No. 20-2719

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Allen Dupree Garrett,

Plaintiff-Appellant,

v.

Phil Murphy, Governor of New Jersey, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of New Jersey
No. 20-cv-5235 (Hillman, J.)

BRIEF OF GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC AS COURT-APPOINTED AMICUS CURIAE

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INTRODUCTION

Plaintiff-Appellant Allen Dupree Garrett is a pre-trial detainee challenging the constitutionality of his confinement. He alleges that the Defendants-Appellees, officers of the state of New Jersey, are ignoring the risks posed by crowded and unsanitary jail conditions during the COVID-19 pandemic. He cannot pre-pay the $505 filing fee to appeal the district court's dismissal of his complaint and seeks to proceed in forma pauperis (IFP) in this Court under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(b).

The PLRA's three-strikes provision requires a prisoner to pre-pay filing fees in "a civil action or appeal" if he "has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal" in a federal court "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).

Amicus has identified five relevant prior actions including the action from which this appeal arises. Only one is a PLRA strike because it was dismissed for failure to state a claim. As explained below, none of Garrett's other prior actions are strikes because none were dismissed entirely on Section 1915(g) enumerated grounds: three were dismissed in whole or in part under *Heck v. Humphrey*, 512 U.S. 477 (1994), and Garrett's final prior action, the action below, includes dismissal of a claim that belongs in a habeas

action. Garrett may thus proceed IFP in this appeal because he does not have three strikes.[1]

Even if this Court finds that Garrett has three strikes, he may still proceed IFP because he was in imminent danger of serious physical injury from COVID-19 at the time he filed this appeal.

ROLE OF AMICUS

The Appellate Courts Immersion Clinic is a clinic at Georgetown University Law Center in which students under faculty supervision litigate a wide range of appeals in circuit courts nationwide and in the Supreme Court. This Court appointed the Clinic as Amicus to answer questions related to whether Garrett may proceed IFP in this appeal. *See* Doc. 38.

STATEMENT OF JURISDICTION

In the action below, Garrett filed a pro se complaint under 42 U.S.C. § 1983 against Defendant-Appellees alleging Sixth Amendment and Fourteenth Amendment violations. App. Vol. 2 at 25-31; App. Vol. 1 at 7, 10. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. On May 14, 2020, the district court dismissed Garrett's Sixth Amendment claim with prejudice and dismissed Garrett's Fourteenth Amendment claim without prejudice and with leave to amend. App. Vol. 1 at 12.

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[1] The Addendum of Prior Actions (Add. 1aa) contains the dismissal orders and accompanying opinions in each of Garrett's prior actions. The Quick Reference Chart (Add. 1a) notes which prior actions are implicated by each issue in this appeal. In this brief, "prior action" refers to any action relevant to counting strikes, including the action below.

Garrett filed a premature notice of appeal on August 21, 2020. App. Vol. 1 at 14. On August 28, 2020, this Court informed Garrett that it likely lacked jurisdiction, explaining that because the district court's order gave Garrett leave to amend his Fourteenth Amendment claim, the order was not final. Doc. 6; *see also Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976).

Garrett then informed the district court that he would not amend his complaint and sought a final order. *See* App. Vol. 1 at 17; *see also Weber v. McGrogan*, 939 F.3d 232, 240 (3d Cir. 2019). The district court issued a final order dismissing Garrett's Fourteenth Amendment claim with prejudice on September 18, 2020, disposing of his remaining claim, App. Vol. 1 at 21, and ripening this appeal, *see Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 185 (3d Cir. 1983). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

This Court directed Amicus to answer the following questions about counting strikes under 28 U.S.C. § 1915(g):[2]

1. Whether a dismissal under *Heck v. Humphrey*, 512 U.S. 477 (1994), counts as a strike.

2. Whether a court counting strikes should look to an accompanying opinion to determine the grounds for dismissal or rely solely on the words of the dismissal order.

3. Whether an order dismissing habeas claims as non-cognizable and dismissing other claims on grounds enumerated in Section 1915(g) counts as a strike.

[2] We have removed most of the citations from this Court's questions. The substance of the questions is unchanged.

4. Because a strike is counted at the time of appeal, whether the dismissal underlying a prisoner's appeal (if it would otherwise count as a strike) is counted at the time of a premature appeal of the dismissal or when the notice of appeal ripens.

* * *

Together, the issues stated above concern whether Garrett may proceed IFP. Amicus therefore also addresses this related issue:

5. Whether Garrett was in imminent danger of serious physical harm when he appealed and may therefore proceed IFP even if he has three strikes.

STATEMENT OF THE CASE

Because Garrett proceeded pro se below, this Court should liberally construe his pleadings. *See Dooley v. Wetzel*, 957 F.3d 366, 374 (3d Cir. 2020). Beyond the pleadings, to aid this Court with its analysis of the imminent-danger exception, *see* 28 U.S.C. § 1915(g), Amicus also cites facts about the COVID-19 pandemic that are generally known, available in public documents, and beyond reasonable controversy, *see* Fed. R. Evid. 201(b); *Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001).

I. Factual and procedural background

A. Garrett is a pre-trial detainee at the Camden County Correctional Facility (CCCF) who has been held without a trial date since January 30, 2020. App. Vol. 2 at 34, 43. In March 2020, in response to Governor Phillip Murphy's Executive Order imposing restrictions on gatherings, the New Jersey court system prohibited in-person Superior

Court proceedings and limited virtual proceedings until further notice. *See* App. Vol. 2 at 40-42.[3]

"County jails" like CCCF "were not designed with pandemics in mind," App. Vol. 2 at 29, and with "dormitory settings, shared bathrooms and hygiene challenges, jails can be COVID-19 hotspots," April Saul, *Families with Incarcerated Loved Ones Worry about COVID-19 Spike in Camden Jail*, WHYY (Dec. 7, 2020).[4] The Centers for Disease Control and Prevention's health guidelines for containing COVID-19 infection in jails include quarantining individuals with symptoms or with exposure to symptomatic individuals, COVID-19 testing, and social distancing. *See* CDC, *People Living in Prisons and Jails* (updated March 5, 2021).[5] Contrary to these guidelines, Garrett has spent time locked up with "30 or more sick inmates," and officials did not perform temperature checks nor take other measures to mitigate contagion for weeks at a time. App. Vol. 2 at 37.

The CDC categorizes "people living in prisons and jails" as people who need extra COVID-19 precautions because they are at a higher risk than the general population. *See* CDC, *People Living in Prisons and Jails*.[6] In addition, people like Garrett who have underlying medical conditions, including hypertension, *see* App. Vol. 2 at 62, 68, may

[3] The district court's opinion referred to facts taken from submissions Garrett sent the court after filing his complaint, App. Vol. 1 at 9, so Amicus does as well.

[4] https://whyy.org/articles/why-cant-they-bring-him-home-families-with-incarcerated-loved-ones-worry-about-covid-19-spike-in-camden-jail.

[5] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/living-prisons-jails.html (last visited April 5, 2021).

[6] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/living-prisons-jails.html (last visited April 5, 2021)

have heightened vulnerability to serious symptoms, *see* CDC, *People with Certain Medical Conditions* (updated March 15, 2021).[7] The New Jersey Supreme Court has recognized the severity of the ongoing pandemic crisis in New Jersey's jails, *see Matter of Request to Release Certain Pretrial Detainees*, 244 A.3d 760, 767 (N.J. 2021), and, when Garrett filed this suit, New Jersey prisons had the highest COVID-19 death rate of any state prison system, *see* Blake Nelson, *New Jersey Prisons Have Highest Coronavirus Death Rate in the Nation, New Study Shows*, NJ.com (May 3, 2020).[8]

Garrett first became ill with COVID-like symptoms in early spring 2020. *See* App. Vol. 2 at 30. Medical records show that, throughout the spring, he experienced hypertension, *see* App. Vol. 2 at 62, 68, and he requested medication for virus-like symptoms several times, *see* App. Vol. 2 at 72, 73. When he filed the complaint in May 2020, Garrett alleged that the virus was still circulating at CCCF, *see* App. Vol. 2 at 39, and that he was still suffering from symptoms, *see* App. Vol. 2 at 37; *see also* CDC, *Long-Term Effects of COVID-19* (Nov. 13, 2020).[9]

Defendants' approach to the pandemic has left Garrett in a dangerous limbo. There have been "no court hearings, no bail hearings, no motions, no family visits, no emergency food or clothing packages." App. Vol. 2 at 38. Garrett also continues to face health risks as virus variants now threaten to spark new outbreaks. *See* Marilynn

[7] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited April 5, 2021).

[8] https://www.nj.com/coronavirus/2020/05/nj-prisons-have-highest-coronavirus-death-rate-in-the-nation-new-study-shows.html.

[9] https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html.

Marchione, *New Variants Raise Worry About COVID-19 Virus Reinfections*, Associated Press (Feb. 8, 2021).[10]

B. On April 28, 2020, Garrett sued Defendants—the Governor of New Jersey and other state officials—under 42 U.S.C. § 1983, alleging, as relevant here, a Fourteenth Amendment violation for unconstitutional conditions at CCCF and a Sixth Amendment violation for his continued confinement. *See* App. Vol. 2 at 25-33. He requested immediate pretrial release and damages. *See* App. Vol. 2 at 30.

Garrett asked to proceed IFP because he could not afford to prepay the district court's $400 filing fee. App. Vol. 2 at 49-61. The district court granted Garrett IFP status. App. Vol. 1 at 1. After a PLRA plaintiff has been granted IFP status but before the complaint is served on the defendant, the Act's screening provision requires the court to dismiss the plaintiff's action sua sponte if it is frivolous or malicious, fails to state a claim, or seeks monetary relief from an immune defendant. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii); *see* App. Vol. 1 at 4-5.

In performing this screening duty, the district court first examined Garrett's Fourteenth Amendment claim, concluding that he had not alleged enough facts to state his claim that officials disregarded inmate health and created dangerous conditions. App. Vol. 1 at 8-9. The court dismissed the claim "without prejudice" and granted him leave to amend. App. Vol. 1 at 12. Turning to Garrett's Sixth Amendment claim, the district court concluded that it lacked authority to grant Garrett's requested relief—release from custody—in a Section 1983 action. App. Vol. 1 at 10-11. Instead, his

[10] https://apnews.com/article/coronavirus-new-variants-b4d472f3d61c62a57aa68c4aa7c85012.

"remedy lies in a habeas corpus action after exhausting his state court remedies." App. Vol. 1 at 11. The court then purported to dismiss the speedy-trial right claim under Section 1915(e)(2)(B)(ii) for failure to state a claim. App. Vol. 1 at 12. But the court made clear that Garrett could bring the same claim in a habeas action. *Id.* The district court later ordered the clerk to open a new proceeding under the habeas statute, 28 U.S.C. § 2241, through which Garrett could pursue relief for his Sixth Amendment claim. App. Vol. 1 at 15-16; *see also* App. Vol. 1 at 19 n.1 (citing *Garrett v. Murphy*, No. 20-11502).

C. Garrett appealed the district court's dismissal to this Court. App. Vol. 1 at 14. This Court invoked the PLRA's three-strikes provision by directing Garrett to either pay the filing fee or move for leave to proceed IFP by demonstrating that he faced imminent danger of serious physical injury under Section 1915(g). Doc. 5.

This Court then informed Garrett that it likely lacked appellate jurisdiction because his complaint had been dismissed without prejudice and that there was therefore no final decision under 28 U.S.C. § 1291. Doc. 6. Garrett moved to stay the appeal until he could obtain a final order from the district court and asked the district court to issue one. Doc. 18. The district court then issued a final order stating that "the complaint is dismissed with prejudice." App. Vol. 1 at 21.

On September 25, 2020, Garrett responded to this Court's show-cause order by denying that he had accrued three strikes. Doc. 19. He also reiterated that, in any case, he faced (and faces) imminent physical danger because the conditions of his pre-trial confinement do not adequately mitigate the risks posed by the COVID-19 pandemic. *See id.* at 4-7.

