No. 17-2427

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MAURICE L. WALLACE
Plaintiff-Appellant

v.

JOHN BALDWIN, ET AL.
Defendants-Appellees.

On Appeal from the
United States District Court for the Southern District of Illinois
Civil Action No. 17-cv-0576-DRH
Honorable David R. Herndon

Brief and Short Appendix of Plaintiff-Appellant Maurice L. Wallace

Tom Kayes
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
312.853.7000
(counsel of record)

Jeffrey T. Green
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
202.736.8291

Daniel M. Greenfield
MACARTHUR JUSTICE CENTER
Northwestern University Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
312.503.8538

Counsel for Maurice L. Wallace

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2427

Short Caption: Maurice Wallace v. John Baldwin, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Maurice Wallace

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

MacArthur Justice Center at Northwestern University Pritzker School of Law

Sidley Austin LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: s/ Tom Kayes Date: 1/8/18

Attorney's Printed Name: Tom Kayes

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

Address: One South Dearborn, Chicago, Illinois 60603

Phone Number: 312.863.3293 Fax Number: 312.853.7036

E-Mail Address: tkayes@sidley.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2427

Short Caption: Maurice Wallace v. John Baldwin, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Maurice Wallace

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

MacArthur Justice Center at Northwestern University Pritzker School of Law

Sidley Austin LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: s/ Jeffrey T. Green Date: 1/8/2018

Attorney's Printed Name: Jeffrey T. Green

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: 1501 K Street, N.W.
Washington, D.C. 20005

Phone Number: 202.736.8291 Fax Number: 202.736.8711

E-Mail Address: jgreen@sidley.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2427

Short Caption: Maurice Wallace v. John Baldwin, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Maurice Wallace

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

MacArthur Justice Center at Northwestern University Pritzker School of Law

Sidley Austin LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: s/ Daniel M. Greenfield Date: 1/8/2018

Attorney's Printed Name: Daniel M. Greenfield

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: 375 East Chicago Avenue
Chicago, IL 60611

Phone Number: 312.503.8538 Fax Number: _____

E-Mail Address: daniel-greenfield@law.northwestern.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

STATEMENT CONCERNING ORAL ARGUMENT

Counsel for Appellant Maurice Wallace believes that oral argument would assist the Court and therefore respectfully requests oral argument. This case presents complex issues, including those involving the intersection of constitutional rights and the Prison Litigation Reform Act. Fed. R. App. P. 34(a); Seventh Cir. R. 34(f).

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under 28 U.S.C. § 1291. Orders denying prisoners leave to proceed *in forma pauperis* become appealable under § 1291 if the prisoner later fails to pay the filing fee and suffers dismissal as a result. *See Sanders v. Melvin*, 873 F.3d 957, 959 (7th Cir. 2017) ("He did not pay, the suit was dismissed, and he appeals from that final decision."); *see also Turley v. Gaetz*, 625 F.3d 1005, 1007 n.3 (7th Cir. 2010); *Davis v. Advocate Health Ctr. Patient Care Express*, 523 F.3d 681, 683 (7th Cir. 2008). Here, the district court denied Maurice Wallace leave to proceed *in forma pauperis* on July 5, 2017. R. 8.[1] The order indicated that Wallace's entire case would be dismissed unless he paid the filing fee within 30 days. *Id.* Thirty days passed, Wallace did not pay, and the order became appealable. *Sanders*, 873 F.3d at 959.

Wallace timely filed his notice of appeal on July 14, 2017. A. 224. It is immaterial that Wallace filed his notice before the 30-days he was given to pay the filing fee elapsed. *Shott v. Katz*, 829 F.3d 494, 496 (7th Cir. 2016); *see also* Fed. R. App. P. 4(a)(2) (allowing for notices of appeal filed after entry of a dispositive order but before final judgment is entered).

The district court had subject-matter jurisdiction over this case under 28 U.S.C. § 1331 because Wallace sued under 42 U.S.C. § 1983 to redress violations of

[1]"R." refers to citations to pages of the required short appendix. "A." refers to citations to the pages of the separately bound appendix.

rights secured by the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE ISSUES

This appeal raises three issues. This Court should vacate and remand for further proceedings if Wallace prevails on any of them.

First, a prisoner who has already had three cases dismissed as frivolous, malicious, or for failure to state a claim may not proceed *in forma pauperis* in later cases. This so-called three-strikes rule has an exception for prisoners under imminent danger of serious physical injury. Researchers, courts, and even prison administrators recognize that prolonged solitary confinement dramatically increases the risk that prisoners will hurt or kill themselves. Maurice Wallace has been in prolonged solitary confinement. The first issue is whether that prolonged solitary confinement places Wallace under imminent danger of serious physical injury.

Second, serious mental illness and a history of self-harm both increase the likelihood that solitary confinement will induce self-harm. Here, prison officials have designated Wallace as seriously mentally ill, and he has tried to kill himself at least three times in the *eleven years* he has been in solitary confinement. If the Court decides that solitary confinement alone does not place Wallace in imminent danger, it should then consider whether it does so when amplified by these additional risk factors.

Third, the three-strikes rule is no barrier to a prisoner with only two strikes. The statutory text permits courts to assess a strike only against a prisoner who

"brought an action … that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." 28 U.S.C. § 1915(g). Only two of Wallace's actions have been dismissed for those reasons. For a third strike, the district court relied on an order denying a motion to intervene. This Court must therefore decide whether an order denying a motion to intervene is the same as "an action … that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." *Id.*

STATEMENT OF THE CASE

I. The Illinois Department of Corrections Places Wallace in Solitary Confinement Almost Immediately After He Enters Its Custody

Maurice Wallace entered the custody of the Illinois Department of Corrections in October 2006 to begin serving a sentence of life without possibility of parole. A. 35. In 2007, Wallace received a ticket for a staff assault and weapons violation. A. 36. In response, the Department placed Wallace in "indeterminate" solitary confinement. A. 17, 36. He has been there ever since. A. 17. Now incarcerated at Menard Correctional Center, Wallace recently marked his eleventh anniversary in solitary confinement. A. 29.

Wallace describes solitary confinement as "extreme isolation." A. 13-14. He is confined to an (often windowless) cell 22-24 hours per day. A. 13, 15, 37. Day after day he spends alone in less than 50 square feet, dimensions so confining that Illinois law no longer permits construction of cells that size. A. 15-16 (citing 730 ILCS 5/3-7-3). Wallace's cell has a solid steel door. A. 37-38. He describes living in solitary as "akin to being sealed inside a coffin[:] dark, hot, and often indu[cing] claustrophobia." *Id.* He is "deprived of meaningful social interaction and any ability to engage in any

rehabilitative or productive physical or mental activity." *Id.* Frequently, he is deprived of exercise. *Id.* His ability to worship is restricted. A. 37. The Department does not permit him to work so he cannot earn commissary money. A. 36-37.

II. Despite His Serious Mental Illness and History of Suicide Attempts, Wallace Remains in Solitary

The Department has kept Wallace in this "extreme isolation" for over eleven years despite designating him as seriously mentally ill or "SMI." His prison medical records reflect this designation. *E.g.*, A. 137, 158, 160, 171. A Department doctor also diagnosed Wallace with post-traumatic stress disorder based on childhood trauma.[2] A. 129.

