No. 20-1013

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Quintez Talley,

Plaintiff-Appellant,

v.

Pushkalai Pillai, et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Western District of Pennsylvania
Case No. 2:18-cv-01060, Judge Cynthia R. Eddy

BRIEF OF GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC AS COURT-APPOINTED AMICUS CURIAE IN SUPPORT OF APPELLANT QUINTEZ TALLEY

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INTRODUCTION

Plaintiff-Appellant Quintez Talley brings constitutional, ADA, and Pennsylvania state-law claims arising out of prison officials' responses to his request for mental-health treatment. JA 10. He cannot pre-pay the $505 filing fee to appeal the district court's dismissal of those claims, so he seeks to proceed in forma pauperis (IFP) in this Court.

To ensure that the federal courts remain open to plaintiffs who cannot afford the filing fees, Congress enacted the federal IFP statute, 28 U.S.C. § 1915. When Congress later enacted the Prison Litigation Reform Act (PLRA), it revised the IFP statute to include the three-strikes provision, 28 U.S.C. § 1915(g). Under it, a prisoner accrues a so-called "strike" each time his case is dismissed as frivolous, malicious, or for failure to state a claim. 28 U.S.C. § 1915(g). If a prisoner accrues three strikes, he cannot proceed IFP unless he shows that he is in imminent danger of serious physical injury. *Id.*

Talley has not accrued three strikes, so he may proceed IFP in this appeal. Amicus does not contest that Talley may have accrued one strike in a prior litigation. But the two actions that this Court has asked Amicus to analyze are not strikes. The district court dismissed the first action for reasons not enumerated in Section 1915(g). And the second is ongoing, so it has not been dismissed at all (let alone for any reason enumerated in Section 1915(g)).

Moreover, as further explained below, even if this Court were to hold that both cases resulted in strikes, Talley would still be authorized to proceed IFP

because he has shown that he was in imminent danger of serious physical injury when he filed this appeal. 28 U.S.C. § 1915(g).

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 concerning whether Talley may proceed IFP in this appeal.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. On December 9, 2019, the district court granted both of Defendants' motions to dismiss, disposing of all of Talley's claims. Addendum (Add.) 2. Talley filed a notice of appeal on December 27, 2019. Add. 16. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

The questions that this Court directed Amicus to answer are as follows:

1. Do any of the following prevent the District Court's dismissal in W.D. Pa. Civ. No. 2:18-cv-01060 from counting as a strike under 28 U.S.C. § 1915(g): (a) the fact that the District Court dismissed Appellant's assault and battery claims on sovereign-immunity grounds; (b) the fact that the District Court dismissed Appellant's medical malpractice claim based on his failure to file a certificate of merit; or (c) the fact that the District Court dismissed

Appellant's state-law excessive-force claim based on his statement that he was voluntarily withdrawing that claim?

2. Does the District Court's dismissal in E.D. Pa. Civ. No. 2:18-cv-5087 count as a strike. *See Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 & n.4 (2020); *Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017)?

3. Appellant's imminent danger motion concerns alleged events at one prison, while his complaint concerned alleged events at another prison. Does this fact prevent Appellant from satisfying § 1915(g)'s imminent-danger standard?

RELATED CASES AND PROCEEDINGS

This specific case or proceeding has not been before this Court previously. Counsel for Amicus are not aware that any of the other cases that Talley has filed in federal courts in Pennsylvania stem from precisely the same facts as this case.

The related cases are as follows:

1. Issues 1 and 3 have been previously addressed by Amicus counsel in *Talley v. Pennsylvania Department of Corrections*, No. 20-1278 (3d Cir. argued Mar. 20, 2023), but those questions were not resolved in that case, *see* 3d Cir. Doc. 72 in No. 20-1278.

2. Issues 1 and 3 relate to *Talley v. Pillai*, 2019 WL 6701346 (W.D. Pa. Dec. 9, 2019) ("*Pillai*"), the decision from which this appeal was taken. The district court in that case granted Defendants' motion to dismiss. Add. 2.

3. Issue 2 relates to *Talley v. Pennsylvania Department of Corrections*, No. 2:18-cv-5087, amended compl. (filed E.D. Pa. June 20, 2023) ("*Talley v. DOC*"). That case is ongoing.

4. This Court did not ask Amicus to address whether the decision in *Talley v. Pennsylvania Department of Corrections*, 2019 WL 6050744 (E.D. Pa. Nov. 14, 2019), constitutes a strike, and we do not do so.

STATEMENT OF THE CASE

Plaintiff-appellant Quintez Talley is serving a prison sentence in the Pennsylvania Department of Corrections (DOC). He wishes to proceed IFP in this appeal following the district court's dismissal of his claims. 3d Cir. Doc. 5 (Jan. 21, 2020). Defendants maintain, however, that Talley may not proceed IFP because he has already accrued three strikes under 28 U.S.C. § 1915(g). JA 79, 85.

Amicus does not address whether the dismissal in *Talley v. Pennsylvania Department of Corrections*, 2019 WL 6050744 (E.D. Pa. Nov. 14, 2019), constitutes a strike. As to the two other potential strikes, this Court has appointed Amicus counsel to analyze whether each constitutes a strike, and whether, in any event, Talley may proceed IFP because he has shown that he is in imminent danger of serious physical injury. 3d Cir. Doc. 54 (Oct. 16, 2023).

I. Legal background

The first federal IFP statute was enacted more than 130 years ago. *See* Act of July 20, 1892, ch. 209 1-5, 27 Stat. 252 (now codified at 28 U.S.C. § 1915). It permits indigent plaintiffs to sue without first paying a filing fee. *Id.* Congress did not want "administrative court costs and filing fees, both of which must be paid by everyone else who files a lawsuit," to "prevent indigent persons from pursuing meaningful litigation." *Deutsch v. United States*, 67 F.3d 1080, 1084 (3d Cir. 1995). Instead, Congress intended that no one be "denied an opportunity to commence, prosecute, or defend an action" in any federal court "solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948).

In 1996, Congress enacted the PLRA, which introduced three key changes to the IFP statute. First, prisoners who proceed IFP generally must make periodic payments from their prison accounts until the filing fee is paid in full. *See* 28 U.S.C. § 1915(b).

Second, the PLRA instituted "prescreening" provisions. They require a court to "dismiss an action or appeal sua sponte if the action is 'frivolous' or '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'" before docketing the complaint, or as soon after docketing as possible. *Ball v. Famiglio*, 726 F.3d 448, 452 (3d Cir. 2013) (citing 28 U.S.C. § 1915A(b)).

Lastly, the PLRA introduced the so-called "three-strikes" provision—the part of the statute particularly relevant here. Under it, prisoners may not proceed IFP if they have accrued three prior dismissals, or "strikes," on enumerated grounds:

> 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. § 1915(g).

A number of rules flow from Section 1915(g)'s text and case law interpreting it. These rules are important to Amicus's analysis of the questions posed by this Court, so we review them here.

To begin with, a district court's dismissal for failure to state a claim "counts as a strike, whether or not with prejudice." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727 (2020). But a strike does not accrue when, after dismissing a claim without prejudice, the "court gives a plaintiff leave to amend his complaint." *Id.* at 1724 n.4.

For a strike to accrue, a prisoner's "entire action or appeal" must be "(1) dismissed explicitly because it is 'frivolous,' 'malicious,' or 'fails to state a claim' or (2) dismissed pursuant to a statutory provision or rule that is limited solely to dismissals for such reasons, including (but not necessarily

limited to) 28 U.S.C. §§ 1915A(b)(1), 1915(e)(2)(B)(i), 1915(e)(2)(B)(ii), or Rule 12(b)(6)." *Byrd v. Shannon*, 715 F.3d 117, 126 (3d Cir. 2013); *see also Talley v. Wetzel*, 15 F.4th 275, 279-80 (3d Cir. 2021). So, for an action to qualify as a strike, all claims in an action must be "dismissed explicitly" under one of Section 1915(g)'s three grounds. *See Byrd*, 715 F.3d at 126.

Relatedly, when a court dismisses "a portion of the action on enumerated grounds and [] the remainder of the action on grounds other than the enumerated grounds," the result is a "mixed dismissal," which does not count as a strike. *Talley v. Wetzel*, 15 F.4th at 280. Thus, if just one of a plaintiff's multiple claims is dismissed for a reason other than a ground enumerated in Section 1915(g), a strike does not accrue. *Id.* at 285.

When a district court dismisses an action, it does not decide whether the dismissal counts as a strike. *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020). Rather, because Section 1915(g)'s text contemplates a "prisoner who attempts to bring a suit after having had three prior suits dismissed," the strike determination is to be made "at the time of the subsequent suit" in which the prisoner seeks to proceed IFP. *Id.*

If a dismissal counts as a strike, "courts must count the dismissal even though it remains pending on appeal." *Coleman v. Tollefson*, 575 U.S. 532, 534 (2015). When a prisoner seeks to proceed IFP in an appeal, "[s]trikes that accrue before the filing of the notice of appeal count—while strikes that accrue after the notice of appeal is filed do not." *Millhouse v. Heath*, 866 F.3d 152, 157 (3d Cir. 2017). An appellate court's reversal of the district court's

judgment reverses any strike that had accrued as a result of that judgment. *See Tollefson*, 575 U.S. at 540; *Talley v. Wetzel*, 15 F.4th at 279 n.3.

