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

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

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Defendants' attempts to show that Talley has accrued three strikes and may not proceed IFP fail. *Pillai* is not a strike because three of its claims—assault and battery, medical malpractice, and excessive force—were dismissed on non-strike grounds. *Talley v. DOC* is not a strike because the case is ongoing and, besides, it was not explicitly dismissed on a strike ground. Regardless, Talley qualifies for IFP status because he was in imminent physical danger when he filed this appeal.

I. The *Pillai* dismissal is not a strike.

A "mixed dismissal"—a case dismissed only in part on strike grounds—is not a strike. *Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021). As Defendants agree, for a dismissal to count as a strike, the entire action—meaning *every claim* in the action—must be dismissed "explicitly" on a "strike-counting ground." DOC Br. 17 (quoting *Garrett v. Murphy*, 17 F.4th 419, 433 (3d Cir. 2021)).[1] Thus, "unclear" dismissals do not count as strikes. *Ball v. Famiglio*, 726 F.3d 448, 463 (3d Cir. 2013), *partially abrogated on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015).

In section A below, we demonstrate that, contrary to Defendants' argument, nothing about the structure of the district court's opinion indicates that every claim was dismissed for failure to state a claim. As

[1] Because the two answering briefs contain similar arguments, for ease of reference, we cite only the DOC Brief.

shown in sections B, C, and D, the district court dismissed Talley's assault-and-battery, medical-malpractice, and excessive-force claims on non-strike grounds. Because *Pillai* is a mixed dismissal, it is not a strike.

A. The district court did not explicitly dismiss every *Pillai* claim on a strike ground.

Defendants argue that three features of the district court's opinion in *Pillai* make failure to state a claim (a strike ground) the basis for every dismissal in that case: its standard-of-review section, Add. 3-4, its generic headings, Add. 4, 9, and its futility analysis, Add. 13. *See* DOC Br. 22-24, 37-38. That is wrong.

As the district court observed in its standard-of-review section, Rule 12(b)(6) asks whether the complaint pleaded "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Add. 3 (citations omitted). When the district court applied this standard to some of Talley's claims, it did so explicitly. *See* Opening Br. 17-18 (giving examples).

In contrast, the district court did *not* rely on a failure to plead sufficient facts when dismissing Talley's excessive-force, assault-and-battery, and medical-malpractice claims. Add. 4 ("[Talley] has voluntarily agreed to dismiss this [excessive-force] claim."); Add. 8 ("[S]overeign immunity attaches and Talley's assault and battery claims against Lt. Morris will be dismissed[.]"); Add. 12 ("Talley's failure to provide the requisite certificate … requires dismissal of this malpractice claim.").

Neither the mention of Rule 12(b)(6) in the standard-of-review section nor the generic headings referencing failure to state a claim against each defendant could apply to all analyses under each heading. *See* Opening Br. 17. As Defendants recognize, DOC Br. 23, the district court analyzed PLRA exhaustion under the summary-judgment standard rather than Rule 12(b)(6), *see* Add. 9. Likewise, the three claims we discuss in sections B, C, and D below did not invoke Rule 12(b)(6) and were not dismissed on that basis. So, not every dismissal under the opinion's two overarching headings was for failure to state a claim.

Defendants also argue that because leave to amend is only appropriate after dismissals for failure to state a claim, the district court's analysis of whether leave to amend Talley's complaint would be futile means the case was dismissed for failure to state a claim. DOC Br. 23-24. But we don't contest that *some* of Talley's claims were dismissed for failing to state a claim, requiring a futility analysis; that does not mean *every* claim was dismissed on that basis.

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

Because immunity is not an enumerated strike ground under 28 U.S.C. § 1915(g), immunity-based dismissals do not count as strikes "unless a 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 v. Famiglio*, 726 F.3d 448, 463 (3d Cir. 2013); *see also, e.g.*,

Millhouse v. Sage, 639 F. App'x 792, 794 (3d Cir. 2016) (concluding, under *Ball*, that inmate did not accrue a strike because the district court "did not explicitly dismiss the unexhausted part of the complaint for failure to state a claim").

The district court neither correctly nor explicitly held that Defendants' immunity required dismissal under Rule 12(b)(6), and the dismissal therefore does not count as a strike.

1. The dismissal of Talley's assault-and-battery claim does not count as a strike because the district court incorrectly relied on a statute that does not apply to the DOC Defendants. The district court found that Defendants are immune under a statute that could not possibly grant them immunity. Add. 8 & n.8 (citing 42 Pa. C.S.A. §§ 8541-8542, which immunize *only* local agencies from damages). This mistake was not, as Defendants claim, a "mere citation error." DOC Br. 22. Rather, the district court named and quoted the incorrect statute and then analyzed whether its statutory exceptions applied. Add. 8 & n.8. The dismissal of the assault-and-battery claim was based entirely on this error.