In addition to the designations and diagnoses, Wallace's medical records reflect the serious symptoms of his mental illness. A. 124-28. Wallace hears voices and hallucinates. "He is paranoid about being assaulted by others." A. 129. Doctors give him depression medication. A. 181. Notes about panic attacks and anxiety appear in almost every record. A. 130-31, 137, 143, 147, 158, 161, 168. One of Wallace's anxieties is that his prolonged isolation has permanently eroded his ability to socialize normally. A. 38, 129.

---

[2]Initially raised in a stable environment by his maternal grandmother, he returned to his biological mother's custody after his grandmother moved away. A. 122. A drug addict, Wallace's mother did not provide a stable environment. A. 122. A neighbor sexually abused Wallace when he was 5 years old. *Id.* And from age 10 on Wallace was beaten by his mother, her boyfriends, and her drug dealers. *Id.*

Wallace committed his first crime, theft, at age 11. *Id.* At 13 he began using drugs. *Id.* He also began hearing voices and experiencing hallucinations at about the same time. A. 128. Wallace's housing situation in his teens was suboptimal. He spent time at the Cook County Juvenile Detention Center. A. 120. He was occasionally homeless. A. 123.

Consistent with the picture painted by Wallace's records, prison officials recognize that Wallace poses a risk to himself. They have repeatedly put Wallace under special observation. A. 150-57, 165-67. On these occasions, guards must check his cell frequently to make sure he has not hurt himself. *Id.*

Wallace's history of self-harm justifies these precautions. Wallace has attempted suicide at least five times—three times while in solitary confinement. A. 121, 169. Most recently, he tried to kill himself in October or November 2016 while in solitary confinement. *Id.* Wallace also tried to kill himself in solitary confinement in 2008 and 2010. A. 121. In one attempt, Wallace "put a sheet around [his] neck and threatened to jump." *Id.* Solitary confinement has only "intensified and significantly exaggerated" his suicidal ideations. A. 30.

The Department has kept Wallace in solitary confinement despite its knowledge of Wallace's profound mental illness and recent history of attempted suicide and despite Wallace's repeated requests to get out. A. 36. Wallace has submitted "several hundred written requests" seeking to learn when he would be released from solitary confinement. A. 31. His most recent request was rebuffed in January 2017. A. 186. The paperwork said only that it had "been determined that [Wallace's] indeterminate segregation [] be continued" and that his "placement w[ould] be reviewed again in 180 days." *Id.* The Department did not inform Wallace how he could end his indefinite solitary confinement. *Id.*

III. Wallace Sues to Get Out of Solitary but His Case is Dismissed Under the Three-Strikes Rule

A few months after the Department decided that Wallace's "indeterminate segregation" would continue, Wallace sued to get out. A. 10. He claimed that his continued placement in solitary confinement violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. A. 16.

The consequences of long-term solitary confinement, Wallace alleged, are "devastating [and] permanent." A. 21. Wallace alleged that solitary confinement "dramatically increases the risk of … suicide [and] self-harm." A. 19, 41-42. And he explained that these risks are even greater for those, like him, who suffer from mental illness. A. 21.

Wallace claims that the Department officials responsible for his solitary confinement are deliberately indifferent to his safety because they are aware of the risks that solitary confinement pose to prisoners with serious mental illness like him and yet they keep him in solitary anyway. A. 14-15, 43. The Department's own data "shows almost a tenfold increase in the incidence of suicide for prisoners in extreme isolation versus prisoners in the general population." A. 19.

Wallace timely filed a motion to proceed *in forma pauperis*. A. 50. The motion explained that Wallace was "unable to pay the costs, fees, and expenses of this action" because he had "no occupation, [was] unemployed, and due to [his] ongoing solitary-confinement, [he was] not able to otherwise generate income." *Id.*

The district court denied Wallace leave to proceed *in forma pauperis*. R. 4-9. The court began with the proposition that "a prisoner cannot create the imminent

danger required" to invoke the exception to the three-strikes rule. R. 5 (quoting *Widmer v. Butler*, 2014 WL 3932519 (S.D. Ill. Aug. 12, 2014)). (This Court rejected that proposition a few months later. *Sanders*, 873 F.3d at 960 ("[T]hat the would-be plaintiff inflicts the injury himself, and does so because of mental problems, does not make the harm less 'physical' or less 'serious.'")). From there, the district court concluded that Wallace's "allegations[] regarding the PTSD symptoms he experiences and the potential psychological, social, and physical harms that those in segregation may face [do not] satisfy the relevant standard." R. 6. Nor did Wallace's "suicidal ideation[s]" suffice. R. 7.

Having denied Wallace's motion, the court ordered Wallace to "pay the full filing fee of $400.00 for this action … on or before August 4, 2017" and warned Wallace that if he were to "fail[] to comply with this Order in the time allotted by the Court, this case will be dismissed." R. 8. Wallace could not pay, his case was dismissed, and now he appeals.

SUMMARY OF THE ARGUMENT

Filing federal lawsuits isn't free. Plaintiffs typically pay a filing fee of several hundred dollars. Those who can show that they can't afford the fee are allowed to proceed without prepaying. This is what it means to proceed *in forma pauperis.* Prisoners who proceed *in forma pauperis* must still pay the whole fee, but may do so over time in installments. A prisoner who has already had three cases dismissed as frivolous, malicious, or for failure to state a claim, however, loses the right to pay over time because of the so-called three-strikes rule. Prisoners with three strikes and no

money can only proceed *in forma pauperis* if under imminent danger of serious physical injury. This appeal is about the application of the three-strikes rule and its imminent-danger exception to a seriously mentally ill prisoner in solitary confinement.

The Illinois Department of Corrections has kept Maurice Wallace in solitary confinement for over eleven years. He recently sued the Department officials responsible for his placement, challenging it as a violation of his constitutional rights. The district court found that Wallace had three strikes and that he was not under imminent danger of serious physical injury. It denied Wallace's motion for leave to proceed *in forma pauperis* on that basis and dismissed his case when he failed to pay the full fee. This Court should vacate and remand for any of three reasons.

First, solitary confinement puts Wallace under imminent danger of serious physical injury because of the risk it will compel him to commit suicide or other self-harm. Social scientists, courts, and increasingly even prison administrators recognize that prolonged solitary confinement dramatically increases the risk that the confined prisoner will try to hurt or kill themselves. Prolonged solitary confinement therefore presents an imminent danger of serious physical injury. This Court has long required a reasonable construction of the imminent-danger exception to ensure that it gives prisoners a meaningful opportunity to protect themselves from foreseeable harm. The

danger posed by solitary confinement is imminent under this reasonable construction.

Second, Wallace's history of five suicide attempts and his serious mental illness increase the risk that solitary confinement will compel him to hurt or kill himself. Numerous studies confirm that solitary confinement presents an extreme danger to the mentally ill. Many jail and prison systems have barred the use of solitary confinement on the mentally ill for this reason. Mental illness must therefore be understood as increasing the danger of self-harm posed by solitary confinement, making it more imminent. And so should a history of past suicide attempts. This Court found three months ago that a prisoner's allegations of past self-harm supported his allegation of imminent danger from solitary confinement. *Sanders*, 873 F.3d at 960. Accordingly, even if this Court is unconvinced that solitary confinement alone places Wallace in imminent danger, it should nonetheless find that it does so in combination with his mental illness and history of self-harm.

