UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-21795-CIV-UNGARO
MAGISTRATE JUDGE P. A. WHITE

TODD CARLTON SMITH,	:	
Plaintiff,	:	
v.	:	REPORT RE DISMISSAL OF SUCCESSIVE COMPLAINT 28 U.S.C. §1915(g)
FEDERAL BUREAU OF PRISONS, ET AL.,	:	
Defendants.	:	

The incarcerated pro se plaintiff in this case is a multiple filer, having filed several cases in this and other federal districts and in the United States Court of Appeals. At least three of the cases were dismissed for failure to state a claim for relief prior to service, including:

1. Smith v. Moore,
   01-Civ-203-WS (N.D.Fl.)
   §1983
   Dismissed, failure to state a claim, 8/281/01

2, 3. Smith v. Bruce,
   03-3116-GTV (D. Kansas)
   §1983
   Dismissal for failure to state a claim, 6/30/03 and affirmed by Tenth Circuit, 2/5/04

4. Smith v. Cummings,
   06-3196-SAC (D. Kansas)
   §1983
   Dismissed, failure to exhaust, 10/19/06

5. Smith v. Ft. Lauderdale PD,
   04-60806 -Civ-Altonaga
   Mandamus dismissed for failure to state a claim, 7/6/04

Pursuant to 28 U.S.C. §1915(g), enacted April 26, 1996, no prisoner may bring a civil action or appeal a judgment in a civil

action in forma pauperis if the prisoner has, on three 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 was frivolous, malicious, or failed to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury. Medberry v. Butler, 185 F.3d 1189, 1192-93 (11 Cir. 1999).

The constitutionality of this section has been comprehensively explored and upheld by the Eleventh Circuit Court of Appeals, Rivera v. Allin, 144 F.3d 719 (11 Cir.), cert. dismissed, 524 U.S. 978 (1998). There the Court held that the new "three strikes" IFP provision does not violate the First Amendment right of access to the court; the separation of judicial and legislative powers; the Fifth Amendment right to due process of law; or the Fourteenth Amendment right to equal protection, as incorporated through the Fifth Amendment. Moreover, the Court held that courts in this circuit may properly count as strikes cases dismissed on the statutory grounds prior to April 26, 1996.

The types of dismissals that count as "strikes" under §1915(g) which have thus far been recognized and established by judicial precedent, include the following:

1. **Pre-PLRA Dismissals under 28 U.S.C. §1915(d)**:

   Civil rights claims raised under Title 42 U.S.C., or raised under Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), which before the April 26, 1996 statutory amendments were dismissed pursuant to the pre-PLRA version of 28 U.S.C. §1915(d), and Neitzke v. Williams, 490 U.S. 319 (1989) in which the Supreme Court had identified two classes of cases in which 28 U.S.C. §1915(d) authorized courts to dismiss cases sua sponte: (i) "claim[s] based on an indisputably meritless legal theory," and (ii)

"those claims whose factual contentions are clearly baseless." Medberry v. Butler, 185 F.3d 1189, 1192 (11 Cir. 1999); Rivera, 144 F.3d at 728-30.

2. **PLRA Dismissals for Failure to State a Claim, Defendants Immune, etc.**:

Civil rights claims raised under Title 42 U.S.C., or raised under Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), which are dismissed pursuant to the Prison Litigation Reform Act of 1995 ("PLRA") under the provisions of 42 U.S.C. §§ 1915A(b)(1) and (b)(2), and/or 1915(e)(2)(B), because the claims are either frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. Rivera, 144 F.3d at 731-32; Anderson v. Hardman, et al., No. 99 C 7282 at *3, 1999 WL 1270692 (N.D.Ill. Dec. 17, 1999); Luedtke v. Gudmanson, 971 F.Supp. 1263 (E.D.Wis. 1997).

