JUDGE BRETT M. KAVANAUGH

SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 13(C)

CITATION OF CASES IN WHICH I WAS A PANEL MEMBER BUT DID NOT WRITE THE OPINION

Below is a list of all cases available on Westlaw where I was a panel member but did not write an opinion in my name.

Morley v. CIA, No. 17-5114, 2018 WL 3351383 (D.C. Cir. July 9, 2018)

Hedgpeth v. Rahim, 893 F.3d 802 (D.C. Cir. 2018)

Citizens for Responsibility & Ethics in Washington v. FEC, 892 F.3d 434 (D.C. Cir. 2018)

Colacurio v. Comm'r, 727 Fed. App'x 705 (D.C. Cir. 2018)

Kelleher v. Dream Catcher, LLC, No. 17-7104, 2018 WL 3159841 (D.C. Cir. June 1, 2018)

Schubarth v. Fed. Republic of Germany, 891 F.3d 392 (D.C. Cir. 2018)

Canuto v. U.S. Dep't of Def., No. 17-5272, 2018 WL 3198405 (D.C. Cir. May 29, 2018)

Int'l Longshore & Warehouse Union v. NLRB, 890 F.3d 1100 (D.C. Cir. 2018)

XPO Logistics Freight, Inc. v. NLRB, No. 17-1177, 2018 WL 2943938 (D.C. Cir. May 25, 2018)

Thyme Holdings, LLC v. NLRB, No. 17-1191, 2018 WL 3040701 (D.C. Cir. May 22, 2018)

Garda CL Atl., Inc. v. NLRB, No. 17-1200, 2018 WL 2943941 (D.C. Cir. May 22, 2018)

Kelly v. DEA, No. 17-1175, 2018 WL 3198774 (D.C. Cir. May 18, 2018)

David E. Harvey Builders, Inc. v. Sec'y of Labor, Occupational Safety & Health Admin., 724 Fed. App'x 7 (D.C. Cir. 2018)

Crumpacker v. Ciraolo-Klepper, No. 17-5191, 2018 WL 2382788 (D.C. Cir. May 9, 2018)

Local 58, Int'l Bhd. of Elec. Workers v. NLRB, 888 F.3d 1313 (D.C. Cir. 2018)

David Saxe Prods., LLC v. NLRB, 888 F.3d 1305 (D.C. Cir. 2018)

Int'l Union of Operating Engineers, Local 18 v. NLRB, No. 17-1122, 2018 WL 2220248 (D.C. Cir. Apr. 24, 2018)

Howard Town Ctr. Developer, LLC v. Howard Univ., No. 17-7133, 2018 WL 2306025 (D.C. Cir. Apr. 17, 2018)

Kelleher v. Dream Catcher, LLC, No. 17-7104, 2018 WL 2306023 (D.C. Cir. Apr. 16, 2018)

Watford v. Fossum, 719 Fed. App'x 24 (D.C. Cir. 2018)

Watts v. U.S. Dep't of Justice, 719 Fed. App'x 23 (D.C. Cir. 2018)

Judicial Watch, Inc. v. U.S. Dep't of Justice, 719 Fed. App'x 21 (D.C. Cir. 2018)

Hall & Assocs. v. EPA, No. 16-5315, 2018 WL 1896493 (D.C. Cir. Apr. 9, 2018)

United States v. James, 719 Fed. App'x 17 (D.C. Cir. 2018)

Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 17-5171, 2018 WL 1896522 (D.C. Cir. Apr. 2, 2018)

Whistleblower 21276-13W v. Comm'r, No. 17-1119, 2018 WL 1896503 (D.C. Cir. Mar. 29, 2018)

Murray v. Amalgamated Transit Union, 719 Fed. App'x 5 (D.C. Cir. 2018)

United States v. Nori, 715 Fed. App'x 23 (D.C. Cir. 2018)

United States v. Curtis, 715 Fed. App'x 24 (D.C. Cir. 2018)

Crumpacker v. Ciraolo-Klepper, 715 Fed. App'x 18 (D.C. Cir. 2018)

Clemente v. FBI, 714 Fed. App'x 2 (D.C. Cir. 2018)

Carter v. Carson, 715 Fed. App'x 16 (D.C. Cir. 2018)

Smith v. United States, 715 Fed. App'x 10 (D.C. Cir. 2018)

Am. Petroleum Inst. v. EPA, 883 F.3d 918 (D.C. Cir. 2018)