Finally, this Court should vacate and remand even if it finds that Wallace is not under imminent danger at all. Wallace need only rely on the imminent-danger exception to proceed *in forma pauperis* if he has three or more strikes. He doesn't. The district court miscounted by treating *Westefer v. Snyder,* No. 00-cv-00162 (S.D. Ill. Feb. 25, 2011), as Wallace's third strike. The statutory text permits courts to assess a strike only if a prisoner's "action or appeal" is "dismissed." *Westefer* did not dismiss any action or appeal; it denied Wallace's motion to intervene.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's order denying Wallace permission to proceed *in forma pauperis. Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003) (interpretation of imminent-danger exception reviewed *de novo*); *Turley*, 625 F.3d at 1008-09 (interpretation of what counts as a strike reviewed *de novo*). Further, this Court must liberally construe Wallace's allegations about imminent danger and accept them as true. *Ciarpaglini*, 352 F.3d at 330. So construed, Wallace's allegations of imminent danger need only be plausible. *Sanders*, 873 F.3d at 961.

ARGUMENT

I. Maurice Wallace May Proceed *In Forma Pauperis* Because He is Under Imminent Danger of Serious Physical Injury

A. A prisoner with three strikes may proceed *in forma pauperis* if under imminent danger of serious physical injury

Filing a federal lawsuit usually requires paying several hundred dollars as a filing fee. 28 U.S.C. § 1914(a) (setting fee at $350); *Sanders* , 873 F.3d at 959 (noting fee of $400). But prisoners who cannot afford to pay the fee up front can still sue. 28 U.S.C. § 1915(a). They must still pay eventually, but may do so over time in installments calibrated to their means. 28 U.S.C. § 1915(a)(1) & (h); *see also Lewis v. Sullivan*, 279 F.3d 526, 529 (7th Cir. 2002) ("[T]he line drawn by § 1915(g) concerns only the timing of payment."). For prisoners, this is what it means to proceed *in forma pauperis*.

Prisoners' ability to proceed *in forma pauperis* is not unlimited. If the prisoner has had three or more prior cases "dismissed on the grounds that [they were]

frivolous, malicious, or fail[ed] to state a claim," then the prisoner will not be allowed to proceed *in forma pauperis*. 28 U.S.C. § 1915(g). This limitation has "come to be called the three-strikes rule." *Lewis*, 279 F.3d at 527. Prisoners with three strikes must pay the filing fee in full and up front. If a prisoner with three strikes sues and then fails to pay up front, his or her case will be dismissed. *Id.* at 528.

The only way for a penniless, struck-out prisoner to sue in federal court is via the three-strikes rule's exception for prisoners "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). "When a threat or prison condition is real and proximate, and when the potential consequence is 'serious physical injury,' then the courthouse doors are open even to those who have filed three frivolous suits and do not have a penny to their name." *Lewis*, 279 F.3d at 531.

B. Maurice Wallace is under imminent danger of serious physical injury because he is in solitary confinement

Solitary confinement places prisoners like Wallace in imminent danger of serious physical injury by increasing their risk of self-harm. Prisoners in solitary confinement attempt and commit suicide, mutilate themselves, and engage in other forms of serious self-harm far more often than do prisoners in general population cells. *E.g.*, Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. OF PUBLIC HEALTH 442, 442-47 (2014) (hereinafter "*Risk of Self-Harm*"). And Wallace alleges that solitary confinement places his life at risk for this reason. *See* A. 41-42. Solitary confinement therefore makes the danger of self-harm "imminent." *See id.*; *see also Sanders*, 873 F.3d at 960. And suicide, self-mutilation, and the other kinds of self-harm associated with solitary confinement constitute

serious physical injury. *See id.* ("[T]hat the would-be plaintiff inflicts the injury himself … does not make the harm less 'physical' or less 'serious.'"). Maurice Wallace is therefore in imminent danger of serious physical injury solely because he is in solitary confinement.

Research on solitary confinement supports this conclusion. Studies show that solitary confinement dramatically increases the incidence of self-harm. As one recent study put it: "[We] found that acts of self-harm were strongly associated with assignment of inmates to solitary confinement." *Risk of Self-Harm* at 445. This study was not small. It tracked 134,188 people who were incarcerated 244,699 separate times during the study period. *Id.* at 444 (Some were incarcerated, released, and then incarcerated again). Of the 244,699 separate periods of incarceration, only 7.3% included any solitary confinement. *Id.* Yet this small percentage of incarcerations nonetheless accounted for the lion's share of self-harm: "53.3% of acts of self-harm and 45.0% of acts of potentially fatal self-harm occurred within this group." *Id.* at 442. Detainees that spent time in solitary were simply much more likely to harm themselves than those who did not. *Id.* at 444 ("Inmates ever assigned to solitary confinement were 3.2 times as likely to commit an act of self-harm per 1000 days at some time during their incarceration as those never assigned to solitary."). These findings strongly suggest that solitary confinement itself puts prisoners in imminent danger.

Other studies consistently report similar results. For example, a large-scale study of completed suicides in California found that "46% of completed suicides

occurred in single cells in administrative segregation or secure housing units and 12% occurred in mental health crisis beds." Raymond F. Patterson & Kerry Hughes, *Review of Completed Suicides in the California Department of Corrections and Rehabilitation, 1999 to 2004*, 59 PSYCHIATRIC SERVICES 676, 678 (2008). The authors concluded that "the conditions of deprivation in locked units and higher-security housing were a common stressor shared by many of the prisoners who committed suicide." *Id.*; *see also, e.g.,* Expert Report of Terry A. Kupers, M.D., M.S.P., in Eastern Mississippi Correctional Facility Litigation (June 16, 2014) at 12 ("Recent research confirms that of all successful suicides that occur in a correctional system, approximately fifty percent involve the 3 to 8 percent of prisoners who are in some form of isolated confinement at any given time.") (collecting studies) available at https://www.aclu.org/sites/default/files/assets/expert_report_of_terrry_kupers_with_table_of_contents.pdf; Gibbons and Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J. OF L. AND POL'Y 385, at 469 (2006) ("Half the documented incidents of self-mutilation in 1985 [in Virginia prisons] took place in the segregation units.") (citing Haney, Craig, and Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. OF L. & SOC. CHANGE 476, 477-570 (1997)).

Even the Illinois Department of Corrections recognizes the danger of solitary confinement. In May 2010, the Department's then-director signed a memorandum of understanding asking the Vera Institute to "assess the use of segregation units in the

IDOC and assist the Department in reducing its reliance on these types of housing units." A. 97. The Department acknowledged that it wished to reduce solitary confinement because "long periods of time in isolating conditions may cause serious and sometimes lasting deterioration of prisoners' mental and physical health[,] lead[ing] to *increased violence* within prison facilities and greater recidivism rates once prisoners are released into the community." *Id.* (emphasis added).