II. Factual background

In 2016, Talley, then an inmate in a DOC prison, SCI-Greene, was housed in a Psychiatric Observation Cell (POC), JA 11-12. A POC is a solitary confinement unit "designed specifically for treating inmates experiencing thoughts of self-harm." *See* JA 162. He was placed in the POC after notifying prison personnel that he was suicidal. JA 11-12. On the morning of August 8, 2016, Talley requested a transfer to the Mental Health Unit (MHU)—a unit designed for prisoners experiencing mental-health problems—because "his ongoing solitary confinement was causing him to suffer major depression." JA 11. Defendant Pushkalai Pillai, the psychiatrist at SCI-Greene, responded that "(1) she didn't care what [the] policy states, (2) under no circumstances was she going to prepare the documentation for plaintiff to go to the MHU, and (3) if plaintiff continued to be suicidal, she'd send him back to the Restricted Housing Unit (RHU)," JA 11-12—that is, back to a solitary confinement cell used for prisoners in the general prison population.

Later that day, Lt. Morris, a corrections officer, informed Talley that he was being moved to the RHU, even though the POC is the appropriate unit for inmates experiencing suicidal thoughts. JA 12. About an hour later, Morris returned and told Talley that he was being moved to the RHU camera cell (presumably, a cell subject to video surveillance). *Id.* Talley resisted the move by reiterating that he was suicidal and explaining that he was already

in a camera cell. *Id.* Morris responded with obscenities, threatening to harm Talley with pepper spray and to return with an "extraction team" that would forcibly remove him from the cell. JA 13. When Morris returned with an extraction team equipped with shield equipment, "pepper spray, handcuffs, etc.," Talley, "fearful" of enduring violent removal, exited his cell and stated that he was no longer suicidal. *Id.*

III. Procedural history

Following the events just described, Talley brought Pennsylvania-law tort claims and claims under 42 U.S.C. § 1983 and Titles II and V of the Americans with Disabilities Act against DOC, DOC Secretary John Wetzel, Lt. Shrader (aka "Shredder"), Lt. Morris, and Dr. Pushkalai Pillai. Add. 1-2. The district court dismissed all claims. Add. 2.

At issue here are three claims that, as explained below, were not dismissed on a Section 1915(g) strike ground, rendering the decision below—*Pillai*—a "mixed" dismissal that does not count as a strike. *See Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021).

First, the court dismissed Talley's state-law assault-and-battery claim against Morris as barred by state-law sovereign immunity. Add. 8.

Second, Talley voluntarily dismissed his state-law excessive-force claim. Add. 4.

The third claim—Talley's Pennsylvania-law medical-malpractice claim against Dr. Pushkalai Pillai—requires some further explanation. Because that claim rested on an allegation that a licensed professional had "deviated

from an acceptable professional standard," Pa. R. Civ. P. 1042.3, Pennsylvania law required Talley to file a certificate of merit (COM) within sixty days of filing his complaint. A COM must state either that "an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care … that is the subject of the complaint, fell outside acceptable professional standards" or that "expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim." Pa. R. Civ. P. 1042.3.

Talley did not file the required COM within sixty days of filing his complaint. Under Pennsylvania Rule of Civil Procedure 1042.7(a), Dr. Pillai was required to give notice of her intent to seek judgment based on Talley's failure to file a COM at least thirty days before moving for judgment. *Regassa v. Brininger*, 2021 WL 4738820, at *3 (3d Cir. Oct. 12, 2021) (citing Pa. R. Civ. P. 1042.7(a)), *cert. denied*, 142 S. Ct. 1388 (2022). Pillai did so. Add. 12.

Talley then had thirty days to file a COM. Pa. R. Civ. P. 1042.7(a)(4). He did not file one or explain why one was not needed. Add. 12. He first addressed the COM requirement in his brief opposing Pillai's motion to dismiss, stating that expert testimony was unnecessary to prosecute his claim. JA 68. Finding this statement insufficient to comply with the COM requirement, the district court dismissed Talley's medical-malpractice claim. Add. 12.

Following dismissal of the case with prejudice, Talley noticed an appeal to this Court and sought to proceed IFP. 3d Cir. Doc. 5 (Jan. 21, 2020). This

Court ordered Talley to file a motion "demonstrating imminent danger" in support of his IFP motion, even though the Court had not yet considered whether Talley had accrued three strikes. 3d Cir. Doc. 10 (Jan. 22, 2020).

Responding to this Court's order, Talley filed a motion seeking a finding of imminent danger. JA 161. He argued that his ongoing "thoughts of suicide"—resulting from DOC "subjecting him to indefinite solitary confinement"—placed him in imminent danger. *Id.* He explained that, in the face of his "suicidal thoughts and conditions of confinement known to [ex]acerbate them," JA 76, DOC officials were displaying "ongoing deliberate indifference" to "the constitutionally inadequate mental health treatment" provided to prisoners, JA 75. Instead of reporting Talley's suicidal thoughts to a psychiatrist, as DOC officials were required to do by prison policy, JA 162, the officials subjected Talley "to indefinite solitary confinement" in the RHU, JA 161. Talley also noted that, despite his "propensity for employing fire as a means of carrying out acts of suicide (attempts) and/or self-injurious behavior," he continues to be "housed in cells unequipped with fire sprinklers." JA 161.

IV. Other relevant action—*Talley v. DOC*

In addition to the district-court dismissal order appealed from here—*Pillai*—this Court has identified one other action relevant to the issues Amicus has been directed to address: *Talley v. DOC*.

In *Talley v. DOC*, Talley sued prison officials and the DOC under 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act in the Eastern

District of Pennsylvania. JA 112. In December 2018, the district court dismissed Talley's claims under 28 U.S.C. § 1915(e)(2)(B)(ii) with leave to amend his ADA claim against the DOC within thirty days of the date of the dismissal order. JA 109, 119, 121.

When Talley did not meet the district court's deadline to amend his complaint, the court directed the clerk to close the action. JA 122. Talley then filed a Rule 60(b) motion explaining that he had not received a copy of the opinion or order granting him leave to amend his complaint. JA 123. He therefore asked the district court to reopen the case on excusable-neglect grounds. JA 124. The district court granted Talley's Rule 60(b) motion on November 14, 2019, and reopened the case, setting a new deadline to file an amended complaint. JA 128.

Although Talley missed the new deadline, the district court never issued another order directing the clerk to close the action. *See* JA 106-08. Talley then filed a motion requesting entry of an appealable order, JA 129, because, as he later explained, he "never received a true and correct copy of the District Court's November 14, 2019, order granting him leave to file an amended complaint," JA 155. The district court dismissed Talley's motion for entry of an appealable order. JA 133. In a footnote, the court observed that the complaint had been dismissed in December 2018 and that the clerk had been ordered to close the case, but the court did not otherwise explain the relevance of those events. JA 133. And, in particular, the court did not

mention its earlier order reopening the action in response to Talley's Rule 60(b) motion, JA 128, which, in fact, left the action pending.

Talley appealed the dismissal of his motion seeking an appealable order to this Court. Dist. Ct. Doc. 17 (Mar. 30, 2020). He later filed a Rule 42(b) voluntary dismissal after he realized that the district court had granted him leave to amend his complaint. JA 155. This Court granted his Rule 42(b) request. JA 160. Talley thereafter filed his amended complaint in the district court in June 2023. JA 134. The district court has not addressed the amended complaint under Section 1915A, Section 1915(e)(2), or otherwise, and, as indicated, *Talley v. DOC* remains pending in the district court.

SUMMARY OF ARGUMENT

I.A. The district court's immunity-based dismissal of Talley's assault-and-battery claim is not a strike. Under this Court's precedent, the dismissal of the assault-and-battery claim does not qualify as a strike because the district court did not expressly dismiss the claim under Rule 12(b)(6) or for frivolousness.

B. The district court's dismissal of Talley's medical-malpractice claim for failure to submit the certificate of merit (COM) required under Pennsylvania Rule of Civil Procedure 1042.3 does not qualify as a strike. A COM is filed separately from the complaint. A dismissal for failure to file a COM therefore cannot be granted simply by reviewing the complaint, and thus it is not a dismissal for failure to state a claim. This Court recognized as much in

Nuveen Municipal Trust ex rel. Nuveen High Yield Municipal Bond Fund v. WithumSmith Brown, P.C., 692 F.3d 283 (3d Cir. 2012), where it observed that because a COM is filed outside of the pleadings, a claim for failure to file a COM is appropriately resolved at summary judgment, not on a motion to dismiss. *Id.* at 303 n.13.

C. Talley's voluntary dismissal of his state-law excessive-force claim also does not qualify as a strike because a voluntary dismissal is not an enumerated strike ground under Section 1915(g). *See, e.g.*, *Tolbert v. Stevenson*, 635 F.3d 646, 654 (4th Cir. 2011). Any contrary purpose-based argument, though misplaced on its own terms, cannot override the PLRA's plain text.

II. *Talley v. DOC* does not constitute a strike because the district court has not acted on Talley's pending amended complaint or resolved the action, so it cannot be a "dismissal" under Section 1915(g). The court's dismissal of the complaint with leave to amend does not constitute a strike under *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 n.4 (2020), because that dismissal did not terminate the action.

Although Talley did not amend his complaint prior to the court's deadline (because he did not receive notice that he had been given leave to amend), the district court subsequently vacated its closure of the action in response to Talley's Rule 60(b) motion. Therefore, any strike that might have accrued has been reversed. Though Talley did not amend his complaint prior to the court's second deadline (of which, again, he did not receive notice), the

action was never subsequently closed for any reason, let alone on a strike ground. *See Byrd v. Shannon*, 715 F.3d 117, 123 (3d Cir. 2013). For equitable reasons, too, Talley should not accrue a strike because he has litigated his case as diligently as possible given his lack of notice of the district court's deadlines.