Iyoha v. Architect of the Capitol, No. 17-5252, 2018 WL 1391720 (D.C. Cir. Mar. 1, 2018)

Foreman v. Lappin, No. 17-5222, 2018 WL 1391547 (D.C. Cir. Mar. 1, 2018)

Green v. Nielsen, No. 16-5295, 2018 WL 1391714 (D.C. Cir. Mar. 1, 2018)

Bennett v. Google, LLC, 882 F.3d 1163 (D.C. Cir. 2018)

In re Klayman, No. 18-7024, 2018 WL 1391754 (D.C. Cir. Feb. 22, 2018)

Plunkett v. Doe, No. 17-5087, 2018 WL 1388574 (D.C. Cir. Feb. 21, 2018)

Burton v. Carson, No. 17-5190, 2018 WL 1391543 (D.C. Cir. Feb. 21, 2018)

Mack v. Georgetown Univ., No. 17-7139, 2018 WL 1391571 (D.C. Cir. Feb. 21, 2018)

Liu v. Comm'r, No. 17-1208, 2018 WL 1352131 (D.C. Cir. Feb. 21, 2018)

Dugdale v. Ditech Fin., LLC, No. 17-7137, 2018 WL 1391724 (D.C. Cir. Feb. 21, 2018)

McKee v. U.S. Dep't of Justice, No. 17-5131, 2018 WL 1388575 (D.C. Cir. Feb. 21, 2018)

McCrea v. D.C., No. 17-7109, 2018 WL 1391553 (D.C. Cir. Feb. 21, 2018)

Allegheny Def. Project v. FERC, No. 17-1098, 2018 WL 1388557 (D.C. Cir. Feb. 16, 2018)

Chichakli v. Tillerson, 882 F.3d 229 (D.C. Cir. 2018)

United States v. Slatten, 712 Fed. App'x 15 (D.C. Cir. 2018)

Loan Syndications & Trading Ass'n v. SEC, 882 F.3d 220 (D.C. Cir. 2018)

Leidos, Inc. v. Hellenic Republic, 881 F.3d 213 (D.C. Cir. 2018)

Slovinec v. Georgetown Univ., No. 17-7122, 2018 WL 1052650 (D.C. Cir. Jan. 26, 2018)

Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 879 F.3d 1202 (D.C. Cir. 2018)

United States v. Benbow, 709 Fed. App'x 25 (D.C. Cir.), *cert. denied*, 138 S. Ct. 2036 (2018)

United States ex rel. Barko v. Halliburton Co., 709 Fed. App'x 23 (D.C. Cir. 2017)

United States ex rel. Schneider v. JPMorgan Chase Bank, Nat'l Ass'n, 878 F.3d 309 (D.C. Cir. 2017)

Dana-Farber Cancer Inst. v. Hargan, 878 F.3d 336 (D.C. Cir. 2017)

Rush Univ. Med. Ctr. v. NLRB, 708 Fed. App'x 692 (D.C. Cir. 2017)

United States v. Talbott, 709 Fed. App'x 20 (D.C. Cir. 2017)

Reporters Comm. for Freedom of Press v. FBI, 877 F.3d 399 (D.C. Cir. 2017)

Lopez v. Postal Regulatory Comm'n, 709 Fed. App'x 13 (D.C. Cir. 2017)

Envtl. Integrity Project v. Pruitt, 709 Fed. App'x 12 (D.C. Cir. 2017)

State Corp. Comm'n of Kansas v. FERC, 876 F.3d 332 (D.C. Cir. 2017)

Ass'n of Oil Pipe Lines v. FERC, 876 F.3d 336 (D.C. Cir. 2017)

Holmes v. FEC, 875 F.3d 1153 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 2018 (2018)

Fleming v. Iowa Bd. of Med. Examiners & Bd. Members, 707 Fed. App'x 7 (D.C. Cir. 2017)

Coulibaly v. MSPB, 709 Fed. App'x 9 (D.C. Cir. 2017)

O'Diah v. Cordray, 707 Fed. App'x 5 (D.C. Cir. 2017)

Byrd-Sanders v. Child Support, 707 Fed. App'x 6 (D.C. Cir. 2017)

Ruther v. USA Today, 707 Fed. App'x 4 (D.C. Cir. 2017)

Ruther v. Gannett Satelit Network, Inc., 707 Fed. App'x 5 (D.C. Cir. 2017)