The case law further supports the link between solitary confinement and self-harm. The Supreme Court first observed the connection in 1890: "A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide … ." *In re Medley*, 134 U.S. 160, 168 (1890). More recently, Justice Kennedy lamented that solitary confinement "common[ly]" induces a variety of physical and psychological injuries, including specifically "self-mutilation, and suicidal thoughts and behaviors." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (citing Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325 (2006)); *see also, e.g.*, *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 567-68 (3d Cir. 2017) (noting that "[p]hysical harm" can result from solitary confinement, including "high rates of suicide and self-mutilation"). This Court considered just months ago a prisoner held in solitary for eight years who "twice tried to commit suicide and at least once engaged in self-mutilation," finding that he had plausibly alleged that he was in imminent danger of further self-harm. *Sanders*, 873 F.3d at 960; *see also Settle v. Phillips*, 2016 WL

3080810, at *2 (E.D. Tenn. May 31, 2016) (allowing prisoner to proceed under imminent-danger exception based on solitary confinement).

First-hand accounts of horrific self-harm in solitary are no less common in the media than they are in the pages of the Federal Reporter or United States Reports. This recent example of a first-hand account of solitary confinement reported in the media is typically gruesome: "There was a guy who was there because he'd smoked marijuana while he was on probation; he cut off part of one his testicles, and he also cut off some of his fingers. Another guy stood on top of the cement bunk and dove headfirst into the toilet, over and over, until he crushed his skull in." Nathaniel Penn, *Buried Alive: Stories From Inside Solitary Confinement*, GQ (Mar. 2, 2017) available at https://www.gq.com/story/buried-alive-solitary-confinement. That studies, judicial decisions, news reports, and even the Department itself all recognize the association between solitary confinement and serious self-harm supports a finding that solitary confinement makes self-harm imminent.

So do this Court's past decisions. This Court recognizes that the imminent-danger exception to the three-strikes rule "can serve its role as an escape hatch for genuine emergencies only if [imminence is] understood reasonably." *Lewis*, 279 F.3d at 531. A reasonable understanding is one that preserves for prisoners a genuine opportunity to prevent serious physical harm by filing suit. *Id.* Other circuits agree: "[I]nmates ought to be able to complain about 'unsafe, life-threatening conditions in their prison' without waiting for something to happen to them." *Brown v. Johnson*, 387 F.3d 1344, 1349 (11th Cir. 2004) (quoting *Gibbs v. Cross*, 160 F.3d 962, 965-66 (3d

Cir. 1998)); *see also Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 587 (6th Cir. 2013) ("We reject the notion that the inclusion of the word 'imminent' in § 1915(g) allows us to grant IFP status only after a plaintiff's condition has deteriorated such that the next instance of maltreatment would result in a serious physical injury.") This Court cannot preserve that opportunity for prisoners in solitary confinement without holding that solitary confinement makes self-harm imminent.

The nature of self-harm compels this conclusion. Suicide and self-mutilation are not rational, predictable acts. It would therefore be unreasonable to expect a prisoner in solitary confinement to anticipate precisely when the pressure will become too much. Construing imminence to require impossible insight like that would render the exception "a cruel joke on prisoners." *Lewis*, 279 F.3d at 531. Requiring prisoners to have a history of self-harm before deeming future self-harm imminent is unreasonable for a similar reason—even a first suicide attempt can be successful. To ensure that prisoners can protect themselves, this Court must hold that the danger posed by solitary confinement is imminent. And, on that basis, this Court should vacate and remand for further proceedings because Wallace is in solitary confinement.

C. Alternatively, Maurice Wallace is under imminent danger of serious physical injury because of his serious mental illness, five suicide attempts, and prolonged solitary confinement

That Maurice Wallace is in solitary confinement at all makes the danger that he will kill or harm himself imminent and therefore qualifies him for the exception to the three-strikes rule. Two additional factors only strengthen his case. They are

Wallace's serious mental illness and his five past suicide attempts. The same categories of evidence that support the link between solitary confinement and self-harm likewise support that these factors increase a prisoner's risk. So, if this Court is unconvinced that solitary confinement alone creates imminent danger, then it should nonetheless vacate and remand Wallace's case based on these two factors.

1. Wallace's serious mental illness increases the likelihood that he will harm himself

Solitary confinement presents an especially heightened risk of self-harm to those with serious mental illness. *E.g.*, Terry A. Kupers, *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment's Sake?*, THE ROUTLEDGE HANDBOOK FOR INTERNATIONAL CRIME & JUSTICE STUDIES 213 (Bruce A. Arrigo & Heather Y. Bersot eds., 2014) ("It is stunningly clear that for prisoners prone to serious mental illness, time served in isolation and idleness exacerbates their mental illness and too often results in suicide."); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 38-39 (2012) (citing studies).[3] As a result, departments of

[3] *See also* Position Statement on Segregation of Prisoners with Mental Illness, AM. PSYCHIATRIC ASS'N, at 35 (2012), http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf (noting that the "[p]rolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential harm to such inmates."); NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE, *2016 Position Statement*, available at, https://www.ncchc.org/solitary-confinement (noting that mentally ill prisoners are particularly vulnerable to the effects of solitary confinement and therefore should not be subjected to it for *any* length of time); *Risk of Self-Harm* at 447 (noting that research "support[s] the need to reconsider the use of solitary confinement … especially for those with SMI [i.e., serious mental illness]").

corrections and legislatures alike are abolishing or curtailing the use of solitary confinement for mentally ill prisoners like Wallace. *E.g.,* U.S. DEP'T OF JUSTICE FINAL REPORT, REPORT & RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, at 46 (2006), available at https://www.justice.gov/archives/dag/file/815551/download (noting that the Federal Bureau of Prisons is curtailing the solitary confinement of mentally ill prisoners); *Risk of Self-Harm* at 447 ("NYC Department of Correction … ha[s] recently announced a plan to eliminate the practice of solitary confinement for inmates with SMI."); A. 21 (citing Raemisch & Wasko, *Open the Door: Segregation Reforms in Colorado,* COLO. DEP'T OF CORR. at 5, (2015)) ("In December of 2013, [Colorado] DOC aggressively stopped the admission of offenders with serious mental illness in this most isolated environment … . By January of 2014, all offenders designated as having serious mental illness were evaluated and moved out of administrative segregation … .")); Hager & Rich, *Shifting Away from Solitary*, THE MARSHALL PROJECT (Dec. 23, 2014) available at https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary (noting that numerous states have abolished or now strictly limit the solitary confinement of mentally ill inmates).

Likewise, this Court and at least one other federal court recognize that serious mental illness can create an imminent danger of self-harm for prisoners in solitary confinement. *Sanders*, 873 F.3d at 960 (accepting inmates argument that "his mental condition … disposes him to self-harm"); *Settle*, 2016 WL 3080810, at *2 (holding that

prisoner adequately alleged an imminent danger of serious physical injury based on the risk of self-harm solitary confinement impose upon those with mental illness).

These decisions, studies, and government actions show that solitary confinement is too dangerous for those with serious mental illness. Yet the Department continues to house Wallace in solitary confinement despite characterizing him as seriously mentally ill. *E.g.*, A. 137, 158, 160, 171. This Court should therefore find that Wallace's mental illness makes the danger that he will harm himself even more imminent than it already is.

