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.)

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

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Plaintiff-Appellant Allen Dupree Garrett may proceed IFP in this appeal challenging the constitutionality of his pre-trial confinement because he does not have three strikes under the Prison Litigation Reform Act. In response to this Court's questions, Amicus explained that none of the three disputed prior actions counts as a strike because none was dismissed entirely on grounds enumerated in 28 U.S.C. § 1915(g). 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. Defendants' contrary arguments should be rejected.[1]

I. Garrett's 2013 and 2018 prior actions are not strikes.

A. Because the 2013 and 2018 prior actions were dismissed in whole or part under *Heck*, they do not count as strikes.

Defendants cherry-pick language from *Heck v. Humphrey*, 512 U.S. 477 (1994), to cobble together a series of assertions about why a *Heck* dismissal is a dismissal for failure to state a claim. None of these assertions is correct.

1. A *Heck* dismissal is not a strike because *Heck*'s favorable-termination prerequisite relates to a court's authority to reach the merits, not to whether a plaintiff has failed to state a claim.

a. *Heck* did not address whether the favorable-termination rule operates formally as a limit on access to a federal forum or as a pleading requirement, and Defendants' assertion to the contrary is wrong. *See Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 n.2

[1] Amicus and Defendants agree that the 2017 action, *Garrett v. U.S. Dist. Ct. for Dist. of N.J.*, No. 17-2924 (D.N.J. July 14, 2017), Add. 12aa, is not a strike and about how this Court should resolve the fourth issue posed to Amicus. *See* Resp. Br. 3 n.1. Amicus therefore relies on its opening brief on those issues.

(2020) (noting that whether a *Heck* dismissal is a dismissal for failure to state a claim is an open question); Resp. Br. 17-18. In any case, that distinction makes no difference to the question presented here. What matters is that *Heck*'s favorable-termination rule *functions* as a limit on federal-court adjudication akin to other doctrines that are jurisdictional in character because they all constrain federal courts' authority to review an action's merits until certain conditions are met. Opening Br. 16-21.

According to Defendants, because *Heck* derived the favorable-termination rule in part from an analogy to the common-law tort of malicious prosecution, a Section 1983 plaintiff fails to state a claim if he does not allege favorable termination in his complaint. That argument misconceives *Heck*'s reliance "on malicious prosecution's favorable termination requirement," which was simply "illustrative of the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions." *Heck*, 512 U.S. at 484 n.4. The Court "often decides" questions about when a cause of action ripens "by referring to the common-law principles governing analogous torts." *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019) (citing *Wallace v. Kato*, 549 U.S. 384, 388 (2007), and *Heck*, 512 U.S. at 483). These "'principles are meant to guide rather than to control the definition of § 1983 claims,' such that the common law serves 'more as a source of inspired examples than of prefabricated components.'" *Id.* (quoting *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017)). And although favorable termination is a pleading requirement for a common-law malicious prosecution claim, the Supreme Court "has not defined the elements of such a § 1983 claim." *Id.* at 2156 n.3.

The common-law principles relied on in *Heck*—focusing on *when* a collateral attack may be mounted—are not about resolving the underlying merits of a plaintiff's claim but instead about a court's power to reach the merits at all. *See Heck*, 512 U.S. at 483-86. Preventing a federal court from reaching the merits of a plaintiff's Section 1983 damages claim until the favorable-termination requirement is met "avoids parallel litigation over the issues of probable cause and guilt" and protects "against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* at 484 (quoting 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, p. 24 (1991)). It also safeguards habeas proceedings' status as the "appropriate vehicle[] for challenging the validity of outstanding criminal judgments." *Id.* at 486. These concerns relate only to when a claim ripens for federal adjudication, not to factual pleading deficiencies.