Ruther v. Sequential Brands Grp. Inc., 707 Fed. App'x 3 (D.C. Cir. 2017)

Ruther v. Lamb Ctr., 707 Fed. App'x 719 (D.C. Cir. 2017)

Ruther v. Gash, 707 Fed. App'x 3 (D.C. Cir. 2017)

Ruther v. G6 Hosp. LLC, 707 Fed. App'x 720 (D.C. Cir. 2017)

Alwi v. Trump, No. 17-5067, 2017 WL 6803406 (D.C. Cir. Nov. 15, 2017)

Quiroz v. Moran, 707 Fed. App'x 1 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-5139

Gray v. Staley, 707 Fed. App'x 2 (D.C. Cir. 2017)

Branch v. Attorney Gen., 703 Fed. App'x 5 (D.C. Cir. 2017)

Xie v. Tillerson, No. 17-5165, 2017 WL 5664735 (D.C. Cir. Nov. 8, 2017)

Void v. Smoot, No. 16-5367, 2017 WL 5664746 (D.C. Cir. Nov. 8, 2017)

Nyambal v. Mnuchin, 2017 WL 5664980 (D.C. Cir. Nov. 8, 2017)

Baloun v. Tillerson, No. 17-5094, 2017 WL 5664733 (D.C. Cir. Nov. 8, 2017)

Int'l Longshore & Warehouse Union v. NLRB, 705 Fed. App'x 3 (D.C. Cir. 2017)

Int'l Longshore & Warehouse Union v. NLRB, 705 Fed. App'x 1 (D.C. Cir. 2017)

Shapiro v. U.S. Dep't of Justice, No. 16-5226, 2017 WL 7197010 (D.C. Cir. Nov. 1, 2017)

Ashbourne v. Hansberry, No. 17-5136, 2017 WL 5664734 (D.C. Cir. Nov. 1, 2017)

Cooper v. D.C., No. 17-7021, 2017 WL 5664737 (D.C. Cir. Nov. 1, 2017)

Bowe-Connor v. Shulkin, No. 16-5084, 2017 WL 5664745 (D.C. Cir. Nov. 1, 2017)

Brandli v. Micrus Endovascular Corp., 709 Fed. App'x 7 (D.C. Cir. 2017)

Garza v. Hargan, No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct. 20, 2017), *reh'g granted*, 874 F.3d 735 (D.C. Cir. 2017), *vacated sub nom.*, *Azar v. Garza*, 138 S. Ct. 1790 (2018)

Garza v. Hargan, No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017)

State of Wisconsin v. EPA, No. 16-1406, 2017 WL 5256905 (D.C. Cir. Oct. 13, 2017)

Crumpacker v. Ciraolo-Klepper, No. 17-5054, 2017 WL 4231164 (D.C. Cir. Sept. 13, 2017), *reconsideration denied*, 715 Fed. App'x 18 (D.C. Cir. 2018)

Dean v. Comm'r, No. 17-1123, 2017 WL 4232520 (D.C. Cir. Sept. 13, 2017)

Passmore v. United States Dep't of Justice, No. 17-5083, 2017 WL 4231167 (D.C. Cir. Sept. 13, 2017), *cert. denied*, 138 S. Ct. 1269 (2018)

Morris v. United States Sentencing Comm'n, 696 Fed. App'x 515 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 711 (2018)

Air All. Houston v. EPA, No. 17-1155, 2017 WL 3864624 (D.C. Cir. Aug. 30, 2017)

Louisiana Pub. Serv. Comm'n v. FERC, 866 F.3d 426 (D.C. Cir. 2017)

United Source One, Inc. v. U. S. Dep't of Agric., 865 F.3d 710 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1332 (2018)

Metlife, Inc. v. Fin. Stability Oversight Council, 865 F.3d 661 (D.C. Cir. 2017)

United States v. Eshetu, 863 F.3d 946 (D.C. Cir. 2017)

Am. Petroleum Inst. v. EPA, 862 F.3d 50 (D.C. Cir. 2017)

Mann v. Washington Metro. Area Transit Auth., 692 Fed. App'x 6 (D.C. Cir. 2017)

Seminole Elec. Coop., Inc. v. FERC, 861 F.3d 230 (D.C. Cir. 2017)

Arc Bridges, Inc. v. NLRB, 861 F.3d 193 (D.C. Cir. 2017)