Defendants suggest that the district court meant to apply 42 Pa. C.S.A. §§ 8521-8522, but, under *Ball*, a district court's decision that a complaint reveals an immunity defense must be both correct *and* explicit. *Ball*, 726 F.3d at 463. Even crediting Defendants' conjecture that the district court was applying Sections 8521 and 8522, the district court did not do so explicitly because it never referred to those provisions. Add. 8 & n.8.

2. The district court did not explicitly dismiss Talley's assault-and-battery claim under Rule 12(b)(6). As explained (at 2-3), the district court's generic headings are not controlling. What matters is the district court's actual "basis for the dismissal." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). Here, the court's explicit basis for dismissing the assault-and-battery claim was that "sovereign immunity attaches." Add. 8.

The lack of an explicit reference to Rule 12(b)(6) matters because this Court has affirmed dismissals of claims against immune defendants under Rule 12(b)(1) for lack of subject-matter jurisdiction, a non-strike ground. *See, e.g.*, *Bradley v. W. Chester Univ. of Pa. State Sys. of Higher Educ.*, 880 F.3d 643, 660 (3d Cir. 2018); *Gary v. Pa. Hum. Rels. Comm'n*, 497 F. App'x 223, 226-27 (3d Cir. 2012). Because "a claim of sovereign immunity advances a jurisdictional bar," courts can and do dismiss claims on this basis sua sponte. *United States v. Bein*, 214 F.3d 408, 412 (3d Cir. 2000); Fed. R. Civ. P. 12(h)(3); *see, e.g.*, *Abulkhair v. Off. of Att'y Ethics*, 2017 WL 2268322, at *7 (D.N.J. May 24, 2017) (dismissing claim as barred by Eleventh Amendment sovereign immunity, a "more basic infirmity" than failing to state a claim); *Perry v. Well-Path*, 2023 WL 3674278, at *10 (E.D. Pa. May 24, 2023) (addressing defendants' sovereign immunity "[f]irst").

As a result, courts in this Circuit often dismiss immunity-barred claims for lack of subject-matter jurisdiction, even where the defendant did not move to dismiss under Rule 12(b)(1). *See, e.g.*, *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 n.2 (3d Cir. 1996); *Abulkhair*, 2017 WL 2268322, at *1,

*5; *Shah v. United States*, 2013 WL 1869095, at *1 & n.1 (W.D. Pa. May 3, 2013). Outside this Circuit, too, courts dismiss claims barred by state sovereign immunity for lack of subject-matter jurisdiction. *See, e.g.*, *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 240 (5th Cir. 2005); *Seaborn v. State of Fla., Dep't of Corr.*, 143 F.3d 1405, 1407 (11th Cir. 1998).

Given this established practice, and because the district court did not say otherwise, the dismissal of Talley's assault-and-battery claim as barred by sovereign immunity may well have been a dismissal for lack of subject-matter jurisdiction, a non-strike ground. At the very least, the nature of the dismissal is "unclear," so it is not a strike. *Ball*, 726 F.3d at 463.

Defendants say that "state sovereign immunity cannot possibly relate to the federal courts' subject matter jurisdiction." DOC Br. 24-25. That's wrong. The Supreme Court has "assum[ed] that Eleventh Amendment immunity is a matter of subject-matter jurisdiction" while noting that the question has not been definitively decided. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391 (1998). In other words, state sovereign immunity very well could present a jurisdictional question, and, as shown above, courts in this Circuit routinely treat it that way.

Defendants also argue the dismissal could not have been for lack of subject-matter jurisdiction because Pennsylvania waives sovereign immunity for certain claims, and parties cannot waive subject-matter jurisdiction. DOC Br. 24-25. But the statutory waiver Defendants cite expressly preserves Pennsylvania's Eleventh Amendment sovereign

immunity in federal court, so Pennsylvania's waiver of sovereign immunity for specific claims does not apply here. *See Downey v. Pa. Dep't of Corr.*, 968 F.3d 299, 310 (3d Cir. 2020). In any event, the power of Pennsylvania to determine the scope of its *waiver* of immunity says nothing about whether dismissing a claim as barred by immunity is a dismissal for lack of subject-matter jurisdiction. *See In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 249 (3d Cir. 2003) (Alito, J.) (explaining that a court "lacks subject matter jurisdiction" when "a defendant successfully demonstrates that the Eleventh Amendment precludes a suit," but "a state may waive its Eleventh Amendment immunity").

