

W.D.N.Y.
23-cv-1121
Vilardo, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of August, two thousand twenty-four.

Present:

Richard J. Sullivan,
Michael H. Park,
Steven J. Menashi,
Circuit Judges.

David C. Lettieri,

Plaintiff-Appellant,

v.


23-8094 (L),
24-1327 (Con)

James Quinn Auricchio,

Defendant-Appellee.

Appellant, proceeding pro se, moves for in forma pauperis status in each of these appeals. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeals are DISMISSED because they “lack[] an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); see 28 U.S.C. § 1915(e).

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

A circular seal of the United States Court of Appeals for the Second Circuit is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around a central star.

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U.S. DISTRICT COURT
U.S. District Court, Western District of New York (Buffalo)
CIVIL DOCKET FOR CASE #: 1:23-cv-01121-LJV

Lettieri v. Aurrichio
Assigned to: Hon. Lawrence J. Vilardo
Demand: \$1,000,000
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 10/25/2023
Date Terminated: 09/30/2024
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

David C. Lettieri

represented by **David C. Lettieri**
2023-00002000
NIAGARA COUNTY JAIL
BOX 496
LOCKPORT, NY 14094
PRO SE

V.

Defendant

James Quinn Auricchio

Date Filed	#	Docket Text
10/25/2023	<u>1</u>	COMPLAINT against James Quinn Aurrichio, filed by David C. Lettieri. (CGJ) (Entered: 10/26/2023)
10/25/2023	<u>2</u>	MOTION for Leave to Proceed in forma pauperis by David C. Lettieri. (CGJ) (Entered: 10/26/2023)
10/26/2023		Remark: Plaintiff has been mailed a pro se packet including a privacy notice, consent to proceed before a Magistrate Judge, and a civil case timeline. (CGJ) (Entered: 10/26/2023)
12/04/2023	<u>3</u>	ORDER denying <u>2</u> Motion for Leave to Proceed in forma pauperis. If Lettieri wants to pursue this action, he must pay the \$402.00 filing and administrative fees. If Lettieri fails to pay the full filing and administrative fees within 30 days of the date of this order, this case will be dismissed without prejudice without further order of the Court. Signed by Hon. Lawrence J. Vilardo on 12/4/2023. (CGJ) This was mailed to: David C. Lettieri. (Entered: 12/05/2023)
12/20/2023	<u>4</u>	MOTION for Reconsideration by David C. Lettieri. (CGJ) (Entered: 12/20/2023)

