Appendix (A)

Appendix (A)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1038

In re: ANTHONY ANDREWS,

Petitioner.

On Petition for Writ of Mandamus. (5:21-ct-03072-D)

Submitted: March 18, 2022 Decided: April 11, 2022

Before QUATTLEBAUM and HEYTENS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Petition denied by unpublished per curiam opinion.

Anthony Andrews, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Anthony Andrews filed a petition for a writ of mandamus alleging that the district court has unduly delayed acting on his Fed. R. Civ. P. 59(e) motion. In a supplemental filing, Andrews also seeks the recusal of the district court judge.

Mandamus relief is a drastic remedy and should be used only in extraordinary circumstances. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004); *In re Murphy-Brown, LLC*, 907 F.3d 788, 795 (4th Cir. 2018). Further, mandamus relief is available only when the petitioner has a clear right to the relief sought and "has no other adequate means to attain the relief [he] desires." *Murphy-Brown*, 907 F.3d at 795 (cleaned up).

Our review of the district court's docket reveals that the district court granted in part Andrews' Rule 59(e) motion on January 18, 2022. Accordingly, because the district court has recently decided Andrews' motion, this claim for relief is moot.

"A district judge's refusal to disqualify himself can be reviewed in this circuit by way of a petition for a writ of mandamus." *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987). However, Andrews' conclusory assertions of bias, based on his dissatisfaction with the district judge's adverse rulings, are insufficient to warrant recusal. *See Belue v. Leventhal*, 640 F.3d 567, 573 (4th Cir. 2011).

Therefore, we deny the mandamus petition. We grant Andrews' motion to seal in part. The Clerk is instructed to file Andrews' motion to seal under seal and to maintain all other currently sealed documents under seal. The motion is denied in all other respects. We dispense with oral argument because the facts and legal contentions are adequately

presented in the materials before this court and argument would not aid the decisional process.

PETITION DENIED

FILED: April 11, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1038
(5:21-ct-03072-D)

In re: ANTHONY ANDREWS

Petitioner

J U D G M E N T

In accordance with the decision of this court, the petition for writ of mandamus is denied.

/s/ PATRICIA S. CONNOR, CLERK

Appendix (B)

Appendix (B)

FILED: May 24, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1038
(5:21-ct-03072-D)

In re: ANTHONY ANDREWS

Petitioner

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Quattlebaum and Judge Heytens acting as a quorum pursuant to 28 U.S.C. § 46(d).

For the Court

/s/ Patricia S. Connor, Clerk

FILED: June 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1038
(5:21-ct-03072-D)

In re: ANTHONY ANDREWS

Petitioner

O R D E R

Upon consideration of submission relative to the motion to stay the judgment, the court denies the motion.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

Appendix (C)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:21-CT-3072-D

ANTHONY ANDREWS, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	)	**ORDER**

On March 10, 2021, Anthony Andrews ("Andrews" or "plaintiff"), a federal inmate proceeding pro se, filed a complaint under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671–80, and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) [D.E. 1]. On August 6, 2021, the court reviewed all of Andrews's filings, granted in part his motions to seal, and dismissed the action pursuant to 28 U.S.C. § 1915(g) [D.E. 14]. On August 30, 2021, Andrews moved for reconsideration [D.E. 16].[1] Andrews "avers that he is in fact in imminent danger of serious physical injury and has stated as such," contends that the court "conveniently left out" any analysis of Andrews's FTCA claim, and notes that another court in this district recently sealed certain records in one of Andrews's criminal cases. Id. at1–2; see [D.E. 17–19].[2] Andrews also seeks recusal of the undersigned [D.E. 20], a preliminary injunction [D.E. 18], and appointment of counsel [D.E. 18].

[1] Andrews instructed the clerk to file the motion under seal without giving any legal basis for the sealing, in contravention of EDNC CM/ECF Policy Manual § V.G. The court directs the clerk to unseal the motion.

[2] The court directs the clerk to maintain [D.E. 19] and the attached exhibit under seal.

Andrews seeks recusal of the undersigned "from all proceedings, civil and criminal, due to 'impartiality,'" based on the court's dismissal of this action. Mot. Recuse [D.E. 20] 1–2.[3] Andrews has failed to make the requisite showing for recusal. See, e.g., Liteky v. United States, 510 U.S. 540, 552–55 (1994); Belue v. Leventhal, 640 F.3d 567, 572–73 (4th Cir. 2011); United States v. Cherry, 330 F.3d 658, 665–66 (4th Cir. 2003). A judge need not recuse "simply because of unsupported, irrational or highly tenuous speculation." Cherry, 330 F.3d at 665 (quotation omitted). "Even remarks made 'that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" United States v. Lentz, 524 F.3d 501, 530 (4th Cir. 2008) (quoting Liteky, 510 U.S. at 555). Moreover, merely ruling against a party does not show impartiality or bias; adverse rulings "are proper grounds for appeal, not for recusal." Liteky, 510 U.S. at 555; see Belue, 640 F.3d 574. Thus, the court denies the motion.

Federal Rule of Civil Procedure 59(e) permits a court to alter or amend a judgment. See Fed. R. Civ. P. 59(e). Whether to alter or amend a judgment under Rule 59(e) is within the sound discretion of the district court. See, e.g., Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 650, 653 (4th Cir. 2002); Hughes v. Bedsole, 48 F.3d 1376, 1382 (4th Cir. 1995). Although Rule 59(e) does not specify a standard for granting a motion to alter or amend, the Fourth Circuit recognizes only three reasons for granting a motion under Rule 59(e): "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007) (quotation omitted); see Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005); Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998).

[3] To the extent Andrews seeks recusal of any judge in any of his criminal cases, see [D.E. 20] 2, he needs to file any motion(s) separately in the applicable criminal case(s).

Andrews does not demonstrate any error, much less a clear error, in the court's August 6, 2021 order. Andrews's allegations concerning the "imminent danger" he faces are vague, speculative, and conclusory. Cf. Johnson v. Warner, 200 F. App'x 270, 272 (4th Cir. 2006) (per curiam) (unpublished). To the extent Andrews relies on the fact that he sought relief under the FTCA in addition to Bivens as an exemption from the "imminent danger" requirement of § 1915(g), "the three strikes provisions of § 1915(g) have been applied to FTCA claims." Brown v. Edinger, No. 3:CV-15-711, 2015 WL 1812827, at *2 (M.D. Pa. Apr. 20, 2015) (unpublished) (collecting cases); see Sinkfield v. United States, No. 7:20CV00149, 2021 WL 789860, at *1–2 (W.D. Va. Mar. 1, 2021) (unpublished), appeal dismissed, No. 21-6385, 2021 WL 4203690 (4th Cir. Apr. 19, 2021) (per curiam) (unpublished); Dickson v. United States, No. 6:16-CV-29-KKC, 2016 WL 866962, at *1–3 (E.D. Ky. Mar. 3, 2016) (unpublished); cf. Gallardo v. United States, No. 1:21-CV-111, 2021 WL 4633854, at *2 (N.D.W. Va. Oct. 7, 2021) (unpublished). Thus, Andrews has not shown any reason why he may proceed in forma pauperis.