2. Wallace's past suicide attempts suggest another attempt is imminent

In *Sanders*, this Court held that the prisoners' two past suicide attempts and one past act of self-mutilation "len[t] support to his allegation that a future attempt is 'imminent'" within the meaning of the imminent-danger exception. *See Sanders*, 873 F.3d at 960. The same goes here. Maurice Wallace has tried to end his life five times. A. 169. This includes at least three attempts while in solitary confinement and one as recently as fall 2016. *Id.*; A. 121. Wallace's attempts "lend[] support" to his argument that future attempts are imminent. *See Sanders*, 873 F.3d at 960.

3. Given his mental illness, history of self-harm, and prolonged solitary confinement, Wallace's situation is materially identical to that of the prisoner in *Sanders v. Melvin*

In *Sanders*, a prisoner with three past acts of self-harm and 8 years in solitary confinement sued to challenge the conditions of his confinement. *Id.* at 959-62. He alleged that his solitary confinement, serious mental illness, and lack of access to psychiatric care made it likely that he would hurt himself again. *Id.* Because he had

three-strikes, the district court denied his motion to proceed *in forma pauperis* and dismissed his case when he failed to pay the filing fee. *Id.*

This Court reversed. *Id.* The prisoner's "history, coupled with the prison's diagnosis of his [mental] condition, make his allegations plausible." *Id.* A prisoner plausibly alleges an imminent danger of serious physical injury if the prisoner alleges lengthy solitary confinement, serious mental illness, and a history of self-harm. *Id.* Wallace has done precisely that: he has been in solitary confinement for three more years than Sanders; like Sanders, the Department designated him seriously mentally ill; and, like Sanders, he has attempted to kill himself multiple times. Accordingly, *Sanders* is materially identical to this case and should control the result here.

Sanders should control despite several notations in Wallace's medical records indicating that he was not contemplating suicide at specific times. *See*, *e.g.*, A. 178 (describing current "Estimate of Suicide Risk" as "Low"). Suicidal ideations are intermittent but can become overwhelming at any time. *E.g.,* NAT'L INST. OF MENTAL HEALTH, *Suicide Prevention,* available at https://www.nimh.nih.gov/health/topics/suicide-prevention/index.shtml (describing a prior suicide attempt as a "main risk factor[]" for future suicide attempts). Thus, Wallace remains in imminent danger of serious physical injury.

Moreover, relying on the notations to hold against Wallace would be inconsistent with *Sanders*. There, this Court held that the prisoner's burden at this stage is merely to plausibly plead an imminent danger of serious physical harm. 873

F.3d at 962. This Court therefore cannot weigh sporadic notations against Wallace's history of suicide attempts. *Id.*

II. Maurice Wallace May Proceed *In Forma Pauperis* Because He Only Has Two Strikes

The three-strikes rule only applies to prisoners with three or more strikes. Wallace has just two. The district court denied his motion to proceed *in forma pauperis* under the rule based on a miscounted strike. Although it correctly tallied *Wallace v. Powers*, No. 09-cv-00224 (S.D. Ill. Nov. 17, 2009), and *Wallace v. Hallam*, No. 09-cv-00418 (S.D. Ill. Feb. 23, 2010), as strikes, it was mistaken to treat *Westefer v. Snyder*, No. 00-cv-00162 (S.D. Ill. Feb. 25, 2011), as one.[4] R. 4. A prisoner only incurs a strike if the prisoner's "action or appeal [is] dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). *Westefer* did not dismiss any "action or appeal" brought by Wallace; it denied his motion to intervene. It cannot therefore count as a strike.

There is no textually defensible way to characterize *Westefer* as the dismissal of an action or appeal. In *Westefer*, a class of prisoners sued Department officials to challenge policies for transferring prisoners to the now-closed Tamms facility. *Westefer* Order at 1-2.[5] Wallace was an absent member of that class. He filed a one-page "Affidavit" and a motion for a temporary restraining order complaining about

[4]The district court did not rely on or mention *Wallace v. Parrish*, No. 09-cv-00362 (S.D. Ill. Mar. 17, 2010 & Apr. 22, 2010), as a possible strike. *Parrish* refers to itself as a strike but, as explained below, it is not.

[5]"*Westefer* Order" refers to docket entry 610, filed on February 25, 2011 in case number is 00-cv-00162 in the Southern District of Illinois.

conditions at Tamms. *Id.* at 7-9. The defendants moved to strike Wallace's papers. *Id.* at 1. The court construed Wallace's filings as a motion to intervene, denied the motion so construed, and granted the defendants' motion to strike. *Id.* at 1, 11. In its order, the court assessed a strike against Wallace because it reasoned that the denial of a motion to intervene is not "functional[ly] differen[t]" than the dismissal of an action.

But a construction of the statutory text based on functional equivalence is only permissible if the statutory text allows it. *See Turley*, 625 F.3d at 1008-09. Here the text does not. For starters, denying and dismissing are two different things. Nothing gets dismissed when a motion for intervention is denied. The text also requires that an "action" be dismissed. When a motion to intervene is denied the underlying action continues. The denial of a motion to intervene therefore cannot be a strike.

Another reason that the denial of a motion to intervene cannot be a strike is that intervention is procedural and strikes are concerned with the merits. By limiting strikes to "actions or appeals" that fail as "frivolous, malicious, or [for] fail[ure] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), the statute limits strikes to claims lacking merit. Intervention is not so limited. It is unconcerned with the merit of the proposed intervener's claims. *E.g.*, Fed. R. Civ. P. 24. Thus, a proposed intervener without a statutory "right to intervene" or a claim "that shares with the main action a common question of law or fact" will likely be denied intervention even if she seeks to bring a winning claim. *Id.* The denial of intervention therefore is not equivalent to a finding of lack of merit, which is the *sine qua non* of a strike.

It makes no difference that treating the denial of a motion to intervene as a strike could, like the three-strikes rule, reduce prisoner litigation. "It is not a judge's job to add to or otherwise re-mold statutory text to try to meet a statute's perceived policy objectives. Instead, we must apply the statute as written." *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1152 (D.C. Cir. 2017) (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562 (2011)) (rejecting purpose-driven interpretation of the three-strikes rule). Because the text of the rule requires the dismissal of an action rather than the denial of a motion, *Westefer* cannot count as a strike.

Any concern that refusing to treat denials of motions to intervene as strikes will hamstring the three-strike rule is misplaced. Few decisions speak of prisoners seeking to avoid the three-strikes rule by filing improper motions to intervene. To counsels' knowledge, no circuit has addressed the question. And district courts have many ways to turn opportunistic attempts at intervention into proper strikes. They can grant intervention and then dismiss the complaint-in-intervention as frivolous, malicious, or for failure to state a claim or they can direct court clerks to docket the complaints-in-intervention as separate actions. Intervention presents no occasion to stretch the statutory text.

This argument could end here except that *Westefer* is not the only mistaken strike against Wallace. *Wallace v. Parrish*, No. 09-cv-00362 (S.D. Ill.) is another. There, the district court dismissed some of Wallace's claims for failure to state a claim but allowed others to go forward to summary judgment. Orders, *Wallace v. Parrish*, No. 09-cv-00362 (S.D. Ill. Mar. 17, 2010 & Apr. 22, 2010). The *Parrish* court held it

must assess a strike if any of the multiple claims within a prisoner's action were frivolous, malicious, or failed to state a claim. This Court disagrees: "[W]e believe that the obvious reading of the statute is that a strike is incurred for an action dismissed *in its entirety* on one or more of the three enumerated grounds." *Turley*, 625 F.3d at 1008-09. *Parrish* is therefore no more a strike than *Westefer*.