3. **PLRA Dismissals for "Abuse of the Judicial Process"**:

A case dismissed as an "abuse of the judicial process" counts as a strike under 28 U.S.C. §1915(g). Rivera v. Allin, 144 F.3d 719, 731 (11 Cir. 1998). Examples of "abuse of the judicial process" include:

i. **lying under penalty of perjury**, Rivera v. Allin, supra, 144 F.3d at 731 (holding that the dismissal of a case as a sanction by the District Court for the Middle District of Florida properly counted as a "strike" under the "three strikes" provision of the PLRA, pursuant to 28 U.S.C. §1915(g), where the plaintiff "had lied under penalty of perjury about the existence of a prior lawsuit [filed by him]," and although the District Court in dismissing the case "may not have uttered the words 'frivolous' or 'malicious,' dismissal for abuse of the judicial process is

precisely the type of strike that Congress envisioned when drafting Section 1915(g)");

ii. **refusal to comply with court orders**, Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1544 (11 Cir.), cert denied, 510 U.S. 863 (1993) (No. 93-80) (holding that failure to comply with court orders is an "abuse of the judicial process"); Huffine v. United States, 25 Cl.Ct. 462, 464 (Cl.Ct. 1992) (pro se litigant's refusal to comply with Court orders was an "abuse of the judicial process"); and

iii. **repeated assertion of claims previously raised**, Hicks v. Brysch, 989 F.Supp. 797, 822-23, nn. 150 and 151 (W.D.Tex. 1997) (Noting that *pro se* civil rights litigation had become a recreational activity for state prisoners in the Circuit, and that prisoners had abused the judicial system in a manner that non-prisoners have not; and holding that "Noone, rich or poor is entitled to abuse the judicial process," and that "it is malicious *per se* for a pauper to file successive *In Forma Pauperis* suits that duplicate claims made in other pending or previous lawsuits") (citing Hardwick v. Brinson, 523 F.2d 798, 800 (5th Cir. 1975), Pittman v. Moore, 980 F.2d 994, 995 (5 Cir. 1993), and Bailey v. Johnson, 846 F.2d 1019, 1021 (5 Cir. 1988)); Lynn v. McClain, 12 Fed.Appx. 676; 2001 WL 328672, at *679 (10 Cir. (Kan) April 4, 2001) (plaintiff's "continued assertion of the same issues and arguments constitutes abuse of the judicial process").

5. **Dismissals under Fed.R.Civ.P. 12(b)(6)**:

Civil rights claims raised under Title 42 U.S.C., or under Bivens, which are dismissed on a motion to dismiss, pursuant to Fed.R.Civ.P. 12(b), for lack of subject matter jurisdiction, or for failure to state a claim upon which relief can be granted. Rivera v. Allin, 144 F.3d 719, 728-30 (11 Cir.

1998); Lloyd v. Schwartz, No. 99 C. 3070 at *5, 1999 WL 1044210 (N.D.Ill. Nov. 9 1999); Correa-Serge v. Eliopoulas, No. 95 C 7085, 1998 WL 292425, at *1-5 (N.D. Ill. May 19, 1998).

6. **Dismissals of Claims Re Confinement under Heck v. Humphrey and PLRA:**

Civil rights claims raised by a state prisoner pursuant to Title 42 U.S.C., or raised by a federal prisoner pursuant to Bivens, attacking his or her confinement, which are dismissed pursuant to Heck v. Humphrey, 512 U.S. 477 (1994) and provisions of the PLRA under 28 U.S.C. §§1915A(b)(1) and/or 28 U.S.C. §1915(e)(2)(B). Patton v. Jefferson Correctional Center, 136 F.3d 458, 462-65 (5 Cir. 1998); Luedtke v. Bertrand, 32 F.Supp.2d 1074 (E.D.Wis. 1999) (citing Rivera v. Allin, 144 F.3d 719, 731 (11 Cir. 1998)); Grant v. Sotelo, No. 2:98-CV-0347, 1998 WL 740826, at *1 (N.D.Tex. Oct. 19, 1998); Sanders v. DeTella, No. 98 C 4481 at *3, 1997 WL 126866 (N.D.Ill., March 13, 1997); Sandles v. Randa, 945 F.Supp. 169, 171-72 (E.D.Wis. 1996).