Alternatively, Andrews seeks "21 days to pay the $400.00 filing fee for this action." Mot. Recons. [D.E. 16] 3. The court grants Andrews's request. Andrews shall have until February 4, 2022, to send a money order in the amount of $402.00[4] payable to "Clerk, U.S. District Court" and present summonses for issuance. The court warns Andrews that if he pays the filing fee, he must properly serve the summons and complaint for each defendant himself.[5] Cf. 28 U.S.C. § 1915(d).

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[4] Effective December 1, 2020, the Judicial Conference raised the administrative fee for filing a civil action from $50 to $52. See 28 U.S.C. § 1914, n.14. Andrews filed this action on March 10, 2021. Thus, Andrews would need to pay $402.

[5] The court also advises Andrews that his complaint likely would not survive a motion to dismiss. See, e.g., Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Van de Kamp v. Goldstein, 555 U.S. 335, 342–43 (2009); Buckley v. Fitzsimmons, 509 U.S. 259, 269–70 (1993); Imbler v. Pachtman, 424 U.S. 409, 427–31 (1976); Bonilla v. United States, 652 F. App'x 885, 890–92 (11th Cir. 2016)

The court directs the clerk to send Andrews the appropriate number of blank summonses and the Eastern District of North Carolina's guide for pro se litigants together with a copy of this order. Andrews shall have until February 4, 2022, to pay the filing fee, fill out the summonses, and present them to the clerk's office for issuance. The clerk need not reopen this action unless Andrews complies with this order.

As for Andrews's motion for a preliminary injunction, Andrews has not plausibly alleged that he is likely to succeed on the merits, that he is likely to suffer irreparable harm absent injunctive relief, that the balance of equities tips in his favor, or that an injunction is in the public interest. See, e.g., Benisek v. Lamone, 138 S. Ct. 1942, 1943–45 (2018) (per curiam); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 345–46 (4th Cir. 2009), vacated, 559 U.S. 1089 (2010), reissued in relevant part, 607 F.3d 355 (4th Cir. 2010) (per curiam). Thus, the court denies the motion.

As for Andrews's motion for appointment of counsel, no right to counsel exists in civil cases absent "exceptional circumstances." Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984), abrogated in part on other grounds by Mallard v. U.S. Dist. Ct. for S. Dist. Iowa, 490 U.S. 296 (1989); see Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975). The existence of exceptional circumstances "hinges on [the] characteristics of the claim and the litigant." Whisnant, 739 F.2d at 163. The facts of this case and Andrews's abilities do not present exceptional circumstances. Thus, the court denies Andrews's request for appointed counsel.

In sum, the court DENIES plaintiff's motion for recusal [D.E. 20] and DENIES plaintiff's motion for a preliminary injunction and the appointment of counsel [D.E. 18]. The court GRANTS

(per curiam) (unpublished); Yacubian v. United States, 750 F.3d 100, 108 (1st Cir. 2014); Levine v. Gerson, 164 F. App'x 64, 65 (2d Cir. 2006) (unpublished).

IN PART plaintiff's motion for reconsideration [D.E. 16] and DIRECTS the clerk to send Andrews the appropriate number of blank summonses and the Eastern District of North Carolina's guide for pro se litigants together with a copy of this order. Andrews shall have until February 4, 2022, to pay the filing fee, fill out the summonses, and present them to the clerk's office for issuance. If Andrews complies with this order, the clerk shall reopen the case.

SO ORDERED. This 14 day of January 2022.

JAMES C. DEVER III
United States District Judge

Appendix (D)

Appendix (D)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

ANTHONY ANDREWS,

Plaintiff,

v.

Judgment in a Civil Case

UNITED STATES OF AMERICA, AUSA RUDY E. RENFER, AUSA KIMBERLY MOORE, and AUSA KELLY M. PERRY,

Defendants.

Case Number: 5:21-CT-3072-D

Decision by Court.

This action came before the Honorable James C. Dever III, United States District Judge, on plaintiff's motion to proceed in forma pauperis.

IT IS ORDERED AND ADJUDGED, in accordance with the court's order entered this date, that this action is hereby dismissed.

This Judgment Filed and Entered on August 6, 2021, with service on the following.

Anthony Andrews 15965-056 (via U.S. Mail)
Coleman Low - F.C.I.
P.O. Box 1031
Coleman, FL 33521

August 6, 2021

PETER A. MOORE, JR., CLERK

by _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:21-CT-3072-D

ANTHONY ANDREWS, Plaintiff,	)	
v.	)	**ORDER**
UNITED STATES OF AMERICA, et al., Defendants.	)	

On March 10, 2021, Anthony Andrews ("Andrews" or "plaintiff"), a federal inmate proceeding pro se, filed a complaint under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671–80, and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) [D.E. 1]. Andrews seeks leave to proceed in forma pauperis [D.E. 2], and to amend his complaint and place all filings under seal [D.E. 1-2, 10, 13].[1] As explained below, the court dismisses the action pursuant to 28 U.S.C. § 1915(g).

This case arises out of Andrews's extensive efforts to have numerous filings in his multiple criminal cases, including his name, placed under seal. See, e.g., Andrews v. Dobbs, 848 F. App'x 568, 569 (4th Cir. 2021) (per curiam) (unpublished); United States v. Doe, 826 F. App'x 301, 302 (4th Cir. 2020) (per curiam) (unpublished); In re Andrews, 801 F. App'x 179 (4th Cir. 2020) (per curiam) (unpublished); United States v. Andrews, No. 7:16-CR-30-D, 2020 WL 4939115, at *3 (E.D.N.C. Aug. 24, 2020) (unpublished), aff'd, 837 F. App'x 195 (4th Cir. 2021) (per curiam) (unpublished). In his complaint, Andrews names as defendants three Assistant United States

[1] The court grants Andrews's motions to amend his complaint and reviews all of Andrews's filings.

Attorneys who were involved in prosecuting his three federal criminal cases, and points to three documents that defendants filed unsealed. See Compl. [D.E. 1] 5–8. One document was publicly available for almost twelve years until it was sealed by an order filed on March 11, 2020, one document remains publicly available because the court denied Andrews's motion to seal that document on May 5, 2019, and one document was publicly available for less than two weeks before the court sealed it on March 10, 2020. Notably, Andrews—who as an incarcerated person retains almost no privacy in his personal effects—maintains personal copies of these documents while in prison. See [D.E. 1-1] 16–21, 23–30.

Citing both "negligent acts under [the] FTCA and constitutional violation[s] under the federal Judicial conference[']s privacy policy[,]" Andrews contends that defendants have "place[d his] life and safety in danger in prison[.]" Compl. at 6 (quotation and emphases omitted); see [D.E. 10] 1–2. Andrews describes his injuries as

> loss of privacy and liberty interest, anxiety, continued threat to safety within prison, depression, loss of appetite, weight loss, agoraphobic episodes, racing thoughts. These acts exacerbated my already existing co-morbidities of diabetes, high cholesterol, obesity. Indignation over private matters now within the public domain.