Defendants overlook that, in creating the favorable-termination rule, *Heck* relied not only on a comparison to malicious prosecution but also on *Preiser v. Rodriguez*, 411 U.S. 475 (1973), which held that claims for injunctive relief challenging the fact or duration of a person's confinement "are not cognizable" under Section 1983. *Heck*, 512 U.S. at 481. When a claim is not "cognizable" it is not "[c]apable of being judicially tried or examined before a designated tribunal" because it is not "within the court's jurisdiction." *Cognizable*, *Black's Law Dictionary* (11th ed. 2019); *see also FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The *Preiser* rule is "rooted in considerations of federal-state comity"—the same principle motivating abstention doctrines that constrain federal courts' authority to hear an action before state-court proceedings are resolved. *Preiser*, 411 U.S. at 491 (citing *Younger v. Harris*, 401 U.S. 37, 44 (1971)). To invoke a federal

court's power to hear a *Preiser*-barred claim, a plaintiff must bring his claim in a habeas proceeding. *Id.* at 500. The Court explained in *Heck* that "the issue with respect to monetary damages challenging conviction" is the "same as the issue was with respect to injunctive relief challenging conviction in *Preiser*"—that is, the claim is not "cognizable under § 1983 at all." *Heck*, 512 U.S. at 483.

What distinguishes a *Heck*-barred claim from a *Preiser*-barred claim is that the damages claim may eventually be brought under Section 1983, once the claim ripens after the plaintiff has satisfied *Heck's* favorable-termination requirement. *Heck*, 512 U.S. at 487. But in neither circumstance is the bar to suit about the merits of the claim. Instead, both the *Heck* bar and the *Preiser* bar limit a federal court's authority to address the merits. When the favorable-termination rule is satisfied, the *Heck* bar is lifted, and the once-dormant claim becomes ripe for adjudication. (And, of course, if the rule is never satisfied, then the Section 1983 claim never ripens.)

b. Defendants caricature Amicus's position regarding *Heck*—we never said that *Heck* imposes a strictly "jurisdictional" bar. *See* Resp. Br. 19-20. Quite the contrary. As our opening brief explains (at 17-19), the precise language used to characterize the *Heck* rule and related doctrines that impose judicial limits on merits adjudication varies, but the label a court uses to describe the *Heck* bar does not matter for resolving the issue presented here. Whether formally "jurisdictional" or not, *Heck* constrains a court's power to consider a plaintiff's Section 1983 damages action until the plaintiff's conviction is set aside. Opening Br. 17-19. Because it is this functional understanding of the *Heck* bar that matters under the PLRA's three-strikes analysis, Defendants'

citations to non-binding precedent referring to *Heck's* rule as non-jurisdictional are irrelevant. *See* Resp. Br. 19-20.

In any case, this Court's opinions referring to the *Heck* bar as "non-jurisdictional" did not involve PLRA strike counting. *See Ortiz v. N.J. State Police*, 747 F. App'x 73, 77 (3d Cir. 2018); *Bolick v. Sacavage*, 617 F. App'x 175, 177 (3d Cir. 2015) (per curiam); *Reaves v. Pa. Bd. of Prob. & Parole*, 580 F. App'x 49, 54 n.3 (3d Cir. 2014). This Court, then, has not considered, let alone rejected, Amicus's position that the favorable-termination rule functions as a condition precedent to suit limiting federal-court adjudication in the same way as other doctrines that constrain federal courts' authority to review an action's merits.

These non-precedential opinions, moreover, each rely on the Seventh Circuit's decision in *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011). *See Ortiz*, 747 F. App'x at 77; *Bolick*, 617 F. App'x at 177; *Reaves*, 580 F. App'x at 54 n.3. And *Polzin*'s treatment of *Heck* dismissals is consistent with Amicus's view that what matters is how the *Heck* bar functions rather than how it's been labeled. Thus, in the Seventh Circuit, although "[t]he *Heck* doctrine is not" considered "a jurisdictional bar" and may be waived, *Polzin*, 636 F.3d at 837-38, a *Heck* dismissal is not a dismissal for failure to state a claim under the PLRA because it "deal[s] with timing rather than the merits of litigation," *Mejia v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013). According to the Seventh Circuit, *Heck* does "not concern the adequacy of the underlying claim for relief," so a *Heck* dismissal does not count as a strike under Section 1915(g). *Id.*

After Defendants filed their brief, this Court noted in passing in *Vuyanich v. Smithton Borough*, 5 F.4th 379, 389 (3d Cir. 2021), that *Heck* "does not present jurisdictional

issues." To support that conclusion, the Court cited only the non-precedential decisions discussed above and decisions from the Seventh and Ninth Circuits, which treat *Heck* as an affirmative defense subject to waiver. *Id.* (citing *Carr v. O'Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999) ("The failure to plead the *Heck* defense in a timely fashion was a waiver."), and *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016) ("[C]ompliance with *Heck* most closely resembles the mandatory administrative exhaustion of PLRA claims, which constitutes an affirmative defense and not a pleading requirement.")). *Vuyanich* did not involve PLRA strike counting, and the panel did not consider how *Heck* functions—that is, whether *Heck* operates as a limit on access to a federal forum or as grounds for a dismissal for failure to state a claim.