III. Even if the Court holds that Talley accrued three strikes, he should be granted IFP status because he plausibly alleged imminent danger when this appeal was filed. This Court should not limit the statute's plain words by requiring a plaintiff's imminent-danger showing to share a nexus with the claims in his complaint. But even if an atextual nexus requirement were applied, Talley nevertheless may proceed IFP because, when he filed this appeal, he was in imminent danger of serious physical injury from an ongoing harm that is fairly traceable to the claims in his complaint.

ARGUMENT

I. The district court's dismissal in *Pillai* is not a strike under Section 1915(g).

The district court's opinion below—in *Pillai*—nowhere suggests that any of Talley's claims were dismissed as frivolous or malicious, so the relevant dismissals of Talley's claims cannot be Section 1915(g) strikes for those reasons. As to each claim, then, the Court need ask only whether it was dismissed for failure to state a claim (a strike ground under Section 1915(g)), or, rather, for some other (non-strike) reason. And recall that if any claim in *Pillai* was dismissed on a non-strike ground, under the "mixed dismissal"

rule, *Pillai* cannot count as a strike. *See Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021); *supra* at 7.

As we now explain, the district court did not dismiss three of Talley's claims in *Pillai* for failure to state a claim. *See* Add. 1-13. The court dismissed Talley's assault-and-battery claim as barred by state-law immunity with no explicit indication that the claim was dismissed under Rule 12(b)(6). Add. 8. Talley's medical-malpractice claim was dismissed because he did not file the COM required by Pennsylvania law. A COM is filed outside the pleadings, so the dismissal was unrelated to whether he alleged sufficient facts to state a claim. Add. 11-12. And Talley's voluntary dismissal of his state-law excessive-force claim falls outside the strike grounds enumerated in Section 1915(g). Add. 4. The *Pillai* dismissal thus does not count as a strike.

A. The district court's dismissal of Talley's assault-and-battery claim as barred by sovereign immunity is not a strike.

Dismissals on immunity grounds generally do not qualify as strikes because Section 1915(g), in contrast to a neighboring provision of Section 1915, omits immunity from its list of strike grounds. *Compare* 28 U.S.C. § 1915(g), *with* 28 U.S.C. § 1915(e)(2); *see Ball v. Famiglio*, 726 F.3d 448, 460 (3d Cir. 2013), *partially abrogated on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015).

Recognizing that Section 1915(g)'s text omits immunity, this Court in *Ball* identified a narrow circumstance in which an immunity-based dismissal can operate as a strike: when a district court "explicitly and correctly concludes

that the complaint reveals the immunity defense on its face and dismisses the unexhausted complaint under Rule 12(b)(6)." *Ball*, 726 F.3d at 463; *Roudabush v. Bitener*, 722 F. App'x 258, 261 (3d Cir. 2018) (holding a dismissal based on sovereign and judicial immunity not a strike because the court's opinion did not explicitly dismiss on a strike ground); *see also Castillo-Alvarez v. Krukow*, 768 F.3d 1219, 1220 (8th Cir. 2014) (recognizing a narrow exception similar to this Court's in *Ball*); *Harris v. Harris*, 935 F.3d 670, 675-76 (9th Cir. 2019) (same); 16AA Wright & Miller, Fed. Prac. & Proc. § 3970.1 (5th ed. 2019).

In light of this principle, the district court's dismissal of Talley's assault-and-battery claim is not a strike because the lower court did not explicitly dismiss the claim under Rule 12(b)(6).

Although the *Pillai* opinion referenced Rule 12(b)(6) in a generic standard-of-review section, Add. 3-4, the district court could not have dismissed all claims under that standard because it would have had to apply other standards to analyze some claims. For example, the opinion acknowledges that Pillai's motion to dismiss was "converted in part to a motion for summary judgment only on the issue of exhaustion." Add. 2. And then when analyzing whether Talley exhausted his claims against Pillai, the district court applied Rule 56's standard to conclude that dismissal for failure to exhaust was inappropriate given the existing "factual dispute." Add. 9.

The district court expressly invoked Rule 12(b)(6)'s plausibility standard when dismissing every claim except those at issue here. *See, e.g.*, Add. 6

("Simply stated, Talley does not allege facts making out a plausible claim of discrimination due to his mental illness."), 8 ("Talley does not allege facts making out a plausible claim of supervisory liability."). But when dismissing Talley's assault-and-battery claim, the district court did not invoke the Rule 12(b)(6) standard. Instead, the court stated only that "sovereign immunity attaches and Talley's assault and battery claims against Lt. Morris will be dismissed with prejudice." Add. 8. Unlike in *Garrett v. Murphy*, 17 F.4th 419, 432-33 (3d Cir. 2021), in dismissing the assault-and-battery claim, the district court did not expressly reference Rule 12(b)(6) or its standard.

The opinion's failure to expressly identify the ground for dismissing the assault-and-battery claim is critical because courts sometimes dismiss claims barred by sovereign immunity for lack of subject-matter jurisdiction under Rule 12(b)(1), rather than for failure to state a claim under Rule 12(b)(6). *See, e.g.*, *Gary v. Pa. Hum. Rels. Comm'n*, 497 F. App'x 223, 226-27 (3d Cir. 2012). And Rule 12(b)(1) dismissals do not qualify as strikes under Section 1915(g). *See Millhouse v. Sage*, 639 F. App'x 792, 794-95 (3d Cir. 2016). Indeed, this Court has affirmed dismissals barred by sovereign immunity for lack of subject-matter jurisdiction under Rule 12(b)(1) rather than under Rule 12(b)(6). *See Gary*, 497 F. App'x at 226-27. And the Supreme Court has established that "the terms of [a] waiver of sovereign immunity define the extent of the court's jurisdiction." *United States v. Mottaz*, 476 U.S. 834, 841 (1986).

Courts disagree as to whether the defense of immunity is properly raised under Rule 12(b)(1) or Rule 12(b)(6). *Compare Morrison v. Walker*, 704 F. App'x 369, 372 n.5 (5th Cir. 2017) (analyzing sovereign immunity under Rule 12(b)(6) "because arguments for immunity are attacks on the existence of a federal action"), *with Brown v. United States*, 151 F.3d 800, 804 (8th Cir. 1998) (noting that sovereign immunity is a jurisdictional doctrine and should thus be addressed under Rule 12(b)(1), not Rule 12(b)(6)). It is thus unclear whether the district court wordlessly viewed its dismissal of Talley's assault-and-battery claim as operating under Rule 12(b)(1) or under Rule 12(b)(6). And because the district court may have dismissed Talley's claim under Rule 12(b)(1), it could not have "explicitly" dismissed the complaint under Rule 12(b)(6). *Ball*, 726 F.3d at 463. The dismissal thus does not qualify as a strike. *See id.*

In addition, the district court did not "*correctly* conclude[] that the complaint reveals the immunity defense on its face," *Ball*, 726 F.3d at 463 (emphasis added), because the court incorrectly dismissed Talley's assault-and-battery claim in reliance on a Pennsylvania statute that provides immunity for only local agencies and their employees, not state-agency employees like Morris. Add. 8 (citing 42 Pa. C.S.A. § 8541).

B. The district court's dismissal of Talley's medical-malpractice claim for failure to file a certificate of merit is not a strike.

Under this Court's precedent, filing the certificate of merit (COM) required in a Pennsylvania medical-malpractice action by Pennsylvania Rule

of Civil Procedure 1042.3 does not depend on the sufficiency of the facts pleaded in the complaint and thus may not be resolved on a motion to dismiss. Therefore, the district court's dismissal of Talley's medical-malpractice claim was not for "fail[ure] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), and is not a strike.

To dismiss under Rule 12(b)(6), a court must find, after accepting all facts pleaded as true and construing reasonable inferences in favor of the plaintiff, that the complaint does not state a plausible claim on the merits. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Shorter v. United States*, 12 F.4th 366, 371 (3d Cir. 2021). Talley's failure to file the COM required by Rule 1042.3 is unrelated to whether the allegations in his complaint plausibly state a medical-malpractice claim. In fact, failure to file the COM cannot be ascertained through review of the complaint. Thus, resolving a claim of noncompliance with Rule 1042.3 is not a Rule 12(b)(6) dismissal.

This Court's decision in *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000), nearly proves the point. There, this Court held that the affidavit of merit required under New Jersey's analogue to Pennsylvania's COM statute, N.J. Stat. Ann. §§ 2A:53A-26 *et seq.* (the AOM statute), is separate and distinct from the Rule 8 pleading requirements, which must be met to avoid dismissal under Rule 12(b)(6). *Chamberlain*, 201 F.3d at 160. To determine whether the AOM requirement applies in federal-court cases under *Erie*, this Court considered whether the federal pleading rules and the AOM statute conflict. *Id.* at 159-60. Finding no conflict, the Court reasoned that the

affidavit required by the AOM statute "is not a pleading, is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim." *Id.*; *see also Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 303 (3d Cir. 2012) (noting that later case law, including *Twombly* and *Iqbal*, do not alter the conclusion that the AOM statute is distinct from Rule 8's pleading requirements).