Compl. at 9. Andrews "request[s] the court find Standing Order 09-SO-02 (E.D.N.C.) . . . facially unconstitutional[,]" $500 million in compensatory damages and $250 million in punitive damages from each defendant, and his "immediate release from B.O.P. custody[.]" [D.E. 13] 2 (emphases omitted).

The Prison Litigation Reform Act's ("PLRA") three-strikes provision allows the court to dismiss a prisoner's action if the prisoner has not paid his filing fees and "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); see Blakely v. Wards, 738 F.3d 607, 610–11 (4th Cir. 2013) (en banc); Tolbert v. Stevenson, 635 F.3d 646, 650–51 (4th Cir. 2011); Green v. Young, 454 F.3d 405, 407–10 (4th Cir. 2006). Andrews has used his three strikes. See Andrews v. Jordan, 225 F. App'x 158 (4th Cir. 2007) (per curiam) (unpublished) (dismissing appeal as frivolous); Andrews v. Fox, 109 F. App'x 603 (4th Cir. 2004) (per curiam) (unpublished) (dismissing appeal as frivolous); Order, Andrews v. Suter, No. 1:05-cv-1173-UNA (D.D.C. June 10, 2005) [D.E. 4] (unpublished) (docket text indicating case dismissed with prejudice), aff'd, No. 05-5342 (D.C. Cir. Mar. 17, 2008) (unpublished) ("[a]ppellant's action is frivolous").

To avoid dismissal and proceed without prepayment of the filing fee, Andrews must plausibly allege that he is under imminent danger of serious physical injury. See 28 U.S.C. § 1915(g). This "exception [to the three-strikes rule] focuses on the risk that the conduct complained of threatens continuing or future injury, not on whether the inmate deserves a remedy for past misconduct." Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003); see Chase v. O'Malley, 466 F. App'x 185, 186 (4th Cir. 2012) (per curiam) (unpublished); Smith v. Wang, 370 F. App'x 377, 378 (4th Cir. 2010) (per curiam) (unpublished); Smith v. Mayes, 358 F. App'x 411, 411–12 (4th Cir. 2009) (per curiam) (unpublished); Johnson v. Warner, 200 F. App'x 270, 272 (4th Cir. 2006) (per curiam) (unpublished). Vague, speculative, or conclusory allegations are insufficient to invoke this exception. See Johnson, 200 F. App'x at 272. Rather, the inmate must make "specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury." Martin, 319 F.3d at 1050.

Andrews fails to plausibly allege that he is presently under imminent danger of serious physical injury. See Bradshaw v. Piccolo, No. 6:21-CV-6050 EAW, 2021 WL 1313628, at *2

(W.D.N.Y. Apr. 8, 2021) (unpublished); Buhl v. U.S. Dep't of Just., No. 15-cv-01179-GPG, 2015 WL 7005584, at *3 (D. Colo. Sept. 29, 2015) (unpublished); cf. Blow v. Bureau of Prisons, No. 1:07-cv-01355-AWI-GSA-PC, 2010 WL 582047, at *1 (E.D. Cal. Feb. 12, 2010) (unpublished). Andrews has further failed to plausibly allege "the kinds of injuries that can lead to impending death or other severe bodily harms[.]" Gresham v. Meden, 938 F.3d 847, 850 (6th Cir. 2019). Thus, Andrews has not made a colorable showing that this action should proceed under the exception to the PLRA's three-strikes rule.

As for Andrews's motions to seal the case [D.E. 1-2, 10], this court thoroughly analyzed a similar motion Andrews made in his most recent criminal case. See Andrews, 2020 WL 4939115, at *3. The court has considered the instant motions to seal under the governing standard. See, e.g., Courthouse News Serv. v. Schaefer, 2 F.4th 318, 325–29 (4th Cir. 2021); United States v. Doe, 962 F.3d 139, 145–52 (4th Cir. 2020); Doe v. Pub. Citizen, 749 F.3d 246, 272–73 (4th Cir. 2014). The court grants the motions in part, and the clerk will maintain the exhibits Andrews filed in support of his complaint [D.E. 1-1] under seal. Andrews, however, "has not given a compelling reason . . . for the court to seal this entire case." Blow, 2010 WL 582047, at *1.

In sum, the court GRANTS IN PART Andrews's motions to amend his complaint and place the case under seal [D.E. 1-2, 10, 13], and the clerk shall maintain the exhibits Andrews filed in support of his complaint [D.E. 1-1] under seal. The court DENIES Andrews's request to proceed in forma pauperis [D.E. 2], and DISMISSES the action under 28 U.S.C. § 1915(g). The clerk shall close the case.

SO ORDERED. This 6 day of August 2021.

JAMES C. DEVER III
United States District Judge

Appendix (E)

Appendix (E)

22-1038

Anthony Andrews
#15965-056
FCI COLEMAN LOW
FEDERAL CORRECTIONAL INSTITUTION
P. O. Box 1031
Coleman, FL 33521

FILED: February 1, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1038
(5:21-ct-03072-D)

In re: ANTHONY ANDREWS

Petitioner

ORDER

Anthony Andrews #15965-056 , has applied to proceed without prepayment of fees and given written consent to the collection in installments of the filing fee from petitioner's trust account in accordance with the terms of the Prison Litigation Reform Act, 28 U.S.C. § 1915(b)(PLRA). The court grants petitioner leave to proceed without full prepayment of fees and directs that:

> an initial partial fee of 20 percent of the greater of the average monthly deposits or average monthly balance for the six-month period immediately preceding the filing of the petition; and
>
> monthly payments of 20 percent of the preceding month's income be collected from the petitioner's trust account and forwarded to the Clerk, U.S. Court of Appeals, each time the amount in the account exceeds $10 until the filing fee has been paid in full.

Fees for this petition shall be paid as follows:

***Total Fee:** $500

*** Make payable to:**

"Clerk, United States Court"

*** All payments shall include:**

Appeal No.: 22-1038

*** All payments shall be mailed to:**

Clerk, U.S. Court of Appeals
1100 East Main Street, Suite 501
Richmond, VA 23219

In the event petitioner is transferred, the balance due shall be collected and paid to the Clerk by the custodian at petitioner's next institution. Petitioner's custodian shall notify the Clerk, U. S. Court of Appeals, in the event petitioner is released from custody.

This order is subject to rescission should the court determine that petitioner has had three prior cases dismissed as frivolous, malicious, or for failure to state a claim and that petitioner is not in imminent danger of serious physical injury.

A copy of this order shall be sent to petitioner's custodian and to all parties.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

RE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517
www.ca4.uscourts.gov

CONSENT TO COLLECTION OF FEES FROM TRUST ACCOUNT FOR ORIGINAL PROCEEDINGS

RECEIVED
2022 JAN 31 AM 8:42
COURT OF APPEALS
4TH CIRCUIT

No. 22-1038, In re: Anthony Andrews
5:21-ct-03072-D

FEE AMOUNT: $500
PAYABLE TO: Clerk, U.S. Court of Appeals

I, Anthony Andrews, # 15965-056, hereby consent for the appropriate prison officials to assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of:

(a) the average monthly deposits to my account for the six-month period immediately preceding the filing of my petition; or

(b) the average monthly balance in my account for the six-month period immediately preceding the filing of my petition.