This Court then appointed Amicus to address whether Garrett may proceed with his appeal without prepaying the $505 filing fee. Doc. 38.

II. Prior actions

In addition to the dismissal order Garrett appeals here, Amicus has identified four other prior actions relevant to the issues that this Court directed Amicus to address. Add. 1aa-28aa. Amicus believes that one of these prior actions, *Garrett v. United States Federal Bureau of Prisons*, No. 16-1603 (E.D. Pa. April 27, 2016), Add. 8aa, is a strike: the district court's order, issued without an accompanying opinion, dismissed Garrett's action because he had failed to state a claim under the Federal Tort Claims Act. *See* Add. 9aa.[11]

Garrett's three remaining prior actions were dismissed in whole or in part as barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), because they involved Section 1983 damages claims that necessarily challenged his underlying conviction. *Garrett v. Mendez*, No. 13-5343 (D.N.J. Aug. 14, 2014), Add. 1aa; *Garrett v. U.S. Dist. Ct. for Dist. of N.J.*, No. 17-2924 (D.N.J. July 14, 2017), Add. 12aa; *Garrett v. United States*, No. 18-14515, (D.N.J. Nov. 27, 2018), *aff'd*, 771 F. App'x 139 (3d Cir. 2019), Add. 22aa.[12] These three

[11] The district court never issued a final order in that action. *See* docket in *Garrett v. U.S. Fed. Bureau of Prisons*, No. 2:16-cv-01603-LDD (E.D. Pa. Apr. 4, 2016). It is therefore possible that Garrett could request a final order and appeal the dismissal. *See Weber v. McGrogan*, 939 F.3d 232, 236 (3d Cir. 2019). If Garrett were to obtain a reversal, this action would no longer count as a strike. Because those things have not occurred, it is currently a strike.

[12] An appellate affirmance of a district court's dismissal does not count as a separate strike because it is not itself a dismissal on grounds enumerated in the PLRA's three-strikes provision. *See Ball v. Famiglio*, 726 F.3d 448, 464 (3d Cir. 2013); *see also Coleman v. Tollefson*, 575 U.S. 532, 537-38 (2015) (analyzing "dismissal").

actions are relevant to the first issue that this Court posed to Amicus: whether actions dismissed as barred by *Heck* count as strikes. *See* Doc. 38.

These actions are also relevant to the second issue presented: whether a court counting strikes should rely solely on the words of a dismissal order or on an accompanying opinion. *See* Doc. 38. That issue is salient when a dismissal order and an accompanying opinion potentially conflict. The district court's opinion in *Garrett v. United States*, No. 18-14515, for example, explained that that action was dismissed wholly under *Heck*. Add. 25aa. The final order, however, stated that the action was dismissed for "failure to state a claim." Add. 27aa. Similarly, the two other prior actions that raised *Heck*-barred damages claims were, according to the accompanying opinions, each also partially dismissed under *Heck*. Add. 3aa, 18aa-19aa. But in one, *Garrett v. Mendez*, No. 13-5343, the final order stated only that the action was dismissed for "failure to state a claim." Add. 6aa. In the other, *Garrett v. United States District Court for District of New Jersey*, No. 17-2924, the final order stated that Garrett's complaint was dismissed "in its entirety" "pursuant to 28 U.S.C. § 1915(e)(2)(B)," the PLRA's general screening provision, without specifying whether the court dismissed the complaint as frivolous, malicious, or for failure to state a claim. Add. 20aa, 21aa.

These two partially *Heck*-barred actions were also both partially dismissed because they requested Garrett's immediate release—relief that a court may only grant in a habeas proceeding. Add. 5aa, 18aa-19aa. These two actions therefore may also be affected by resolution of the third issue presented: whether a strike occurs when an action is dismissed in part because a claim sounds in habeas and in part on grounds enumerated in Section 1915(g). *See* Doc. 38.

In the argument section, Amicus explains that these three actions and the dismissal below do not count as strikes. In sum, Garrett has only one strike and is therefore entitled to proceed IFP in this appeal.

SUMMARY OF ARGUMENT

I.A. None of Garrett's prior actions involving *Heck*-barred claims count as strikes under Section 1915(g). A strike is assessed only if the entire action is dismissed based on one of three enumerated grounds: the action (1) is frivolous; (2) is malicious; or (3) fails to state a claim. Garrett's prior actions were not dismissed as frivolous or malicious, and a *Heck* dismissal is not a dismissal for failure to state a claim.

Heck is a limit on federal-court adjudication that is jurisdictional in nature. Under *Heck*, a federal court lacks power to reach the merits of a prisoner's Section 1983 damages claim if vindication of the claim would necessarily undermine an underlying criminal conviction or sentence that has yet to be invalidated. That is, until the conviction or sentence has been terminated in the plaintiff's favor, the Section 1983 action remains unripe for judicial consideration, and a court must defer its merits consideration of the action until the favorable-termination threshold is overcome. A *Heck*-based dismissal is therefore not one for failure to state a claim.

Even if this Court does not view *Heck* as a restraint on federal courts' authority to decide whether an action states a claim, a plaintiff, in what is later determined to be a *Heck*-barred action, is not required to plead facts showing his prior conviction has been favorably terminated to state a claim for relief. For that reason, a *Heck* dismissal is not a dismissal for failure to state a claim. This is true because *Heck*'s favorable-termination prerequisite is not an element of a Section 1983 claim. Thus, whether the *Heck* bar is

jurisdictional in nature or not, a *Heck* dismissal does not count as a strike under Section 1915(g)'s "fails to state a claim" ground.

B. In final orders dismissing PLRA-screened actions, district courts sometimes either neglect to explicitly state the grounds for the dismissal or mischaracterize *Heck*-barred actions as dismissals for failure to state a claim. Because a strike may only be assessed when an action has clearly been dismissed on Section 1915(g)'s enumerated grounds, a court may conclude based solely on the words of the final order that the dismissal is *not* a strike, but it may not *issue* a strike—based solely on the words of the final order—if the order's language conflicts with reasoning found in an accompanying opinion.

A strike-counting court must first look at the words in the final order to determine whether a dismissal is clearly based on a Section 1915(g) ground. If the order is not explicit that the action was dismissed on an enumerated ground, the court must conclude that the dismissal was not a strike. Applying this rule, the order dismissing one of Garrett's *Heck*-barred actions "in its entirety" under the PLRA's general screening provision without specifying an enumerated ground is not a strike.

When the order explicitly relies on an enumerated ground, as with the orders dismissing Garrett's other two actions with *Heck*-barred claims, the court must then look to the reasoning in an accompanying opinion to determine whether the action was actually dismissed on an enumerated ground. Though the orders dismissing these other two actions explicitly identify strike-triggering grounds by purporting to dismiss the actions for failure to state a claim, they, too, are not strikes because the accompanying opinions demonstrate that the dismissals actually rested in whole or in part on *Heck*.

II. The dismissal below is not a strike because the final order failed to explicitly identify strike-triggering grounds, and unclear dismissals are not strikes. It is also not a strike because mixed dismissals where one claim is dismissed as in substance a habeas action and other claims are dismissed on enumerated grounds are not strikes. A strike is triggered only when the entire "civil action" is dismissed on enumerated grounds. 28 U.S.C. § 1915(g).

A habeas claim is not a "civil action" under the PLRA. *See Santana v. United States*, 98 F.3d 752, 756 (3d Cir. 1996). Moreover, a dismissal because claims should have been filed as a habeas action relates to the court's lack of power to hear the merits and not whether the plaintiff has failed to state a claim. For these reasons, a mixed-grounds dismissal that involves both a claim dismissed because it belongs in habeas and claims dismissed on enumerated grounds—like the dismissal below—is not a strike because the entire "civil action" has not been dismissed on enumerated grounds.

III. If the district court's dismissal below were a strike, it would have accrued with the district court's final order on September 18, 2020. App. Vol. 1 at 21. It had not accrued, however, when this Court ordered Garrett to file a motion for leave to proceed IFP on August 27, 2020, Doc. 5, because the district court's order was not final at that time. Because dismissals are not counted as strikes until they are final, a strike does not accrue until a court fully disposes of all claims.

IV. Even if this Court concludes that Garrett has three strikes, he may still proceed IFP in this appeal under Section 1915(g)'s imminent-danger exception. Garrett has demonstrated that he faces imminent danger of physical harm due to the life-threatening risks posed by the COVID-19 pandemic.

ARGUMENT

Under the PLRA's three-strikes provision, a prisoner is barred from bringing a civil action or appeal IFP 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. § 1915(g). A strike is counted only when the "entire action" is dismissed on grounds enumerated in Section 1915(g). *Byrd v. Shannon*, 715 F.3d 117, 125 (3d Cir. 2013).

Garrett's prior actions were not dismissed as frivolous or malicious. Whether Garrett may proceed IFP depends, then, on when a civil action "fails to state a claim" for relief and the method a strike-counting court should use to determine a dismissing court's grounds.

As explained below, neither Garrett's three prior actions involving *Heck*-barred claims nor the action below count as strikes. He may therefore proceed IFP in this appeal.

I. Because three of Garrett's prior actions were dismissed in whole or in part under *Heck*, they do not count as strikes.

A. A *Heck* dismissal is not a strike under Section 1915(g).

Congress borrowed the statutory phrase "fails to state a claim" from Federal Rule of Civil Procedure 12(b)(6), and courts therefore interpret Section 1915(g)'s language to have the same meaning and boundaries. *See, e.g.*, *Thompson v. DEA*, 492 F.3d 428, 438 (D.C. Cir. 2007). This Court presumes that Congress is familiar with existing law when

it passes legislation. *Ball v. Famiglio*, 726 F.3d 448, 460 n.17 (3d Cir. 2013) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015). Thus, this Court may infer that, by mirroring Rule 12(b)(6)'s language in Section 1915(g), Congress intended the phrase to refer only to dismissals of meritless prisoner suits based on the insufficiency of the complaint's factual allegations. *See* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1349 (3rd ed. 2020); *see also Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1726 (2020) ("The point of the PLRA, as its terms show, was to cabin … simply meritless prisoner suits."). In other words, the phrase "fails to state a claim" covers only dismissals when a plaintiff, subject to Rule 12(b)(6)'s pleading requirement, has failed to allege facts that plausibly make out a prima facie case entitling him to relief. *See Wisniewski v. Fisher*, 857 F.3d 152, 155-56 (3d Cir. 2017).

Dismissals on other, non-enumerated grounds do not count as strikes under Section 1915(g). *See, e.g.*, *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1151 (D.C. Cir. 2017) (Kavanaugh, J.). For instance, dismissals under Rule 12(b)(1) for lack of jurisdiction have not been dismissed on Section 1915(g)'s enumerated grounds because jurisdictional dismissals are treated separately from dismissals for failure to state a claim under the Federal Rules. *See, e.g.*, *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016) (collecting precedents from four other circuits holding the same). After all, a jurisdictional dismissal is "not a determination of the claim, but rather a refusal to hear it." *See Small v. Camden Cnty.*, 728 F.3d 265, 269-70 n.3 (3d Cir. 2013) (quoting 18 James Wm. Moore, *Moore's Federal Practice* § 131.30(3)(b) at 104 (3d ed. 2008)). Other grounds that usually cannot be invoked in a Rule 12(b)(6) motion, and thus typically do

not trigger strikes based on Section 1915(g)'s "fails to state a claim" criterion, include affirmative defenses. *See Ball*, 726 F.3d at 459.