c. Defendants ask this Court to ignore the similarities between the *Heck* rule and the *Younger* and *Pullman* abstention doctrines because the latter "operate regardless of the type of claim being pursued, indicating they are not elements of any particular claim." Resp. Br. 22. That misses the point. Whether this Court refers to *Heck*'s favorable termination rule as an "essential element" of a plaintiff's Section 1983 damages claim, Resp. Br. 16, 17, 22, 23, or uses other words to describe the *Heck* bar, does not change that *Heck* requires a court to postpone its review of the merits until the favorable termination requirement has been met. Like the *Younger* and *Pullman* abstention doctrines, the *Heck* rule creates a threshold question that must be resolved before a plaintiff has access to a federal forum. And whereas discretionary abstention safeguards comity and avoids "prejudicing litigants and cluttering dockets with dormant, unripe cases" on only an "ad hoc" basis, the *Heck* bar applies categorically to Section 1983 damages claims attacking the fact or duration of a plaintiff's conviction or confinement.

McDonough, 139 S. Ct. at 2158. "[T]he pragmatic considerations discussed in *Heck*," moreover, "apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions." *Id.* (citing *Preiser*, 411 U.S. at 490-91).

d. Defendants also misunderstand Amicus's point about the quirky way in which *Heck*-barred actions typically are dismissed. *See* Resp. Br. 24 n.9. We do not argue, as Defendants suggest, that whenever an action is dismissed "without prejudice" and "without leave to amend," that dismissal is not a strike. Instead, we maintain that the courts' tendency to dismiss *Heck*-barred actions "without prejudice" and "without leave to amend" is another indicator that *Heck* dismissals express a temporal, non-merits-based limit on a federal court's power unrelated to a pleading deficiency. *See* Opening Br. 20-21. District courts are instructed to "dismiss complaints under the PLRA with leave to amend 'unless amendment would be inequitable or futile.'" *Dooley v. Wetzel*, 957 F.3d 366, 376 (3d Cir. 2020). Amendment of a presently *Heck*-barred action is futile because the court lacks the power to review the claim until the favorable-termination requirement has been met, but the plaintiff's Section 1983 damages claim may eventually ripen and prove meritorious. For example, after the Supreme Court's decision in *United States v. Jones*, 565 U.S. 400 (2012), rendered a plaintiff's conviction invalid, the plaintiff refiled his previously *Heck*-barred Section 1983 damages action and ultimately settled his claims. *See* Court Docket, *Jones v. Kirchner et al.*, No. 1:12-cv-01334-RJL, Dkt. 45 at 5-6, 73 (D.D.C.).

2. Alternatively, *Heck*'s favorable-termination rule is not a pleading requirement because the *Heck* bar must be raised as an affirmative defense.

Even if this Court does not accept Amicus's principal argument that *Heck* dismissals are not strikes because they constrain a court's power to hear the merits, the favorable-termination prerequisite is still not an element of a Section 1983 claim because, as our opening brief explains (at 21-24), a Section 1983 plaintiff need not plead in his complaint that his conviction has been invalidated. Therefore, a *Heck* dismissal is not a dismissal for failure to state a claim and not a Section 1915(g) strike.

Defendants are wrong that, under *Heck's* language and reasoning, the favorable-termination rule cannot be an affirmative defense. *See* Resp. Br. 22-23. *Heck* was decided before the PLRA's enactment and did not address whether a failure to satisfy its favorable-termination requirement should be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim or at a later stage in the litigation. *See Heck*, 512 U.S. at 487; *see also Washington*, 833 F.3d at 1056.

True, *Heck* did not engraft the habeas statute's state-remedies-exhaustion requirement onto Section 1983, but that does not mean, as Defendants assert, that a comparison between *Heck's* favorable-termination rule and the PLRA's administrative-exhaustion requirement is fruitless. *See* Resp. Br. 23. *Heck* could not have "explicitly distinguished" the PLRA's exhaustion requirement from the favorable-termination rule, *id.*, because, as just noted, *Heck* was decided before the PLRA existed.