I further consent for the appropriate prison officials to collect:

> monthly payments of 20 percent of my preceding month's income and forward the payments to the Clerk, U.S. Court of Appeals, each time the amount in the account exceeds $10 until the filing fee has been paid in full.

I understand that by signing this consent I agree to payment of the full filing fee from my trust account regardless of whether I later choose to dismiss my petition or the court decides my petition before the entire amount has been paid. I understand that once consent to the collection of fees has been given it cannot be withdrawn.

Signature _____ Date 1-21-22

Appendix (F)

Appendix (F)

22-1038

Anthony Andrews
#15965-056
FCI COLEMAN LOW
FEDERAL CORRECTIONAL INSTITUTION
P. O. Box 1031
Coleman, FL 33521

Court Name: US COURT OF APPEALS, 4TH CIR
C
Division: 1
Receipt Number: 4CCA003923
Cashier ID: cherb
Transaction Date: 03/15/2022
Payer Name: U.S. Treasury

PLRA CASE DKTG FEE INST [illegible]
For: U.S. Treasury
Case/Party: X-XXX-X-XX-22-[illegible]-XXX
Amount: $200.00
PLRA CASE DKTG FEE INST [illegible]
For: U.S. Treasury
Case/Party: X-XXX-X-XX-22-[illegible]-XXX
Amount: $26.74

CHECK
Remitter: U.S. Treasury
Check/Money Order Num: [illegible]
Amt Tendered: $226.74

Total Due: $226.74
Total Tendered: $226.74
Change Amt: $0.00

Anthony Andrews

$500.00-

$226.74=

$273.26 Balance Due - [illegible]

ONLY WHEN A BANK CLEARS THE CHECK, MONEY ORDER, OR VERIFIES CREDIT OF FUNDS IS THE FEE OR DEBT OFFICIALLY PAID OR DISCHARGED. A $53 FEE WILL BE CHARGED FOR ANY PAYMENT RETURNED/DENIED FOR INSUFFICIENT FUNDS.

Appendix (G)

Appendix (G)

22-1038

Anthony Andrews
#15965-056
FCI BUTNER MEDIUM I
SATELLITE CAMP
P. O. Box 1000
Butner, NC 27509-0000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
OFFICE OF THE CLERK
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517
www.ca4.uscourts.gov

Patricia S. Connor
Clerk

Telephone
804-916-2700

June 28, 2022

FULL PAYMENT UNDER
PRISON LITIGATION REFORM ACT

No. 22-1038, In re: Anthony Andrews
5:21-ct-03072-D

To: Warden
Federal Correctional Institution – Butner Medium I
P.O. Box 1000
Butner, NC 27509

The Clerk, U. S. Court of Appeals for the Fourth Circuit, acknowledges payment in full under the Prison Litigation Reform Act of the filing fee in the above-referenced case. No further payments should be withheld on account of this case.

Dee Gómez, Deputy Clerk
804-916-2700

Appendix (H)

Appendix (H)

FREDERICK BANKS, Plaintiff - Appellant, v. MARK HORNAK; TIMOTHY PIVNICHNY; SEAN LANGFORD; ROBERT WERNER; ADRIAN ROE; DAVID HICKTON; ROBERT CESSAR; JEFFERSON B. SESSIONS III; SCOTT SMITH; FEDERAL BUREAU OF INVESTIGATION; JAMES COMEY; MIKE POMPEO; CENTRAL INTELLIGENCE AGENCY; UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NORTH CAROLINA; UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA; FOREIGN INTELLIGENCE SURVEILLANCE COURT; ASSISTANT ATTORNEY GENERAL ON COUNTERTERRORISM; MERIT SYSTEMS PROTECTION BOARD; UNITED STATES MARSHALS SERVICE, Defendants - Appellees.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
698 Fed. Appx. 731; 2017 U.S. App. LEXIS 11416
No. 16-6981
June 27, 2017, Decided
May 9, 2017, Argued

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Writ of habeas corpus dismissed, Without prejudice Banks v. Forbes, 2017 U.S. Dist. LEXIS 214940 (E.D.N.C., Aug. 25, 2017)US Supreme Court certiorari denied by Banks v. Hornak, 138 S. Ct. 483, 199 L. Ed. 2d 367, 2017 U.S. LEXIS 6921 (U.S., Nov. 27, 2017)

Editorial Information: Prior History

{2017 U.S. App. LEXIS 1}Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. (5:16-ct-03160-BO). Terrence W. Boyle, District Judge.Banks v. Hornak, 2016 U.S. Dist. LEXIS 195430 (E.D.N.C., July 13, 2016)

Disposition:

APPLICATION DENIED.

Counsel ARGUED: Robert Matthew Bernstein, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellant.

Edward Himmelfarb, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Erin E. Murphy, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellant.

Chad A. Readler, Acting Assistant Attorney General, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; John Stuart Bruce, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellees.

Judges: Before NIEMEYER, WYNN, and HARRIS, Circuit Judges.

CASE SUMMARY Petitioner was barred from proceeding IFP on appeal by operation of 28 U.S.C.S. § 1915(g) because (1) petitioner fell squarely within § 1915(h)'s definition of "prisoner" because he was detained pending trial on criminal charges against him pursuant to 18 U.S.C.S. § 3142(e); and (2) 28 U.S.C.S. § 1361 **petition for writ of mandamus** was civil action.

OVERVIEW: HOLDINGS: [1]-Petitioner fell squarely within 28 U.S.C.S. § 1915(h)'s definition of a "prisoner" because at all relevant times petitioner was detained pending trial on the criminal charges against him pursuant to 18 U.S.C.S. § 3142(e); [2]-Petitioner's 28 U.S.C.S. § 1361 **petition for writ of mandamus** was a civil action within the meaning of 28 U.S.C.S. § 1915(g) because the petition sought to compel the institution of new proceedings by requesting that a grand jury be empaneled to investigate petitioner's separate allegations against a group of government officials and, additionally, to initiate separate proceedings for disclosure of certain electronic surveillance allegedly related to petitioner; [3]-Petitioner was barred from proceeding in forma pauperis on appeal by operation of 28 U.S.C.S. § 1915(g).

OUTCOME: Application denied.

LexisNexis Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners > Three Strikes Provision

28 U.S.C.S. § 1915(g), commonly referred to as the three-strikes rule, prohibits a prisoner from proceeding in forma pauperis if on 3 or more prior occasions, while incarcerated or detained in any facility, the prisoner 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.

Criminal Law & Procedure > Bail

18 U.S.C.S. § 3142(e) authorizes the pretrial detention of certain criminal defendants.

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners > Three Strikes Provision
Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis
Civil Rights Law > Prisoner Rights > Prison Litigation Reform Act > Claim Dismissals

28 U.S.C.S. § 1915 governs applications to proceed in forma pauperis, including applications filed by prisoners. The Prison Litigation Reform Act of 1995 significantly amended the application of the in forma pauperis statute to federal prisoners by adding the three-strikes rule. This rule provides that in no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section 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.S. § 1915(g).

