

W.D.N.Y.
23-cv-6690
Wolford, C.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 7th day of November, two thousand twenty-four.

Present:

Susan L. Carney,
Joseph F. Bianco,
William J. Nardini,
Circuit Judges.

David C. Lettieri,

Petitioner-Appellant,

v.

24-411

Lawrence Joseph Vilardo,

Respondent-Appellee.

Appellant, pro se, moves for leave to proceed in forma pauperis and to "grant writ." Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

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

Catherine O'Hagan Wolfe



PS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID C. LETTIERI,

Petitioner,

ORDER

v.

23-CV-6690-EAW

LAWRENCE JOSEPH VILARDO,

Respondent.

Pro se Petitioner David C. Lettieri (“Petitioner”) is currently confined at the Niagara County Jail. On June 14, 2023, a jury found him guilty of one count of enticement of a minor in violation of 18 U.S.C. § 2422(b). *United States v. Lettieri*, case no. 1:21-cr-00020, Dkt. 150 (W.D.N.Y. July 14, 2023). Petitioner is awaiting sentencing. *Id.* Dkt. 182.

Petitioner has filed a petition purportedly pursuant to 28 U.S.C. § 2241. (Dkt. 1). He alleges that he is being denied access to the courts in relation to a previously-filed action, *Lettieri v. Federal Bureau of Investigation*, case no. 1:23-cv-00318-LJV, Dkt. 13 (W.D.N.Y. Nov. 27, 2023) (hereinafter, “23-cv-318”), in violation of “title 42 section 1997(D).”¹ (Dkt. 1 at 2, 6). Petitioner also alleges violations of his due process and free speech rights in relation to that case. (*Id.* at 6). As relief, he requests that his application for *in forma pauperis* (“IFP”) status in that case be granted, for United States District Judge “Lawrence Joseph Vilardo[s] ‘[i]mmunity’ to be dissolved, \$100 [f]or the commence[ment] of this petition, [and] recusal of Judge Lawrence Joseph Vilardo or

¹ The Court assumes Plaintiff refers to 42 U.S.C. § 1997d which states “[n]o person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting.”

[s]ummary [j]udgement granted to 23-cv-318." (*Id.* at 7). Petitioner also seeks permission to proceed IFP in the present action. (Dkt. 2).

Petitioner's IFP motion is granted. However, because he is not challenging the execution of his sentence or the fact of his confinement, he is not entitled to relief under § 2241 and the petition is dismissed without prejudice.²

DISCUSSION

A. Habeas Petition or Civil Action

Petitioner filed this claim alleging denial of access to the courts, as well as due process and free speech violations, as a petition for a writ of habeas corpus under 28 U.S.C. § 2241, rather than a civil action under 42 U.S.C. § 1983. “[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.” *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). On the other hand, “[s]ection 1983 provides a civil claim for damages against any person who, acting under color of state law, deprives another of a right, privilege or immunity secured by the Constitution or the laws of the United States.” *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993).

² See Rule 4, Rules Governing Section 2254 Cases in the United States District Courts (“If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition . . .”); *Dory v. Comm’r of Corr. of the State of N.Y.*, 865 F.2d 44, 45 (2d Cir. 1989) (“[A] petition for a writ of habeas corpus may be summarily dismissed [under Rule 4] if it fails to state a claim upon which relief may be granted.”); see also Rule 1, Rules Governing Section 2254 Cases in the United States District Courts (providing that “[t]hese rules govern a petition for a writ of habeas corpus filed . . . under 28 U.S.C. § 2254” but “[t]he district court may apply any or all of these rules to a habeas corpus petition not covered by [this section]”).

"A [petition] pursuant to § 2241 generally challenges the execution of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001) (citing *Chambers v. United States*, 106 F.3d 472, 474-75 (2d Cir. 1997)); see also *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (noting that the Second Circuit has long interpreted § 2241 as applying to challenges to the execution of a federal sentence).