1. A *Heck* dismissal is not a strike because *Heck*'s favorable-termination prerequisite is jurisdictional in nature, and, until it is met, a court lacks the authority to reach the merits.

a. In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Supreme Court held that a court may not entertain a prisoner's suit for damages under 42 U.S.C. § 1983 if the suit's success "would necessarily imply the invalidity" of the fact or duration of his still-valid conviction or confinement. Under those circumstances, a prisoner must obtain a favorable termination of his conviction—either on direct appeal or by writ of habeas corpus—before the court has the power to review the merits of his related Section 1983 action. *Id.* Thus, unless and until the "favorable termination" prerequisite is met, a plaintiff's Section 1983 damages claim has not accrued and must be dismissed for that reason. *See id.* at 489-90; *McDonough v. Smith*, 139 S. Ct. 2149, 2158-59 (2019).[13]

An action that has not accrued remains "dormant" and "unripe" for adjudication. *See McDonough*, 139 S. Ct. at 2156, 2158-59. When a claim depends on future events, a court lacks authority to adjudicate its merits, *see Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020), and, unlike a factual pleading deficiency, ripeness is analyzed separately from

[13] The *Heck* bar applies only to damages claims that challenge a not-yet favorably terminated conviction or confinement. *See Heck v. Humphrey*, 512 U.S. 477, 479, 486-87 (1994). It does not bar Section 1983 claims for injunctive relief that do the same; such relief, however, cannot be granted in a Section 1983 action because it sounds in habeas. *See Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056-57 (9th Cir. 2016). Thus, when a plaintiff seeks both injunctive and damages relief in the same Section 1983 action, only the damages claim will be *Heck*-barred, and the claim for injunctive relief will be dismissed because the proper procedural vehicle is habeas. *See id.*

the merits of the litigation, *see Meija v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013). *Cf.* 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3532 (3d ed. 2020). A dismissal on the ground that a court lacks power to hear a claim must occur before any assessment of the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

The *Heck* bar restrains a court's authority in just this way. Until a plaintiff's criminal conviction is invalidated, a court lacks the power to consider the underlying claim for relief—meaning that a dismissal on *Heck* grounds cannot be one for failure to state a claim. *See Mejia*, 541 F. App'x at 710. Rather, inherent in a *Heck* dismissal is a federal court's recognition that the plaintiff brought suit prematurely, which does not reflect any conclusion that the facts or legal theories advanced in the complaint are meritless. *See id.* To the contrary, the *Heck* bar constrains a court from considering even the most meritorious claims until the claim has ripened. In sum, a court must defer consideration of the underlying merits of a *Heck*-barred action until the conviction is invalidated. *See McDonough*, 139 S. Ct. at 2159.

The *Heck* bar thus operates like other doctrines that are jurisdictional in character because they constrain federal courts' authority to hear an action until certain conditions are met. Compare the *Heck* bar, for instance, to the *Younger* abstention doctrine, which represents "the sort of 'threshold question' [that] must be resolved" before a district court may exercise jurisdiction over a Section 1983 claim if adjudicating the merits would interfere with an ongoing state criminal proceeding. *Lazaridis v. Wehmer*, 591 F.3d 666, 670 n.3 (3d Cir. 2010) (quoting *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005)). The *Pullman* abstention doctrine presents an even closer analogy to the *Heck* rule: it requires a federal

court to "postpone[]" exercising jurisdiction and to stay the action pending resolution of related state-law claims, *Georgevich v. Strauss*, 772 F.2d 1078, 1094 (3d Cir. 1985) (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)), just as *Heck* requires a federal court to postpone deciding the merits of a plaintiff's Section 1983 claim until his conviction has been favorably resolved. What these doctrines have in common, in addition to avoiding needless friction between federal and state courts, *see, e.g., McDonough*, 139 S. Ct. at 2157-58, is that they necessarily restrict a court's power to adjudicate whether the plaintiff has stated a claim.

The precise language used to define the *Heck* bar and related doctrines that impose judicial limits on merits adjudication varies, but a common thread emerges. *Heck* dismissals implicate whether or not the court has the authority to entertain the action. For that reason, some courts have described *Heck* as strictly jurisdictional. *See O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) (explaining that whether *Heck* bars a Section 1983 action is "a jurisdictional question"); *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018) (per curiam) (describing *Heck* as "strip[ping] a district court of jurisdiction"). Other courts use the term "quasi-jurisdictional" to define similar limits on a federal court's power to entertain unripe actions. *See, e.g.*, *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (8th Cir. 1981) (describing dismissals based on issues related to standing, advisory opinions, mootness, and ripeness as quasi-jurisdictional). In comparing the non-discretionary *Heck* bar to case-by-case abstention rules, the Supreme Court has described *Heck* as a categorical rule requiring federal courts to defer consideration of a Section 1983 claim's merits until it has accrued. *See McDonough*, 139 S. Ct. at 2159.

At the end of the day, the label a court uses does not change the consequences of *Heck*'s favorable-termination rule: until the plaintiff's conviction is set aside, a court lacks the power to consider the plaintiff's Section 1983 damages action. It is this functional understanding of *Heck* that is relevant here because, under the PLRA's three-strikes analysis, dismissals based on courts' lack of authority to entertain an action do not "fail[] to state a claim" and thus do not count as strikes. *See Mejia*, 541 F. App'x at 710; *see also Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1057-58 (9th Cir. 2016) (holding dismissals under *Younger* abstention do not count as strikes).

b. That the *Heck* bar limits a federal court's authority to hear the merits of a Section 1983 damages action dovetails with the policy interests underlying the favorable-termination rule: avoiding collateral attacks on criminal judgments through civil litigation. *See Heck*, 512 U.S. at 484-85; *McDonough*, 139 S. Ct. at 2157. To advance this goal, a federal court must be able to raise the defect—at any point during the litigation—under its inherent powers to assess jurisdiction, even if a defendant failed to raise it.

Although it may be rare for a PLRA-screening court to overlook the *Heck* bar or for a defendant to later fail to raise it, when that does happen, courts raise the issue sua sponte. For example, the Sixth Circuit reversed a merits-based grant of summary judgment because it was "unclear from the record" if the suit was barred by *Heck*, even though neither party raised the issue in the district court or on appeal. *Naselroad v. Mabry*, 686 F. App'x 312, 314 (6th Cir. 2017). Similarly, the First Circuit vacated a district court's dismissal on the merits "[a]lthough neither party addressed the issue" and remanded the case to be dismissed for lack of jurisdiction as *Heck* demanded. *White v. Gittens*, 121

F.3d 803, 806-07 (1st Cir. 1997). The sua sponte, issue-spotting approach taken in *Naselroad* and *White* to reverse merits-based dismissals was proper only because a *Heck* dismissal is jurisdictional in nature. *See Naselroad*, 686 F. App'x at 314; *White*, 121 F.3d at 806.

c. The way that courts dismiss *Heck*-barred actions further demonstrates that *Heck* dismissals express a limit on a federal court's power that is unrelated to a pleading deficiency. A *Heck* dismissal is "without prejudice" and "without leave to amend" but often with an explicit statement that the plaintiff may reinstitute the action after the favorable-termination rule is satisfied. *See, e.g.*, *Garrett v. United States*, No. 18-14515, Add. 27aa, *aff'd Garrett v. United States*, 771 F. App'x 139, 141 (3d Cir. 2019).

By dismissing a *Heck*-barred action in this way, the court is telling the plaintiff that further amendment of the action is futile *at this time* because, until the favorable-termination rule is met, the court lacks power to hear the action. But if the favorable-termination rule is overcome, the court will then have authority to entertain the plaintiff's suit based on the same factual allegations. In contrast, that is not how courts terminate an action for failure to state a claim: either the action is dismissed without prejudice and with leave to amend (because the pleading deficiency may be curable with additional facts) or it is dismissed with prejudice and without leave to amend (because the pleading deficiency is incurable). This distinctive attribute of a *Heck* dismissal reveals that the defect leading to dismissal is not about the underlying factual allegations and thus does not reflect a failure to state a claim.

In this context, consider the differences between how district courts dismissed two of Garrett's prior actions. The court dismissing one of Garrett's *Heck*-barred actions,

Garrett v. United States, No. 18-14515, dismissed the complaint "without prejudice" and "without leave to amend" because granting contemporaneous leave to amend would have been "futile" but explained that Garrett could "file a new complaint in the event his conviction is vacated." Add. 26aa. Further, the court denied Garrett's request to stay the case because the claims had not accrued and thus the statute of limitations on the *Heck*-barred action had not begun to run. Add. 25aa. In contrast, in *Garrett v. United States Federal Bureau of Prisons*, No. 16-1603, the one prior action that Amicus believes was dismissed on strike-triggering grounds for failure to state a claim, the district court analyzed Garrett's substantive claims as if it were deciding a Rule 12(b)(6) motion, dismissing the action "without prejudice" and "with leave to amend" so that Garrett could add facts to "state a plausible claim" within a period that later expired. *See* Add. 11aa.

2. Alternatively, a *Heck* dismissal is not a strike because *Heck*'s favorable-termination rule is not an element of a plaintiff's Section 1983 claim, and the *Heck* bar must instead be raised as an affirmative defense.

Even if this Court does not view *Heck* dismissals as jurisdictional in nature, a *Heck*-barred action is not a strike under Section 1915(g)'s "fails to state a claim" criterion because the favorable-termination prerequisite is not an element of a Section 1983 claim—that is, a Section 1983 plaintiff need not plead in his complaint that his conviction has been invalidated. *See Washington*, 833 F.3d at 1056. Instead, the favorable-termination prerequisite must be raised as an affirmative defense, which typically may not be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See id.*

Neither *Heck* nor the PLRA changed this pleading requirement nor how affirmative defenses are treated under the Federal Rules of Civil Procedure.

In *Heck*, the Court emphasized that it was "not engraft[ing]" a special pleading requirement onto a Section 1983 claim. *Heck*, 512 U.S. at 489. Nor could it have done so. *See Jones v. Bock*, 549 U.S. 199, 213-14 (2007). Only Congress—not the federal courts—has the power to depart from the usual pleading standards established by the Federal Rules. *Id.* at 213.

Although the PLRA requires courts to sua sponte screen for deficiencies that would typically be raised in a Rule 12(b)(6) motion, Congress did not otherwise alter normal pleading rules in the PLRA, meaning that the usual practice applies to prisoner litigation. *See Jones*, 549 U.S. at 213. Thus, to establish a prima facie case, a plaintiff is not required to plead facts that anticipate an affirmative defense. *See Schmidt v. Skolas*, 770 F.3d 241, 248-49 (3d Cir. 2014).

For example, although the PLRA requires prisoners to exhaust administrative remedies before suing in federal court—a centerpiece of the PLRA's reforms—Congress did not require prisoners to plead exhaustion. *Jones*, 549 U.S. at 215-16. Instead, exhaustion must be raised as an affirmative defense, as is customary under the Federal Rules. *Id.* at 215.

For these reasons, a failure-to-exhaust dismissal does not count as a strike under Section 1915(g). *See Ball*, 726 F.3d at 459-60. That is because an affirmative defense can generally not be raised in a Rule 12(b)(6) motion—which looks to deficiencies only on the face of the complaint—and, thus, a dismissal on affirmative-defense grounds is not one for failure to state a claim. *Id.*

In the rare circumstance where a valid affirmative defense is obvious on the face of the complaint, however, the defense may be raised in a Rule 12(b)(6) motion. *Ball*, 726 F.3d at 460. But this scenario is unlikely to occur in the "majority of cases" because, at this early stage in the litigation, a plaintiff is not required to say anything about a possible defense in the complaint. *See id.* And a court reviewing a Rule 12(b)(6) motion (or applying the PLRA's screening provision) generally may not consider evidentiary materials outside of the complaint. *See Rinaldi v. United States*, 904 F.3d 257, 261 n.1 (3d Cir. 2018) (consideration of prison records and affidavits may turn a failure-to-exhaust Rule 12(b)(6) motion into one for summary judgment). Furthermore, in this Circuit, even when an affirmative defense is obvious from the face of a prisoner's complaint such that it may be dismissed for failure to state a claim, as detailed below in Part I.B., a strike under Section 1915(g) is counted only when the dismissing court "*explicitly and correctly* concludes" in the dismissal order "that the complaint reveals" the "defense on its face." *See Ball*, 726 F.3d at 460 (emphasis added).