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners

For purposes of 28 U.S.C.S. § 1915(g), the term "prisoner" means any person incarcerated or detained in

any facility who is accused of, convicted of, or sentenced for violations of criminal law. 28 U.S.C.S. § 1915(h). Accordingly, a court must decide whether, at the relevant times, a petitioner was incarcerated or detained in any facility, § 1915(h), as the result of a violation of criminal law.

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners

Ordinary pretrial detainees who have been charged with, but not yet convicted of or sentenced for, crimes are prisoners within the meaning of 28 U.S.C.S. § 1915(h).

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners
Civil Rights Law > Prisoner Rights > Prison Litigation Reform Act

Pretrial detainees are prisoners for purposes of the Prison Litigation Reform Act of 1995 because they are in custody while accused of violations of criminal law.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Civil Procedure > Remedies > Writs > All Writs Act
Administrative Law > Judicial Review > Remedies > Mandamus

Federal courts' power to issue writs of mandamus springs from two statutory sources. First, the All Writs Act, 28 U.S.C.S. § 1651, authorizes federal courts of appeals to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C.S. § 1651(a). A writ of mandamus issued pursuant to § 1651 is an extraordinary remedy and has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Second, 28 U.S.C.S. § 1361 accords to federal district courts original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Writs of mandamus issued pursuant to § 1361 are intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty.

Opinion

Opinion by: WYNN

Opinion

{698 Fed. Appx. 732} WYNN, Circuit Judge:

This case asks us to determine whether 28 U.S.C. § **1915(g)** bars Petitioner Frederick Banks from proceeding in forma pauperis on appeal of the dismissal of his purported mandamus action under 28 U.S.C. § 1361. Section **1915(g)**, commonly referred to as the "three-strikes rule," prohibits a prisoner, like Petitioner, from proceeding in forma pauperis if "on 3 or more prior occasions, while incarcerated or detained in any facility, [the prisoner] brought an action or appeal in a court of the United**{2017 U.S. App. LEXIS 2}** States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Petitioner argues that he is not subject to the three-strikes rule because (1) he is not a "prisoner" within the meaning of Section 1915; and (2) his appeal arises from the district court's dismissal of his petition for mandamus relief,

which, Petitioner maintains, is not a "civil action" for purposes of Section **1915(g)**.

We reject Petitioner's first argument and find that Petitioner falls within the plain language of the statute's definition of a "prisoner" because, at the time he filed his petition, Petitioner was in custody under 18 U.S.C. § 3142(e), which authorizes the pretrial detention of certain criminal defendants. We also reject Petitioner's attempt to characterize his petition as seeking relief in the preexisting criminal proceedings against him and, instead, conclude that his petition is a "civil action" within the meaning of Section **1915(g)**. Accordingly, we hold that Petitioner is subject to the three-strikes rule, and we deny Petitioner's application to proceed in forma pauperis on appeal.

I.

On August 5, 2015, a federal grand jury empaneled by the United States District Court for the Western District**{2017 U.S. App. LEXIS 3}** of Pennsylvania (the "Pennsylvania district court") indicted Petitioner on one count of interstate stalking, in violation of 18 U.S.C. § 2261A(2).1 Petitioner pleaded not guilty, and the government moved that Petitioner be detained pretrial pursuant to 18 U.S.C. § 3142(e), which requires that a district **{698 Fed. Appx. 733}** court detain a criminal defendant pretrial if the court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." After holding a detention hearing, the Pennsylvania district court found that Petitioner presented a risk of danger to his alleged interstate stalking victim, individuals against whom he had filed lawsuits, and possibly others and, thus, ordered that Petitioner be detained pending trial.

Soon thereafter, Petitioner's counsel moved the court to order an examination of Petitioner's "competence to understand the nature and consequences of the charges pending against him and to effectively participate in his defense." J.A. 94. The Pennsylvania district court granted the motion, and on October 9, 2015, ordered that Petitioner be "committed to the custody of the Attorney General for the conduct of" a psychiatric**{2017 U.S. App. LEXIS 4}** or psychological examination and the preparation of a report setting forth findings from that examination, citing 18 U.S.C. §§ 4241 and 4247. J.A. 96. The Pennsylvania district court conducted its first competency hearing on December 30, 2015, and, based on evidence adduced during that hearing, ordered that Petitioner undergo further examination.

On April 22, 2016, the Pennsylvania district court again concluded that there was "reasonable cause to believe that [Petitioner] may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." J.A. 133 (internal quotation marks omitted) (quoting 18 U.S.C. § 4241(a)). As a result, the court ordered Petitioner to undergo additional evaluation while remaining in the custody of the Attorney General pursuant to 18 U.S.C. § 4241. The court also ordered that Petitioner be transferred to Federal Medical Center Butner ("Butner") in Butner, North Carolina, to undergo such further evaluations and examinations. In the same order, the Pennsylvania district court also reaffirmed its finding that Petitioner "poses a danger (both economic and**{2017 U.S. App. LEXIS 5}** physical) to the community and others in it if released before trial" and found that Petitioner presented "a genuine and very real flight risk." J.A. 133. Accordingly, the court found an additional, independent basis for Petitioner's detention and ordered that Petitioner "remain in custody and . . . not be released on bond," J.A. 133, consistent with the requirements of 18 U.S.C. § 3142(e). Pursuant to the Pennsylvania district court's order, the Federal Bureau of Prisons transferred Petitioner to Butner on May 18, 2016.

On July 1, 2016, during his confinement at Butner, Petitioner filed a document titled "Indictment Complaint; and Petition for a Writ of Mandamus 28 USC 1361; and Motion to Disclose Electronic Surveillance 50 USC 1806(f)" in the United States District Court for the Eastern District of North

Carolina (the "district court"). J.A. 5. The petition named several defendants, including the FBI and former Director James Comey; the CIA and former Director John Brennan; and former Attorney General Loretta Lynch. In the petition, Petitioner recited several "counts" against the named defendants, claiming that these defendants unlawfully surveilled Petitioner without his consent; misappropriated public funds by requiring Petitioner**{2017 U.S. App. LEXIS 6}** to undergo mental health evaluations that they knew or had reason to know Petitioner did not need; and traveled in interstate commerce with the intent to harass and intimidate Petitioner by placing him under unlawful surveillance. The petition requested two forms of relief. First, the petition asked the district court "to compel the **{698 Fed. Appx. 734}** U.S. Attorney for this district to perform their official duty" and "to present evidence against the [named defendants] related to the charges above" in an evidentiary hearing. J.A. 5. Second, the petition requested that the government disclose all electronic surveillance related to Petitioner. In addition to filing the petition, Petitioner also sought leave to proceed in forma pauperis.