This Court has since applied the same reasoning to the statute at issue here, holding, for *Erie* purposes, that Pennsylvania Rule 1042.3 does not conflict with the federal pleading rules. *Liggon-Redding v. Est. of Sugarman*, 659 F.3d 258, 262-64 (3d Cir. 2011). The affidavit required by the COM statute, like the affidavit required by the New Jersey AOM statute, "is not part of the complaint, nor does it need to be filed with the complaint." *Schmigel v. Uchal*, 800 F.3d 113, 122 (3d Cir. 2015) (quoting *Nuveen*, 692 F.3d at 303). The COM requirement thus does not "conflict with Rule 12(b), which tests the sufficiency of pleadings," because "the COM requirement 'does not have *any effect* on what is included in the pleadings of a case or the specificity thereof.'" *Id.* (quoting *Liggon-Redding*, 659 F.3d at 263).

It follows from this Court's decisions in *Chamberlain* and *Liggon-Redding* that because Talley's failure to comply with the COM requirement is unrelated to the sufficiency of the facts pleaded in his complaint, *id.*, the district court did not dismiss his claim—and *could not* have dismissed his claim—for "fail[ure] to state a claim upon which relief may be granted," 28

U.S.C. § 1915(g). *See also Coleman v. United States*, 803 F. App'x 209, 215 (10th Cir. 2020). So, the dismissal is not a strike.

Applicable timing requirements further illustrate that failure to file a COM cannot be ascertained through review of the complaint. A plaintiff who serves the defendant the day after filing her medical-malpractice complaint "has fifty-nine more days to file a COM" under Rule 1042.3(a). *Schmigel*, 800 F.3d at 122 n.13. But a defendant must file a motion to dismiss for failure to state a claim within twenty-one days of service. *Id.* At that point, in many cases, a defendant could not move to dismiss for failure to file a COM because the plaintiff could timely file the COM after the defendant's motion to dismiss is due—for instance, thirty days after the defendant is served. *Id.* Thus, this Court has explained, the appropriate procedure for challenging a plaintiff's failure to file a certificate of merit is a motion for summary judgment, not a motion to dismiss for failure to state a claim. *Nuveen*, 692 F.3d at 303 n.13 (discussing the AOM statute); *accord Berger v. Hahnemann Univ. Hosp.*, 2017 WL 5570340, at *3 (E.D. Pa. Nov. 17, 2017) (holding that "[a] motion to dismiss is not the proper procedure to dismiss an action for failure to timely file a COM" because a motion to dismiss must be filed before the COM deadline expires).

For these reasons, the dismissal of Talley's medical-malpractice claim for failure to file a COM is not a strike.

C. Talley's voluntary dismissal of his state-law excessive-force claim is not a strike.

A plaintiff's voluntary dismissal of a claim is not a dismissal for failure to state a claim upon which relief may be granted under Rule 12(b)(6) or Section 1915(g). Talley's voluntary dismissal of his excessive-force claim thus does not constitute a strike.

The Fourth Circuit has recognized—based on Section 1915(g)'s text—that a plaintiff's voluntary dismissal of a claim is not a strike. In *Tolbert v. Stevenson*, 635 F.3d 646, 654 (4th Cir. 2011), the district court dismissed some of the prisoner's claims as frivolous, and the prisoner later voluntarily dismissed the remainder of his claims. The Fourth Circuit held that the dismissal was not a strike for a simple, text-based reason: a voluntary dismissal "is not one of the grounds listed in § 1915(g)." *Id.*

The Tenth and Eleventh Circuits have held that the voluntary dismissal of an entire action is not a strike. *Tiedemann v. Church of Jesus Christ of Latter Day Saints*, 631 F. App'x 629, 631 (10th Cir. 2015); *Andrews v. Persley*, 669 F. App'x 529, 530 (11th Cir. 2016); *Daker v. Head*, 730 F. App'x 765, 767 (11th Cir. 2018); *Daker v. Keaton*, 787 F. App'x 630, 634 (11th Cir. 2019). Their reasoning echoed *Tolbert*'s: a "voluntary dismissal does not count as a PLRA strike" given that "the district court did not dismiss the case because of one of the statutory factors" in Section 1915(g). *Tiedemann*, 631 F. App'x at 631.

True, the Sixth Circuit has come to the opposite conclusion, rejecting *Tolbert*'s text-based holding because it would (purportedly) subvert the

PLRA's purpose. *See Taylor v. First Med. Mgmt.*, 508 F. App'x 488, 497 (6th Cir. 2012). "[A] plaintiff could," the court maintained, "guard against incurring strikes by filing an action with a bogus claim and then voluntarily dismissing that claim, thereby allowing inmates to easily avoid strikes even if all of their claims were meritless." *Id.* at 497 & n.9.

But "the most formidable argument concerning the statute's purposes [can]not overcome the clarity [] in the statute's text." *Nichols v. United States*, 578 U.S. 104, 112 (2016) (citation omitted). Both the Supreme Court and this Court have emphasized since *Taylor* that analysis under Section 1915(g) should "begin[], and pretty much end[], with the text." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020); *see Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021). The Sixth Circuit in *Taylor* relied on *Pointer v. Wilkinson*, 502 F.3d 369, 372-73 (6th Cir. 2007), which held that mixed dismissals may qualify as strikes based on the PLRA's policy aims. This Court has rejected that result and the policy-based reasoning employed in *Pointer* in favor of the actual words Congress used in the PLRA. *See Talley v. Wetzel*, 15 F.4th at 283. Here, too, Section 1915(g)'s words supersede the concern identified by the Sixth Circuit.

In any event, the Sixth Circuit's purposivist reasoning is overstated. For starters, district courts retain discretion to dismiss a prisoner's claim on a Section 1915(g) ground before it is voluntarily withdrawn. The PLRA authorizes courts to pre-screen a prisoner's complaint before docketing, or as soon as possible thereafter, and dismiss the suit as frivolous, malicious, or

for failure to state a claim. 28 U.S.C § 1915A(a)-(b). And the statute provides that "the court shall dismiss the case at any time if the court determines" that the claim should be dismissed for any of the enumerated reasons. *Id.* § 1915(e)(2). Under those provisions, the district court may dismiss a claim on a Section 1915(g) strike ground as soon as it sees fit.

This Court made a similar observation in *Talley v. Wetzel*, 15 F.4th at 282. It rejected the defendant's argument that prisoners could "strike-proof" their claims by adding a state-law claim because district courts have discretion to exercise supplemental jurisdiction over state-law claims and then dismiss them on Section 1915(g) grounds.

Moreover, holding that a voluntary dismissal does not count as a strike would not offend the central purpose of the three-strikes rule: preventing "a flood of nonmeritorious claims" from prisoners. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1726 (2020). Plaintiffs may voluntarily withdraw a claim or action for any number of reasons, even when their claims are meritorious. For instance, a plaintiff may voluntarily withdraw after settling his claims. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii). Or, after filing the complaint, a plaintiff may not be able to afford the litigation. As is particularly relevant in the prisoner context, a pro se plaintiff may find it too difficult to navigate the court system. And even if a claim lacks merit, a plaintiff's voluntary dismissal saves the court from expending further resources on that claim, which is one of the PLRA's key goals. *See Lomax*, 140 S. Ct. at 1726.

Finally, the Sixth Circuit's gamesmanship rationale makes little real-world sense. Prisoner plaintiffs may be unfamiliar with Section 1915(g)'s three-strikes rule because it cannot apply at least until the plaintiff has had at least three other cases dismissed. And prisoners lack legal training and often do not have access to legal resources, *see Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244-45 (3d Cir. 2013), so they are unlikely to foresee that they could avoid a strike by including a "bogus claim" in their complaint and then voluntarily dismissing it, *Taylor*, 508 F. App'x at 497. So, to assume that prisoners would know the ins-and-outs of the three-strikes rule and then act in bad faith to undermine it is unrealistic.

II. The district court's dismissal in *Talley v. DOC* does not count as a strike.

Talley v. DOC does not count as a strike. Three actions by the district court are relevant to the strike determination: first, the court's dismissal of Talley's complaint with leave to amend, JA 109-21; second, the court's order to close the case after Talley did not file an amended complaint, JA 122; and, third, the district court's dismissal of Talley's motion for an appealable order, JA 133. None constitutes a strike.

A. Initial dismissal with leave to amend. The initial dismissal of Talley's complaint with leave to amend, JA 121, is not a strike. When a complaint is dismissed with leave to amend, "the court's action falls outside of Section 1915(g) and no strike accrues … because the suit continues." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 n.4 (2020). Under that "carveout," "a strike is

not called when the district court grants the prisoner leave to amend the complaint." *Talley v. Wetzel*, 15 F.4th 275, 282 (3d Cir. 2021). Simply put, the carveout applies here.

B. Missed initial deadline to amend complaint. Talley did not amend his complaint after the district court's dismissal, so the court directed the clerk to close Talley's case. A strike did not accrue then, however, because in closing the case, the court did not explicitly invoke a Section 1915(g) strike ground, as explained below (at 28).

In any event, the order to close the case was vacated when the district court granted Talley's Rule 60(b) motion, relieving Talley from the court's final decision. Granting Talley's Rule 60(b) motion reversed any strike that may have accrued. This strike reversal operated in the same way that an appellate court's reversal of a lower court's Section 1915(g) dismissal eliminates a prior strike. *See Talley v. Wetzel*, 15 F.4th at 279 n.3 (noting that reversal of a dismissal undid a prior strike); *see also Powells v. Minnehaha Cnty. Sheriff Dep't*, 198 F.3d 711, 713 (8th Cir. 1999).