To the extent that *Heck*'s favorable-termination prerequisite is non-jurisdictional in character, it poses an exhaustion-like obstacle for Section 1983 plaintiffs. A *Heck*-based dismissal is mandatory, and, yet, a plaintiff need not plead facts demonstrating his prior conviction has been invalidated. *See Washington*, 833 F.3d at 1056. Rather, consistent with the burden of proof for affirmative defenses, the defendant must make a prima facie showing that the plaintiff's claim is *Heck*-barred in the answer to the complaint. *See id.* at 1056 n.5. Only then would the burden shift to the plaintiff to show that his conviction has been set aside. *See id.* at 1056.

Under these principles, then, if a *Heck* dismissal may ever properly be dismissed for failure to state a claim, it would be only when the *Heck* bar is obvious from the face of the complaint—that is, when a defendant can show that the requested relief would necessarily undermine the underlying conviction, or the conviction was not favorably terminated, based solely on the information in the plaintiff's complaint (without considering outside evidentiary materials). And even then, a *Heck*-barred action dismissed on those grounds counts as a strike under Section 1915(g) only if the dismissing court "explicitly" and "correctly" concluded in the final order that the affirmative defense was, in fact, revealed on the "face" of the complaint. *See Ball*, 726 F.3d at 460. As explained below (at 28), none of Garrett's prior *Heck*-barred actions were explicitly dismissed in this way.

B. The final dismissal orders failed to explicitly and correctly identify strike-triggering grounds.

As just demonstrated, a *Heck* dismissal is not a dismissal for failure to state a claim and therefore does not count as a strike under Section 1915(g). In two of Garrett's dismissals, however, the courts conflated a *Heck*-barred action with one that fails to state a claim and thus explicitly but inaccurately dismissed the action. *See Garrett v. Mendez*, No. 13-5343, Add. 3aa, 6aa; *Garrett v. United States*, No. 18-14515, Add. 25aa, 27aa. In the third *Heck*-related dismissal, the district court failed to explicitly state the grounds for the dismissal in the final order. *See Garrett v. U.S. Dist. Ct. for the Dist. of N.J.*, No. 17-2924, Add. 21aa.

When a dismissing court fails explicitly to identify a strike-triggering ground in its final order, a strike-counting court may rely solely on that order to determine that the

prior action is *not* a strike. But because calling a strike "hinges exclusively on the basis for the dismissal," *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020), when a final order clearly lists a Section 1915(g) ground, the court must then look beyond the order to the accompanying reasoning to determine whether that characterization is correct. Only when the basis for dismissal is both explicit and correct may the court issue a strike against a plaintiff.

1. A strike-counting court must first look to the words of the final order to determine if the action was "explicitly" dismissed on an enumerated ground.

A dismissal is a strike only if the entire action is dismissed "explicitly" because it is frivolous, malicious, or fails to state a claim. *Byrd v. Shannon*, 715 F.3d 117, 126 (3d Cir. 2013). To provide certainty about its reasons for dismissal, *see id.* at 127, the dismissing court must state the basis for dismissal in the final order.

If the final order is not explicit, the strike-counting court must conclude that the dismissal is not a strike. This Court does not permit a dismissal to be shoehorned into a strike category when the basis for the dismissal is ambiguous. *See Byrd*, 715 F.3d at 126. In *Byrd*, this Court distinguished an unclear dismissal under Section 1915(e)(2)(B), the general screening provision, from an explicit dismissal on strike-triggering grounds under Section 1915(e)(2)(B)(i), the sub-provision requiring dismissal for frivolousness. *Id.* at 126-27. The unclear dismissal was not a strike because this Court could not "determine with certainty that Byrd's appeal was dismissed for reasons warranting a strike under" Section 1915(g) based on the court's citation to the screening provision alone. *Id.* at 127.

An approach that requires dismissing courts to be explicit in their final orders has important benefits that correspond with the PLRA's purposes. That approach avoids litigation over what the court intended as the basis for dismissal, *see Byrd*, 715 F.3d at 126, which gives certainty to future courts and assists them in later tallying strikes, *see Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999). It also makes sense because "most prisoners litigate their civil claims pro se," so "they should not be required to speculate on the grounds the judge could or even should have based the dismissal on." *Paul v. Marberry*, 658 F.3d 702, 706 (7th Cir. 2011).

Because one of Garrett's *Heck* dismissals was simply "dismissed in its entirety" without an explicit statutory basis in the final order, *see Garrett v. U.S. Dist. Ct. for the Dist. of N.J.*, No. 17-2924, Add. 21aa, it is not a strike. The court did not dismiss the complaint on an enumerated ground, so the strike inquiry for that action should end.[14]

[14] The dismissal in *Garrett v. United States District Court for the District of New Jersey*, No. 17-2924, is not a strike for at least two other independent reasons. First, the dismissing court stated in its accompanying opinion that "absolute immunity dispose[d] of all claims," but it did not state that the immunity defense was obvious from the face of Garrett's complaint. Add. 18aa. An immunity dismissal is not a strike unless "a court explicitly and correctly concludes that the complaint reveals the immunity defense on its face." *Ball v. Famiglio*, 726 F.3d 448, 463 (3d Cir. 2013).

Second, the district court acknowledged that, in addition to a Section 1983 damages claim, Garrett sought injunctive relief in the form of "immediate release" from his "allegedly improper sentence." Add. 19aa. The proper vehicle for this requested injunctive relief is a habeas action. *See Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1057 (9th Cir. 2016). As explained in Part II (at 32-34), a mixed dismissal where one claim should have been brought in habeas is not a strike because the entire action has not been dismissed on enumerated grounds. *See Byrd v. Shannon*, 715 F.3d 117, 125 (3d Cir. 2013). Because Garrett's *Heck*-barred damages claim was separate from his habeas challenge to the underlying sentence, the mixed dismissal of both claims does not count as a strike. *See Washington*, 833 F.3d at 1057; *see supra* 16 note 13.

2. If the dismissal order is purportedly based on one of Section 1915(g)'s enumerated grounds, then the strike-counting court must examine the court's reasoning given elsewhere.

a. If the final order is explicit, the strike-counting court must then turn to the district court's reasoning. The PLRA requires that an action be "dismissed *on the grounds*" of one of the enumerated provisions for it to qualify as a strike. *See* 28 U.S.C. § 1915(g) (emphasis added). If the court concludes that the dismissal does not actually fall under Section 1915(g), the dismissal is not a strike—despite the dismissing court's characterization. *See Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020); *Fourstar v. Garden City Grp.*, 875 F.3d 1147, 1152 (D.C. Cir. 2017).

A court generally will be unable to rely solely on a dismissal order when issuing a strike because the "grounds" for a decision are not normally found there. A "ground" is "the reason or point that something (as a legal claim or argument) relies on for validity." *Ground*, Black's Law Dictionary (11th ed. 2019). An "order" does not typically state the grounds for a dismissal because it is simply "a command, direction, or instruction." *Order*, Black's Law Dictionary (11th ed. 2019). On the other hand, an accompanying opinion does explain the grounds for a dismissal because an "opinion" is a "court's written statement explaining its decision in a given case." *Opinion*, Black's Law Dictionary (11th ed. 2019). Not surprisingly, then, several of the orders explicitly dismissing Garrett's actions on enumerated grounds instruct the reader to consider the order and opinion together. *See, e.g.*, Add. 6aa (order dismissing the complaint "[f]or the reasons explained in the Memorandum Opinion of today's date").

Examining the accompanying opinion to determine the grounds for dismissal clarifies the dismissing court's reasoning. In *Dooley*, when a district court order explicitly

dismissed an action on two different statutory grounds—"as frivolous and for failure to state a claim"—this Court looked to the memorandum opinion to make sure that the court was truly dismissing the action on both grounds. *See* 957 F.3d at 373 n.2. Similarly, this Court's rule regarding affirmative-defense dismissals directs a strike-counting court to determine if the dismissing court explicitly and correctly concluded that the defense appeared on the face of the complaint. *See Ball*, 726 F.3d at 460, 463. That determination will usually require a strike-counting court to look beyond the order's stated basis for dismissal.

Garrett has two *Heck*-barred actions that are not strikes if this Court looks, as it should, to the district courts' opinions. In these cases, the dismissal orders state (incorrectly) that Garrett's actions were dismissed for failure to state a claim. *Garrett v. Mendez*, No. 13-5343, Add. 6aa; *Garrett v. United States*, No. 18-14515, Add. 27aa. The opinions, however, clarify that the dismissals were actually based on *Heck*. Add. 3aa, 25aa. Because, as explained above (at 16-21), the *Heck* bar is a limit on a federal court's authority to hear the claim and thus not a dismissal for failure to state a claim under Section 1915(g), they are not strikes. But if this Court adopts Amicus's alternative argument (at 21-24), they are also not strikes because the dismissing courts did not explicitly and correctly conclude that the affirmative-defense defect was apparent on the face of the complaint. *See Ball*, 726 F.3d at 460, 463. Either way, the dismissals in these two *Heck*-barred actions do not count as strikes.[15]

[15] As described above (at 10), one of these actions, *Garrett v. Mendez*, No. 13-5343, Add. 6aa, involved both a *Heck*-barred Section 1983 damages claim and a claim for injunctive relief in which Garrett sought "to challenge the propriety of his stop, arrest, prosecution and conviction." Add. 5aa. *Heck* does not bar claims for injunctive relief

b. Allowing a strike-counting court to issue strikes based only on the final order might streamline the strike-counting process, but it would impermissibly rewrite the PLRA. "The judge's job is to construe the statute—not to make it better." *Jones v. Bock*, 549 U.S. 199, 217 (2007). The PLRA bars a prisoner from proceeding IFP in an action if "on 3 or more prior occasions" he has brought an action that has been dismissed on the ground that it was "frivolous, malicious, or fails to state a claim." 28 U.S.C. § 1915(g). The statute does not require dismissing courts to label their dismissals as strikes, nor does it tell future courts simply to defer to the dismissing court's characterization. *See Fourstar*, 875 F.3d at 1152. Further, a strike determination is relevant only when a litigant may have accrued three or more strikes. *See Dooley*, 957 F.3d at 377. Therefore, the statute actually "envisions a determination at the time of the subsequent suit," *id.* at 377, in which a strike-counting court performs its "statutory responsibility" to "*independently* evaluate" the prior actions, *Fourstar*, 875 F.3d at 1152 (emphasis in original).

An independent strike analysis also avoids the erroneous issuance of strikes to a litigant's detriment. *See Dooley*, 957 F.3d at 377. "A strike carries great significance, and the gratuitous calling of a strike … can clearly be damaging later on." *Id.* This Court has concluded that dismissing courts may not prospectively label a dismissal a strike and

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that challenge an underlying conviction or confinement. *See supra* at 16 note 13, 26 note 14. Instead, Garrett's injunctive relief claim was barred because the court lacked the power to hear the merits of the claim, which belonged in a habeas action. Under these circumstances, when an action is dismissed because one claim should have been brought in habeas and another claim is dismissed on other grounds, the action is not a strike. *See infra* Part II (at 32-34); *see also Byrd v. Shannon*, 715 F.3d 117, 125 (3d Cir. 2013); *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1057 (9th Cir. 2016). Thus, *Garrett v. Mendez* is not a strike for this independent reason as well.

has suggested that a court may need "the benefit of briefing by the parties" before issuing a strike in some circumstances. *Id.* at 377.

Independently reviewing whether an action is a strike does not amount to a review of the merits of the dismissed action. *See Fourstar*, 875 F.3d at 1153 n.2. A strike determination "is distinct from the question of whether a prior district court properly dismissed a case" for a strike-triggering reason. *Id.* Instead, the reviewing court must confirm that the final order's explicit language matches the basis for dismissal that is reflected in the court's reasoning and that that reasoning is strike-triggering.

c. Garrett's dismissals highlight why it is important that a court not rely solely on the words of a dismissal order when calling a strike. A court that ended its strike-counting inquiry after finding that the final orders were explicit would have mistakenly counted those dismissals as strikes—and harmed Garrett irrevocably in the process. Given that "haphazard or erroneous determinations," *Dooley*, 957 F.3d at 377, could effectively bar an indigent prisoner from federal court unless he is in imminent physical danger, the task of calling strikes is too important to require that a court perform it with only a partial understanding of the reasons for dismissal.