Because Petitioner applied to proceed in forma pauperis, the district court undertook a frivolity determination pursuant to 28 U.S.C. § 1915(e)(2), a subsection of the in forma pauperis statute that requires the court to "dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief." Additionally, the court discussed**{2017 U.S. App. LEXIS 7}** Section **1915(g)**-the three-strikes rule-and its application to Petitioner's case. In particular, the district court incorrectly stated that the three-strikes rule allows a court to dismiss a prisoner's civil action if the prisoner previously has had three or more prior actions or appeals, filed while the prisoner was "incarcerated or detained in any facility," 28 U.S.C. § **1915(g)**, dismissed as frivolous or malicious or for failure to state a claim.2

The district court then concluded that Petitioner, a "frequent filer" in the federal courts, fell "within the three strikes provision" and did not allege any imminent danger that would warrant excepting him from that provision's application. J.A. 11-13. Accordingly, the district court denied Petitioner's application to proceed in forma pauperis. And, based on its misunderstanding of Section **1915(g)**'s operation, the court dismissed Petitioner's action without prejudice, citing Section **1915(g)** for support. Petitioner later filed a motion for reconsideration, which the district court denied. Still detained at Butner, Petitioner timely appealed the district court's dismissal of his petition, as well as its denial of his application to proceed in forma pauperis. Petitioner then**{2017 U.S. App. LEXIS 8}** sought leave to proceed in forma pauperis on appeal.

In sum, Petitioner was detained pursuant to 18 U.S.C. § 3142(e) *and* 18 U.S.C. § 4241 at the time he filed (1) the underlying petition; (2) the notice of appeal; and (3) the application to proceed in forma pauperis before this Court. *See United States v. Banks*, No. 2:15-cr-00168-MRH-1, ECF No. 349 (W.D. Pa. May 10, 2017) (regarding Petitioner's continued detention pursuant to 18 U.S.C. § 3142(e)); *id.* ECF No. 361 (W.D. Pa. May 31, 2017) (regarding Petitioner's continued detention pursuant to 18 U.S.C. § 4241).

II.

28 U.S.C. § 1915 governs applications to proceed in forma pauperis, including applications filed by prisoners. The Prison Litigation Reform Act of 1995 ("PLRA") significantly amended the application of the in forma pauperis statute to federal prisoners by adding the three-strikes rule. This rule provides that "[i]n no event shall a prisoner **{698 Fed. Appx. 735}** bring a civil action or appeal a judgment in a civil action or proceeding under this section 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,**{2017 U.S. App. LEXIS 9}** unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § **1915(g)**. The question now before this Court is whether Section **1915(g)** bars Petitioner's application to proceed in forma pauperis on appeal.

Petitioner argues that his application is not barred by Section **1915(g)** for two reasons: (1) he is not a "prisoner" as Section 1915 defines that term; and (2) his **petition for writ of mandamus** pursuant to 28 U.S.C. § 1361 is neither a "civil action" nor an "appeal [from] a judgment in a civil action or proceeding" subject to Section **1915(g)**.3 We reject both arguments.

A.

Petitioner first argues that he is not a "prisoner" and, therefore, that the three-strikes rule cannot preclude him from proceeding in forma pauperis on appeal. For purposes of Section **1915(g)**, "the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, [or] sentenced for . . . violations of criminal law." 28 U.S.C. § 1915(h). Accordingly, we must decide whether, at the relevant times, Petitioner was "incarcerated or detained in any facility," *id.*, as "the result of a violation of criminal law," *Michau v. Charleston County*, 434 F.3d 725, 727 (4th Cir. 2006).

Although Petitioner acknowledges that "ordinary pretrial detainees who have been charged with, but not yet convicted of or sentenced for, crimes" are "prisoners" within the**{2017 U.S. App. LEXIS 10}** meaning of Section 1915(h), he asserts that he "is not an ordinary pretrial detainee but a person in federal custody under the civil-commitment program for the mentally ill," citing his confinement pursuant to 18 U.S.C. § 4241. Pet'r's Opening Br. at 17-18. The Pennsylvania district court, however, originally detained Petitioner not based on cause to believe that Petitioner may have been incompetent to stand trial under 18 U.S.C. § 4241, but based on its finding that Petitioner presented a threat to the safety of certain individuals in the community, requiring that Petitioner be detained pretrial pursuant to 18 U.S.C. § 3142(e). As recently as April 22, 2016, the Pennsylvania district court concluded that Petitioner continues to merit pretrial detention under Section 3142(e) because he "poses a danger (both economic and physical) to the community and others in it if released before trial" and because "he would be a genuine and very real flight risk" if released prior to trial on his pending criminal charges. J.A. 133.

Accordingly, at the time Petitioner filed the petition and at the time he filed his notice of appeal and application to proceed **{698 Fed. Appx. 736}** in forma pauperis before this Court, Petitioner was detained on two, independent bases: (1) to undergo competency evaluations**{2017 U.S. App. LEXIS 11}** to "determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the [criminal] proceedings to go forward," 18 U.S.C. § 4241(d)(1); and (2) to "reasonably assure [his] appearance . . . and the safety of any . . . person and the community," *id.* § 3142(e)(1). Because of this dual basis for Petitioner's detention, at all relevant times Petitioner was detained pending trial on the criminal charges against him pursuant to 18 U.S.C. § 3142(e)-the statute governing "ordinary pretrial detainees who have been charged with, but not yet convicted of or sentenced for, crimes." Pet'r's Opening Br. at 18. In other words, Petitioner was at all relevant times a "person incarcerated or detained in any facility who [wa]s accused of . . . violations of criminal law." 28 U.S.C. § 1915(h). Thus, Petitioner falls squarely within Section 1915(h)'s definition of a "prisoner." *See Kalinowski v. Bond*, 358 F.3d 978, 979 (7th Cir. 2004) ("Pretrial detainees are 'prisoners' for purposes of the PLRA because they are in custody while 'accused of . . . violations of criminal law.'" (quoting 28 U.S.C. § 1915(h))). Therefore, we reject Petitioner's contention that he is not a "prisoner" as defined in Section 1915(h).4

B.

Petitioner also argues that Section **1915(g)** does not apply to him because his petition was a **petition for writ of mandamus**, not{**2017 U.S. App. LEXIS 12**} a "civil action," and his pending appeal is, accordingly, not an "appeal [from] a judgment in a civil action."5 28 U.S.C. § **1915(g)**. According to Petitioner, petitions for writs of mandamus are, categorically, not "civil actions" and, therefore, are not subject to the three-strikes rule.

Federal courts' power to issue writs of mandamus springs from two statutory sources. First, the All Writs Act, 28 U.S.C. § 1651, {**698 Fed. Appx. 737**} authorizes federal courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."6 28 U.S.C.§ 1651(a). A writ of mandamus issued pursuant to Section 1651 is an "extraordinary remedy" and "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943)). Second, 28 U.S.C. § 1361 accords to federal district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Writs of mandamus issued pursuant to Section 1361 are "intended to provide a remedy for a plaintiff only if he has exhausted{**2017 U.S. App. LEXIS 13**} all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616-17, 104 S. Ct. 2013, 80 L. Ed. 2d 622 (1984).