Finally, this Court's decisions confirm that merely referring to the Rule 12(b)(6) failure-to-state-a-claim standard elsewhere in an opinion does not convert an immunity-based dismissal into a strike unless the court explicitly and specifically applies the Rule 12(b)(6) standard to the immunity-barred claim. *See, e.g.*, *Roudabush v. Bitener*, 722 F. App'x 258, 260-61 (3d Cir. 2018); *Parks v. Samuels*, 540 F. App'x 146, 149 (3d Cir. 2014). The question here is whether the district court dismissed Talley's assault-and-battery claim for failure to state a claim. It did not. Instead, the explicit basis for its dismissal was that "sovereign immunity attache[d]." Add. 8. This dismissal is not a strike.

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

The district court's dismissal of Talley's medical-malpractice claim for failure to file a certificate of merit (COM) is not a strike. Opening Br. 19-22. It can't be a Rule 12(b)(6) dismissal because the court considered more than the "complaint, exhibits attached to the complaint, matters of public record," and other "undisputably authentic documents" on which the complaint is based. *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 197 (3d Cir. 2019) (citation omitted). Nor did the district court explicitly dismiss for failure to state a claim or on any other strike ground.

Defendants say it is "critical" that the COM is a "pleading" filed "during the pleading stage." DOC Br. 28. That's incorrect. A COM is not a pleading, and dismissal for failure to file a COM is distinct from dismissal for failure to state a claim. Rather, this Court must treat the resolution of Talley's claim for failure to file a COM as a grant of summary judgment.

1. Pennsylvania's COM requirement is separate and distinct from the complaint and other pleadings. Defendants maintain, without citation, that everything that happens during what they call the "pleading stage"—a term they never define—is a pleading and thus may be considered under Rule 12(b)(6). DOC Br. 28. Defendants are mistaken. The COM "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); *see also Liggon-Redding v. Est. of Sugarman*, 659 F.3d 258, 263 (3d Cir. 2011); *Chamberlain v. Giampapa*, 210 F.3d 154, 160

(3d Cir. 2000); *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 303 (3d Cir. 2012).[2] Nor is a COM contained within the specific, enumerated list of seven items that are the "[o]nly … pleadings [that] are allowed." Fed. R. Civ. P. 7; *see also* 231 Pa. Code § 1017 (listing similar permitted pleadings). Each pleading is a type of complaint or answer. *See* Fed. R. Civ. P. 7(a)(1)-(7). Because the COM is "not part of the complaint" and is not an answer, it is not a pleading. *Schmigel*, 800 F.3d at 122.

Defendants also contend that the failure to file a COM "negate[s]" the complaint's allegations. DOC Br. 31. Even if true, that would be irrelevant. Many things, such as unpersuasive evidence at trial, "negate" a complaint's allegations. But it's also not true. This Court repeatedly has recognized that "the COM requirement 'does not have *any effect* on what is included in the pleadings of a case or the specificity thereof.'" *Schmigel*, 800 F.3d at 122 (quoting *Liggon-Redding*, 659 F.3d at 263).

The COM also exceeds Rule 8's pleading requirements. *See* Fed. R. Civ. P. 8(a)(2) (requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Chamberlain*, 210 F.3d at 159-60

[2] Contrary to Defendants' suggestion, DOC Br. 32 n.7, this Court has repeatedly found that New Jersey's AOM statute is analogous to Pennsylvania's COM statute. *See Schmigel*, 800 F.3d at 120; *see also Keel-Johnson v. Amsbaugh*, 2009 WL 648970, at *6 (M.D. Pa. Mar. 10, 2009) (noting that "the weight of authority has found the *Giampapa* [AOM] reasoning applicable to the similar Pennsylvania COM rules").

(finding New Jersey's analogous AOM requirement does not conflict with Rule 8 because an AOM "is not a pleading"). Accordingly, even though a *claim*'s survival may depend on whether a COM is filed, the analysis of whether the *complaint* is sufficient is done "independently." *See Holbrook v. Woodham*, 2007 WL 2071618, at *4 (W.D. Pa. July 13, 2007) (noting that the COM "law [does not] implicate[] … the pleading requirements"); *cf. Long v. Adams*, 411 F. Supp. 2d 701, 708 (E.D. Mich. 2006) (noting that Michigan's COM rule contains heightened pleading requirements and therefore does not apply in federal court under *Erie* because it requires plaintiffs to file the COM with their complaint).

Defendants do not appreciate the paradoxical consequences of their argument. The COM requirement applies in federal court only because this Court has concluded that the COM is not a complaint or pleading and thus does not conflict with the Federal Rules. If the COM *were* a pleading, as Defendants urge, it would conflict with Rules 7, 8, and 12, and would not be considered in federal court under *Erie*. *See Schmigel*, 800 F.3d at 121-22; *Hanna v. Plumer*, 380 U.S. 460, 465-66 (1965); *see also Liggon-Redding*, 659 F.3d at 262-63; *Holbrook*, 2007 WL 2071618, at *3 (comparing state COM laws and explaining that those "that have been sustained in federal diversity actions are those laws that do not create additional pleading requirements"). Yet Defendants' position remains that the COM requirement applies in federal court; indeed, their entire argument depends on the COM's application there. *See* DOC Br. 29-31.