C. Missed second deadline to amend complaint. Although Talley did not meet the second deadline to amend set by the district court when it granted his Rule 60(b) motion, he ultimately filed an amended complaint on which the district court has yet to act (under Section 1915A or otherwise). JA 134. The case is thus ongoing, so there has been no dismissal of "the action," 28 U.S.C. § 1915(g), that could qualify as a strike.

DOC may rely on the district court's purported closure of the action after Talley did not meet the second deadline to amend. But the only potentially relevant district-court order simply dismissed Talley's motion for an appealable order, not the entire action. *See* JA 133. In a footnote to that order, the court misconstrued the initial dismissal as a dismissal of the "action," JA 133, when, in fact, it dismissed the complaint with leave to amend, JA 121. And although the footnote referred to the "order directing the Clerk to close the case," JA 133, the court ignored its *later* vacatur of that order and grant of Talley's Rule 60(b) motion, JA 128. So, in fact, the court never dismissed the action after Tally missed the second deadline to amend—indeed, the action is still pending—so that action cannot have resulted in a strike.

In any case, to qualify as a strike, dismissal of an action following a failure to amend must overtly invoke a Section 1915(g) ground. *Byrd v. Shannon*, 715 F.3d 117, 126 (3d Cir. 2013). That is so because, as explained earlier, under this Court's precedent, only dismissals that are "explicitly" based on Section 1915(g) grounds constitute strikes. *See Ball v. Famiglio*, 726 F.3d 448, 460, 464 (3d Cir. 2013) (holding that exhaustion-based and immunity-based dismissals do not constitute PLRA strikes unless the court expressly dismisses on a strike ground); *see also Washington v. Gilmore*, 825 F. App'x 58, 60 (3d Cir. 2020) (concluding that dismissal did not qualify as a strike because the court "did not use the words 'frivolous,' 'malicious,' or 'fails to state a claim'" or dismiss under a statutory provision solely limited to one of those reasons).

Thus, even if the district court's initial dismissal, its closure of the action after Talley missed the first deadline to amend, and its reference to those actions after Talley missed the second deadline together are (wrongly) construed as dismissing the entire action, no strike accrued because the district court never explicitly dismissed the action on a strike ground.

Start with the initial dismissal of the complaint with leave to amend. As explained (at 26-27), that dismissal does not count as a strike because it did not close the action. Next, consider the order directing the clerk to close the case after Talley missed the first deadline to amend. That order nowhere references a strike ground. Instead, the court cites only one reason for closing the action: Talley did not amend his complaint within the time "required" by the court's prior order. JA 122.

As for the order dismissing Talley's motion to issue an appealable order, the district court's reasoning is unclear at best. It references the court's prior order to close the case "because the Clerk had failed to terminate it after the plaintiff did not file an amended complaint." JA 133. The court thus reiterated that the reason for closing the action was that Talley had not amended his complaint. And although the order refers to a strike ground, it does so only when summarizing the basis for the court's initial dismissal with leave to amend (which, as already explained, does not count as a strike).

Counting strikes only when the court explicitly dismisses the action on a strike ground makes sense because after a plaintiff fails to amend the

complaint, courts may ultimately terminate the action for a variety of reasons. For instance, a court might dismiss an action after the plaintiff does not amend for failure to prosecute, and failure-to-prosecute dismissals are not strikes. *See, e.g.*, *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016); *Butler v. U.S. Dep't of Just.*, 492 F.3d 440, 443-44 (D.C. Cir. 2007); *Jacobs v. Bayha*, 2009 WL 1790506, at *1 (W.D. Pa. June 23, 2009). Or a court might subsequently dismiss an action under Rule 41(b) for failure to comply with a court order. *See Harris v. Mangum*, 863 F.3d 1133, 1142 (9th Cir. 2017) (characterizing the entry of judgment after a plaintiff's failure to amend as a "dismissal for failure to comply with a court order based on" Rule 41(b)), or as another form of sanction, *see Chambers v. Nasco*, 501 U.S. 32, 35 (1991). That form of dismissal, too, is not a strike because it is not enumerated in Section 1915(g). So, the district court's initial reason for dismissing the complaint with leave to amend should not automatically be attributed to the court's subsequent dismissal of the action without an explicit statement to that effect. *See Byrd*, 715 F.3d at 126; *see also Ball*, 726 F.3d at 459-60, 463-64.

We acknowledge that the Ninth Circuit had held that a court's entry of judgment after a plaintiff fails to file an amended complaint constitutes a strike because the plaintiff's "failure to file an amended complaint did not negate the determination already made by the court that the complaint that he had filed, and on which he effectively elected to stand, failed to state a claim." *Harris*, 863 F.3d at 1142. First of all, *Harris* did not confront a case like

this one, in which the plaintiff filed an amended complaint (albeit past the deadline) and the action remains open. Second, *Harris* is wrong to automatically attribute the reason for dismissing the complaint to the later dismissal of the whole action. As just explained, the action may later be dismissed for reasons different from the reasons that were given when the district court granted the plaintiff leave to amend.

D. Equitable considerations. Equitable considerations, too, weigh in Talley's favor. As explained in his Rule 60(b) motion, Talley has been stymied in litigating his case by not receiving notice of the first or second deadlines to amend. *See* JA 123-24, 155. Had Talley gotten notice of the court's dismissal with leave to amend, he could have filed an amended complaint within the specified period. Indeed, he filed his amended complaint after he received notice. Talley should not be sanctioned with a strike for failing to amend within deadlines of which he lacked notice.

III. Talley has shown that he was in imminent physical danger.

Even if this Court concludes that Talley accrued three strikes, it should permit him to proceed IFP because he plausibly alleged imminent danger when he filed this appeal. Section 1915(g) allows a prisoner to proceed IFP if he alleges that he is in "imminent danger of serious physical injury" at the time his claim or appeal is filed. 28 U.S.C. § 1915(g). Courts liberally construe claims alleging imminent danger because the imminent-danger exception is "not a vehicle for determining the merits of a claim." *Brown v. Wolf*, 705 F.

App'x 63, 66 (3d Cir. 2017) (citations omitted). So, at the IFP stage, "courts generally accept the litigant's claims as true." *Id.*; *see also Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007).

Talley qualifies for the imminent-danger exception because he alleges facts that demonstrate serious impending physical harm. The statute contains no requirement that the facts alleged in his imminent-danger motion share a nexus with his complaint. But even if the Court applies a nexus requirement, Talley's complaint and imminent-danger motion share a nexus because his claims allege an ongoing harm that continues at his current prison.

A. Talley alleged imminent danger at the time this appeal was filed.

Whether imminent danger exists is assessed "at the time the complaint or appeal is filed." *Ball v. Famiglio*, 726 F.3d 448, 467 (3d Cir. 2013). Physical harm caused by mental illness is a "serious physical injury." *See Sanders v. Melvin*, 873 F.3d 957, 960 (7th Cir. 2017). In *Sanders*, a prisoner attempted to commit suicide and engaged in self-mutilation because solitary confinement exacerbated his mental illness. *Id.* The court held that "[w]hen the prospect of self-harm is a consequence of the condition that prompted the suit, a court should treat the allegation (if true) as imminent physical injury." *Id.* at 961.

Here, Talley maintained in his imminent-danger motion to this Court that he was in imminent danger of physical harm. *See* JA 161. He alleged that he has a "propensity for employing fire as a means of carrying out acts of

suicide (attempts) and/or self-injurious behavior" due to his mental illness. *Id.* And his self-harm tendencies could occur "at any moment." *Id.* Though Talley was at a different prison when he filed suit in the district court, 3d Cir. Doc. 54 (Oct. 16, 2023), that is irrelevant. As explained, the question is whether Talley was in imminent danger when he filed this appeal. *See Brown v. Wolf*, 705 F. App'x 63, 64 n.1 (3d Cir. 2017).

B. This Court should not adopt an atextual nexus requirement.

Despite Section 1915(g)'s text, some circuits have adopted "nexus" requirements, under which the alleged imminent danger required by Section 1915(g) must relate to the conduct alleged in the complaint. *See, e.g.*, *Pettus v. Morgenthau*, 554 F.3d 293, 299 (2d Cir. 2009); *Hall v. United States*, 44 F.4th 218, 221 (4th Cir. 2022); *but cf. Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 588 (6th Cir. 2013) (declining to reach whether a nexus requirement exists). In the circuits that impose a nexus requirement, imminent harm must be fairly traceable to the assertion of unlawful conduct in the complaint. *See Hall*, 44 F.4th at 232 n.10; *Newkirk v. Kiser*, 812 F. App'x 159, 160 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1087 (2021); *Pettus*, 554 F.3d at 299.

But Section 1915(g) contains no nexus requirement. Instead, the statute prevents prisoners with three strikes from proceeding IFP "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Nothing ties the statutorily required "imminent danger" to the claims in the complaint. *Id.* For a nexus requirement to apply, this Court

would have to implant limiting words into Section 1915(g). The Supreme Court, however, has emphasized a plain-text reading of the PLRA, *see, e.g.*, *Coleman v. Tollefson*, 575 U.S. 532, 537 (2015), under which a court "may not narrow a provision's reach by inserting words Congress chose to omit," *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020).

Adding an atextual nexus requirement doesn't conflict with the imminent-danger exception's purpose. Congress included the exception as a "safety valve" to prevent impending harms because "it could take prisoners a significant period of time to obtain the filing fee in some cases." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315 (3d Cir. 2001) (en banc); *see Bruce v. Samuels*, 577 U.S. 82, 90 (2016) (recognizing that the imminent-harm provision "ensures against denial of access to federal courts"). Prisoners facing imminent harms (regardless of whether those harms relate to their complaint) may not have a "significant period of time," *Abdul-Akbar*, 239 F.3d at 315, in which to commence their suits and may face additional, harm-related barriers to acquiring the filing fee, resulting in the denial of access to the federal courts, *see Bruce*, 577 U.S. at 90.