In support of the argument that his petition-which seeks relief pursuant to Section 1361-is not a "civil action" within the meaning of Section **1915(g)**, Petitioner relies on several out-of-circuit cases holding that certain petitions for writs of mandamus filed pursuant to Section 1651 are not "civil actions" and, thus, are not subject to Section **1915(g)**. Petitioner principally relies on *Madden v. Myers*, 102 F.3d 74 (3d Cir. 1996), *superseded in part by* 3d Cir. R. 24.1(c), a case in which the Third Circuit considered "whether the filing fee payment requirements of the [in forma pauperis statute] apply to mandamus petitions" filed by prisoners. 102 F.3d at 76. In *Madden*, the petitioner sought a Section 1651 writ of mandamus compelling the district court to act promptly on his petition for habeas corpus relief. *Id.*

The *Madden* Court found that a writ of mandamus "is not an 'action,' and, *a fortiori*, not a 'civil action.'" *Id.* Instead, the court concluded that a Section 1651 writ of mandamus is "a procedural mechanism through which a court of appeals reviews a carefully circumscribed and discrete category of district court orders," *id.* at 77, observing that the writ "has traditionally been available to{**2017 U.S. App. LEXIS 14**} a court of appeals only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so,'" *id.* at 77 n.3 (quoting *Will*, 389 U.S. at 95). The *Madden* Court also concluded that a writ of mandamus is not an "appeal"-that is, an "appeal of a civil action"-but "is different in kind from an appeal" and, in fact, "may not issue if a petitioner can obtain relief by appeal." *Id.* at 77.

Because it found that a writ of mandamus did not fall within the plain meaning of either a "civil action" or an "appeal" as those terms are used in Section 1915, the court concluded that its decision was "not {**698 Fed. Appx. 738**} controlled by the plain meaning of the text." *Id.* Accordingly, the court moved on to determining whether treating a **petition for writ of mandamus** as a "civil action" would further or, alternatively, "frustrate[] congressional intent." *Id.* The *Madden* Court explained that "[t]he clear import of the PLRA is to curtail frivolous prison litigation, namely that brought under 42 U.S.C. § 1983 and the Federal Torts Claims Act." *Id.* (citing H.R. Conf. Rep. No. 104-378, 104th Cong., 2d Sess. (1996)). The court described Section 1651 writs of mandamus as securing types of relief that are fundamentally different from{**2017 U.S. App. LEXIS 15**} the kinds of relief afforded pursuant to

causes of action that are subject to the PLRA. In particular, the court stated that the writ provides relief "for prisoners who may have no other relief in a criminal action in which a court has exceeded its judicial power or failed to use its power where there is a duty to do so." *Id.* (internal quotation marks omitted). And, additionally, the court described Section 1651 petitions as "often the only way a litigant can obtain review of certain orders or can compel a district judge to act," *e.g.*, when the district court has "unduly delayed" proceedings in the petitioner's case or when the district judge has "refus[ed] to recuse . . . [and] the judge's impartiality might reasonably be questioned." *Id.* at 78. Concluding, then, that Section 1651 petitions are not representative of the type of "frivolous prison litigation" Congress intended to curtail through the PLRA, the Third Circuit held that "where the underlying litigation is criminal, or otherwise of the type that Congress did not intend to curtail, the petition for mandamus need not comply with the PLRA." *Id.* at 77.

Other courts have reached similar conclusions regarding whether Section 1651 petitions for writs of mandamus are subject to the PLRA. *See**{2017 U.S. App. LEXIS 16}** *In re Stone*, 118 F.3d 1032, 1034 & n.2 (5th Cir. 1997) (holding that, "[i]n a mandamus proceeding, . . . the nature of the underlying action will determine the applicability of the PLRA," such that petitions filed in underlying *civil* proceedings are "civil actions" but those filed in underlying *criminal* proceedings are not); *Martin v. United States*, 96 F.3d 853, 854-55 (7th Cir. 1996) (Posner, C.J.) (finding that, although Section 1651 petitions arising from underlying *civil* litigation are "civil actions," petitions arising from *criminal* proceedings are "not a form of prisoner litigation" that Congress intended to curtail and, thus, are not "civil actions"); *In re Nagy*, 89 F.3d 115, 117 & n.1 (2d Cir. 1996) (holding that "if a prisoner seeks a writ of mandamus directed to a judge conducting a criminal trial, the application is not within the category of lawsuits to which the PLRA was aimed" and is not a "civil action" subject to the PLRA, but noting that a petition arising from *civil* proceedings may be a "civil action" if it is "an alternative device for obtaining the relief sought in civil actions that are covered by the PLRA"). *But see Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (holding that "petitions for a writ of mandamus are included within the meaning of the term 'civil action' as used in § 1915"). Similarly, the Fourth Circuit has adopted a rule requiring only prisoners who file a petition for writ**{2017 U.S. App. LEXIS 17}** of mandamus "in a matter arising out of a *civil* case" to comply with Section 1915's requirement that prisoners proceeding in forma pauperis pay filing fees in full. 4th Cir. R. 21(c)(1), (3) (emphasis added); *see also* 28 U.S.C. § 1915(b)(1).

Petitioner argues that his **petition for writ of mandamus**, filed pursuant to Section 1361 rather than Section 1651, falls outside the definition of a "civil action" and, thus, that Section **1915(g)** does not bar him from proceeding in forma pauperis on appeal. No circuit court has squarely **{698 Fed. Appx. 739}** addressed, in a published opinion, whether petitions for writs of mandamus filed pursuant to Section 1361 are, or are not, "civil actions" within the meaning of Section 1915.7 Nor do we resolve that question in this case. Instead, we assume, without deciding, that Section 1361 and Section 1651 petitions are treated equivalently for purposes of Section 1915. Applying this assumption, certain Section 1361 petitions would fall squarely within the definition of a "civil action" for purposes of Section 1915-such as petitions that serve merely as "alternative device[s] for obtaining the relief sought in civil actions that are covered by the PLRA," *In re Nagy*, 89 F.3d at 117 n.1-while other Section 1361 petitions would not be "civil actions" subject to the three-strikes rule-such as petitions that seek relief in preexisting criminal proceedings, *see id.* at 117; *Martin*, 96 F.3d at 854.

Petitioner attempts to characterize his Section 1361 petition**{2017 U.S. App. LEXIS 18}** as seeking relief in his preexisting criminal proceedings before the Western District of Pennsylvania and, thus, as falling outside the definition of a "civil action." In particular, Petitioner's counsel suggests that Petitioner "may have harbored concern about his speedy-trial rights" and "may have also felt that his mental-competency proceedings were unjustly drawn out." Pet'r's Opening Br. at 32. Based on these

conjectures, Petitioner's counsel argues that we should read Petitioner's Section 1361 petition as seeking to compel the Pennsylvania district court to act on the criminal charges pending against Petitioner in that district or, similarly, to move forward with Petitioner's competency proceedings in that district. But no fair reading of the petition supports this characterization.8 Indeed, rather than seeking relief in Petitioner's criminal proceedings before the Pennsylvania district court, the petition in question seeks to compel the institution of *new* proceedings by requesting that a grand jury be empaneled to investigate Petitioner's separate allegations against a group of government officials and, additionally, to initiate *separate* proceedings for disclosure of certain electronic surveillance**{2017 U.S. App. LEXIS 19}** allegedly related to Petitioner.