* * *

As just explained, Garrett's *Heck*-barred actions are not strikes. Because three of Garrett's five prior actions were dismissed, at least in part, as *Heck*-barred and not for failure to state a claim, he has fewer than three strikes and may proceed IFP in this Court.

II. The dismissal below is not a strike.

If this Court agrees with the analysis in Part I above, the question whether an action that is partially dismissed because it contains an improperly filed, non-cognizable habeas claim implicates only one of Garrett's prior dismissals: the dismissal below. *See* Quick Reference Chart, Add. 1a. Thus, no matter how this Court ultimately characterizes the decision below, it will not result in a third strike because Garrett's three wholly-or-partially *Heck*-barred actions are not strikes, leaving Garrett with at most two strikes and allowing him to proceed IFP.[16]

This Court should not end its analysis there, however. Instead, it should also clarify that, for the reasons now explained, the dismissal below is not a strike. That leaves Garrett with only one strike and a nearly clean slate.

Before answering this Court's habeas-related question, Amicus notes that the dismissal below is not a strike because the final order did not explicitly state enumerated grounds as the bases for dismissal. *See Byrd v. Shannon*, 715 F.3d 117, 126 (3d Cir. 2013). It states only that "the complaint is dismissed with prejudice." App. Vol. 1 at 21. As shown above (at 25-27), when a dismissing court fails to explicitly identify a strike-triggering ground in its final order, as occurred below, the dismissal is not a strike.

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[16] If, however, this Court finds that a *Heck* dismissal is based on strike-qualifying grounds, this question additionally affects Garrett's two prior actions that were partially dismissed under *Heck* and partially dismissed because each requested Garrett's immediate release: *Garrett v. Mendez*, No. 13-5343, Add. 6aa, and *Garrett v. United States District Court for the District of New Jersey*, No. 17-2924, Add. 18aa. *See supra* at 26 note 14, 28 note 15. Those two dismissals would not be strikes under this analysis because they include claims that belonged in a habeas petition. Garrett would therefore be left with two strikes and could proceed IFP.

A. Mixed dismissals where a claim is dismissed because it belongs in habeas do not count as strikes, even when the other claims are dismissed on enumerated grounds.

An action like the dismissal below that is partially dismissed because it contains an improperly filed habeas claim is not a strike. Dismissals of habeas claims alone are not strikes, and this Court has already concluded that actions where some claims are dismissed on enumerated grounds but other claims are dismissed on different grounds are not strikes. *See Byrd v. Shannon*, 715 F.3d 117, 123, 125 (3d Cir. 2013).

1. A claim dismissed because it should have been brought in a habeas petition is not a qualifying dismissal under Section 1915(g).

a. The PLRA's three-strikes provision does not cover habeas claims. The three-strikes provision bars a prisoner from proceeding IFP when bringing "a civil action" or appealing "a judgment in a civil action" if "an action or appeal" was dismissed on enumerated grounds on "3 or more prior occasions." 28 U.S.C. § 1915(g). The "most natural reading of the three strikes provision is that the term 'action or appeal' in the second half of the provision is simply an abbreviated reference to the term 'civil action' … mentioned earlier in the same sentence." *Jones v. Smith*, 720 F.3d 142, 146 (2d Cir. 2013).

This Court has already determined that, even though they are "technically civil actions," habeas petitions are not covered by the PLRA because they are "hybrid" civil-criminal proceedings and "independent civil dispositions of completed criminal proceedings." *Santana v. United States*, 98 F.3d 752, 754 (3d Cir. 1996). *Santana* analyzed the phrase "civil action" in a neighboring subsection of the PLRA's IFP requirements, not in Section 1915(g)'s three-strikes provision itself. *Id.* at 756. Because, generally, "a

single use of a statutory phrase must have a fixed meaning across a statute," *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) (quotation marks omitted), the "civil action" language in Section 1915(g) does not apply to habeas claims, either.

b. But even if a habeas petition were a "civil action" under the PLRA, a strike would not occur when a claim is dismissed because it should have been brought in habeas. That type of dismissal is based on the court's inability to reach the merits of the claim, so it is not based on a failure to state a claim as enumerated in Section 1915(g). Even though "the literal terms of § 1983 might seem to cover" a prisoner's challenge to his confinement, *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973), the Supreme Court has concluded that "actions that lie within the core of habeas corpus" are an "exception from § 1983's otherwise broad scope." *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (quotation marks omitted). Claims that attack the fact or duration of a prisoner's conviction or confinement have their own vehicle: a petition for a writ of habeas corpus. *See Preiser*, 411 U.S. at 490. A court acquires "habeas jurisdiction" when those claims are filed under the appropriate federal habeas statute. *See McGee v. Martinez*, 627 F.3d 933, 935 (3d Cir. 2010) (quoting *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2001)). Unless a claim attacking the fact or duration of a prisoner's confinement is properly filed in habeas, a court does not have the power to grant the requested relief and must dismiss the action—even if the claim is meritorious.

A dismissal because a claim belongs in habeas is therefore not dismissed because the complaint is "frivolous, malicious, or," as detailed in Part I.A above (at 16-21), because it "fails to state a claim" as enumerated in Section 1915(g). It is therefore not a strike.

2. A strike occurs only when the entire action is dismissed on enumerated grounds.

This Court has already concluded that a strike occurs only when the "entire action or appeal" is dismissed on grounds enumerated in Section 1915(g). *Byrd*, 715 F.3d at 125; *accord Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1151 (D.C. Cir. 2017) (collecting precedents from "at least seven other courts of appeals" holding the same). As then-Judge Kavanaugh wrote, "the PLRA speaks of the dismissal of actions and appeals, not claims." *Fourstar*, 875 F.3d at 1151 (quotation marks omitted). These holdings dovetail with the Supreme Court's understanding that a dismissal on a "prior occasion" under Section 1915(g) constitutes the dismissal of "suits," *see Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020), or of the entire "stage" of litigation, *see Coleman v. Tollefson*, 575 U.S. 532, 538-39 (2015).

Though "[t]he three strikes provision was designed to filter out the bad claims," it was also designed to "facilitate consideration of the good." *Coleman*, 575 U.S. at 539 (quotation marks omitted). Over-counting dismissals of individual claims as strikes would risk wrongly depriving many pro se prisoners of their day in federal court because they have come up with the wrong answer to a question that trained lawyers and judges struggle with: whether the court must hear the claim in a habeas proceeding or in a civil action under Section 1983. *See Thompson v. DEA*, 492 F.3d 428, 437 (D.C. Cir. 2007). Counting individual claims and not entire actions as strikes would therefore defeat the guarantee "that prisoner claims of illegal conduct by their custodians are fairly handled according to law." *Jones v. Bock*, 549 U.S. 199, 203 (2007).

B. The dismissal below did not dismiss the entire action on enumerated grounds because one claim was dismissed on the ground that it belonged in a habeas petition.

The dismissal below is not a strike because it was based on mixed grounds. In a non-final order, the district court dismissed Garrett's Fourteenth Amendment claim under Section 1915(e)(2)(B)(ii) on the ground that he failed to state a claim, one of Section 1915(g)'s enumerated grounds. App. Vol. 1 at 12. The accompanying opinion reasoned that the complaint did not "allege enough facts … to survive this [c]ourt's review under § 1915," App. Vol. 1 at 8, and the district court gave Garrett leave to amend his complaint. App. Vol. 1 at 12. The court's order also purported to dismiss Garrett's Sixth Amendment claim under Section 1915(e)(2)(B)(ii), App. Vol. 1 at 12, but the accompanying opinion acknowledged that the claim was dismissed because his "remedy lies in a habeas corpus action," App. Vol. 1 at 11. As if to underscore the point, the court later opened a new habeas action for Garrett's claim to proceed. App. Vol. 1 at 15-16. Because the action was dismissed partially based on the court's lack of power to hear the habeas claim in a Section 1983 action, the district court's dismissal below is not a strike.

III. A strike does not accrue until the notice of appeal ripens.

When Garrett filed his notice of appeal, App. Vol. 1 at 14, the appeal was premature because the district court had dismissed one of his claims with leave to amend and had not yet issued a final order, App. Vol. 1 at 12-13. The Court therefore asked Amicus to address when a dismissal underlying a prisoner's premature appeal (if it would otherwise qualify as a strike) may be counted as a strike.

Before answering that question, three preliminary points bear mention. First, the question when a premature appeal counts as a strike will likely never affect a court's counting of strikes because, as here, a court does not obtain appellate jurisdiction, and therefore does not have the power to count strikes, until the notice of appeal ripens. *See supra* 2. Second, if the dismissal underlying this appeal were a strike—and, as shown above (at 31-35), it is not—it would have accrued on September 18, 2020, when the district court issued its final order (and the appeal therefore ripened). App. Vol. 1 at 21. Third, answering the Court's question could not affect the outcome here because, as explained above (at 31), even if the dismissal below counts as a strike, it would not be Garrett's third strike.

Turning to the Court's question, because a premature notice of appeal ripens only when all claims below have been finally resolved, *see Marshall v. Comm'r Penn. Dep't of Corr.*, 840 F.3d 92, 96 (3d Cir. 2016), Garrett's appeal from the district court's May 14, 2020 order, App. Vol. 1 at 12, was not yet ripe when this Court informed him on August 27, 2020 that he must either pre-pay the filing fee or demonstrate imminent danger of serious physical injury under Section 1915(g). Doc. 5. This Court acknowledged the lack of finality of the district court's order, and therefore the potential lack of appellate jurisdiction, in its August 28, 2020 letter. Doc. 6. Because the district court's order was not final, no strike had accrued when this Court initially counted strikes on August 27, 2020.

A strike accrues only when the decision dismissing the entire action becomes final. *See Thompson v. DEA*, 492 F.3d 428, 432 (D.C. Cir. 2007). Thus, a dismissal with leave to amend is not a strike "because the suit continues." *Lomax v. Ortiz-Marquez*, 140 S. Ct.

1721, 1724 n.4 (2020). Whether a strike has accrued based on a district court's decision is therefore the same inquiry as whether that decision has become final and is ripe for appeal.

In this Circuit, "a premature notice of appeal, filed after disposition of some of the claims before a district court, but before entry of final judgment, will ripen upon the court's disposal of the remaining claims." *Marshall*, 840 F.3d at 96 (quoting *Khan v. Att'y Gen.*, 691 F.3d 488, 493 (3d Cir. 2012)). Here, the district court's May 14, 2020 order was not final. It was not "self-effectuating" under this Circuit's "stand on the complaint" doctrine because neither the order nor its accompanying opinion clearly stated that the order would become final at the end of the forty-five-day period that Garrett was given to amend his complaint. App. Vol. 1 at 11-12; *see Weber v. McGrogan*, 939 F.3d 232, 238, 240 (3d Cir. 2019). If this dismissal were a qualifying strike (and, again, it is not), it would have accrued when the notice of appeal ripened with the entry of the final order on September 18, 2020, App. Vol. 1 at 21, and it would therefore count as a strike against Garrett for this appeal.

IV. Because Garrett is in imminent danger, he may proceed IFP.

For the reasons explained above in Parts I and II, Garrett has only one strike and may therefore proceed IFP. *See* Quick Reference Chart, Add. 1a. To sum up: three of Garrett's prior actions do not count as strikes because they were dismissed in whole or in part as *Heck*-barred. Two of the prior actions involving *Heck*-barred claims do not count as strikes for other, independent reasons. *See supra* at 26 note 14, 28 note 15. The action below is also not a strike because one of the claims should have been brought in habeas, and thus the entire action was not dismissed on an enumerated ground.