Herron v. Fannie Mae, 861 F.3d 160 (D.C. Cir. 2017)

Lucia v. SEC, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd*, 138 S. Ct. 2044 (2018)

Lee v. United States Agency for Int'l Dev., No. 16-5276, 2017 WL 4232330 (D.C. Cir. June 16, 2017)

Lee v. U. S. Agency for Int'l Dev., 859 F.3d 74 (D.C. Cir. 2017)

United States v. Harris, 701 Fed. App'x 4 (D.C. Cir. 2017)

Byrd v. Washington Metro. Area Transit Auth., 701 Fed. App'x 1 (D.C. Cir. 2017)

Transmission Agency of N. California v. FERC, 697 Fed. App'x 11 (D.C. Cir. 2017)

Stoller v. United States, 697 Fed. App'x 10 (D.C. Cir. 2017)

United States v. Jones, 697 Fed. App'x 2 (D.C. Cir. 2017)

In re Cunningham, 692 Fed. App'x 3 (D.C. Cir. 2017)

Starling v. Royal, 688 Fed. App'x 15 (D.C. Cir. 2017)

Ruisi v. NLRB, 856 F.3d 1031 (D.C. Cir. 2017)

Page v. Berryhill, 688 Fed. App'x 7 (D.C. Cir. 2017)

United States v. Crews, 856 F.3d 91 (D.C. Cir. 2017)

U. S. Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017)

Nat'l R.R. Passenger Corp. v. Fraternal Order of Police, Lodge 189 Labor Comm., 855 F.3d 335 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 979 (2018)

Paracha v. Trump, 697 Fed. App'x 703 (D.C. Cir. 2017)

Duarte v. Nolan, No. 16-7102, 2017 WL 7736939 (D.C. Cir. Apr. 18, 2017)

Citizens for Responsibility v. FEC, No. 16-5300, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017)

Dawn J. Bennett Holding, LLC v. Fedex TechConnect, Inc., No. 16-7144, 2017 WL 2373115 (D.C. Cir. Apr. 4, 2017)

Pettaway v. Teachers Ins. & Annuity Ass'n of Am., No. 16-7137, 2017 WL 2373078 (D.C. Cir. Apr. 4, 2017), *cert. denied*, 138 S. Ct. 2019 (2018)

Tracy v. United States, No. 16-5349, 2017 WL 2348070 (D.C. Cir. Mar. 31, 2017)

Satterlee v. Comm'r, No. 16-5342, 2017 WL 2348059 (D.C. Cir. Mar. 31, 2017)

K.P. v. D.C., 690 Fed. App'x 10 (D.C. Cir. 2017)

Airaj v. U. S. Dep't of State, No. 16-5193, 2017 WL 2347794 (D.C. Cir. Mar. 30, 2017)

Durham Sch. Servs., L.P. v. NLRB, No. 16-1074, 2017 WL 2347659 (D.C. Cir. Mar. 21, 2017)

Reynolds v. Swilly, 690 Fed. App'x 4 (D.C. Cir. 2017)

Reynolds v. Brown, 690 Fed. App'x 5 (D.C. Cir. 2017)

Reynolds v. Driggers, 690 Fed. App'x 5 (D.C. Cir. 2017)

Ampersand Publ'g, LLC v. NLRB, No. 15-1074, 2017 WL 1314946 (D.C. Cir. Mar. 3, 2017)

FedEx Home Delivery v. NLRB, 849 F.3d 1123 (D.C. Cir. 2017)

Regents of the Univ. of California v. Price, 681 Fed. App'x 5 (D.C. Cir. 2017)

Modrall v. Deutsch, 686 Fed. App'x 9 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 386 (2017)

Modrall v. Johns Hopkins Univ., 686 Fed. App'x 10 (D.C. Cir.), *cert. dismissed*, 138 S. Ct. 235 (2017)

Stoller v. OCWEN Fin. Corp., 686 Fed. App'x 10 (D.C. Cir. 2017)

Steele v. Mattis, No. 16-5236, 2017 WL 2332608 (D.C. Cir. Feb. 21, 2017)

Al Kassar v. Samuels, No. 16-5134, 2017 WL 2332596 (D.C. Cir. Feb. 21, 2017)

Kwok Sze v. Kelly, No. 16-5090, 2017 WL 2332592 (D.C. Cir. Feb. 21, 2017)