12/20/2023	<u>5</u>	NOTICE OF APPEAL as to <u>3</u> Order, by David C. Lettieri. Fee Status: Due (CGJ) (Entered: 12/20/2023)
12/20/2023	<u>6</u>	CLERKS CERTIFICATE filed and electronically sent to Court of Appeals (Attachments: # <u>1</u> Index) (CGJ) (Entered: 12/20/2023)
03/13/2024	<u>7</u>	Mail Returned as Undeliverable. Pro Se packet sent to David C. Lettieri. Clerk remailed to Plaintiff at Niagara County Jail. (CGJ) (Entered: 03/13/2024)
04/22/2024	<u>8</u>	<p>TEXT ORDER: On December 4, 2023, this Court denied the motion of the <i>pro se</i> plaintiff, David C. Lettieri, to proceed <i>in forma pauperis</i>. Docket Item 3. In that order, the Court found that Lettieri was barred from proceeding IFP under the "three strikes rule" of 28 U.S.C. § 1915. <i>Id.</i> at 2-4. That provision prohibits a prisoner from proceeding IFP if he has, "on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal... 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." <i>Id.</i> at 2 (alteration in original) (quoting 28 U.S.C. § 1915(g)). The Court thus ordered that Lettieri's complaint would be dismissed without prejudice unless he paid the required \$402.00 filing and administrative fees within 30 days of the date of that order. <i>Id.</i> at 4 (bolding omitted).</p> <p>Instead of paying those fees, Lettieri moved for reconsideration of this Court's order. Docket Item 4. He also filed a notice of appeal. Docket Item 5.</p> <p>"If a timely motion is made for relief that the [district] court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed R. Civ. P. 62.1. The Court therefore addresses Lettieri's motion.</p> <p>"As explained by the Second Circuit, 'the standard for granting a motion for reconsideration is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" <i>Kharshiladze v. Philips</i>, 2021 WL 1525869, at *1 (W.D.N.Y. Apr. 19, 2021) (alterations omitted) (quoting <i>Shrader v. CSX Transp., Inc.</i>, 70 F.3d 255, 257 (2d Cir. 1995)). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice." <i>Id.</i> (quoting <i>Virgin Atl. Airways v. Nat'l Mediation Bd.</i>, 956 F.2d 1245, 1255 (2d Cir. 1992)).</p> <p>Lettieri does not provide any such grounds justifying reconsideration here. To the extent the motion is legible, it appears to argue that the cases that this Court cited as "strikes" under section 1915(g) may be "remanded" by the Second Circuit, so that there then would be "only one strike" against him when he signed the complaint in this case on October 11, 2023. Docket Item 4 at 1-2; <i>see</i> Docket Item 1 at 7. But—as this Court has previously explained to Lettieri, <i>see Lettieri v. Hockwater</i>, Case No. 23-cv-1123, Docket Item 8 at 4-5 (W.D.N.Y. Feb. 13, 2024)—it is well settled that "[a] prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of [a pending] appeal," <i>Coleman v. Tollefson</i>, 575 U.S. 532, 537 (2015). Lettieri's motion for reconsideration therefore is denied.</p> <p>SO ORDERED. Issued by Hon. Lawrence J. Vilardo on 4/22/2024. (CRT)</p>

		This was mailed to: the plaintiff. (Entered: 04/22/2024)
05/06/2024	<u>9</u>	NOTICE OF APPEAL as to 8 Text Order by David C. Lettieri. Fee Status: Due (CGJ) (Entered: 05/06/2024)
05/06/2024	<u>10</u>	CLERKS CERTIFICATE filed and electronically sent to Court of Appeals (Attachments: # <u>1</u> Index) (CGJ) (Entered: 05/06/2024)
09/27/2024	<u>11</u>	MANDATE of USCA as to <u>5</u> Notice of Appeal, <u>9</u> Notice of Appeal filed by David C. Lettieri. It is hereby ORDERED that the motions for in forma pauperis status are DENIED and the appeals are DISMISSED. (CGJ) (Entered: 09/27/2024)
09/27/2024	12	NOTICE: this case is dismissed without prejudice per Order entered in re: David C. Lettieri, 23-mc-32, docket #32. (LB)This was mailed to David C. Lettieri at Niagara County Jail. Clerk to follow-up. (LB) (Entered: 09/27/2024)
09/30/2024	<u>13</u>	JUDGMENT in favor of James Quinn Auricchio against David C. Lettieri. Signed by Mary C. Loewenguth, Clerk of Court on 9/30/2024. (CGJ) This was mailed to: Plaintiff. (Entered: 09/30/2024)
10/07/2024	<u>14</u>	Mail Returned as Undeliverable. <u>13</u> Judgment sent to David C. Lettieri (CGJ) (Entered: 10/07/2024)

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APPENDIX

B

DAVID C. LETTIERI, Plaintiff, v. JAMES QUINN AURICCHIO,¹ Defendant.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
2023 U.S. Dist. LEXIS 232046
23-CV-1121-LJV
December 4, 2023, Decided
December 4, 2023, Filed

Counsel {2023 U.S. Dist. LEXIS 1} David C. Lettieri, Plaintiff, Pro se, Lockport
NY.
Judges: LAWRENCE J. VILARDO, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: LAWRENCE J. VILARDO

Opinion

ORDER

The *pro se* plaintiff, David C. Lettieri, was a prisoner incarcerated at the Niagara County Jail when he commenced this action under 42 U.S.C. § 1983. Docket Item 1. He alleges that his former defense attorney, James Quinn Auricchio, violated his right to due process and provided ineffective assistance of counsel.² Docket Item 1 at 5.