As such, even assuming that Section 1361 petitions seeking relief in preexisting criminal proceedings are, like their Section 1651 counterparts, not "civil actions" for purposes of the PLRA, Petitioner's Section 1361 petition does not benefit from this principle. Accordingly, we conclude that Petitioner's Section 1361 petition is a "civil action" within the meaning of Section **1915(g)** and, thus, that Petitioner is barred from proceeding in forma pauperis on appeal by operation of the three-strikes rule.

III.

For the reasons set forth herein, we conclude that Petitioner is barred from proceeding in forma pauperis on appeal by **{698 Fed. Appx. 740}** operation of Section **1915(g)**. Accordingly, we deny Petitioner's application to proceed in forma pauperis.

APPLICATION DENIED

Footnotes

1

The government later procured a superseding indictment further charging Petitioner with wire fraud, aggravated identity theft, and making false statements.

2

Notably, Section **1915(g)** is not a basis for dismissing a claim. On the contrary, Section **1915(g)** operates only to bar certain specified prisoners from proceeding in forma pauperis. 28 U.S.C. § **1915(g)** (barring three-strikers from "bring[ing] a civil action or appeal[ing] a judgment in a civil action or proceeding *under this section*" (emphasis added)); *id.* § 1915 (governing "[p]roceedings in forma pauperis"); *see also Blakely v. Wards*, 738 F.3d 607, 609 (4th Cir. 2013) (en banc) (explaining that a "prisoner generally may not proceed in forma pauperis but rather must pay up-front all filing fees for his subsequent suits" when the prisoner "has already had three cases dismissed as frivolous, malicious, or for failure to state a claim for which relief may be granted").

3

Petitioner does not dispute that-if the three-strikes rule otherwise applies-he is barred from proceeding in forma pauperis because he previously has filed numerous claims "while incarcerated or detained," 28 U.S.C. § **1915(g)**, that have been dismissed as frivolous or malicious or for failing to state a claim on which relief may be granted, *see Banks v. U.S. Marshal*, 274 F. App'x 631, 635 (10th Cir. 2008) (assessing Petitioner four strikes); *Banks v. County of Allegheny*, 568 F. Supp. 2d 579, 586 n.1 (W.D. Pa. 2008) (adopting magistrate's report and recommendation, which explained that Petitioner "has accumulated many more than three strikes"). Nor does Petitioner argue that he "is under imminent danger of serious physical injury," 28 U.S.C. § **1915(g)**, such that the statutory

exception to the three-strikes rule should apply.
4

We note, however, that if the basis for Petitioner's detention changes, Petitioner may not qualify as a "prisoner" for purposes of Section **1915(g)**. For instance, if the Pennsylvania district court were to determine that Petitioner's "mental condition has not so improved as to permit the proceedings to go forward," 18 U.S.C. § 4241(d), and to civilly commit Petitioner pursuant to the procedures set forth in 18 U.S.C. § 4246, Petitioner would no longer be detained as "the result of a violation of criminal law," *Michau*, 434 F.3d at 727. Instead, Petitioner would be detained as the result of a determination that he "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. § 4246(d). In such circumstances, Petitioner would not be a "prisoner" for purposes of the in forma pauperis statute. *Cf. Kolocotronis v. Morgan*, 247 F.3d 726, 728 (8th Cir. 2001) (holding that an inmate detained at a mental health facility after being found not guilty by reason of insanity was a patient receiving mental health treatment and was not a "prisoner" under Section 1915(h)); *Michau*, 434 F.3d at 727-28 (holding that an individual detained under the South Carolina Sexually Violent Predator Act was not a "prisoner" within the meaning of Section 1915(h) because he was detained pursuant to a nonpunitive, civil detention statute).
5

In the alternative, Petitioner asserts that his petition sought habeas corpus relief by requesting that the government "release him from federal custody." Pet'r's Opening Br. at 34-35. No fair reading of the petition supports this argument. This is particularly true given that Petitioner has demonstrated an ability to request his release from custody should he desire to do so. *See, e.g., In re Banks*, No. 16-3933, 674 Fed. Appx. 238, 2017 U.S. App. LEXIS 1519, 2017 WL 383369, at *1 (3d Cir. Jan. 27, 2017) (summarizing a petition in which Petitioner alleged that the Pennsylvania district court judge was "keeping him committed for an unreasonable period of time" and sought "an order . . . directing the Respondents to . . . release him from custody"). Accordingly, we decline to consider this argument.
6

Federal Rule of Civil Procedure 81(b) abolished the common law writ of mandamus, precluding federal district courts from issuing writs of mandamus under Section 1651. *See* 12 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3134 (3d ed. 2014). Rule 81(b) has no effect on appellate courts' power to issue writs of mandamus pursuant to Section 1651. *Id.*; *see also Armour & Co. v. Kloeb*, 109 F.2d 72, 74 (6th Cir. 1939) (stating that Rule 81(b) "cannot be construed to apply to Circuit Courts of Appeals, since so construed it would be in the exercise of a power not conferred upon the Supreme Court"), *judgment rev'd on other grounds by Kloeb v. Armour & Co.*, 311 U.S. 199, 61 S. Ct. 213, 85 L. Ed. 124 (1940). And despite Rule 81(b), Congress has granted district courts original jurisdiction over certain "action[s] in the nature of mandamus." 28 U.S.C. § 1361.
7

The Third Circuit has noted, however, that "the same considerations" that govern the determination of whether a Section 1651 petition is a "civil action" within the meaning of the PLRA "may apply" when determining whether a **petition for writ of mandamus** filed pursuant to Section 1361 is a "civil action" for purposes of the PLRA. *Madden*, 102 F.3d at 76 n.2.
8

This is especially true given that Petitioner previously has filed a mandamus petition seeking to compel just such action in the Pennsylvania district court. *See, e.g., In re Banks*, 2017 U.S. Dist.

LEXIS 39156, 2017 WL 383369, at *1 (summarizing a petition in which Petitioner alleged that the Pennsylvania district court judge was "violat[ing] his right to a speedy trial" and "keeping him committed for an unreasonable period of time" and sought "an order . . . directing the Respondents to perform their duties").

Appendix (I)

SEALED ORDER

Appendix J

SEALED ORDER

APPENDIX K

SEALED ORDER

Appendix (L)

FILED: July 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6124
(5:21-ct-03072-D)

ANTHONY ANDREWS

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; AUSA RUDY E. RENFER; AUSA KIMBERLY A. MOORE; AUSA KELLY M. PERRY

Defendants - Appellees

ORDER

Upon consideration of the motion for extension, the court extends the time for filing the application for leave to proceed under the Prison Litigation Reform Act to 10/11/2022.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

22-6124

Anthony Andrews
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