2. This Court must treat the district court's resolution of Talley's claim as a grant of summary judgment for failure to file a COM. Under Rule 12(d), if matters outside the pleadings are presented to and not excluded by the court, a Rule 12(b)(6) dismissal motion is converted into a Rule 56 motion. Fed. R. Civ. P. 12(d); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 360 (3d Cir. 2016). Even when a district court does not state it is converting the Rule 12(b)(6) motion, if it considers material outside the pleadings, this Court is "constrained by [Rule 12(d)] to treat the district court's disposition of the matter pursuant to Rule 56, and not Rule 12(b)(6)." *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 284 (3d Cir. 1991); *accord Switlik v. Hardwicke Co.*, 651 F.2d 852, 857 (3d Cir. 1981); *Messer v. V.I. Urb. Renewal Bd.*, 623 F.2d 303, 307 (3d Cir. 1980); *Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir. 1992). Dismissal for failure to file a COM "necessarily seems to involve matters outside the pleadings" and thus cannot be resolved under Rule 12(b)(6). *Nuveen*, 692 F.3d at 303 n.13; *see* Opening Br. 14, 22.

a. The district court cited Pillai's "Notice of Intention to Enter Judgment on Professional Liability Claim," which she filed fifty-one days after Talley filed his complaint and also attached to her brief in support of her motion to dismiss. Add. 12; JA 52. Under Pennsylvania law, Pillai was required to serve this notice at least thirty days before moving for dismissal. *See Regassa v. Brininger*, 2021 WL 4738820, at *3 (3d Cir. Oct. 12, 2021) (citing 231 Pa. Code § 1042.7(a)). The district court relied on the notice to conclude that Talley had thirty days after the notice was filed to submit a COM and Talley's claim

should be dismissed because he had not done so. Add. 12. Neither fact was in the complaint or the pleadings (nor could they have been). By "accept[ing] these extra-pleaded materials," the district court effectively granted summary judgment to Pillai—that is, "the motion … convert[ed] to one for summary judgment" under Rule 12(d). *Lombarski v. Cape May Cnty.*, 2011 WL 1322910, at *2 (D.N.J. Apr. 5, 2011). And the district court's grant of summary judgment does not depend on whether the court *expressly* converted Pillai's motion, because "the label a district court places on its disposition is not binding on an appellate court." *Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989).

This Court recognized as much when it observed that dismissing for failure to file a COM "*require*[*s*] a court to consider a motion to dismiss for failure to state a claim as a motion for summary judgment, as provided by Rule 12(d)." *Nuveen*, 692 F.3d at 303 n.13 (emphasis added). Defendants ignore this clear language. Instead, they point to a single quote from *Schmigel*, that failure to file a COM "*can* form the basis for a motion for summary judgment," to argue that it could also form the basis for a Rule 12(b)(6) dismissal. DOC Br. 33 (quoting *Schmigel*, 800 F.3d at 122) (emphasis added by Defendants). But, as we have explained, *Schmigel* held that a COM is not a pleading that can be considered under Rule 12(b)(6). *Schmigel*, 800 F.3d at 122. All Defendants' snippet from *Schmigel* means is that a deficient or missing COM *can* form the basis for summary judgment, whereas a sufficient COM *cannot*—not that a Rule 12(b)(6) dismissal is an appropriate alternative.

Because the district court did not dismiss under Rule 12(b)(6), the dismissal was not a strike unless the court expressly found that Talley failed to state a claim. *Byrd v. Shannon*, 715 F.3d 117, 126 (3d Cir. 2013). The court did not do so. Without mentioning a strike ground, the district court reasoned only that Talley's belated "statement [was] not sufficient to comply with the certificate requirement" so "Talley's failure to provide the requisite certificate … require[d] dismissal of [the] malpractice claim." Add. 12.