Even if this Court concludes otherwise, however, Garrett may proceed IFP under Section 1915(g)'s imminent-danger exception. When a prisoner alleges facts showing that, at the time of his appeal, he was "under imminent danger of serious physical injury," he may proceed IFP even if he has three or more strikes. 28 U.S.C. § 1915(g); *Ball v. Famiglio*, 726 F.3d 448, 467 (3d Cir. 2013) (citing *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312 (3d Cir. 2001) (en banc)). Beyond the prisoner's allegations in his filings, the Court may also take judicial notice of facts that "are not subject to reasonable dispute" because they are "generally known" within the court's jurisdiction or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b); *Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001).

Garrett alleges that he has continuously faced imminent physical danger due to the life-threatening health risks posed by the COVID-19 pandemic. *See* Doc. 19 at 4-7. Nothing in the record or in publicly available sources suggests that conditions at CCCF have improved since Garrett filed his complaint, and, meanwhile, the virus has spread and new variants have emerged. *See, e.g.*, *Matter of Request to Release Certain Pretrial Detainees*, 244 A.3d 760, 767 (N.J. 2021); Marilynn Marchione, *New Variants Raise Worry About COVID-19 Virus Reinfections*, Associated Press (Feb. 8, 2021).[17]

Garrett alleged that CCCF officials are flouting public-health guidelines and failing to use best practices to control the spread of COVID-19, such as frequent testing, social distancing, masking, and good hygiene. *See* App. Vol. 2 at 29, 37. Temperature checks and other public-health measures are not performed regularly. *See* App. Vol. 2 at 37.

[17] https://apnews.com/article/coronavirus-new-variants-b4d472f3d61c62a57aa68c4aa7c85012.

Garrett remains unable to socially distance from other inmates because he is confined in a crowded jail. *See id.* All of these failures are particularly problematic for Garrett, who, given his underlying medical conditions, has heightened vulnerability to the virus and long-term damage to his health. *See* App. Vol. 2 at 62-78. In sum, Garrett is in imminent danger.

CONCLUSION

Garrett is entitled to proceed IFP in this appeal.

Respectfully submitted,

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April 5, 2021

CERTIFICATE OF COMPLIANCE

1. Amicus has been informed by the Clerk's Office that this brief should comply with the word limit set in Federal Rule of Appellate Procedure 32(a)(7)(B). In accordance with Rule 32(g), I certify that this brief: (i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 11,375 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and (ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016, set in Garamond font in 14-point type.

2. In accordance with Local Rule 28.3(d), I certify that I am a member of the bar of the Third Circuit in good standing.

3. In accordance with Local Rule 31.1(c), I certify that (i) this brief has been scanned for viruses using McAfee LiveSafe and is free of viruses; and (ii) when paper copies are required by this Court, the paper copies will be identical to the electronic version of the brief filed via CM/ECF.

s/ Madeline Meth
Madeline Meth
Counsel for Amicus

ADDENDA

QUICK REFERENCE CHART

Quick Reference Chart

Prior Action	Issue 1 (*Heck*)	Issue 2 (Order/Opinion)	Issue 3 (Habeas)	Issue 4 (Timing)	Strike?	Reasoning by Issues Presented
Garrett v. Mendez, No. 13-5343 (D.N.J. Aug. 14, 2014) (Add. 1aa-7aa)	**X**	**X**	**X**		No	**Issue 1:** Opinion indicates dismissed in part under *Heck*. Add. 3aa. **Issue 2:** Order dismisses for "failure to state a claim." Add. 6aa. **Issue 3:** Opinion indicates dismissed in part because request for release can only be brought in habeas. Add. 5aa
Garrett v. United States Fed. Bureau of Prisons, No. 16-1603 (E.D. Pa. April 27, 2016) (Add. 8aa-11aa)					Strike	Order properly states 28 U.S.C. § 1915(e)(2)(B)(ii), an enumerated ground, as reason for dismissal. Add. 9aa.
Garrett v. United States Dist. Court for Dist. of New Jersey, No. 17-2924 (D.N.J. July 14, 2017) (Add. 12aa-21aa)	**X**	**X**	**X**		No	**Issue 1:** Opinion indicates dismissed because of defendants' immunity, Add. 17aa, or in part under *Heck*, Add. 19aa. **Issue 2:** Order dismisses "in its entirety" with no statutory grounds listed. Add. 21aa. **Issue 3:** Opinion indicates dismissed in part because request for release can only be brought in habeas. Add. 18aa-19aa.
Garrett v. United States, No. 18-14515, (D.N.J. Nov. 27, 2018), *aff'd*, 771 F. App'x 139 (3d Cir. 2019) (Add. 22aa-28aa)	**X**	**X**			No	**Issue 1:** Opinion indicates dismissed under *Heck*. Add. 25aa. **Issue 2:** Order dismisses for "failure to state a claim, 28 U.S.C. § 1915(e)(2)(B)(ii)." Add. 27aa.
Garrett v. Murphy, No. 20-5235 (D.N.J. May 14, 2020) (App. Vol. 1 at 4-13, 18-21)		**X**	**X**	**X**	No	**Issue 2:** Non-final order dismisses both claims citing 28 U.S.C. § 1915(e)(2)(B)(ii). App. Vol. 1 at 12. Final order cites no ground. App. Vol. 1 at 21. **Issue 3:** Opinion indicates Sixth Amendment claim dismissed because it can only be brought in habeas. App. Vol. 1 at 10-11. **Issue 4:** Strikes initially counted before notice of appeal ripened, Doc. 5, but now appeal is ripe. App. Vol. 1 at 21.

ADDENDUM OF PRIOR ACTIONS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALLEN DUPREE GARRETT, Plaintiff, v. OFFICER MIGUEL MENDEZ, et al., Defendants.	HONORABLE JEROME B. SIMANDLE Civil Action No. 13-5343 (JBS/AMD) **MEMORANDUM OPINION**

SIMANDLE, Chief Judge:

Plaintiff Allen Dupree Garrett, pro se, brings this action under 42 U.S.C. § 1983, in essence challenging his criminal conviction and bringing claims arising from his arrest and imprisonment. This action relates to an arrest and a criminal charge to which which Plaintiff pleaded guilty and unsuccessfully challenged on direct appeal and on a petition for habeas corpus, under 28 U.S.C. § 2255, see Garrett v. United States, No. 13-27, 2014 WL 1334213 (D.N.J. Apr. 2, 2014), and again on a Fed. R. Civ. P. 60(b) motion, see Order, Garrett v. United States, No. 13-27 (D.N.J. June 12, 2014), ECF No. 24. Plaintiff is currently incarcerated and seeks to proceed in forma pauperis under 28 U.S.C. § 1915. The Court finds as follows:

1. Because Plaintiff's application discloses that he is indigent, the Court will permit the Complaint be filed without

prepayment of fees, pursuant to 28 U.S.C. § 1915, and order the Clerk of Court to file the Complaint.

2. Section 1915(e)(2)(B) requires the Court to screen the complaint and dismiss any claim that is frivolous or malicious, fails to state a claim, or seeks monetary relief against a defendant who is immune from such relief.

3. By way of background, Plaintiff pleaded guilty to one count of possession of a firearm by a convicted felon, and on January 26, 2012, was sentenced to 77 months imprisonment. See Judgment in a Criminal Case, United States v. Garrett, No. 11-242 (D.N.J. Jan. 26, 2012), ECF No. 29. The judgment was affirmed by the Third Circuit. See Judgment, United States v. Garrett, No. 12-1338 (3d Cir. Dec. 5, 2012). Plaintiff's habeas petition was denied, as was his motion under Fed. R. Civ. P. 60(b).

4. Plaintiff's new Complaint asserts claims under 42 U.S.C. §§ 1981 & 1983 for malicious prosecution, unlawful arrest, racial discrimination in violation of the Equal Protection Clause, and common-law false imprisonment. He takes issue with his arrest, arguing that the police lacked probable cause to arrest him and that he was the victim of racial profiling.

5. Plaintiff's Complaint must be dismissed. The U.S. Supreme Court has held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). See also Deemer v. Beard, 557 F. App'x 162, 166 (3d Cir. 2014) (stating that the Third Circuit has "interpreted Heck to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence"). Here, Plaintiff's claims depend on the impropriety of his stop, arrest and prosecution, yet he pleaded guilty to possession of a firearm, and the conviction was upheld on appeal and upon collateral review. Because Plaintiff's conviction has not been invalidated, this action is barred by Heck v. Humphrey, 512 U.S. at 486-87.

6. The Third Circuit considered substantially similar facts in Gibson v. Superintendent of N.J. Dep't of Law & Publ. Safety, 411 F.3d 427 (3d Cir. 2005), overruled on other grounds by Dique v. N.J. State Police, 603 F.3d 181 (3d Cir. 2010) (overruling based on the accrual date of a § 1983 claim). In Gibson, the Third Circuit stated:

> [Gibson's] car was stopped because of a pattern and practice of racial profiling, not because police had reasonable suspicion to believe a crime was being committed. Generally, the absence of reasonable suspicion renders a stop unlawful, see Alabama v. White, 496 U.S. 325, 329-30 (1990), and evidence obtained from that unlawful stop excludable, see Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Gibson was arrested when the Defendant Troopers discovered drugs during the subsequent search of the car. These drugs were the only evidence supporting the drug charges against Gibson. Thus, success on his § 1983 claim for false arrest would "necessarily imply" that he was improperly convicted.

Gibson, 411 F.3d at 451-52 (Fuentes, J., writing the opinion of the Court with respect to one claim) (parallel citations omitted). Judge Van Antwerpen, writing the majority opinion in Gibson with respect to most of the plaintiff's claims, added: "if a person can demonstrate that he was subjected to selective enforcement in violation of his Equal Protection rights, his conviction will be invalid." Id. at 440-41 (citing United States v. Berrigan, 482 F.2d 171, 174 (3d Cir. 1973)).

7. Similarly, here, the only evidence against Plaintiff was the gun discovered during the police stop. Even setting aside the fact that Plaintiff pleaded guilty, success on Plaintiff's equal protection claim for racial profiling would necessarily imply that his conviction was improper. See also Ellis v. Mondello, No. 05-1492, 2005 WL 1703194, at *2 (D.N.J. July 20, 2005) (dismissing a complaint under § 1915 for failure

to state a claim when the plaintiff alleged that he was falsely arrested and convicted as a result of racial profiling).

8. Moreover, to the extent Plaintiff seeks to challenge the propriety of his stop, arrest, prosecution and conviction, he is attempting to bring a second or successive motion for habeas relief, which is barred except in certain narrow circumstances not present here. See 28 U.S.C. § 2255(h) (providing that second or successive motions for relief must be certified by a panel of the appropriate court of appeals to contain "(1) newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty . . . ; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"). Plaintiff's attempt to bring a second or successive petition under § 2255 has not been properly certified and will not be considered.

9. For these reasons, Plaintiff's claims are barred and the Complaint is dismissed for failing to state a claim upon which relief may be granted. An accompanying Order will be entered.