7. **Dismissals of Claims Re Disciplinary Proceedings under Heck v. Humphrey; Edwards v. Balisok, and PLRA:**

Civil rights claims concerning disciplinary proceedings in state or federal facilities, raised pursuant to Title 42 U.S.C., or raised pursuant to Bivens, which are dismissed pursuant to Edwards v. Balisok, 520 U.S. 641 (1997) and Heck v. Humphrey, 512 U.S. 477 (1994), and provisions of the PLRA under 28 U.S.C. §§1915A(b)(1) and/or 28 U.S.C. §1915(e)(2)(B). Warburton v. Goord, 14 F.Supp.2d 289, 294 (W.D.N.Y. 1998); Hayes v. Washington, No. 99 C 929, 1999 WL 782095, at *4, *8 (N.D. Ill. Sept. 23, 1999).

8. **Appeals Dismissed as Frivolous, Malicious, or for Failure to State a Claim:**

Appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. Rivera, supra; Adepegba v. Hammons, 103 F.3d 383, 387-388 (5 Cir. 1996).

9. **Dismissals of Mandamus Actions Against Federal Officials or Against State Officials**:

Petitions for Mandamus against either federal officials or against state officials qualify as "civil actions" under 28 U.S.C. §1915(g). See In Re: Billy D. Jacobs, a/k/a Ya qub, 213 F.3d 289 (5 Cir. 2000) (holding that after he was granted leave under the PLRA to proceed *in forma pauperis* in the district court, and his case was still under initial review for frivolousness as required by 28 U.S.C. §1915A, appellant's mandamus petition in the Court of Appeals seeking to compel the district court to order service on the defendants was inappropriate, hindered the initial review process, and was subject to dismissal as frivolous and counted as a strike under 28 U.S.C. §1915(g), the PLRA's three strikes provision); Green v. Nottingham, 90 F.3d 415, 418 (10 Cir. 1996) (holding that mandamus petitions qualify as "civil actions" under §1915(g), and that plaintiff with three prior strikes under the statute could not be permitted to continue filing actions by merely framing pleadings as petitions for writs of mandamus since to do so would allow a loophole Congress surely did not intend in its stated goal of discouraging frivolous and abusive prison lawsuits); In Re: Michael C. Washington, 122 F.3d 1345 (10 Cir. 1997) (petitions for writ of mandamus qualify as "civil actions" under §1915(g)); Hicks v. Brysch, 989 F.Supp. 797 (W.D.Tex. 1997) (in an *in forma pauperis* §1983 action against state court clerk for mandamus, monetary and injunctive relief, mandamus could not be granted where the defendant was an elected County official, not a federal officer, agent, or employee, and suit was legally frivolous, requiring dismissal under *IF* statute as amended by the PARA. Cf. Martin v. United States, 96 F.3d 853 (if defendant's petition for writ of mandamus arises from civil litigation, the petition must conform with the PARA, however if petition arises from criminal litigation, petition need not comply with the Act).

As demonstrated in the list of cases at the top of this report, this plaintiff has filed three or more cases which fit the criteria of this statute.

As stated above, the plaintiff is barred from proceeding in forma pauperis pursuant to 28 U.S.C. §1915(g) unless he can show that he is under imminent danger of serious physical injury. The Eleventh Circuit has held that in order to meet this exception, "the complaint, as a whole, [must] allege[] imminent danger of serious physical injury." Brown v. Johnson, 387 F.3d 1344, 1350 (11 Cir. 2004). The plaintiff raises absolutely no allegations that he is in any present danger of serious physical injury. The Complaint, as a whole, does not indicate that the plaintiff is entitled to proceed in forma pauperis under the "imminent danger" exception.

As the statute provides that the filing fee must be paid at the time the suit is initiated, and only precludes the plaintiff from proceeding in forma pauperis, it is recommended that the dismissal should be without prejudice to the plaintiff to file a new complaint accompanied by payment of the full filing fee. See Dupree v. Palmer, 284 F.3d 1234, 1236 (11 Cir. 2002).

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

24th day of July, 2008.