C. Talley's imminent-danger motion survives any nexus requirement because it alleges harms related to the claims in his complaint.

If this Court institutes a nexus requirement, Talley still may proceed IFP because his complaint alleges an ongoing harm that forms the basis of his imminent-danger motion. *See Hall v. United States*, 44 F.4th 218, 221 (4th Cir. 2022). In *Hall*, the Fourth Circuit concluded that an ongoing "pattern of past

conduct that places an incarcerated person in imminent danger of harm" triggers the imminent-harm exception. *Id.* at 225. Similarly, in *Newkirk*, the court held that "[a] prisoner who alleges that prison officials *continue with a practice* that has injured him or others similarly situated in the past will satisfy the 'ongoing danger' standard and meet the imminence prong of the three-strikes exception." *Newkirk v. Kiser*, 812 F. App'x 159, 160 (4th Cir. 2020) (quoting *Andrews v. Cervantes*, 493 F.3d 1047, 1056-57 (9th Cir. 2007)) (alteration in original) (emphasis added).

In both his complaint and his imminent-danger motion, Talley has alleged a continuing practice by DOC officials that causes him ongoing harm. His unremitting suicidal thoughts are left untreated, *see* JA 11-12, and he is consistently housed in cells "unequipped with fire sprinklers" despite his "propensity for employing fire as a means of carrying out acts of suicide," JA 161. His complaint alleges that DOC officers refused to facilitate his move to the Mental Health Unit and instead kept him in solitary confinement, worsening his thoughts of suicide and leading to attempts at self-harm. JA 11-13. At SCI-Fayette, where Talley is currently incarcerated, he continues to experience suicidal thoughts resulting from repeated periods of solitary confinement and the prison's continuing refusal to provide mental-health treatment. JA 161-62.

Although his complaint alleges facts that began at his prior facility, SCI-Greene, JA 11-14, the unsafe conditions and practices exacerbating his suicidal tendencies have continued at his current prison, *see* JA 161-62. Talley

has thus pleaded facts that plausibly establish imminent danger at the time he filed this appeal that fairly trace back to his complaint.

CONCLUSION

This Court should hold that Talley may proceed IFP in this appeal because he has not accrued three PLRA strikes, or, alternatively, because he has alleged that he is under imminent danger of serious physical harm.

Respectfully submitted,

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December 15, 2023

CERTIFICATE OF COMPLIANCE

1. I certify that this document complies with Federal Rule of Appellate Procedure 32(g)'s type-volume limitations. In compliance with Rule 32(a)(7)(B), it contains 9,121 words, excluding the parts exempted by Rule 32(f) and Circuit Rule 32(e)(1), and it has been prepared in proportionally spaced typeface using Palatino Linotype, 14-point, in Microsoft Word 2019.

2. I certify that, on December 15, 2023, this brief was filed via CM/ECF. All participants in the case are registered CM/ECF users and will be served electronically via that system with the public copy of this brief. Seven paper copies of this brief will also be filed with the Clerk of this Court.

3. 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.

4. 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/ Natasha R. Khan
Natasha R. Khan
Counsel for Amicus

ADDENDUM

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Addendum

Separately Bound Joint Appendix, Vol. 1

Separately Bound Joint Appendix, Vol. 2 (SEALED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH

QUINTEZ TALLEY, Plaintiff, vs. PUSHKALAI PILLAI, PSYCHIATRIST, SCI GREENE; PA. DEPT. OF CORRECTIONS, U/K MHM1, JOHN E. WETZEL, CAPTAIN SHREDDER, LT. MORRIS, and U/K DEFENDANTS, Defendants.	)	2:18-cv-01060 Chief United States Magistrate Judge Cynthia Reed Eddy

MEMORANDUM OPINION[1]

Plaintiff, Quintez Talley, has brought this lawsuit against the Pennsylvania Department of Corrections ("DOC"), DOC Secretary John Wetzel, Captain "Shredder," and Lt. Morris (collectively referred to as the "Commonwealth Defendants") [2] and Dr. Pushkalai Pillai, a

[1] In accordance with the provisions of 29 U.S.C. § 636(c)(1), all served parties have voluntarily consented to have a United States Magistrate Judge conduct proceedings in this case, including trial and the entry of a final judgment. *See* ECF Nos. 21, 23, and 33. While unserved defendants generally must also consent for a magistrate judge to exercise jurisdiction based on "consent of the parties" under that statute, *see Williams v. King*, 875 F.3d 500 (9th Cir. 2017), this Court is not aware of any decision holding that consent is necessary from defendants who are both unserved and unidentified.

[2] Talley also names U/K Defendants, who were members of the extraction team on August 8, 2016. These defendants have not been identified or served and, thus, did not file motions to dismiss. Nonetheless, a court may, on its own initiative, dismiss claims as to non-moving defendants if the claims against the non-moving defendants suffer from the same defects raised in the moving parties' motions. *Minn. Lawyers Mut. Ins. Co. v. Ahrens*, 432 F. App'x 143, 148 (3d Cir. 2011) (quoting *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980) (stating that the court may *sua sponte* dismiss a claim as to non-moving defendants where the inadequacy of the claim is clear)). A claim against a non-moving party may be dismissed if the claims against all defendants are "integrally related" or where the non-moving defendants are in a similar position to the moving defendants. *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993). Therefore,

psychiatrist, under 42 U.S.C. § 1983 and Titles II and V of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165. He also brings a state law claim of assault and battery against Lt. Morris and a state law claim of medical malpractice against Dr. Pillai. The Complaint filed at ECF No. 7 is the operative pleading.

Two motions to dismiss are pending before the Court: (i) the motion to dismiss filed by the Commonwealth Defendants (ECF No. 25), and (ii) the motion to dismiss filed by Defendant Pillai (ECF No. 28), which was converted in part to a motion for summary judgment only on the issue of exhaustion. Talley has responded in opposition to each motion. (ECF Nos. 32 and 37). Dr. Pillai filed a reply brief (ECF No. 38), to which Talley filed a Sur-Reply. (ECF No. 41). The matter is ripe for resolution. For the reasons that follow, the motions will be granted and this case will be dismissed with prejudice.

Background[3]

The events giving rise to this lawsuit occurred on August 8, 2016, while Talley was housed at SCI-Greene.[4] On that day, Talley was housed in a psychiatric observation cell ("POC") after claiming to be suicidal. During Dr. Pillai's daily rounds, Talley asked to be moved to the Mental Health Unit ("MHU"). Dr. Pillai refused and told Talley that if he "continued to be suicidal, she'd send him back to the Restricted Housing Unit (RHU)." Complaint at ¶ 10. Later that same day, Lt.

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to the extent the deficiencies cited in the Commonwealth Defendants' motion to dismiss also apply to these defendants, the Court considers them.

[3] The factual history cited has been gleaned from Plaintiff's Complaint. For purposes of the pending motions to dismiss, Plaintiff's recitation of the facts is accepted as true. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

[4] At the time Talley filed this complaint, he was housed at SCI-Fayette, where he remains currently housed. See DOC Inmate Locator, http://inmatelocator.cor.pa.gov/#/ (last visited 12/9/2019).

Morris came to Talley's POC cell to move him to the RHU, but Talley refused to be moved stating that he was suicidal. Lt. Morris then spoke to Dr. Pillai who told him to move Talley to a RHU cell with a camera so that he could be observed. Lt. Morris told Talley what Dr. Pillai had said, but Talley continued not to comply. At that point, Lt. Morris threatened to spray Talley with OC spray as part of planned use of force if Talley would not voluntarily exit his cell. Capt. Shrader[5] then spoke with Talley, but did not overrule Dr. Pillai's directive to move him to a RHU cell with a camera. When Talley saw an extraction team assembling ready to use force to remove him from the POC cell, he said he was no longer suicidal and came out of the POC cell voluntarily. Talley alleges that Secretary Wetzel maintains policies which disregard the care of mentally ill patients. Talley seeks compensatory and punitive damages, as well as injunctive and declaratory relief.

Standard of Review

The applicable inquiry under Federal Rule of Civil Procedure 12(b)(6) is well settled. A court may dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The plaintiff must allege facts that indicate "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Pleading only "facts that are 'merely consistent with' a defendant's liability" is insufficient and cannot survive a motion to dismiss. *Id*. (quoting *Twombly*, 550 U.S. at 557).

A conclusory recitation of the elements of a cause of action is not sufficient. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). The plaintiff must allege facts necessary to

[5] Lt. Shrader is incorrectly identified as "Shredder" in the Complaint.

make out each element. *Id.* (quoting *Twombly*, 550 U.S. at 563 n.8). In other words, the complaint must contain facts which, if proven later, support a conclusion that the cause of action can be established. In assessing the sufficiency of a complaint, a court must: (1) identify the elements of the causes of action; (2) disregard conclusory statements, leaving only factual allegations; and (3) assuming the truth of those factual allegations, determine whether they plausibly give rise to an entitlement to relief. *Palakovic v. Wetzel*, 854 F.3d 209, 220 (3d Cir. 2017) (internal quotation marks and citations omitted) (quoting *Burtch v. Millberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011)).