Lettieri has moved to proceed *in forma pauperis* ("IFP") under 28 U.S.C. § 1915(a)-(b). Docket Item 2. For the reasons that follow, Lettieri's motion to proceed IFP is denied. Therefore, his complaint will be dismissed without prejudice unless he pays the required \$402.00 filing and administrative fees.³

LEGAL PRINCIPLES

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act of 1995, a prisoner who cannot afford to pay court filing fees may proceed IFP and repay the fees according to a "structured payment plan." *Chavis v. Chappius*, 618 F.3d 162, 167 (2d Cir. 2010); 28 U.S.C. § 1915(a)-(b). But certain prisoners—"so-called 'frequent filers'"—are barred from filing IFP. *Chavis*, 618 F.3d at 167. The statute defines such litigants as those who have,

on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal . . . that was dismissed on the grounds that {2023 U.S. Dist. LEXIS 2} 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).

Courts refer to this provision as the "three strikes rule." *Malik v. McGinnis*, 293 F.3d 559, 560 (2d Cir. 2002). Claims dismissed because of judicial or prosecutorial immunity are "frivolous" and therefore "strikes" under 28 U.S.C. § 1915(g). See *Mills v. Fischer*, 645 F.3d 176, 177 (2d Cir. 2011) (judicial immunity); *Collazo v. Pagano*, 656 F.3d 131, 134 (2d Cir. 2011) (prosecutorial immunity). Likewise, any dismissal for failure to state a claim is a "strike" regardless of whether the dismissal was with or without prejudice. See *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727, 207 L. Ed. 2d 132 (2020).

A prisoner who has accumulated "three strikes" may proceed IFP only if the complaint alleges that

"the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). A danger that has "dissipated by the time [the] complaint is filed" is not "imminent." *Abreu v. Brown*, 317 F. Supp. 3d 702, 704 (W.D.N.Y. 2018) (quoting *Chavis*, 618 F.3d at 169); see *Malik*, 293 F.3d at 563 (holding that "by using the term 'imminent,' Congress indicated that it wanted to include a safety valve for the 'three strikes' rule to prevent impending harms, not those harms that had already occurred" (alteration omitted)). So to be entitled to the exception, the prisoner must adequately allege a danger that "exist[s] at the time the complaint is filed." *Malik*, 293 F.3d at 563.

DISCUSSION

The three strikes rule squarely{2023 U.S. Dist. LEXIS 3} applies here. In addition to this case, Lettieri has filed more than 50 actions in this Court in the past year. See Lettieri v. Dep't of Just., Case No. 23-cv-865, Docket Item 3, at 1 n.1 (W.D.N.Y. Oct. 19, 2023). At least three of those cases were dismissed because the defendants were immune from suit. See Lettieri v. Vilardo, Case No. 23-cv-6498, Docket Item 3 (W.D.N.Y. Sept. 21, 2023) (dismissing complaint due to judicial immunity); Lettieri v. Western Dist. of New York, Case No. 23-cv-770, Docket Item 7 (W.D.N.Y. Sept. 11, 2023) (same); Lettieri v. Dep't of Just., Case No. 23-cv-866, Docket Item 3 (W.D.N.Y. Sept. 19, 2023) (dismissing complaint due to prosecutorial immunity).⁴ Because the Second Circuit has held that dismissals based on immunity count as "strikes," see *Mills*, 645 F.3d at 177; *Collazo*, 656 F.3d at 134, Lettieri has accumulated three strikes under 28 U.S.C. § 1915(g).⁵

For that reason, Lettieri cannot proceed IFP unless he faces "imminent danger of serious physical injury." 28 U.S.C. § 1915(g); see also *Malik*, 293 F.3d at 562. But his complaint does not even suggest that is the case. Instead, his complaint alleges an injury in connection with his criminal trial, which ended months ago.⁶ Therefore, Lettieri is barred from proceeding IFP under section 1915.