That the *Westefer* and *Parrish* district courts labelled their own decisions as strikes likewise changes nothing. *Fourstar*, 875 F.3d at 1153. A district court's characterization of its actions as a strike does not bind future decisions. "District courts must *independently* evaluate prisoners' prior dismissals to determine whether there are three strikes." *Id.* Since *Westefer* and *Parrish* are not actually strikes, they do not count toward Wallace's total.

And that leaves him with just two: *Hallam* and *Powers.* Counsel has reviewed Wallace's litigation history and has found no others. Since Wallace was dismissed under the three-strikes rule but has only two strikes, this Court should vacate and remand for further proceedings even if it does not find that Wallace is under imminent danger of serious physical injury.

CONCLUSION

This Court should vacate and remand with instructions to permit Wallace to litigate his complaint *in forma pauperis*.

Dated: January 8, 2017 Respectfully submitted,

/s/ Tom Kayes
Tom Kayes
SIDLEY AUSTIN LLP

One South Dearborn
Chicago, Illinois 60603
t: 312.853.3293
f: 312.853.7036
tkayes@sidley.com

Counsel of Record for Maurice Wallace

Jeffrey T. Green
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
t: 202.736.8291
f: 202.736.8711

Daniel M. Greenfield
MACARTHUR JUSTICE CENTER
Northwestern University
Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
t. 312.503.8538
daniel-greenfield@law.northwestern.edu

Counsel for Maurice Wallace

CERTIFICATES OF COMPLIANCE

Rule 30(d) Compliance

I certify under Rule 30(d) that all materials required by Circuit Rule 30(a) and (b) are included in the appendix.

Rule 32(g) Compliance

I certify that this brief complies with the type-volume limitations of Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Circuit Rule 32. This brief is typeset in 12-point Century with footnotes in 11-point Century. This brief contains 6,728 words not counting those sections exempt from counting under Rule 32(f). This certification is based on the word count function in Microsoft Word.

Dated: January 8, 2017 Respectfully submitted,

/s/ Tom Kayes
Tom Kayes
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
t: 312.853.3293
f: 312.853.7036
tkayes@sidley.com

Counsel of Record for Maurice Wallace

TABLE OF CONTENTS OF THE REQUIRED SHORT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MAURICE L. WALLACE, #R10764,

Plaintiff,

vs. **Case No. 17-cv-0576-DRH**

JOHN BALDWIN,
KIMBERLY BUTLER,
MIKE ATCHISON,
JOHN/JANE DOE, and
ILLINOIS DEPARTMENT OF CORRECTIONS,

Defendants.

MEMORANDUM AND ORDER

HERNDON, District Judge:

This action is before the Court to address Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction (Doc. 8) and Motion for Leave to Proceed I*n Forma Pauperis* ("IFP") (Doc. 6).

Motion for Temporary Restraining Order and/or Preliminary Injunction

Plaintiff seeks issuance of a temporary restraining order ("TRO") and/or preliminary injunction. A TRO is an order issued without notice to the party to be enjoined that may last no more than fourteen days. A TRO may issue without notice:

> only if (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any

> efforts made to give notice and the reasons why it should not be required.

FED. R. CIV. P. 65(b). "The essence of a temporary restraining order is its brevity, its ex parte character, and . . . its informality." *Geneva Assur. Syndicate, Inc. v. Medical Emergency Servs. Assocs. S.C.*, 964 F.2d 599, 600 (7th Cir. 1992). In addition to the immediate and irreparable damage requirement for a TRO, to justify issuance of preliminary injunctive relief, the plaintiff must first demonstrate that 1) he has a reasonable likelihood of success on the merits, 2) he has no adequate remedy at law, and 3) he will suffer irreparable harm if preliminary injunctive relief is denied. *See Stifel, Nicholaus & Company, Inc. v. Godfre & Kahn*, 807 F.3d 184, 193 (7th Cir. 2015).

Without expressing any opinion on the merits of any of Plaintiff's other claims for relief, the Court concludes that a TRO should not issue in this matter. Plaintiff's allegations do not set forth specific facts demonstrating the likelihood of immediate and irreparable harm *before Defendants can be heard*. Plaintiff alleges that he has been confined in disciplinary segregation for more than ten years. (Doc. 5, p. 23). He claims that this confinement has intensified the symptoms he experiences in conjunction with his post-traumatic stress disorder ("PTSD"). (Doc. 5, p. 18). He notes that these symptoms may include nightmares, severe anxiety, and suicidal ideations, among other things. *Id.* Plaintiff has provided the Court with his recent mental health records to support his claim, and though they seem to confirm that Plaintiff has been diagnosed with PTSD and suffers from anxiety and depression, they also repeatedly signal that Plaintiff has not recently

demonstrated or reported suicidal ideations from which he may be suffering currently. (*See* Doc. 7, p. 81, 83, 85, 107).

In his Amended Complaint (Doc. 5), Plaintiff also provides the Court with studies and findings concerning the potential negative effects of prolonged segregation on an individual, seemingly in an attempt to support his claim that he will suffer irreparable injury if he is not removed from segregation, but what studies and statistics indicate *might* happen to individuals in situations similar to Plaintiff is not of interest to this Court when considering Plaintiff's motion for preliminary injunctive relief. All that concerns this Court is what harm *to Plaintiff* is occurring or imminent. Plaintiff has not alleged to this Court's satisfaction any risk of immediate and irreparable injury, loss, or damage that will befall him before any of the defendants can be heard in opposition to his motion. Further, he readily admits that he "will certainly require years of professional therapy before [he] can confidently reclaim his status as a 'civilized human being'" after being subjected to such extreme isolation, so it appears unlikely that ordering immediate action will benefit Plaintiff in any significant way. (Doc. 5, p. 26).

Moreover, federal courts must exercise equitable restraint when asked to take over the administration of a prison, something that is best left to correctional officials and their staff. *See Sandin v. Conner*, 515 U.S. 472, 482 (1995); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (noting that where a plaintiff requests an award of remedial relief that would require a federal court to interfere with the administration of a state prison, "appropriate consideration must be given to

principles of federalism in determining the availability and scope of [such] relief."). Particularly because of Plaintiff's previous prison staff assault and weapons violations, and admitted violent, asocial, and aggressive tendencies, this Court is extremely hesitant to direct Plaintiff's transfer from disciplinary segregation without at least allowing the defendants an opportunity to defend their decision to continue to hold Plaintiff. (Doc. 5, pp. 24, 27).

Plaintiff's request for issuance of a temporary restraining order will therefore be denied. This Court will reserve a decision on the Motion (Doc. 8) to the extent it requests a preliminary injunction.

Motion for Leave to Proceed *In Forma Pauperis*

According to Section 1915(g), a prisoner may not bring a civil action or appeal a civil judgment *in forma pauperis* "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).