b. State law confirms that this dismissal was not an explicit strike ground. Under Pennsylvania law, the proper way to dispose of a case when a plaintiff fails to file a COM is to enter a *non pros* judgment, 231 Pa. Code § 1042.7, a process distinct from dismissal for failure to state a claim, *see* 231 Pa. Code § 1032(a). And courts in this Circuit distinguish between dismissing for failure to file a COM and failure to state a claim, as Defendants' authority shows. *See Young v. Halligan*, 2019 WL 1978478, at *1 (W.D. Pa. May 3, 2019) (denying motion to reconsider an order "dismissing Plaintiff's Eighth Amendment claim for failure to state a claim and his medical-malpractice claim for failure to file a Certificate of Merit"); *see also, e.g.*, *Michtavi v. Scism*, 2013 WL 371643, at *4 (M.D. Pa. Jan. 30, 2013); *Hill v. Knox, McLaughlin, Gornall & Sennett*, 2009 WL 693252, at *2, *4 (W.D. Pa. Mar. 13, 2009). Defendants' other unpublished cases (cited at DOC Br. 30, 35) fail to contend with *Schmigel*, Rule 12(d), or other controlling law.

c. Our opening brief (at 22) observes that, because a COM is often filed *after* the defendant's motion to dismiss is due, Rule 12(b)(6) is not the

mechanism for disposing of a case for failure to file a COM. *See Schmigel*, 800 F.3d at 122 & n.13 (citing *Nuveen*, 692 F.3d at 303). Defendants respond that a motion to dismiss is not due until twenty days after service of the COM under Pennsylvania Rule 1042.4. DOC Br. 33. But if a COM is never filed, then Rule 1042.4 would require a responsive pleading, and therefore a Rule 12(b)(6) motion to dismiss, to be filed well before the COM is due. 231 Pa. Code § 1042.4. None of Defendants' other timing arguments, *see* DOC Br. 33-35, undermine our basic point: dismissal for failure to file a COM is properly decided at summary judgment because it requires the court to consider matters outside the pleadings, often after responsive pleadings are due.

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

Defendants do not dispute that voluntary dismissal is not a strike ground. Instead, they contend that Talley did not and could not have voluntarily dismissed his state-law excessive-force claim, DOC Br. 36, and that his withdrawal amounted to a concession that he could not state a claim, DOC Br. 37. Though Talley, a pro se litigant, did not explicitly invoke Rule 41, he maintained that he was withdrawing the claim, JA 57, and the district court properly construed Talley's withdrawal as a voluntary dismissal, Add. 4.

1. The district court construed Talley's withdrawal as a voluntary dismissal. A filing that does not explicitly invoke Rule 41, but communicates an intent to voluntarily dismiss a claim, can be treated as a Rule 41 voluntary dismissal. *See, e.g.*, *Brooks-Washington v. Doe*, 2012 WL 6931923, at *1 (M.D.

Pa. Oct. 24, 2012) (construing plaintiff's statement that he "hopes to withdraw[]" his case as a voluntary dismissal), *R. & R. adopted*, 2013 WL 310401 (M.D. Pa. Jan. 25, 2013); *Lombarski v. Cape May Cnty.*, 2011 WL 1322910, at *2-4 (D.N.J. Apr. 5, 2011) (construing request for voluntary dismissal in opposition to a motion to dismiss as a Rule 41(a)(1)(A)(i) notice of voluntary dismissal and noting that Rule 41(a)(2) voluntary dismissal also would have been appropriate). Here, the district court construed Talley's withdrawal as a voluntary dismissal by concluding that "this claim is dismissed" because Talley "voluntarily agreed to dismiss [the] claim." Add. 4.

2. Talley's voluntary dismissal was proper under Rule 41. Defendants suggest that Talley could not have dismissed his state-law excessive-force claim under Rule 41 because that Rule authorizes dismissal of only an entire action. That's incorrect. First, as DOC concedes, Rule 41(a) "allows a party to voluntarily dismiss all of its claims against a particular party," even when other defendants remain in the case. DOC Br. 38 (quoting *Noga v. Fulton Fin. Corp. Emp. Benefit Plan*, 19 F.4th 264, 271 n.3 (3d Cir. 2021)); *see also Young v. Wilky Carrier Corp.*, 150 F.2d 764, 764 (3d Cir. 1945). In voluntarily dismissing the excessive-force claim, Talley dismissed his only claim against Defendant Shrader. JA 16. Therefore, at a minimum, it was procedurally proper for Talley to voluntarily dismiss this claim against Shrader.

In any event, this Court has recognized voluntary dismissals of fewer than all claims under Rule 41(a), even as to a particular defendant. *See, e.g.*,

Betz v. Temple Health Sys., 659 F. App'x 137, 141 (3d Cir. 2016); *see also Siehl v. City of Johnstown*, 365 F. Supp. 3d 587, 600 (W.D. Pa. 2019); *Fennell v. Wetzel*, 2023 WL 1997116, at *8 (M.D. Pa. Feb. 14, 2023), *appeal dismissed*, 2023 WL 5608411 (3d Cir. June 6, 2023); *Houser v. Beard*, 2013 WL 3943510, at *5 (W.D. Pa. July 30, 2013), *R. & R. adopted*, 2013 WL 4494373 (W.D. Pa. Aug. 22, 2013). That accords with the well-established principle that a plaintiff "is the master of his complaint." *Fennell*, 2023 WL 1997116, at *8.