As Defendants acknowledge, the PLRA's exhaustion requirement is an affirmative defense, *Jones v. Bock*, 549 U.S. 199, 212 (2007), and this Court has thus held that failure-to-exhaust dismissals under the PLRA generally do not count as strikes, *see Ball v.*

Famiglio, 726 F.3d 448, 459-60 (3d Cir. 2013), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015). The favorable-termination rule is an exhaustion-like hurdle that a plaintiff must overcome to bring his lawsuit at the appropriate time. *See* Opening Br. 21-24. The PLRA "dealt extensively with" the exhaustion requirement, *Jones*, 549 U.S. at 212, which is central to the Act's goal of "reduc[ing] the quantity and improv[ing] the quality of prisoner suits," *Ball*, 726 F.3d at 452 (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)), and gives prison officials the opportunity to consider the merits of disputes prior to being sued. PLRA exhaustion also produces an administrative record, making it easier for witnesses to be identified and for evidence to be preserved. *Woodford v. Ngo*, 548 U.S. 81, 95 (2006). In contrast, *Heck's* favorable-termination requirement is not mentioned in the PLRA, is unrelated to the statute's reforms, and is unconnected to the merits of a plaintiff's suit. It would therefore make no sense to categorically count *Heck* dismissals as strikes when this Court has already concluded that the failure to meet the PLRA's exhaustion obligation—a requirement important to the Act's operation—does not automatically trigger a PLRA strike.

When a dismissal is based on an affirmative defense, it "does not constitute a PLRA strike unless" the dismissing court itself "explicitly and correctly concludes that the complaint reveals" the defense "on its face" and then dismisses the "complaint for failure to state a claim." *Ball*, 726 F.3d at 460; *see* Opening Br. 23. "By using the phrase 'was dismissed' in the past tense and the phrase 'on the grounds that,'" the PLRA instructs courts "to identify the *reasons* that the court gave for dismissing" a prior action. *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016). The strike-counting court "cannot conclude that an action or appeal" was dismissed on

enumerated grounds based on its "*present-day* determination" "that the dismissing court *could have* dismissed it" on strike-triggering grounds. *Id.*

Defendants' assertion that Garrett's complaints in the 2013 and 2018 actions reveal the *Heck* defense on their face fails to account for this rule. Nowhere did the dismissing courts in the 2013 and 2018 actions "explicitly" conclude that the complaints revealed the *Heck* bar on their face. And although courts may (of course) take judicial notice of other courts' opinions, *see* Resp. Br. 25, "dismissal based on [an affirmative defense] does not constitute a PLRA strike, unless a court explicitly and correctly concludes that the complaint reveals the [affirmative] defense on its face." *Ball*, 726 F.3d at 460. Basing a dismissal on documents not relied on in a plaintiff's complaint means that the complaint is not defective on its face, and the dismissal is thus not a strike.

* * *

Because the 2013 and 2018 actions were dismissed in whole or in part under *Heck*, they were not dismissed for failure to state a claim. These actions therefore do not count as strikes under the PLRA.

B. The 2013 and 2018 final dismissal orders failed to explicitly and correctly identify strike-triggering grounds.

In the 2013 and 2018 cases, the dismissing courts explained that the actions were dismissed in whole or in part under *Heck*, but the final orders misstated that the actions were dismissed for "failure to state a claim." *Garrett v. United States*, No. 18-14515, Add. 25aa, 27aa; *Garrett v. Mendez*, No. 13-5343, Add. 3a, 6aa. Defendants agree with Amicus that, under these circumstances, this Court should look to the accompanying opinions to confirm the dismissing court's reasoning rather than rely solely on the words of

dismissal orders, which explicitly but incorrectly stated Section 1915(g) enumerated grounds. *See* Resp. Br. 27.

Defendants otherwise advocate for an approach to strike counting that makes no sense. They argue that strike-counting courts should not "second-guess the plain language of duly issued dismissal orders by mining the record for reasons to undermine that order." Resp. Br. 27. But assessing strikes "hinges exclusively on the basis for the dismissal," *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020), and, as our opening brief details (at 27), a court generally will be unable to rely solely on a dismissal order when issuing a strike because the "grounds" for the decision, 28 U.S.C. § 1915(g), are not normally found there. Anyway, Amicus does not maintain that strike-counting courts should look "to undermine" the reasoning in "duly issued dismissal orders." Resp. Br. 27. Instead, our position is that strike-counting courts must confirm that any enumerated grounds given in a final dismissal order (which are often boilerplate and lack reasoning) do not conflict with the reasoning given elsewhere (typically in reasoned opinions).