Here, Petitioner does not in any way challenge the fact or duration of his confinement. In fact, he alleges no facts related to his confinement. Rather, Petitioner claims that Respondent denied him access to the courts and violated his rights to free speech and due process in relation to 23-cv-318. (Dkt. 1 at 6). Specifically, he claims that he "never receive[d] any mail [f]rom the decision made [in] the case [23-cv-318]." (Dkt. 1 at 6). That case has been stayed pending a decision in Petitioner's appeal of the denial of IFP in that case. See *In re Lettieri*, case no. 1:23-mc-00032-LJV, Dkt. 11 (W.D.N.Y. Dec. 4, 2023).

In the present case, Petitioner requests that Respondent recuse himself or that his immunity be dissolved, and requests that Petitioner's application for IFP in 23-cv-318 be granted and he be awarded summary judgment in his favor. Because neither his allegations nor his request for relief seek to address the fact or duration of his confinement, his claim is not cognizable under § 2241 and the petition must be dismissed.

B. Recharacterization of Petition or Leave to File a New Civil Action

In *Thompson*, the Second Circuit held that the district court “should have treated the claims as properly pleaded, or at least given the petitioner leave to file an amended pleading identifying the proper source of law without dismissing the action.” 525 F.3d at 210. However, the Court declines to do so here in light of the unique circumstances involving this Petitioner.

Petitioner has been found to have “engaged in a pattern of abuse of the judicial process” and has been prohibited from filing new actions in this district without first obtaining written permission of the Court. *In re Lettieri*, case no. 1:23-mc-00032-LJV, Dkt. 18 (W.D.N.Y. January 19, 2024). Petitioner’s litigation history³ suggests that he filed this habeas petition, prior to the imposition of the filing injunction, to avoid the “three-strikes rule” that prevented him from proceeding IFP in a § 1983 action absent imminent danger of serious physical injury.⁴ See 28 U.S.C. § 1915(g); *Lettieri v. Vilardo*, No. 6:23-cv-6563-EAW, Dkt. 3 (W.D.N.Y. Oct. 10, 2023) (finding that Plaintiff had garnered three strikes and denying his motion to proceed IFP). For that reason, the Court declines to recharacterize this petition as an action under § 1983.⁵

³ A review of this Court’s records shows that Petitioner has filed over 70 actions in this Court since November 2022.

⁴ See *Adams v. McGinnis*, 317 F. Supp. 2d 243, 245 n.1 (W.D.N.Y. 2004) (noting that “the Prisoner Litigation Reform Act of 1996, of which the ‘three strikes rule’ of 28 U.S.C. § 1915(g) was a part, does not apply to habeas petitions” (citing *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996) (concluding that Congress did not intend the PLRA to apply to petitions for a writ of habeas corpus), overruled on other grounds by *Lindh v. Murphy*, 521 U.S. 320, 336 (1997))).

⁵ If the Petition was recharacterized as an action under § 1983, it would likely be barred by judicial immunity. Judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities. See, e.g., *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). “A judge will not be deprived of immunity because the action he took was

Petitioner may seek permission to file a complaint asserting these claims again under § 1983, but that complaint will be subject to the three strikes rule and the filing injunction. Under the three strikes rule, Petitioner is not permitted to proceed IFP unless he establishes that he is under imminent danger of serious physical injury and that there is “a nexus between the imminent danger” and the claim asserted. See *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009).

CONCLUSION

For the reasons stated above, Petitioner is granted permission to proceed IFP and the petition is dismissed⁶ without prejudice. The Clerk of Court is directed to close this case as dismissed. The Court also hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. *Coppedge v. United States*, 369 U.S. 438 (1962).

SO ORDERED.

Dated: January 29, 2024
Rochester, New York



ELIZABETH A. WOLFORD
CHIEF JUDGE
UNITED STATES DISTRICT COURT

in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quotation omitted). Petitioner alleges no facts here to suggest that Respondent acted outside his jurisdiction or outside his judicial capacity.

⁶ The Court notes that the 28 U.S.C. § 2253(c) certificate of appealability requirement does not apply to petitions filed under 28 U.S.C. § 2241. See *Drax v. Reno*, 338 F.3d 98, 106 n.12 (2d Cir. 2003).