3. Talley's withdrawal did not concede that he failed to state a claim. For starters, the district court itself did not construe Talley's withdrawal as a concession regarding the merits, *see* Add. 4, as "[t]here are any number of meritorious reasons why a plaintiff might seek voluntary dismissal." *Chodorow v. Roswick*, 160 F.R.D. 522, 524 (E.D. Pa. 1995). Further, the court never analyzed whether Talley failed to state an excessive-force claim, *see* Add. 4, so this dismissal cannot be a strike.

II. *Talley v. DOC* is not a strike because it is pending.

A. *Talley v. DOC* is not a strike because the district court has not dismissed it. Talley filed his amended complaint in June 2023, JA 134-53, and, as we file this brief, the district court has yet to act on it. Even if the district court later dismisses Talley's amended complaint as outside the deadline set by the court's order granting Talley's Rule 60(b) motion, JA 128, that would be irrelevant for strike purposes because only strikes that have

accrued before an appeal is filed are strikes for purposes of that appeal. *Millhouse v. Heath*, 866 F.3d 152, 157 (3d Cir. 2017).

Defendants respond that *Talley v. DOC* was effectively closed because Talley elected to stand on his amended complaint. DOC Br. 48 (quoting ECF 11, at 7, in 3d Cir. No. 20-2093).[3] But Talley, a pro se litigant, used the words "standing on his complaint" without knowing what they meant.

In Talley's response to this Court's letter advising him that his appeal may not be reviewable "unless plaintiff elects to stand on [his] complaint," ECF 3, at 1, Talley told this Court that he was "expressly praying for an opportunity to file an amended complaint to prosecute" his claims. ECF 5, at 2. Then, Talley's opening brief explained he was "confused" about standing on his complaint, ECF 11, at 15 n.11, but wished to do so to "do[] away with any questions of (subject-matter) jurisdiction." ECF 11, at 6-7. He also argued that the district court's holding that its dismissal "with leave to amend was an appealable order should be reversed and this case remanded to the District Court," ECF 11, at 15, indicating again that he wanted an opportunity to amend his complaint.

And, when he filed his opening brief, Talley still had not received a copy of the district court's order granting his Rule 60 motion and reopening the period to amend his complaint. ECF 11, at 6. Thus, he invoked a legalism—

[3] All ECF citations in this section of this brief refer to filings in case number 20-2093 (3d Cir.) except where a different case number is provided.

the notion of standing on one's complaint—that he did not understand because he viewed it as the only way to ask this Court to allow him to amend his complaint. The case was subsequently stayed for resolution of a strike issue in another case. Once the stay was lifted and Talley had received a copy of the order granting his Rule 60(b) motion, Talley dismissed the appeal. ECF No. 24, at 1. He then filed an amended complaint, JA 134-53, which the district court has yet to act on.

B. Even assuming (counterfactually) that *Talley v. DOC* is not pending, any dismissal did not count as a strike. None of the three district-court actions in that case constitute a strike. *See* Opening Br. 26-29.

First, the district court's initial dismissal, JA 120-21, is not a strike because Talley was granted leave to amend. *See Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 n.4 (2020); *Talley v. Wetzel*, 15 F.4th 275, 282 (3d Cir. 2021).

Second, the district court's subsequent order directing the clerk to close the case, JA 122, is not a strike because it did not reference any Section 1915(g) strike ground and because it was later reversed in response to Talley's Rule 60 motion, JA 128. *See Wetzel*, 15 F.4th at 279 n.3.

Third, the district court's dismissal of Talley's motion for an appealable order, JA 133, is not a strike because, by its own terms, it did not dismiss Talley's action, only his motion for an appealable order. *See* 28 U.S.C. § 1915(g) (providing that a strike accrues only when a plaintiff has "brought an *action* … that was dismissed" on a strike ground (emphasis added)). Defendants suggest that this order made clear that the court's prior dismissal

order was final. DOC Br. 47. However, this order mischaracterized the initial dismissal and ignored the court's subsequent grant of Talley's Rule 60 motion, which reversed the initial dismissal. *See* Opening Br. 28.

If a district court's order dismissing the case after a plaintiff fails to amend does not itself explicitly state a strike ground, it is not a strike. *See* Opening Br. 29-30. Defendants never respond to this point. Instead, they rely entirely on an out-of-circuit case decided before the Supreme Court clarified that dismissals with leave to amend are *not* strikes. *Lomax*, 140 S. Ct. at 1724 n.4; *see* DOC Br. 41 (citing *Harris v. Mangum*, 863 F.3d 1133 (9th Cir. 2017)). *Harris* held that when a court dismisses a complaint on a strike ground and grants leave to amend, but the plaintiff fails to file an amended complaint "within the time designated in the dismissal order[]," the case automatically counts as a strike no matter the reason the district court gives for the later dismissal. *Harris*, 863 F.3d at 1141, 1143.