Stoddard v. Wynn, No. 16-5182, 2017 WL 2332601 (D.C. Cir. Feb. 21, 2017)

United States ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017)

United States v. Jackson, 848 F.3d 460 (D.C. Cir. 2017)

Ellis v. Langer, 686 Fed. App'x 4 (D.C. Cir. 2017)

Jordan v. D.C., 686 Fed. App'x 3 (D.C. Cir. 2017)

United States v. Kenny, 846 F.3d 373 (D.C. Cir. 2017)

United States v. Jones, 846 F.3d 366 (D.C. Cir. 2017)

Ozburn-Hessey Logistics, LLC v. NLRB, 689 Fed. App'x 639 (D.C. Cir. 2016)

Judicial Watch, Inc. v. Kerry, 844 F.3d 952 (D.C. Cir. 2016)

U.S. Sugar Corp. v. EPA, 672 Fed. App'x 40 (D.C. Cir. 2016)

Nat'l Biodiesel Bd. v. EPA, 843 F.3d 1010 (D.C. Cir. 2016)

Smith-Penny v. SEC, 672 Fed. App'x 19 (D.C. Cir. 2016)

Koon v. Lynch, 672 Fed. App'x 19 (D.C. Cir. 2016)

Fuller v. Okun, 672 Fed. App'x 21 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1826 (2017)

Cohea v. United States, 672 Fed. App'x 18 (D.C. Cir. 2016)

Sanchez-Alaniz v. Fed. Bureau of Prisons, 664 Fed. App'x 5 (D.C. Cir. 2016)

Tracy v. U.S. Dep't of Justice, 664 Fed. App'x 8 (D.C. Cir. 2016)

Chambers v. Office of Attorney Gen., 672 Fed. App'x 15 (D.C. Cir. 2016)

Borgess Med. Ctr. v. Burwell, 843 F.3d 497 (D.C. Cir. 2016)

Wang v. New Mighty U.S. Trust, 843 F.3d 487 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 2266 (2017)

United States v. Gooch, 842 F.3d 1274 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 2005 (2018)

Rochon v. Lynch, 664 Fed. App'x 8 (D.C. Cir. 2016)

United States v. Matthews, 672 Fed. App'x 8 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1608 (2017)

LeFande v. D.C., 841 F.3d 485 (D.C. Cir. 2016)

Idrogo v. Castro, 672 Fed. App'x 27 (D.C. Cir. 2016)

White v. O'Reilly, 672 Fed. App'x 26 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 147 (2017)

Knorr v. SEC, 672 Fed. App'x 5 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1232 (2017)

Ryan v. FBI, No. 16-5108, 2016 WL 6237841 (D.C. Cir. Sept. 16, 2016)

Boyd v. Exec. Office for U. S. Attorneys, No. 16-5133, 2016 WL 6237850 (D.C. Cir. Sept. 16, 2016), *cert. denied*, 138 S. Ct. 95 (2017)

Sack v. CIA, No. 15-5300, 2016 WL 6238503 (D.C. Cir. Sept. 16, 2016)

Miles v. Bowser, 671 Fed. App'x 811 (D.C. Cir. 2016)

Robinson v. Comm'r, No. 16-1096, 2016 WL 6238524 (D.C. Cir. Sept. 8, 2016)

Hall v. Fed. Bureau of Prisons, No. 15-5303, 2016 WL 6237817 (D.C. Cir. Sept. 1, 2016), *cert. denied*, 138 S. Ct. 182 (2017)

Seed Co. Ltd. v. Westerman, 832 F.3d 325 (D.C. Cir. 2016)

Hand v. Perez, 672 Fed. App'x 24 (D.C. Cir. 2016)

Covington v. JPMorgan Chase & Co., 671 Fed. App'x 819 (D.C. Cir. 2016)

Hao Liu v. Hopkins Cty. Sulphur Springs, Texas, 672 Fed. App'x 23 (D.C. Cir. 2016)

Lattisaw v. D.C., 672 Fed. App'x 22 (D.C. Cir. 2016)

Rail-Term Corp. v. R.R. Ret. Bd., 666 Fed. App'x 1 (D.C. Cir. 2016)

Pursuing America's Greatness v. FEC, 831 F.3d 500 (D.C. Cir. 2016)

In re Haque, 671 Fed. App'x 810 (D.C. Cir. 2016)

Fields v. Harris, 671 Fed. App'x 808 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 2248 (2017)