The United States Court of Appeals for the Third Circuit has held that, in civil rights cases, a court must give a plaintiff the opportunity to amend a deficient complaint - regardless of whether the plaintiff requests to do so - when dismissing a case for failure to state a claim, unless doing so would be inequitable or futile. *See Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir. 2007).

Discussion

A. The Complaint fails to state a claim against the Commonwealth Defendants

1. *Excessive Force Claims*

In his Complaint, Talley alleges that Defendants Morris, Shrader, and the U/K Defendants violated his rights under the "excessive force" clause of Article I, Section 13 of the Pennsylvania Constitution. Complaint at ¶ 32. Talley, however, represents in his brief in opposition to the Commonwealth Defendants' motion to dismiss, that he has voluntarily agreed to dismiss this claim. Br. at n. 7 (ECF No. 32). Therefore this claim is dismissed.

2. *Title II of the ADA Claim*

Title II of the ADA provides, in relevant part, "that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity,[6] or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II of the ADA does not apply to individuals in their individual capacities. Plaintiff states that his claim against Secretary Wetzel "is being brought against Defendant Wetzel in his 'official' capacity, i.e., against his office (Defendant DOC)." Pl's Br. at 4-5.

The Commonwealth Defendants argue that, not only are they entitled to Eleventh Immunity on this claim, but Talley's claim has no merit. The Court agrees with the Commonwealth Defendants, and finds that, even assuming *arguendo* that Talley's claims are not barred by the Eleventh Amendment, this claim has no merit. To state a claim, Talley has to allege that (1) he is a qualified individual with a disability; (2) that he was excluded from participation in or denied benefits of DOC's services, programs, or activities; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. *Furgess v. Pa Dep't of Corr.*, 933 F.3d 285 (3d Cir. 2019).

Talley argues that he is a "qualified individual with a disability" and that the POC and MHU provide "services and/or programming / placement," Complaint at ¶ 23, which were denied to him when he was moved to the RHU. Even if Talley could show that he has a qualifying disability, he has alleged no facts describing what programs he was excluded from and he alleges no facts which show that such purported exclusion was on account of any mental health disability.

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[6] The ADA does not define "service, programs, and activities," but both Congress and our appellate court have recognized that the phrase is "extremely broad in scope and includes anything a public entity does." *Furgess v. Pa Dep't of Corr.*, 933 F.3d 285, 289 (3d Cir. 2019).

Brown v. Pa. Dep't of Corr., 290 F. App'x 463, 467 (3d Cir. 2012) (quoting 42 U.S.C. § 12132) (stating that a plaintiff must allege facts "sufficient to show that he was excluded 'by reason of his disability."). Simply stated, Talley does not allege facts making out a plausible claim of discrimination due to his mental illness. Therefore, this claim will be dismissed.

3. *Title V of the ADA and First Amendment Retaliation Claims*[7]

In order to state a *prima facie* claim of retaliation under either Title V of the ADA or the First Amendment, a prisoner-plaintiff must show: (1) he engaged in constitutionally protected activity; (2) he suffered an "adverse action" at the hands of prison officials; and (3) his constitutionally protected activity was a substantial or motivating factor between the exercise of his constitutional rights and the adverse action. *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2004).

A general statement made to a prison official is not constitutionally protected conduct. *Knight v. Walton*, 2014 WL 1316115 (W.D. Pa. 2014). Fatal to Talley's retaliation claims is that the Complaint states no facts which support Talley's assertion that he engaged in constitutionally protected conduct. Here, Talley alleges that he made a statement to Dr. Pillai that he wanted to be transferred to the MHU. This statement does not amount to constitutionally protected conduct triggering a retaliation claim. Moreover, any threats by Lt. Morris to use force to gain compliance was not an adverse action as a matter of law. It is well established that verbal threats alone do not constitute a constitutional claim, *Tindell v. Wetzel*, 2014 WL 3868240 at *9 (W.D. Pa. 2014) (citing *Gannaway v. Berks County Prison*, 439 F. App'x 86 (3d Cir. 2011), and verbal harassment or threats do not constitute an adverse action sufficient for a retaliation claim. *Marten v. Hunt*, 379 F. App'x 436, 438-39 (3d Cir. 2012); *Burgos v. Canino*, 358 F. App'x 302, 306 (3d Cir. 2009).

[7] Because claims of Title V ADA retaliation and First Amendment retaliation are subject to the same analysis, the claims will be addressed at the same time.

For all these reasons, Talley's retaliation claims under Title V of the ADA claim and the First Amendment will be dismissed against the Commonwealth Defendants.

4. *Supervisory Claims*

In his Complaint, Talley alleges that Secretary Wetzel was willfully blind to the "ongoing mistreatment of prisoner's diagnosed as suffering from mental illness . . . allowing for the custom of violence (and threats of) to be used as an alternative to providing mental health care, he violated the 8th Amendment." Complaint at ¶ 29.

There are "two general ways" in which a supervisor-defendant may be liable: (1) where the supervisor established a policy, custom, or practice that caused the harm; or (2) where the supervisor personally participated in the constitutional violation. The United States Court of Appeals for the Third Circuit explained these two general types of supervisory liability as follows:

> First, liability may attach if they, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm." *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004) (alteration in original) (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989)). Second, "a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced" in the subordinate's unconstitutional conduct. *Id.* (citing *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir. 1995)). "Failure to" claims—failure to train, failure to discipline, or, as in the case here, failure to supervise—are generally considered a subcategory of policy or practice liability.

Barkes v. First Correctional Medical, Inc., 766 F.3d 307, 316-19 (3d Cir. 2014), *reversed on other grounds by Taylor v. Barkes*, -- U.S. --, 135 S.Ct. 2042, 2043 (2015).

Talley's allegations against Secretary Wetzel are no more than boilerplate allegations that Secretary Wetzel did not ensure that mentally ill prisoners received better treatment. The Complaint is void of any allegations that Secretary Wetzel "established and maintained a policy, practice, or custom" which resulted in Talley's constitutional rights being violated or that he

directly participated in violating Talley's rights, directed others to violate them, or, "as the person in charge, had knowledge of and acquiesced" in any of the conduct which resulted in Talley's constitutional rights allegedly being violated. As such, Talley does not allege facts making out a plausible claim of supervisory liability. Therefore, this claim will be dismissed.

5. *Assault and Battery Claims*

Paragraph 30 of the Complaint asserts a claim for assault and battery against Lt. Morris. This claim will be dismissed. The Pennsylvania Political Subdivision Tort Claims Act provides that "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. C.S.A. § 8541. Unless otherwise waived, the Commonwealth of Pennsylvania, its agencies, and its employees acting within the scope of their employment enjoy sovereign immunity. There is no waiver of sovereign immunity for intentional torts. In this case, Lt. Morris allegedly verbally threatened Talley and called for an extraction team in an attempt to move Talley from the POC cell, after he twice refused to comply. Undeniably, Lt. Morris was at all times acting within the scope of his employment in doing so and Lt. Morris's conduct does not fall within any of the exceptions to the statute.[8] Accordingly, sovereign immunity attaches and Talley's assault and battery claims against Lt. Morris will be dismissed with prejudice.

[8] The exceptions to immunity provided by statute are: (1) vehicle liability, (2) care, custody or control of personal property, (3) real property, (4) trees, traffic controls and street lighting, (5) utility service facilities, (6) streets, (7) sidewalks and (8) care, custody or control of animals. 42 Pa. C.S.A. § 8542(b).

B. The Complaint fails to state a claim against Dr. Pillai

1. *Exhaustion Under the PLRA*

Before filing suit challenging prison life under any federal law, including the ADA, a prisoner must exhaust all available administrative remedies. *Rinaldi v. United States*, 904 F.3d 257, 265 (3d Cir. 2018). Dr. Pillai argues that Talley failed to exhaust administrative remedies because he did not take any of the steps set forth in DC-ADM 804. Notwithstanding that the Complaint specifically states that Talley told Dr. Pillai "that if she continued to deny me my mental health rights that I would be forced to file a grievance and lawsuit, " Complaint at ¶ 11, Talley responds that he was not required to file a grievance under DC-ADM 804, because he reported Dr. Pallia's conduct pursuant to DC-ADM 801, which permits inmates to report "allegations of abuse." *See* Pl's Resp. at 3 (ECF No. 37) and Sur-Reply at 3 (ECF No. 41). Dr. Pillai responds that Talley's argument fails as there are no claims in this lawsuit that Dr. Pillai abused Talley; rather, Talley's claims against Dr. Pillai are related to his mental health care.

Given this factual dispute, the Court finds that dismissal for failure to exhaust administrative remedies would be inappropriate at this time. The Court will proceed to address Talley's claims on their merits.

2. *Title II of the ADA Claim*

Dr. Pillai argues that she is not a public entity and therefore cannot be held liable for damages under Title II of the ADA. Talley responds that this claim is brought against Dr. Pillai in her "official capacity." Assuming without deciding that Dr. Pillai in fact can be sued in an "official capacity," Talley's claim fails as denial of treatment for a disability is not actionable under the ADA, *Iseley v. Beard*, 200 F. App'x 137, 142 (3d Cir. 2006) (citing *Bryant v. Madrigan*, 84 F.3d 246, 248 (7th Cir. 1996)), and neither is a claim for medical malpractice. *Bryant*, 84 F.3d at

248. See *Talley v. PA Dep't of Corr.*, No. CV 19-1687, 2019 WL 6050744, at *5 (E.D. Pa. Nov. 14, 2019). Therefore, this claim will be dismissed.

