three "strikes" because three federal cases or appeals have been dismissed as frivolous or malicious, or for failure to state a claim, the prisoner may not file suit in federal court without pre-paying the filing fee unless he is in imminent danger of serious physical injury. *Id.* If Johnston seeks leave to proceed *in forma pauperis* on appeal, he must file a motion for leave to proceed *in forma pauperis* on appeal in this Court. *See* Fed. R. App. P. 24(a)(1). His motion must include his intended grounds for appeal.

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[2] Rule 11(b) provides that, "[b]y presenting to the court a pleading, written motion, or other paper, . . . an [] unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purposes, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument or extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]" Fed. R. Civ. P. 11(b).

Johnston need not bring a motion to reconsider this Court's ruling to preserve his appellate rights. If Johnston wishes the Court to reconsider its judgment, however, he may file a motion under Federal Rule of Civil Procedure 59(e) or 60(b). Any Rule 59(e) motion must be filed within 28 days of the entry of this judgment. *See* Fed. R. Civ. P. 59(e). The time to file a motion pursuant to Rule 59(e) cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A timely Rule 59(e) motion suspends the deadline for filing an appeal until the Rule 59(e) motion is ruled upon. *See* Fed. R. App. P. 4(a)(4)(A)(iv). Any Rule 60(b) motion must be filed within a reasonable time and, if seeking relief under Rule 60(b)(1), (2), or (3), must be filed no more than one year after entry of the judgment or order. *See* Fed. R. Civ. P. 60(c)(1). The time to file a Rule 60(b) motion cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A Rule 60(b) motion suspends the deadline for filing an appeal until the Rule 60(b) motion is ruled upon only if the motion is filed within 28 days of the entry of judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi).

Date: January 11, 2021

Andrea R. Wood
United States District Judge

Additional material from this filing is available in the Clerk's Office.