Plaintiff has received strikes in at least three cases in this District. *See Wallace v. Powers*, Case No. 09-cv-224-DRH (S.D. Ill. November 19, 2009) (dismissed for failure to state a claim upon which relief may be granted); *Wallace v. Hallam*, Case No. 09-cv-418-DRH (S.D. Ill. Feb. 23, 2010) (same); *Westefer v. Snyder, et al.*, Case No. 00-cv-162-GPM (S.D. Ill. Feb. 25, 2011) (denying

Plaintiff's motion to intervene and assessing strike for filing frivolous action). In fact, because of his voluminous frivolous filings, Plaintiff has been given at least one warning about filing frivolous papers or actions in this District. *See*, *Wallace v. Taylor*, Case No. 11-cv-332-MJR (S.D. Ill. June 6, 2012) (Doc. 29, p. 2). Because Plaintiff has incurred at least three "strikes" for purposes of Section 1915(g), he may not proceed IFP in this case unless he is under imminent danger of serious physical injury.

Plaintiff has failed to satisfy this requirement. The United States Court of Appeals for the Seventh Circuit has explained that "imminent danger" within the meaning of 28 U.S.C. § 1915(g) requires a "real and proximate" threat of serious physical injury to a prisoner. *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003) (citing *Lewis v. Sullivan*, 279 F.3d 526, 529 (7th Cir. 2002)). In general, courts "deny leave to proceed IFP when a prisoner's claims of imminent danger are conclusory or ridiculous." *Id.* at 331 (citing *Heimermann v. Litscher*, 337 F.3d 781, 782 (7th Cir. 2003)). Additionally, "[a]llegations of past harm do not suffice" to show imminent danger; rather, "the harm must be imminent or occurring at the time the complaint is filed," and when prisoners "allege only a past injury that has not recurred, courts deny them leave to proceed IFP." *Id.* at 330 (citing *Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir. 1996)). Further, "[t]his Court has previously observed that a prisoner cannot 'create the "imminent danger" required by § 1915(g).'" *See Widmer v. Butler*, Case No. 14-cv-874-NJR, 2014 WL 3932519 (S.D. Ill. August 12, 2014) (citing

Taylor v. Walker, Case No. 07-cv-706-MJR, 2007 WL 4365718 (S.D. Ill. Dec. 11, 2007) (citing *Ball v. Allen*, Case No. 06-cv-0496, 2007 WL 484547 (S.D. Ala. Feb. 8, 2007); *Muhammed v. McDonough*, Case No. 06-cv-527, 2006 WL 1640128 (M.D. Fla. June 9, 2006); *Wallace v. Cockrell*, Case No. 03-mc-98, 2003 WL 22961212 (N.D. Tex. Oct. 27, 2003))).

In this case, Plaintiff's Amended Complaint (Doc. 5), as well as his Motion for Leave to Proceed IFP (Doc. 6), are devoid of allegations that might lead the Court to conclude that Plaintiff is under imminent danger of serious physical injury. Plaintiff's relevant allegations, regarding the PTSD symptoms he experiences and the potential psychological, social, and physical harms that those in segregation may face, are outlined above. None of them satisfy the relevant standard. Notably, the Seventh Circuit has recently indicated, contrary to Plaintiff's apparent proposition that prolonged segregation necessarily violates the rights of inmates, that there are many factors to consider when determining whether the conditions of a prisoner's confinement are unconstitutional, and the length of time in segregation is not a determinative one. *Isby v. Brown*, 856 F.3d 508, 524 (7th Cir. 2017) ("While, as a personal matter, we (like the district court) find the length of Isby's confinement [over ten years] greatly disturbing, *see, e.g.*, *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2208–10, 192 L.Ed.2d 323 (Kennedy, J., concurring) (discussing "[t]he human toll wrought by extended terms of isolation"), *reh'g denied*, —— U.S. ——, 136 S.Ct. 14, 192 L.Ed.2d 983 (2015), we agree that under the law as it currently stands, Isby has not made out

an Eighth Amendment violation"). Further, as previously noted, Plaintiff has not cited any physical injury looming over him. The closest he comes to doing so is mentioning the suicidal ideation that accompanies PTSD, which he has been diagnosed with, but his medical records, failure to allege that he is currently considering suicide, and the general requirement that a prisoner cannot create the imminent danger required by § 1915(g) all run against allowing this particular potential threat to result in Plaintiff's IFP Motion being granted. Finally, Plaintiff's IFP Motion contains language that indicates that Plaintiff is actually protected from harm from others given his current housing assignment of disciplinary segregation, which is puzzlingly the exact situation he seeks to be freed from in his TRO Motion (Doc. 8). (Doc. 6, p. 12).

The Court concludes that Plaintiff has not shown that he is under imminent danger of serious physical injury so as to escape the "three-strikes" rule of Section 1915(g), thus he cannot proceed IFP in this case.

Affidavit (Doc. 9) Filed June 30, 2017

Plaintiff's most recent filing, detailing an incident in which other inmates threw a "vile combination of (spoiled milk, blood, saliva, feces, amongst other things) . . . seriously contaminating both [Plaintiff] and nearly everything else within [his] cell" does not change the analysis for either motion considered herein. (Doc. 9, p. 2). Setting aside the fact that the allegations in this affidavit exceed the scope of the Amended Complaint, which could prevent this Court from considering their effect on either motion, in the affidavit, Plaintiff indicates that he

has been moved to a cell with a solid door from his previous cell that had bars, seemingly to prevent such an event from recurring. *Id.* Any danger he may have faced from projectile fluids being thrown into his cell due to its location and construction has therefore passed and can no longer be considered imminent or immediate. Further, as Plaintiff has noted at length, he is currently assigned to a single cell in disciplinary segregation, which is a "barrier preventing [him] from being violently assaulted and/or ravished." (Doc. 6, p. 12).

Disposition

IT IS THEREFORE ORDERED that the request for issuance of a temporary restraining order in Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction (Doc. 8) is **DENIED**. This Court **RESERVES** a decision on the Motion (Doc. 8) to the extent it requests a preliminary injunction.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to Proceed *In Forma Pauperis* (Doc. 6) is **DENIED**. Plaintiff shall pay the full filing fee of $400.00 for this action within **thirty (30) days** of the date of entry of this Order (on or before August 4, 2017). If Plaintiff fails to comply with this Order in the time allotted by the Court, this case will be dismissed. *See* FED. R. CIV. P. 41(b); *Ladien v. Astrachan*, 128 F.3d 1051, 1056-57 (7th Cir. 1997); *Johnson v. Kamminga*, 34 F.3d 466, 468 (7th Cir. 1994).

Plaintiff's obligation to pay the filing fee for this action was incurred at the time the action was filed, thus the filing fee for this case remains due and

payable—and will be collected one way or another. *See* 28 U.S.C. § 1915(b)(1); *Lucien v. Jockisch*, 133 F.3d 464, 467 (7th Cir. 1998).

Finally, Plaintiff is **FURTHER ADVISED** that he is under a continuing obligation to keep the Clerk and each opposing party informed of any change in his address, and that the Court will not independently investigate his whereabouts. This shall be done in writing and not later than seven (7) days after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents, and may result in a dismissal of this action for want of prosecution.

IT IS SO ORDERED.