August 13, 2014
Date

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALLEN DUPREE GARRETT, Plaintiff, v. OFFICER MIGUEL MENDEZ, et al., Defendants.	HONORABLE JEROME B. SIMANDLE Civil Action No. 13-5343 (JBS/AMD) **ORDER**

This matter having come before the Court pursuant to Plaintiff Allen Dupree Garrett's Complaint and petition to proceed in forma pauperis [Docket Item 1]. For the reasons explained in the Memorandum Opinion of today's date; and for good cause shown;

IT IS this **13th** day of **August**, **2014,** hereby

ORDERED that Plaintiff's application to proceed without prepayment of fees under 28 U.S.C. § 1915 is GRANTED; and it is further

ORDERED that the Clerk of Court shall file the Complaint; and it is further

ORDERED that Plaintiff's Complaint is DISMISSED for failure to state a claim upon which relief may be granted; and it is further

ORDERED that the Clerk shall close this matter on the Docket.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN DUPREE GARRETT a/k/a ALAN D. GARRETT	:	**CIVIL ACTION**
v.	:	
UNITED STATES OF AMERICA FEDERAL BUREAU OF PRISONS, et al.	:	**NO. 16-1603**

ORDER

AND NOW, this 27th day of April, 2016, upon consideration of plaintiff's motion to proceed *in forma pauperis*, *pro se* complaint, and "Motion to Correct or Amend" (Document No. 5) it is ORDERED that:

1. Leave to proceed *in forma pauperis* is GRANTED.

2. Plaintiff, Allen Dupree Garrett a/k/a Alan D. Garrett #63176-050, shall pay the full filing fee of $350 in installments, pursuant to 28 U.S.C. § 1915(b). Based on the financial information provided by plaintiff, an initial partial filing fee of $5.02 is assessed. The Warden or other appropriate official at the Federal Correctional Institution – Fort Dix or at any other prison at which plaintiff may be incarcerated is directed to deduct $5.02 from plaintiff's inmate trust fund account, when such funds become available, and forward that amount to the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Room 2609, Philadelphia, PA 19106, to be credited to Civil Action No. 16-1603. After the initial partial filing fee is collected and until the full filing fee is paid, the Warden or other appropriate official at the Federal Correctional Institution – Fort Dix or at any other prison at which plaintiff may be incarcerated, shall deduct from plaintiff's account, each time that plaintiff's inmate trust fund account exceeds $10, an amount no greater than 20 percent of the money credited to his

account during the preceding month and forward that amount to the Clerk of Court at the address provided above to be credited to Civil Action No. 16-1603.

3. The Clerk of Court is directed to send a copy of this order to the Warden of the Federal Correctional Institution – Fort Dix.

4. The complaint is DISMISSED, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), for failure to state a claim.[1] Plaintiff, a prisoner at the Federal Correctional Institution at Fort Dix, brings this action pursuant to the Federal Tort Claims Act (FTCA) against the "United States of America Federal Bureau of Prisons," the "F.B.O.P.," the Kintock Group Halfway House, Mr. Coates, Ms. C. Minnis, and R.N. Every-Clayton. Plaintiff alleges that he was "sent to the Kintock Group as a mental health patient by [the] Bureau of Prisons Fort Dix" from November 12, 2015 through March 7, 2016. While he was a patient with the Kintock Group, plaintiff was prescribed medication that caused several side effects. He alleges that he complained to employees of the Kintock Group but that they failed to adequately respond to his complaints. He subsequently fainted at the Kintock Group Halfway House.

The FTCA partially waives the federal government's sovereign immunity to allow liability for the torts of federal employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The only proper defendant in a FTCA case is the United States. *See CNA v. United States*, 535 F.3d 132, 138 n.2 (3d Cir. 2008); *see also Gary v. Pa. Human Relations Comm'n*,

[1] To survive dismissal for failure to state a claim, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). "[M]ere conclusory statements[] do not suffice." *Id.* The Court may also consider exhibits attached to the complaint. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006). As plaintiff is proceeding *pro se*, the Court construes his allegations liberally. *Higgs v. Att'y Gen.*, 655 F.3d 333, 339 (3d Cir. 2011).

497 F. App'x 223, 228 (3d Cir. 2012) (per curiam) ("[T]he FTCA authorizes suits only against the United States itself, not individual defendants or agencies."). Accordingly, plaintiff cannot state a claim under the FTCA against the entities and individuals named as defendants in his complaint.

Furthermore, the United States is not liable under the FTCA for the torts of independent contractors. *See Moreno v. United States*, 387 F. App'x 159, 160-61 (3d Cir. 2010) (per curiam) (citing *Norman v. United States*, 111 F.3d 356 (3d Cir. 1997)). "The critical factor used to distinguish a federal agency employee from an independent contractor is whether the government has the power 'to control the detailed physical performance of the contractor.'" *Norman*, 111 F.3d at 357 (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)). Here, the complaint suggests that the Kintock Group is a contractor of the United States such that the FTCA would not be applicable. Additionally, to the extent plaintiff intended to raise any claims pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), his claims fail because *Bivens* only provides a remedy for constitutional violations committed by federal officers. It does not provide a cause of action against the federal government, federal agencies, independent contractors, or employees of independent contractors. *See Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001); *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994).

To the extent plaintiff intended to raise claims against the Kintock Group Halfway House and its employees under state law, it is not clear an independent basis for subject matter jurisdiction exists over those claims. The only possible basis for jurisdiction is 28 U.S.C. § 1332(a), which grants a district court jurisdiction over a case in which "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens

of different States." As the complaint does not allege the citizenship of the parties, the Court cannot determine whether they are diverse for purposes of § 1332.

5. The "Motion to Correct or Amend" is DENIED because the motion does not cure the defects in the complaint. However, plaintiff will be given leave to amend in the event he can state a plausible claim. Plaintiff's request for an attorney is DENIED without prejudice at this time. *See Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993) (indicating that, in determining whether appointment of counsel is appropriate, the Court should first determine whether plaintiff's lawsuit has a legal basis).

6. Plaintiff is given leave to file an amended complaint within thirty (30) days of the date of this order in the event he can state a basis for a plausible claim against an appropriate defendant within this Court's jurisdiction. Alternatively, he may refile his complaint in state court. Upon the filing of an amended complaint, the Clerk of Court shall not make service until so ORDERED.

BY THE COURT:

/s/ Legrome D. Davis
LEGROME D. DAVIS, J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALAN D. GARRETT, Plaintiff, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, et al., Defendants.	Civil Action No. 17-2924-BRM-DEA **OPINION**

MARTINOTTI, DISTRICT JUDGE

Before this Court[1] is: (1) Plaintiff Alan D. Garrett's ("Plaintiff") Complaint asserting civil rights claims against his former criminal defense attorneys, Maggie F. Moy, Michael N. Huff, and Thomas J. Young (collectively, "Prior Defense Attorneys") and former Chief Jerome B. Simandle, U.S.D.J. (ECF No. 1); and (2) Plaintiff's Amended Application for leave to proceed *in forma pauperis* (ECF No. 7-1.) As leave to proceed *in forma pauperis* is warranted in this matter, this Court **GRANTS** Plaintiff's application to proceed *in forma pauperis*. Because this Court is granting that application, this Court is required to screen the complaint pursuant to 28 U.S.C. §§

[1] Because Plaintiff names a District Court judge as a Defendant, this case was assigned to this Court pursuant to the Court's January 13, 1994 standing order, which requires that in all cases where a judge of this District is named as a party, the matter shall be assigned to a judge sitting in a different vicinage of this District than the one in which the named judge sits. Pursuant to the standing order, this Court need not recuse itself if the assigned judge determines the matter to be patently frivolous or if judicial immunity is plainly applicable, but the Court must reassign the matter for transfer outside of this District in the event the matter is neither frivolous nor subject to immunity. Because Plaintiff's Complaint must be dismissed for the reasons expressed herein, this Court need not recuse under the standing order.

1915(e)(2)(B) and 1915A. For the reasons set forth below, Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**.

I. BACKGROUND

The following factual allegations are taken from Plaintiff's Complaint (ECF No. 1), and are assumed to be true for the purposes of this Opinion. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). In his Complaint, Plaintiff asserts various claims against Defendants regarding events that occurred during plea negotiations and during his plea and sentencing hearings in 2011 and 2016. (ECF No. 1 at 3-4.) Specifically, Plaintiff claims his Prior Defense Attorneys "provided ineffective assistance of counsel" in negotiating and prosecuting a plea agreement Petitioner entered into in October 2011, as well as in their representation of Plaintiff during his sentencing in February 2012 and in a subsequent violation of probation matter in December 2016. (*Id.*) Plaintiff contends counsels' ineffective assistance resulted in Plaintiff involuntarily and unknowingly agreeing to an improper plea agreement, and this improper agreement resulted in him receiving an "illegal" sentencing enhancement. (*Id.* at 3.) Finally, Plaintiff claims Judge Simandle accepted and failed to correct the "erroneous plea agreement" including the "enhancements that didn't fit" the crime to which he pled guilty, resulting in a "manifest injustice." (*Id.*) Therefore, Plaintiff requests he be provided "monetary compensation" for his "unconstitutional sentence . . . [and] a reasonable probability [that] counsels[']' unprofessional errors [affected] the result of [his criminal] proceeding." (*Id.* at 4.) Plaintiff also seeks his "immediate release." (*Id.*)

II. LEGAL STANDARD

Pursuant to the Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66 to 1321-77 (Apr. 26, 1996) (the "PLRA"), district courts must review the complaints in all civil actions in which a prisoner is proceeding *in forma pauperis*, *see* 28 U.S.C. § 1915(e)(2)(B), or seeks damages from a state employee, *see* 28 U.S.C. § 1915A. The PLRA directs district courts to *sua sponte* dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A. Because Plaintiff has been granted *in forma pauperis* status (*see* ECF No. 6) and is a state prisoner seeking damages from state agencies (*see* ECF No. 1), this action is subject to *sua sponte* screening for dismissal pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and § 1915A.

"The legal standard for dismissing a complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) is the same as that for dismissing a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Schreane v. Seana*, 506 F. App'x 120, 122 (3d Cir. 2012) (citing *Allah v. Seiverling*, 229 F.3d 220, 223 (3d Cir. 2000)); *Courteau v. United States*, 287 F. App'x 159, 162 (3d Cir. 2008) (discussing 28 U.S.C. § 1915A(b)).

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff]." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). "[A] complaint attacked by a . . . motion to dismiss does not need detailed factual allegations." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). However, the Plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* This "plausibility standard" requires the complaint allege "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a 'probability requirement.'" *Id.* (citing *Twombly*, 550 U.S. at 556). "Detailed factual allegations" are not required, but "more than 'an unadorned, the defendant-harmed-me accusation" must be pled; it must include "factual enhancements" and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

"Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Moreover, while *pro se* pleadings are liberally construed, "*pro se* litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (citation omitted) (emphasis added).

III. DECISION

Plaintiff brings claims against his Prior Defense Attorneys for ineffective assistance of counsel and against Judge Simandle for the imposition of an allegedly unconstitutional sentence pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal analogue to an action under § 1983. *See, e.g.*, *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 800 (3d Cir. 2001). "To establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a violation of a right protected by the Constitution or laws of the United States that was committed by a person acting under the color of state law." *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000); *see also Woodyard v. Cty. of Essex*, 514 F. App'x 177, 180 (3d Cir. 2013) (§ 1983 provides "private citizens with a means to redress violations of federal law committed by state [actors]"). "The first step in evaluating a section 1983 claim is to 'identify the exact contours of the underlying right said to have been violated' and to determine 'whether the plaintiff has alleged a deprivation of a constitutional right at all.'" *Nicini*, 212 F.3d at 806 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)).

A *Bivens* action is the federal equivalent of the § 1983 action against state actors, and the same legal principles and analyses apply to a federal actor under *Bivens* as would apply under § 1983 for a state actor. *Brown*, 250 F.3d at 800. Accordingly, the elements of a *Bivens* claim are: "that a defendant acted under color of federal law" and "to deprive plaintiff of a constitutional right." *Capalbo v. Hollingsworth*, No. 13-3291 (RMB), 2013 WL 6734315, at *4 (D.N.J. Dec. 19, 2013).