But *Harris* is in tension with the Supreme Court's decision in *Lomax.* There, the Court held that whether a dismissal is with prejudice is irrelevant for strike purposes. It also held that "when a court gives a plaintiff leave to amend his complaint[,] … the suit continues, the court's action falls outside of Section 1915(g)[,] and no strike accrues." *Lomax*, 140 S. Ct. at 1724 & n.4. Thus, under *Lomax*, the initial dismissal of a complaint with leave to amend contemplated by *Harris* cannot be a strike until the district court issues a subsequent order closing the action after the plaintiff fails to amend so that the suit no longer continues. And under this Court's precedent, the dismissal

of an action is not a strike unless it is *explicitly* on a strike ground. *E.g.*, *Garrett v. Murphy*, 17 F.4th 419, 433 (3d Cir. 2021); *Ball v. Famiglio*, 726 F.3d 448, 460, 463 (3d Cir. 2013).

Defendants do not dispute that this Court requires strike grounds to be stated explicitly, DOC Br. 17, or that dismissals with leave to amend are not strikes, DOC Br. 42. Instead, they point to three cases—all pre-*Lomax*—that they claim "have reached the same conclusion" as *Harris*: *Best v. S.C.I. Huntington*, 2019 WL 5866707 (M.D. Pa. Oct. 9, 2019); *Holmes v. Reilly*, 2012 WL 528562 (E.D. Pa. Feb. 16, 2012); and *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272 (3d Cir. 1992). DOC Br. 44. But none of these cases adopted the rule that Defendants extol. Indeed, all three are consistent with this Court's requirement that dismissals be explicitly on strike grounds to qualify as strikes.

In *Best*, 2019 WL 5866707, at *6, the court warned the plaintiff that after failure "to timely file an amended complaint, the dismissal of this action for failure to state a claim pursuant 28 U.S.C. § 1915(e)(2)(B)(ii) … will constitute a 'strike.'" But an explicit dismissal of the entire action under Section 1915(e)(2)(B)(ii) constitutes a strike regardless of whether the complaint was initially dismissed with leave to amend. *Best* did not address the situation here: where a district court dismisses a complaint with leave to amend but does not explicitly dismiss the action on a strike ground.

Holmes and *Shapiro* held that a plaintiff's failure to amend converted the dismissal to one with prejudice, which, before *Lomax*, determined strike

status in some circuits. *Shapiro*, 964 F.2d at 278; *Holmes*, 2012 WL 528562, at *1-2. After *Lomax*, however, it is clear both that prejudice is not relevant to strike determinations and that dismissals with leave to amend are not strikes while "the suit continues." *Lomax*, 140 S. Ct. at 1724 & n.4. Thus, neither *Holmes* nor *Shapiro* are relevant to whether cases like *Talley v. DOC* count as strikes today.

By contrast, more recent decisions of this Court support our position. *Roudabush v. Bitener*, 722 F. App'x 258 (3d Cir. 2018), for example, expressly rejected the argument that a "dismissal without prejudice became a dismissal with prejudice once [the inmate] failed to amend." *Id.* at 261. Instead, the dismissal of the unamended complaint in that case was not a strike. *Id.* To be sure, the Court relied on the since-abrogated rule that dismissals without prejudice do not constitute strikes, *see id.*, but the point stands that the plaintiff's failure to amend did not change the nature of the dismissal. And, in *Lewis v. United States*, 2022 WL 795424, at *1 (3d Cir. Mar. 15, 2022), this Court applied *Lomax* and held that two dismissals with leave to amend that had been entered years before did not constitute strikes, even though the inmate had not amended either complaint. *See Lewis v. Zoll Med. Corp.*, No. 19-19231, https://ecf.njd.uscourts.gov/cgi-bin/DktRpt.pl?847059502289522-L_1_0-1 (docket sheet showing no amended complaint); *Lewis v. New Jersey*, No. 19-20490, https://ecf.njd.uscourts.gov/cgi-bin/DktRpt.pl?431798310233 74-L_1_0-1

(same). By contrast, Defendants can identify no case from any court in this Circuit applying the *Harris* rule.

C. Only an explicit dismissal of an action on a Section 1915(g) ground qualifies as a strike in this Circuit. Rejecting Defendants' request to embrace *Harris* is consistent with this Court's precedent, which applies a stricter standard than the Ninth Circuit. *Compare Ball v. Famiglio*, 726 F.3d 448, 460 (3d Cir. 2013) (requiring that a defense appear on the face of the complaint *and* that the court explicitly dismiss the complaint on a strike ground), *with El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016) (requiring only that a defense appear on the face of the complaint).