It is critical that courts not rely solely on the language of a dismissal order when issuing a strike because accompanying opinions routinely offer context missing from dismissal orders. For example, the dismissal order in *Dooley v. Wetzel*, 957 F.3d 366 (3d Cir. 2020), "purported to dismiss the Complaint 'as frivolous'" and "for failure to state a claim," *id.* at 373 n.2, but the plaintiff brought his suit in state court, meaning the action could not have been a PLRA strike, *id.* at 377 n.9. Dismissing courts often use the language of enumerated grounds in dismissal orders even when a dismissal should not count as a strike. That might happen when an action is dismissed based on a failure

to exhaust, a statute of limitations defense, lack of personal jurisdiction, improper venue, and the like. The existence of mismatches between the generic language used in dismissal orders and the details provided in opinions is not surprising because this Court has instructed dismissing courts not to prospectively label a dismissal as a strike, meaning dismissing courts are not focused on strike counting when drafting dismissal orders. *See id.* at 377.

District courts also may not be attentive to the weight that later will be placed on whether, for example, an action is dismissed under Federal Rule of Civil Procedure 12(b)(1), on the one hand, or Rule 12(b)(6), on the other. After all, outside the PLRA context, "[t]his distinction is mostly formal and does not substantively change [an appellate court's] review or the result." *Ortiz v. New Jersey State Police*, 747 F. App'x 73, 77 (3d Cir. 2018) (citing *Sprauve v. W. Indian Co.*, 799 F.3d 226, 229 n.2 (3d Cir. 2015), and *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991)). When it is relevant for a court to determine whether a prior dismissal is on the merits or based on a jurisdictional defect—for example, when res judicata is at issue—courts look beyond the words of a dismissal order in conducting their review. *See Papera v. Pa. Quarried Bluestone Co.*, 948 F.3d 607, 612 (3d Cir. 2020) (looking beyond the words of a district court's order to determine whether a dismissal constituted an adjudication on the merits).

Although Defendants may prefer a streamlined strike-counting process, the PLRA requires courts issuing strikes to determine whether a prior action has been dismissed on the ground that it was "frivolous, malicious, or fails to state a claim." 28 U.S.C. § 1915(g). That determination may need "the benefit of briefing by the parties," *Dooley*,

957 F.3d at 377, and requires that a court understand the true grounds for dismissal when issuing a strike. Thus, a court's review of an opinion to determine whether it conflicts with a dismissal order does not "fruitlessly increase the burdens on strike-counting courts," Resp. Br. 28, but ensures that the PLRA is applied as it was written and intended.[2]

II. The 2013 action and the dismissal below are not strikes because they are mixed dismissals.

Garrett also does not have three strikes because the 2013 action and the dismissal below included claims that belonged in a habeas petition, which were not dismissed for failure to state a claim. As with a *Heck* dismissal, when a court dismisses a *Preiser*-barred claim, the dismissal is unrelated to a factual pleading deficiency and instead concerns the court's lack of power to consider the merits of the claim. *See* Opening Br. 33. Thus, when an action is dismissed in part based on the *Preiser* bar, the entire action has not

[2] Although Defendants agree with Amicus that the 2017 action is not a strike, they disagree with Amicus about the application of the second issue—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—to the 2017 action. Resp. Br. 29 n.10. As Defendants would have it, strike-counting courts should look beyond the words of a dismissal order only when it benefits defendants—that is, courts may generally issue strikes based solely on the words of a dismissal order even when the grounds given in an opinion show that the action is not a strike but should look beyond the dismissal order when the order does not mention strike-triggering grounds. *Id.* This approach to issuing strikes would discourage dismissing courts from being accurate in their final orders and waste the time of future courts tallying strikes. Opening Br. 26. The method proposed in our opening brief (at 25-26), on the other hand, prioritizes efficient strike assessment while avoiding the erroneous issuance of strikes. *See Dooley*, 957 F.3d at 377.

been dismissed on enumerated grounds and cannot be a Section 1915(g) strike. *See Byrd v. Shannon*, 715 F.3d 117, 125 (3d Cir. 2013).