DATED: July 5, 2017

David R. Herndon

Digitally signed by Judge David R. Herndon
Date: 2017.07.05 10:39:56 -05'00'

United States District Judge

U.S. District Court
Southern District of Illinois (East St. Louis)
CIVIL DOCKET FOR CASE #: 3:17-cv-00576-DRH

Wallace v. Baldwin et al
Assigned to: Judge David R. Herndon
Case in other court: USCA-7, 17-02427
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 06/01/2017
Jury Demand: Plaintiff
Nature of Suit: 555 Prison Condition
Jurisdiction: Federal Question

Plaintiff

Maurice L. Wallace

represented by **Maurice L. Wallace**
R10764
MENARD CORRECTIONAL CENTER
711 Kaskaskia Street
PO Box 1000
Menard, IL 62259
PRO SE

V.

Defendant

John Baldwin
Acting Director of the Illinois Department of Corrections

Defendant

Kimberly Butler
Chief Administrative Officer of Menard Correctional Center

Defendant

Mike Atchison
Chief of Operations at the IDOC

Defendant

John/Jane Doe
Dietary Director

Defendant

IDOC

Date Filed	#	Docket Text
06/01/2017	1	STRICKEN PER COURT ORDER at Doc. 4: COMPLAINT against All Defendants, filed by Maurice L. Wallace.(tkm) Modified on 6/2/2017 (tjk). (Entered: 06/01/2017)
06/01/2017	2	STRICKEN PER COURT ORDER at Doc. 4: MOTION for Leave to Proceed in forma pauperis by Maurice L. Wallace. (Attachments: # 1 Memorandum in Support of Motion)

		(tkm) (Entered: 06/01/2017)
06/01/2017	3	Letter to plaintiff regarding case opening. (Attachments: # 1 Consent to Magistrate Judge) (tkm) (Entered: 06/01/2017)
06/02/2017	4	Order STRIKING Complaint 1 and Motion for Leave to Proceed In Forma Pauperis 2 and DIRECTING the CLERK to return the documents to Plaintiff. Many words throughout the Complaint 1 and Motion 2 are too light to read. All pleadings presented for filing in this District must be "plainly typewritten, printed, or prepared by a clearly legible duplication process and double-spaced." See SDIL-LR 5.1(b). Further "[t]he Court, in its discretion, may strike and direct the return of any defective pleading." SDIL-LR 8.1(b). Plaintiff's pleading and motion are defective and are hereby STRICKEN. Plaintiff is ORDERED to file a legible copy of the pleading and motion within twenty-eight (28) days (on or before June 30, 2017. He should clearly label the pleading "First Amended Complaint" and label the motion "Motion for Leave to Proceed In Forma Pauperis" and refer to this case number (i.e., 17-cv-0576-DRH) on the front page of both. Failure to do so will result in dismissal of this action for want of prosecution or for failure to comply with a court order. Fed. R. Civ. P. 41(b). To enable Plaintiff to comply with this order, the CLERK is DIRECTED to mail Plaintiff blank civil rights complaint and motion to proceed in forma pauperis forms. (Action due by 6/30/2017). Signed by Judge David R. Herndon on 6/2/2017. (tjk)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 06/02/2017)
06/16/2017	5	FIRST AMENDED COMPLAINT against All Defendants, filed by Maurice L. Wallace. (tkm) (Entered: 06/16/2017)
06/16/2017	6	MOTION for Leave to Proceed in forma pauperis by Maurice L. Wallace. (tkm) (Entered: 06/16/2017)
06/26/2017	7	EXHIBIT by Maurice L. Wallace. Exhibit to 5 First Amended Complaint. (Attachments: # 1 Exhibits Part 2)(tkm) (Entered: 06/27/2017)
06/29/2017	8	MOTION for Temporary Restraining Order and/or Preliminary Injunction by Maurice L. Wallace. (jsm2) (Entered: 06/29/2017)
06/30/2017	9	AFFIDAVIT by Maurice L. Wallace. (tkm) (Entered: 06/30/2017)
07/05/2017	10	MEMORANDUM AND ORDER: IT IS THEREFORE ORDERED that the request for issuance of a temporary restraining order in Plaintiffs Motion for a Temporary Restraining Order and/or Preliminary Injunction (Doc. 8) is DENIED. This Court RESERVES a decision on the Motion (Doc. 8) to the extent it requests a preliminary injunction. IT IS FURTHER ORDERED that Plaintiffs Motion for Leave to Proceed In Forma Pauperis (Doc. 6) is DENIED. Plaintiff shall pay the full filing fee of $400.00 for this action within thirty (30) days of the date of entry of this Order (on or before August 4, 2017). If Plaintiff fails to comply with this Order in the time allotted by the Court, this case will be dismissed. Signed by Judge David R. Herndon on 7/5/2017. (tkm) (Entered: 07/05/2017)
07/05/2017		Full filing fee of $400.00 due on or before by 8/4/2017 - per order 10. (tkm) (Entered: 07/05/2017)
07/14/2017	11	NOTICE OF INTERLOCUTORY APPEAL as to 10 Order on Motion for Leave to Proceed in forma pauperis, Order on Motion for TRO, by Maurice L. Wallace. Filing fee $ 505 DUE. (tkm) (Entered: 07/14/2017)
07/14/2017	12	Transmission of Short Record to US Court of Appeals re 11 Notice of Interlocutory Appeal (tkm) (Entered: 07/14/2017)
07/14/2017	13	Circuit Rule 10 Letter. Appeal Record due to be prepared by 7/28/2017. (tkm) (Entered:

		07/14/2017)
07/14/2017	14	USCA Case Number 17-2427 for 11 Notice of Interlocutory Appeal filed by Maurice L. Wallace. (Attachments: # 1 Notice of Case Opening, # 2 PLRA Fee Notice and Order) (kls3) (Entered: 07/14/2017)
07/26/2017	15	MOTION for Leave to Appeal in forma pauperis by Maurice L. Wallace. (Attachments: # 1 Letter)(kls3) (Entered: 07/27/2017)
07/27/2017	16	TRANSCRIPT INFORMATION SHEET by Pro Se Party, Maurice Wallace (Attachments: # 1 Letter)(kls3) (Entered: 07/27/2017)
07/31/2017		Record on Appeal Prepared re 11 Notice of Interlocutory Appeal. 1 Volume of Pleadings constitute the Record on Appeal. (cjo) (Entered: 07/31/2017)
08/03/2017	17	ORDER denying 15 Motion for Leave to Appeal in forma pauperis. Plaintiff is ORDERED to remit the $505 appellate filing and docketing fee to this Court not later than fourteen (14) days from service of notice of the action of this Court. Alternatively, he must file his application for IFP with the Seventh Circuit within thirty (30) days of service of notice of the action of this Court. Signed by Judge David R. Herndon on 8/2/2017. (tkm) (Entered: 08/03/2017)
08/07/2017	18	MOTION to Appoint Counsel by Maurice L. Wallace. (dkd) (Main Document 18 replaced on 8/7/2017) (dkd). (Entered: 08/07/2017)
08/07/2017	19	NOTICE OF MODIFICATION re 18 Motion to Appoint Counsel filed by Maurice L. Wallace. Last page of document omitted. Document replaced with correct number of pages. (dkd)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 08/07/2017)

CERTIFICATE OF SERVICE

I certify that on January 8, 2017, I caused a true and correct copy of this brief and its appendix to be filed with the Court using its CM/ECF system.

Dated: January 8, 2017 Respectfully submitted,

/s/ Tom Kayes
Tom Kayes
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
t: 312.853.3293
f: 312.853.7036
tkayes@sidley.com

Counsel of Record for Maurice Wallace