UNITED STATES MAGISTRATE JUDGE

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H
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
Markeith BOYD, Petitioner-Appellant,
v.
Stephen J. T'KACH, Respondent-Appellee.
No. 01-1124.

Nov. 15, 2001.

State prisoner brought action alleging that his removal from the United States Marshal's Witness Protection Program violated due process, constituted cruel and unusual punishment, and was in retaliation for the exercise of his First Amendment rights, and that the Witness Relocation and Protection Act is unconstitutional. Motion for preliminary injunction and request to proceed in forma pauperis on appeal were denied by the United States District Court for the District of Colorado, and prisoner appealed. The Court of Appeals, Robert H. Henry, Circuit Judge, held that the district court lacked any jurisdiction to grant motion for injunctive relief seeking either prisoner's continuation in, or his return to, the Witness Protection Program.

Affirmed.

West Headnotes

|1| Attorney General 46 ⚷6

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Criminal Law 110 ⚷1222.1

110 Criminal Law
110XXVII Prevention of Crime
110k1222 Prevention and Investigation of Crime
110k1222.1 k. In General. Most Cited
Whether a witness will be protected under the witness protection program is entirely within the Attorney General's discretion. 18 U.S.C.A. § 3521(f).

|2| Injunction 212 ⚷95

212 Injunction
212II Subjects of Protection and Relief
212II(G) Personal Rights and Duties
212k95 k. Protection from Physical Injury. Most Cited Cases
The district court lacked any jurisdiction or authority to grant motion for injunctive relief seeking either movant's continuation in, or his return to, the United States Marshal's Witness Protection Program, in light of the statutory bar on judicial review. 18 U.S.C.A. § 3521(f).

***792** Before HENRY, STEPHEN H. ANDERSON, and BRISCOE, Circuit Judges.

***793** ORDER AND JUDGMENT FN*

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

ROBERT H. HENRY, Circuit Judge.

****1** After examining the briefs and appellate re-

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cord, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Petitioner Markeith Boyd, a state inmate appearing *pro se*, appeals the denial of his motion for a preliminary injunction pending resolution of his complaint in district court. This court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) to consider Boyd's appeal of the district court's denial of his motion for an injunctive relief. He also appeals the district court's denial of his request to proceed on appeal *in forma pauperis*. Because judicial review does not exist for Boyd's claims under 18 U.S.C. § 3521(f) of the Witness Relocation and Protection Act, we affirm.

I.

In 1992, Boyd, a prisoner in New York state custody, was placed in the United States Marshal's Witness Protection Program (Program) in federal correctional facilities after he was attacked in prison. In November 1999, the Attorney General terminated his participation in the Program because he had violated Program guidelines and Bureau of Prisons rules. While still incarcerated in a federal correctional facility in Colorado, Boyd brought a 28 U.S.C. § 2241 action in federal district court against the respondent, who is the Associate Director of the Office of Enforcement Operations at the Department of Justice and whose office oversees the Program. Boyd claimed that his removal from the Program violated his due process rights, constituted cruel and unusual punishment and was in retaliation for the exercise of his First Amendment rights. He also claimed that the Witness Relocation and Protection Act, 18 U.S.C. § 3521, is unconstitutional. Boyd was transferred out of the Program and returned to state custody at a state correctional facility in New York. Boyd filed a motion in district court seeking injunctive relief requiring respondent to return him to the Program pending resolution of his action. [FN1]

FN1. Boyd filed his motion seeking a preliminary injunction or temporary restraining order the same day he filed his complaint, and sought an order precluding his removal from the Program. It is clear from the record, however, that Boyd had already been removed from the Program when he filed his stay request. In later pleadings filed in support of his request for injunctive relief, Boyd stated that he sought to be reinstated to the Program. *See* R. Doc. 22, at 7.

The district court dismissed Boyd's due process and cruel and unusual punishment claims as barred from judicial review by 18 U.S.C. § 3521(f). It further ruled that Boyd's challenge to the constitutionality of § 3521 and his First Amendment retaliation claim were not barred from judicial review under § 3521(f), but were not appropriately pleaded as a § 2241 habeas action. The district court ordered Boyd to file an amended civil rights complaint providing the necessary details in support of his First Amendment retaliation claim. Boyd has recently filed an amended complaint in district court.