3. *Title V of the ADA and First Amendment Retaliation Claims*

Dr. Pillai argues that Talley's retaliation claims should be dismissed because the statement he made to Dr. Pillai is not constitutionally protected conduct. Further, Dr. Pillai argues that even if Talley could meet his *prima facie* case of retaliation, the facts of the Complaint are clear that Dr. Pillai did not believe that Talley needed to be placed in the MHU or remain in the POC. Her decision to return Talley to the RHU was not impacted by his request to be transferred to the MHU.

As stated above, Talley cannot make out a *prima facie* case of retaliation as the statement he made to Dr. Pillai does not amount to constitutionally protected conduct triggering a retaliation claim. Therefore, this claim will be dismissed.

3. *Eighth Amendment Claim*

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishment," U.S. Const. amend. VIII, and requires that prisoners receive access to basic medical treatment. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To establish an Eighth Amendment medical claim, a prisoner-plaintiff must allege facts that demonstrate "(i) a serious medical need and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need." *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003). The Court finds that Talley's claim fails as a matter as law because Talley cannot establish that Dr. Pillai was deliberately indifferent to his serious medical needs. At most, Talley's claim reflects a disagreement and dissatisfaction with Dr. Pillai's decision not to move Talley to the MHU.

A fair reading of the Complaint indicates that Talley received medical attention for his suicidal claims. He was placed in a POC, was evaluated by a psychiatrist, and, at Dr. Pillai's

instruction, was then transferred to a RHU cell with camera supervision, where he remained on suicide watch. It is a "well-established rule that mere disagreements over medical judgments do not state Eighth Amendment claims." *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990). In the context of the Eighth Amendment, any attempt to second-guess the propriety or adequacy of a particular course of treatment has been disavowed by courts since such determinations remain a question of sound professional medical judgment. *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979).

Significantly, the Complaint contains no allegations that Dr. Pillai refused to provide Talley with medical care for his mental health needs or that she delayed any treatment for non-medical reasons. *Durmer v. O'Carroll*, 991 F.2d 64, 68 (3d Cir. 1993). Thus, the Court finds that the factual allegations of the Complaint do not show that Talley has a plausible claim for relief. *Iqbal*, 566 U.S. at 678. Talley has failed to present any allegations which demonstrate that Dr. Pillai was deliberately indifferent to his mental health needs.

4 *Medical Malpractice Claim*

In Paragraph 33 of his Complaint, Talley brings a medical malpractice claim against Dr. Pillai asserting that by refusing to move him to the MHU, Dr. Pillai's conduct "deviated from acceptable - psychological and/or psychiatric - standard for such licensed professional."

Pennsylvania law requires that a Certificate of Merit ("COM") accompany a claim for professional liability brought against designated licensed professionals, including health care providers. *See* Pa R. Civ. P. 1042.3 and 1042.1(b). The certificate must attest either that an appropriate licensed professional supplied a written statement that there exists a reasonable probability that the care provided fell outside acceptable professional standards, or that expert testimony of an appropriate licensed professional is unnecessary. Pa. R. Civ. P. 1042.3(a)(1) &

(3). This requirement is a substantive rule under the Erie doctrine and must be applied as such by federal courts. *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. 2011).

Talley's Complaint was filed on November 14, 2018, and it was not accompanied by a COM. Dr. Pillai filed a "Notice of Intention to Enter Judgment on Professional Liability Claim" on January 4, 2019. (ECF No. 12). Talley had thirty days after the Notice was filed to file a COM. *Id*. He did not do so, nor did he make any effort to comply with the rule or provide a reasonable excuse for failing to do so. It was not until his brief was filed in May of 2019, approximately five months after the Notice was filed, that he stated, "expert testimony of an appropriate licensed professional is unnecessary for the prosecuting of Plaintiff's medical malpractice claim." Br. at ¶ 4 (ECF No. 37 at 2).[9] This statement is not sufficient to comply with the certificate requirement of Pa. R. Civ. P. 1042.3(a)(1) & (3). Talley's failure to provide the requisite certificate as required by Rule 1042.3 requires dismissal of this malpractice claim.

[9] The exception cited by Talley is "very narrow" and only applies "where the matter is so simple or the lack of skill or care is so obvious as to be within the range of experience and comprehension of even non-professional persons." *Toogood v. Owen J. Rogal*, D.D.S., P.C., 824 A.2d 1140, 1145 (Pa. 2003). Nevertheless, it appears to be a plaintiff's prerogative, under Pennsylvania law, to invoke this exception by filing the requisite certification. *See Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 265 and n.5 (3d Cir. 2011) ("the consequence of such a filing is prohibition against offering expert testimony later in the litigation, absent 'exception circumstances'."); *see also Bilinski v. Wills Eye Hosp*., —— F. App'x ——, 2019 WL 168907, at *2 (3d Cir. Jan. 11, 2019) (holding that the district court erred by granting the defendants' motion to dismiss on the basis that the plaintiff's certificate of merit filed under Rule 1042.3(a)(3) was inadequate); *Horsh v. Clark*, No. 1:17-cv-316, 2019 WL 1243009 (W.D. Pa. Mar. 18, 2019) (accepting plaintiff's timely filed "Motion for Determination of Certificate of Merit As Unnecessary" as a certificate under Rule 1042.3.(a)(3)), appeal dismissed on 6/12/2019 for failure to timely prosecute pay filing fee, No. 19-1888. However, in this case, Talley never filed a certificate and thus has failed to comply with Rule 1042.3(a)(3).

Leave to Amend

The Court of Appeals for the Third Circuit has instructed that if a civil rights complaint is vulnerable to dismissal for failure to state a claim, the Court should permit a curative amendment, unless an amendment would be inequitable or futile. *See Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir. 2007). The Court finds that Talley's claims cannot be cured by amendment. Therefore, the Court is not required to provide Talley with further leave to amend as further amendment would be futile. *Shelley v. Patrick*, 481 F. App'x 34, 36 (3d Cir. 2012).

Conclusion

For all the above reasons, the pending motions to dismiss will be granted and the case will be dismissed with prejudice. An appropriate order follows.

Dated: December 9, 2019

BY THE COURT:

s/Cynthia Reed Eddy
Cynthia Reed Eddy
Chief United States Magistrate Judge

cc: QUINTEZ TALLEY
KT 5091
SCI Fayette
48 Overlook Drive
LaBelle, PA 15450-0999
(via U.S. First Class Mail)

All Counsel of Record
(via ECF electronic notification)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH

QUINTEZ TALLEY, Plaintiff, vs. PUSHKALAI PILLAI, PSYCHIATRIST, SCI GREENE; PA. DEPT. OF CORRECTIONS, U/K MHM1, JOHN E. WETZEL, CAPTAIN SHREDDER, LT. MORRIS, and U/K DEFENDANTS, Defendants.	)	2:18-cv-01060 Chief United States Magistrate Judge Cynthia Reed Eddy

ORDER

AND NOW, this 9th day of December, 2019, for the reasons stated in the Memorandum Opinion filed this date, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

(1) The Motion to Dismiss filed by Lt. Morris, PA. Dept of Corrections, Captain Shredder, and John E. Wetzel is **GRANTED** in its entirety; and

(2) The Motion to Dismiss filed by Defendant Pushkalai Pillai is **GRANTED** in its entirety.

It is further **ORDERED** that the Clerk of Court mark this case closed.

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Plaintiff has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

BY THE COURT:

s/Cynthia Reed Eddy
Cynthia Reed Eddy
Chief United States Magistrate Judge

cc: QUINTEZ TALLEY
KT 5091
SCI Fayette
48 Overlook Drive
LaBelle, PA 15450-0999
(via U.S. First Class Mail)

All Counsel of Record
(via ECF electronic notification)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION

QUINTEZ TALLEY,
Plaintiff,
V.
PUSHKALAI PILLAI, et al.,
Defendants.

2:18-CV-01060

NOTICE OF APPEAL

Notice is hereby given that Quintez Talley, Pro se Plaintiff in the above captioned action, hereby appeals to the United States Court of Appeals Chief Magistrate Judge Cynthia Reed Eddy's:

(1) July 22, 2019 ORDER Denying Plaintiffs Motion to Appoint Counsel. ECF. No. 43;
(2) September 4, 2019 ORDER Denying Plaintiff's Motion for Leave to Invoke the Law of the Case Doctrine. ECF. No. 46; and,
(3) December 9, 2019 ORDER Denying/Ruling that Plaintiff's Complaint failed to state a claim, specifically:
(a) Plaintiff's Title II of the ADA;
(b) Plaintiff's Title II of the ADA:
(C) Plaintiff's First and Eighth Amendment of the United States Constitution;
(D) Assualt and Battery Claims against LT. Morris; and,
(E) Plaintiffs Medical Malpractice Claim against Dr. Pillai; and,
(F) Denial of Leave to Amend.

Respectfully submitted,

D/ December 19, 2019

S/ Quintez Talley

Quintez Talley - KT5091
48 Overlook Drive
Labelle, Pa 15450

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION

QUINTEZ TALLEY,
Plaintiff,
v.
PUSHKALAI PILLAI, et al.,
Defendants.

2:18-cv-01010

CERTIFICATE OF SERVICE

I, the undersigned, hereby Certify that I have caused to be served a true and correct copy of the foregoing Notice of Appeal ~~to be filed~~ upon Counsel of record.

D/ December 19, 2019

S/ Quintez Talley

Quintez Talley - KT5091
48 Overlook Drive
Labelle, Pa 15450