ORDER

Lettieri's motion to proceed IFP, Docket Item 2, therefore is DENIED. If Lettieri wants to pursue this action, he must pay the \$402.00 filing and administrative fees. If Lettieri fails to pay the full filing and administrative fees **within 30 days of the date of this order**, this case will be dismissed without prejudice without further order of the Court.

SO ORDERED.{2023 U.S. Dist. LEXIS 4}

Dated: December 4, 2023

Buffalo, New York

/s/ **Lawrence J. Vilardo**

LAWRENCE J. VILARDO

UNITED STATES DISTRICT JUDGE

Footnotes

¹ Lettieri's complaint, and thus the official case caption, misspelled Auricchio's name, which appears correctly here. The Clerk of the Court shall correct the caption accordingly.

²

On June 14, 2023, a jury found Lettieri guilty on one count of enticement of a minor in violation of 18 U.S.C. § 2422(b). See *United States v. Lettieri*, Case No. 21-cr-20, Docket Items 146, 150

(W.D.N.Y. June 14, 2023). Auricchio represented Lettieri in this case from April 15, 2021, see *id.*, Docket Item 17 (W.D.N.Y. Apr. 15, 2021), until March 3, 2022, *id.*, Docket Item 38 (W.D.N.Y. Mar. 3, 2022).

3

The fee to file a civil action is \$350.00. Effective May 1, 2013, the Judicial Conference of the United States added an administrative fee of \$50.00 to the cost of filing a civil lawsuit in district court. See September 2012 Report of the Proceedings of the Judicial Conference of the United States, available at <http://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us>. Effective December 1, 2020, this fee was increased to \$52.00. See District Court Miscellaneous Fee Schedule, <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

4

Those three cases are not the only ones filed by Lettieri that have been dismissed for reasons that likely are "strikes." See, e.g., Lettieri v. Daniels, Case No. 23-cv-867, Docket Item 3 (W.D.N.Y. Oct. 16, 2023) (dismissing complaint for failure to state a claim); Lettieri v. Auricchio, Case No. 23-cv-875, Docket Item 3 (W.D.N.Y. Oct. 11, 2023) (same); Lettieri v. Reynolds, Case No. 23-cv-925, Docket Item 4 (W.D.N.Y. Oct. 17, 2023) (same); Lettieri v. Dep't of Just., Case No. 23-cv-897, Docket Item 3 (W.D.N.Y. Oct. 10, 2023) (dismissing complaint due to prosecutorial immunity). In fact, none of Lettieri's civil complaints that this Court has screened under 28 U.S.C. §§ 1915(e)(2)(b) and 1915A have raised colorable claims. So Lettieri likely has many more than three strikes. But three are enough. 28 U.S.C. § 1915(g).

5

Three courts, including this one, have found that Lettieri has garnered three strikes under section 1915. See Lettieri v. Vilardo, Case No. 23-cv-6563, Docket Item 3 (W.D.N.Y. Oct. 10, 2023) (Wolford, C.J.) (denying Lettieri's motion to proceed IFP under the three strikes rule); Lettieri v. Broome Cnty. Humane Soc'y, 2023 U.S. Dist. LEXIS 191813, 2023 WL 7017081, at *2-3 (E.D.N.Y. Oct. 25, 2023) (Gonzalez, J.) (same); Lettieri v. Hockwater, Case No. 23-cv-1123, Docket Item 3 (W.D.N.Y. Nov. 13, 2023) (Vilardo, J.) (same).

6

Lettieri sues Auricchio for violation of his due process rights and for ineffective assistance of counsel. Docket Item 1 at 5. He alleges that he was shown an "affidavit" that was purportedly signed by him but that he "[d]id not sign anything and can prove that the signature was [f]orged." *Id.* at 8. He argues that this "show[s]" that Auricchio "committed a crime." *Id.* Those assertions do not suggest that Lettieri was in any "imminent danger of serious physical injury" when he filed the complaint. See 28 U.S.C. § 1915(g).

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