The district court also denied Boyd's request for injunctive relief, finding no substantial likelihood of success on the merits and no showing of irreparable ***794** harm. *See Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1065-66 (10th Cir.2001) (setting forth factors required to obtain injunctive relief).

II.

****2** In appeal No. 01-1040, Boyd appeals the district court's denial of his request for injunctive relief. In order to obtain a preliminary injunction, Boyd must establish (1) that he has a substantial likelihood of prevailing on the merits; (2) that he will suffer irreparable injury if the injunction is denied; (3) that the threatened injury to him out-

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weighs the injury that the opposing party will suffer under the injunction; and (4) that the injunction would not be adverse to the public interest. *Id.* "We review a district court's denial of a preliminary injunction for an abuse of discretion." *Id.* at 1065. "An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* (quotation omitted). "Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Id.* at 1066 (quotation omitted).

[1][2] Whether a witness will be protected under the witness protection program is entirely within the Attorney General's discretion. *See Abbott v. Petrovsky,* 717 F.2d 1191, 1193 (8th Cir.1983). "One cannot receive protection simply on demand." *Garcia v. United States,* 666 F.2d 960, 962 (5th Cir.1982). Most significantly, § 3521(f) of the Witness Relocation and Protection Act provides that "[t]he decision of the Attorney General to terminate such protection shall not be subject to judicial review." Because the district court lacks jurisdiction to review the decision to remove Boyd from the Program, and lacks authority to require his placement in the Program, it is clear that it lacked any jurisdiction or authority to grant Boyd's motion for injunctive relief seeking either his continuation in, or his return to, the Program. *See United States v. Gigante,* 187 F.3d 261, 262 (2d Cir.1999) (holding that under § 3521(f), district court is without jurisdiction to consider request to be returned to witness protection program). Although Boyd claims that the bar on judicial review under § 3521(f) is unconstitutional, he has not presented any reasoned or meritorious argument in support of this contention. Thus, the district court did not abuse its discretion in denying Boyd's motion for injunctive relief.

Boyd has filed a motion in this court seeking to expedite his appeal. In the motion, he presented evidence that he was assaulted in prison in June 2001, resulting in fractures to his cheekbone and eye socket requiring surgery. He contends this assault demonstrates that he will suffer irreparable harm if he is not returned to the Program. He contends that officials at the state correctional facility denied his request to be placed in protective custody. Petitioner does not present any evidence demonstrating that the recent assault was directly or indirectly linked to his removal from the Program, nor, as explained above, does this court have any authority to order Boyd to be placed in the Program, as he requests. Insofar as Boyd seeks an order mandating his placement in protective custody, he must seek redress from the prison officials and the court having jurisdiction over the state prison in which he now resides.

III.

****3** In his related appeal No. 01-1124, Boyd appeals the district court's denial of his request to proceed *in forma pauperis* in appeal No. 01-1040. The district court certified in writing that Boyd's appeal was not taken in good faith because he had not shown a reasoned, nonfrivolous argument on the law or the facts in support of the ***795** issues raised on appeal. *See* 28 U.S.C. § 1915(a)(3); Fed. R.App. P. 24(a)(3). In his opening brief, Boyd does not raise any claim of error with respect to the district court's denial of his request to proceed *in forma pauperis.* Because the district court applied the correct legal standards and we find no error with its finding that Boyd's appeal was not taken in good faith, we affirm.

Accordingly, Boyd's request to proceed *in forma pauperis* is DENIED; the district court's order dated December 27, 2000 denying Boyd's motion for preliminary injunction or temporary restraining order and its March 7, 2001 order denying Boyd's request to proceed *in forma pauperis* are AFFIRMED; and Boyd's motion to expedite his appeals is DENIED as moot. The mandate shall issue forthwith.

C.A.10 (Colo.),2001.
Boyd v. T'Kach
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