In this matter, Plaintiff raises claims based on ineffective assistance of counsel and imposition of an improper sentence. As a preliminary matter, all of the Defendants named in the Complaint – Plaintiff's Prior Defense Attorneys and the sentencing judge – are either immune

from suit under § 1983 or *Bivens*. As to Plaintiff's claims against his sentencing judge, it is well established that judges acting in performance of their duties are absolutely immune from suit. *Kwasnik v. Leblon*, 228 F. App'x 238, 243 (3d Cir. 2007); *see also Mireles v. Waco*, 502 U.S. 9, 12 (1991). "A judge will not be deprived of immunity because the action he took was 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." *Kwasnik*, 228 F. App'x at 243. (quoting *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978)). Because Plaintiff has pled no facts indicating a lack of jurisdiction, and has instead pled facts – including facts regarding his guilty plea – that indicate criminal jurisdiction did exist, Judge Simandle is absolutely immune from the claims Plaintiff presents against him for issuing an allegedly illegal sentence. *Id.*

Plaintiff's civil rights claims against his Prior Defense Attorneys fail for similar reasons. Defense counsel, including "public defenders and court-appointed counsel acting within the scope of their professional duties are absolutely immune from civil liability under § 1983." *Walker v. Pa.*, 580 F. App'x 75, 78 (3d Cir. 2014) (quoting *Black v. Bayer*, 672 F.2d 309, 320 (3d Cir. 1982), *abrogated on other grounds by D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1368 n. 7 (3d Cir. 1992)). Public defenders do "not act under color of state [or federal] law when performing a lawyer's traditional functions." *Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981). Plaintiff's claims against his Prior Defense Attorneys arise out of those attorneys' actions taken in Plaintiff's criminal defense – negotiating and pursuing a plea agreement and representing Plaintiff during plea and sentencing hearings. As such, Defendants Moy, Huff, and Young were not acting under color of state or federal law in representing him and are entitled to absolute immunity. *Id.* Accordingly, all of Plaintiff's claims are **DISMISSED** with prejudice because all of the named Defendants are absolutely immune from suit based on the actions alleged in the Complaint.

Although the Court finds absolute immunity disposes of all claims raised in Plaintiff's Complaint, Plaintiff's Complaint also raises claims to secure his immediate release, and to recover monetary damages arising out of his criminal sentence. It is well established that a prisoner may not use a civil rights complaint under § 1983 or *Bivens* as a means to challenge "the fact or duration" of his criminal confinement. *See Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (holding a federal civil rights action "will not lie when a state prisoner challenges the fact or duration of his confinement" and a civil rights action cannot be used by a prisoner to seek either his "immediate release" or a "shortening" of his term of confinement). The Supreme Court has further extended this rule to bar not only those suits seeking to invalidate a prisoner's conviction or sentence, but also to cases where a plaintiff seeks compensatory damages where the success of that claim for damages would necessarily impugn the validity of his conviction or sentence. *Wilkinson*, 544 U.S. at 80-82; *Heck v. Humphries*, 512 U.S. 477, 486-87 (1994). Therefore, any suit seeking damages arising from an allegedly improper sentence or conviction must be preceded by a judgment of the state or federal courts invalidating the plaintiff's conviction or sentence. *Wilkinson*, 544 U.S. at 81-82. A claim seeking the invalidation of a federal sentence must instead be brought pursuant to 28 U.S.C. § 2255, and a civil rights action may not be used in the stead of a § 2255 motion where the plaintiff cannot meet the habeas statute's gatekeeping requirements.[2] *Id.*at 80-82. The *Wilkinson* Court therefore expressly held that a prisoner's civil rights action "is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – *if*

[2] This Court will not construe Plaintiff's current Complaint as a § 2255 because Plaintiff has already filed § 2255 motions related to his convictions under Docket Numbers 13-27 and 17-3254, which have been decided or remain pending before Judge Simandle.

success in that action would necessarily demonstrate the invalidity of [his] confinement or its duration." *Id.* at 81-82.

Here, Plaintiff seeks both immediate release and monetary damages arising from the allegedly improper sentence he received. However, Plaintiff has failed to present facts suggesting his conviction was invalidated. Indeed, because Plaintiff remains confined, it is clear his conviction, or at least his most recent supervised release violation, has not been invalidated. Accordingly, Plaintiff's claims are also **DISMISSED** because he seeks an immediate release and monetary damages from his allegedly improper sentence.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Amended Application for leave to proceed *in forma pauperis* (ECF No. 7) is **GRANTED**, and Plaintiff's Complaint (ECF No. 1) is **DISMISSED** in its entirety. An appropriate order will follow.

Date: July 14, 2017

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALAN D. GARRETT, Plaintiff, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, et al., Defendants.	Civil Action No. 17-2924-BRM-DEA **ORDER**

THIS MATTER is opened to the Court on the Amended Application for leave to proceed *in forma pauperis* (ECF No. 7-1) of Plaintiff Alan D. Garrett ("Plaintiff") and the Court's *sua sponte* screening of Plaintiff's Complaint (ECF No. 1) pursuant to 28 U.S.C. § 1915(e)(2)(B). The Court finding leave to proceed *in forma pauperis* is warranted; the Court having reviewed Plaintiff's Complaint; and for the reasons expressed in the accompanying Opinion,

IT IS on this 14th day of July 2017,

ORDERED that the Clerk of the Court shall re-open this matter for the purposes of this Order only; and it is further

ORDERED that Plaintiff's Amended Application for leave to proceed *in forma pauperis* (ECF No. 7-1) is hereby **GRANTED**; and it is further

ORDERED that the Complaint (ECF No. 1) shall be filed; and it is further

ORDERED that pursuant to 28 U.S.C. § 1915(b) and for purposes of account deduction only, the Clerk shall serve a copy of this Order by regular mail upon the United States Attorney's Office and upon the Warden of USP-Atlanta; and it is further

ORDERED that Plaintiff is assessed a filing fee of $350.00 and shall pay the entire filing fee in the manner set forth in this Order pursuant to 28 U.S.C. § 1915(b)(1) and (2), regardless of

the outcome of the litigation, meaning that the Court's dismissal of this matter does not suspend the requirement that Plaintiff pay installment payments towards the filing fee as required by § 1915(b)(1)-(2); and it is further

ORDERED that pursuant to *Bruce v. Samuels*, 136 S. Ct. 627, 632 (2016), if Plaintiff owes fees for more than one court case, whether to a district or appellate court, under the Prison Litigation Reform Act ("PLRA") provision governing the mandatory recoupment of filing fees, Plaintiff's monthly income is subject to a simultaneous, cumulative 20% deduction for *each* case a court has mandated a deduction under the PLRA; *i.e.*, Plaintiff would be subject to a 40% deduction if there are two such cases, a 60% deduction if there are three such cases, etc., until all fees have been paid in full; and it is further

ORDERED that pursuant to 28 U.S.C. § 1915(b)(2), each month the amount in Plaintiff's account exceeds $10.00, the agency having custody of Plaintiff shall assess, deduct from Plaintiff's account, and forward to the Clerk of the Court payment equal to 20% of the preceding month's income credited to Plaintiff's account, in accordance with *Bruce*, until the $350.00 filing fee is paid. Each payment shall reference the civil docket numbers of the actions to which the payment should be credited; and it is further

ORDERED that Plaintiff's Complaint (ECF No. 1) is **DISMISSED** in its entirety; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Order and the accompanying Opinion upon Plaintiff by regular U.S. mail and shall **CLOSE** the file.

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALAN D. GARRETT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	HONORABLE JEROME B. SIMANDLE Civil Action No. 18-14515 (JBS-JS) **OPINION**

APPEARANCES:

Alan D. Garrett, Plaintiff pro se
#63176050
Federal Detention Center Philadelphia
P.O. Box 562
Philadelphia, PA 19105

SIMANDLE, U.S. District Judge:

1. Alan D. Garrett, a federal prisoner confined at FDC Philadelphia, has filed a civil lawsuit pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* 403 U.S. 388 (1971). Complaint, Docket Entry 1.

2. The Court granted his *in forma pauperis* application on October 26, 2018. Docket Entry 5. At this time, the Court must review the complaint to determine whether it should be dismissed as frivolous or malicious, for failure to state a claim upon which relief may be granted, or because it seeks monetary relief

from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

3. According to the Supreme Court's decision in *Ashcroft v. Iqbal*, "a pleading that offers 'labels or conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive sua sponte screening for failure to state a claim, the complaint must allege "sufficient factual matter" to show that the claim is facially plausible. *Fowler v. UPMS Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citation omitted).

4. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 308 n.3 (3d Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678). Moreover, while pro se pleadings are liberally construed, they "still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (citation omitted).

5. It is not entirely clear what claim Plaintiff is attempting to bring against the United States. As Plaintiff references his pending motion to correct, vacate, or set aside

his federal sentence under 28 U.S.C. § 2255,[1] the Court presumes he is making some sort of wrongful conviction and imprisonment allegation.

6. By way of background, Plaintiff pleaded guilty to one count of possession of a firearm by a convicted felon, and on January 26, 2012, was sentenced to 77 months imprisonment. See Judgment in a Criminal Case, *United States v. Garrett*, No. 11–242 (D.N.J. Jan. 26, 2012), ECF No. 29. The judgment was affirmed by the Third Circuit. *See* Judgment, *United States v. Garrett*, No. 12–1338 (3d Cir. Dec. 5, 2012).

7. The United States has sovereign immunity for constitutional claims. *Tucker v. Sec'y of Health & Human Servs.*, 588 F. App'x 110, 115 (3d Cir. 2014); *Perez–Barron v. United States*, 480 F. App'x. 688, 691 (3d Cir. 2012) (citing *Chinchello v. Fenton*, 805 F.2d 126, 130 n.4 (3d Cir. 1986)). "[W]aivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6 (1993).

8. Furthermore, Plaintiff's challenge to the validity of his conviction is ongoing. The U.S. Supreme Court has held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983

[1] *See Garrett v. United States*, No. 17-3254 (D.N.J. filed May 8, 2017).

> plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck v. Humphrey, 512 U.S. 477, 486–87 (1994). *See also Deemer v. Beard*, 557 F. App'x 162, 166 (3d Cir. 2014) (stating that the Third Circuit has "interpreted *Heck* to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence").

9. Here, Plaintiff's claims depend on the impropriety of his prosecution and conviction. Because Plaintiff's conviction has not been invalidated, this action is barred by *Heck*.

10. Petitioner asks the Court to stay his civil suit pending the outcome of his § 2255 proceedings. The Court declines to do so. "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). There are no concerns such as the statute of limitations that would warrant staying the case as Plaintiff's claims, as best as the Court is able to discern them, would not accrue until his conviction is vacated. The Court therefore exercises its discretion to dismiss Plaintiff's complaint without prejudice.

11. The Court denies leave to amend at this time as futile. However, Plaintiff may file a new complaint in the event his conviction is vacated.

12. An accompanying Order will be entered.

November 27, 2018
Date

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALAN D. GARRETT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	HONORABLE JEROME B. SIMANDLE Civil Action No. 18-14515 (JBS-JS) **ORDER**

This matter having come before the Court on Plaintiff's a civil lawsuit pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* 403 U.S. 388 (1971)(Docket Entry 1); the Court having reviewed the complaint under 28 U.S.C. § 1915(e)(2); for the reasons explained in the Opinion of today's date; and for good cause shown;

IT IS this **27th** day of **November**, **2018,** hereby

ORDERED that the Complaint is DISMISSED WITHOUT PREJUDICE for failure to state a claim, 28 U.S.C. § 1915(e)(2)(B)(ii); and it is further

ORDERED that leave to amend is denied as futile, except that Plaintiff may file a new complaint in the event his criminal conviction is vacated; and it is finally

ORDERED that the Clerk shall serve copies of this Order and Opinion on Plaintiff by regular mail and mark this matter **CLOSED**.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge

STATUTORY ADDENDUM

28 U.S.C. § 1915. Proceeding in forma pauperis

* * *

(e)(1) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

* * *

(g) 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. § 1915A. Screening

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(e)(1) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

CERTIFICATE OF SERVICE

I certify that on April 5, 2021 this brief was filed using the Court's CM/ECF system. Appellant Allen Dupree Garrett will be served a physical copy of the brief at:

Allen Dupree Garrett
4366289
Camden County Correctional Facility
330 Federal Street
Camden, NJ 08103

s/ Madeline Meth
Madeline Meth

Counsel for Amicus