A. Defendants argue that applying this Court's existing rule for mixed dismissals to actions that contain an improperly filed habeas claim would create an end run around the PLRA. Resp. Br. 31. They say that "every litigant seeking to proceed IFP would always add meritless claims for immediate release." Resp. Br. 32. But that can't be right because, in those circumstances, the district court may dismiss the meritless claims as "frivolous or malicious," meaning the entire action would be dismissed on enumerated grounds, and this Court's mixed-dismissal rule would not apply. *See Ball v. Famiglio*, 726 F.3d 448, 463 (3d Cir. 2013).

The D.C. Circuit addressed a similar argument in *Fourstar v. Garden City Group, Inc.*, 875 F.3d 1147, 1152 (D.C. Cir. 2017) (Kavanaugh, J.). There, the United States argued that mixed dismissals involving state-law claims should be counted as strikes because the opposite approach would "allow prisoners to avoid accruing strikes by just willy-nilly adding state-law claims to their federal claims." *Id.* The court rejected that argument, explaining that "if a prisoner adds meritless state-law claims, the district court may in appropriate circumstances dismiss those state-law claims for failure to state a claim, or as frivolous or malicious, rather than declining to exercise supplemental jurisdiction over the state-law claims," meaning "the case will still count as a strike." *Id.*

Defendants conjure an image of crafty but senseless litigants, focused not on vindicating their rights but only on immunizing lawsuits from being counted as strikes. Resp. Br. 32. That is an unrealistic portrayal of incarcerated litigants, who typically proceed pro se and often struggle to answer questions about the relationship between

Section 1983 and the federal habeas statute—questions that trained lawyers and judges find confusing. *See Thompson v. DEA*, 492 F.3d 428, 437 (D.C. Cir. 2007). Counting dismissals of actions that mistakenly include claims that should have been brought in habeas as strikes risks wrongly depriving pro se prisoners their day in court based on a technicality unrelated to the merits of the action.

B. Defendants are wrong about why the district court dismissed the 2013 action. *See* Resp. Br. 30. As our opening brief notes (at 28 n.15, 31 n.16), the 2013 action was dismissed partially because the court viewed Garrett's efforts "to challenge the propriety of his stop, prosecution and conviction," as an attempt "to bring a second or successive motion for habeas relief." Add. 5aa. To counter this conclusion, Defendants ask this Court to look beyond the dismissing court's reasoning to the complaint in the 2013 action. Resp. Br. 30. But in its strike-counting role—a role shared with district courts—this Court is not in a position to determine whether the dismissing court correctly viewed the complaint as alleging a claim that should have been brought in habeas. Instead, the Court is reviewing only whether the reasoning provided by the dismissing court is strike-triggering. *See* 28 U.S.C. § 1915(g).

III. Because Garrett was in imminent danger when he appealed, he may proceed IFP.

After Amicus filed its opening brief, Garrett submitted additional medical records, corroborating his allegation that he was "under imminent danger of serious physical injury," 28 U.S.C. § 1915(g), when he filed his appeal. *See* Doc. 62. The records show that Garrett was infected with COVID-19 in December 2020 and that he suffers from underlying medical conditions including hypertension that put him at heightened risk

for severe or life-threatening symptoms. Doc. 62 at 2; *see* Opening Br. 37-38. Garrett's allegation of imminent harm, therefore, cannot be dismissed as a "generalized fear of contracting an illness." Resp. Br. 35. And although Defendants seek to minimize Garrett's allegations by asserting that "every person" in their custody was at risk of contracting COVID-19, Resp. Br. 35, that fact simply underscores the truth of Garrett's allegation: he and others at the Camden County Correctional facility faced a serious threat of contracting a deadly disease in the State that, at the time, had the highest COVID-19 death rate of any state prison system. Opening Br. 5.

In sum, Garrett was in imminent danger when he filed his appeal and may proceed IFP even if this Court concludes that he has three strikes.

CONCLUSION

Garrett is entitled to proceed IFP in this appeal.

Respectfully submitted,

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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 4,626 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
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CERTIFICATE OF SERVICE

I certify that, on August 30, 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:

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