Besides, *Harris* is wrong. Courts can and do terminate cases after granting leave to amend for reasons unrelated to the merits of the underlying claims—most obviously, for failure to comply with a court order. *See* Opening Br. 29-30. That a case can be ended for a variety of reasons is why this Court requires strike grounds to be stated explicitly, rather than presumed. *Garrett v. Murphy*, 17 F.4th 419, 433 (3d Cir. 2021). Likewise, plaintiffs fail to amend their complaints for reasons separate from the merits, so failing to amend does not necessarily reflect gamesmanship or a plaintiff's agreement with the district court that the claim lacks merit. *Contra* DOC Br. 42-43. That is especially true when, as here, the plaintiff is an inmate who may lack legal knowledge, access to counsel, or even a functioning mail system that allows the court's orders to reach him on time. *E.g.*, JA 155. As a result, this Court should not assume from either a plaintiff's failure to amend

or a court's subsequent termination of the case that the dismissal was on a strike ground.

Here, the district court's only order arguably closing the case referred merely to "the plaintiff having failed to file an amended complaint," JA 122, which is not a strike ground.

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

Section 1915(g)'s imminent-danger exception does not require a nexus between the imminent danger and the complaint's allegations. But if it did, Talley would satisfy that requirement.

A. This Court should not adopt an atextual nexus requirement. Section 1915(g)'s text contains no nexus requirement. That should end the argument. Courts may not "narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). Nor would a nexus requirement remedy Defendants' concern that appellate courts would have to consider the merits of imminent-danger allegations not presented to the lower courts. DOC Br. 51. They already must do so. Because the plaintiff must allege imminent danger at the time of the appeal, *Ball v. Famiglio*, 726 F.3d 448, 467 (3d Cir. 2013), the appellate court necessarily will have to consider facts that were not present when the complaint was filed.

B. Regardless, Talley's imminent-danger motion survives any nexus requirement. Though Talley's imminent-danger motion pertains to his confinement at SCI-Fayette and his complaint alleges harms at SCI-Greene,

the allegations establish a pattern of misconduct by DOC officials that places him in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Defendants recite the Second Circuit's nexus requirement: "(1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is fairly traceable to unlawful conduct asserted in the complaint; and (2) whether a favorable judicial outcome would redress that injury." DOC Br. 54 (citing *Pettus v. Morgenthau*, 554 F.3d 293, 298-99 (2d Cir. 2009)). The connection between Talley's allegations satisfies both requirements.

Talley's complaint alleges that he was being kept in solitary confinement and barred from the Mental Health Unit, causing him to suffer depression and suicidal thoughts. JA 11. Talley's imminent-danger motion alleges that he was being held in indefinite solitary confinement, thereby exacerbating his suicidal thoughts. JA 161-63. So, contrary to Defendants' assertion, DOC Br. 54, the two sets of allegations involve a continuing and related pattern of misconduct placing Talley in harm's way.

That nexus is sufficient just like the connection in *Ball v. Hummel*, 577 F. App'x 96, 97-98 (3d Cir. 2014), where the complaint alleged physical harm by guards and the imminent-danger motion on appeal pertained to renewed threats from guards of the same physical violence. Cases where the nexus requirement has not been satisfied, on the other hand, involve dangers completely unrelated to the complaint's allegations. *See, e.g.*, *Ray v. Lara*, 31 F.4th 692, 701-02 (9th Cir. 2022) (complaint alleged censored and confiscated mail, while imminent danger related to the threat of being housed in general

population); *Pettus*, 554 F.3d at 295-96 (complaint alleged procedural issues at trial and bias in adjudicating disciplinary infractions, while imminent danger related to unsafe prison conditions).

Talley's complaint seeks, among other relief, an injunction requiring DOC to "implement sanctions to be entered against their subordinates who[] fail to work responsibly" with inmates. JA 17. Defendants point only to Talley's efforts to seek "damages for *past* harm," DOC Br. 54, but Talley's complaint also seeks injunctive relief that would prevent DOC from continuing to subject him to solitary confinement without accounting for his mental health, JA 17. This relief would redress the conditions that place Talley in imminent danger of physical injury. So, that Talley's complaint alleges events at a prior facility does not matter. *See* Opening Br. 34-36.

CONCLUSION

Talley is entitled to proceed IFP in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I certify that, on March 8, 2024, this brief was filed via CM/ECF, which will send notice to all counsel of record registered with the ECF system. I have mailed a copy of the motion by first-class mail to the following party who is not a CM/ECF participant:

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