Martinez v. Wainstein, 671 Fed. App'x 809 (D.C. Cir. 2016)

Harper v. United States, 671 Fed. App'x 805 (D.C. Cir. 2016)

Calderon v. Brown, 671 Fed. App'x 804 (D.C. Cir. 2016)

Amiri v. Law Office of Olikamma A. Ekekwe, 671 Fed. App'x 808 (D.C. Cir. 2016)

Fields v. United States, 671 Fed. App'x 811 (D.C. Cir. 2016)

Jones v. Dufek, 830 F.3d 523 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1336 (2017)

Fla. Health Scis. Ctr., Inc. v. HHS, 830 F.3d 515 (D.C. Cir. 2016)

Havens v. Mabus, No. 16-5016, 2016 WL 4098840 (D.C. Cir. July 22, 2016)

United States v. Alston, No. 15-3019, 2016 WL 4098630 (D.C. Cir. July 22, 2016)

Jordan v. Ormond, No. 15-7151, 2016 WL 4098823 (D.C. Cir. July 22, 2016), *cert. denied*, 137 S. Ct. 515 (2016)

Gavin v. Prudential Office of Servicemen's Grp. Life Ins. Co., No. 15-7007, 2016 WL 4098810 (D.C. Cir. July 18, 2016)

Takeda Pharm. U.S.A., Inc. v. Burwell, 691 Fed. App'x 634 (D.C. Cir. 2016)

EarthReports, Inc. v. FERC, 828 F.3d 949 (D.C. Cir. 2016)

BP Energy Co. v. FERC, 828 F.3d 959 (D.C. Cir. 2016)

Mellen v. U. S. Park Police, No. 15-5328, 2016 WL 4098769 (D.C. Cir. July 12, 2016), *cert. denied*, 137 S. Ct. 517 (2016)

Peavey v. United States, No. 15-5290, 2016 WL 4098768 (D.C. Cir. July 12, 2016)

Newco Ltd. v. Gov't of Belize, No. 15-7077, 2016 WL 4098818 (D.C. Cir. July 7, 2016)

Patel v. McDonald, No. 13-5105, 2016 WL 6659490 (D.C. Cir. July 5, 2016)

Rosebud Mining Co. & Parkwood Res., Inc. v. Mine Safety & Health Admin., 827 F.3d 1090 (D.C. Cir. 2016)

W. Virginia ex rel. Morrisey v. HHS, 827 F.3d 81 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1614 (2017)

Am. Transmission Sys. Inc. v. FERC, No. 14-1085, 2016 WL 3615443 (D.C. Cir. July 1, 2016)

Okla. Gas & Elec. Co. v. FERC, 827 F.3d 75 (D.C. Cir. 2016)

United Airlines, Inc. v. FERC, 827 F.3d 122 (D.C. Cir. 2016)

Calvo v. Comm'r, 653 Fed. App'x 767 (D.C. Cir. 2016)

Custis v. CIA, 650 Fed. App'x 46 (D.C. Cir. 2016)

Modrall v. Biggs, 653 Fed. App'x 766 (D.C. Cir.), *cert. denied*, 137 S. Ct. 246 (2016)

Nelson v. Florida, 653 Fed. App'x 9 (D.C. Cir. 2016)

Sands v. NLRB, 825 F.3d 778 (D.C. Cir. 2016)

Bullock v. Brennan, No. 16-5022, 2016 WL 3545470 (D.C. Cir. June 13, 2016)

Dorsey v. DEA, 650 Fed. App'x 41 (D.C. Cir. 2016)

Ellis v. U.S. Dep't of Justice, No. 15-5198, 2016 WL 3544816 (D.C. Cir. June 13, 2016)

Rojas-Vega v. U.S. Citizenship & Immigration Servs., 650 Fed. App'x 36 (D.C. Cir. 2016)

Simon v. U.S. Dep't of Justice, No. 16-5031, 2016 WL 3545484 (D.C. Cir. June 10, 2016), *cert. denied*, 137 S. Ct. 593 (2016)

Ilaw v. Littler Mendelson PC, 650 Fed. App'x 35 (D.C. Cir. 2016)

Crafton v. D.C., No. 15-7122, 2016 WL 3545194 (D.C. Cir. June 10, 2016)

Flamingo Las Vegas Operating Co. v. NLRB, No. 15-1024, 2016 WL 3887170 (D.C. Cir. June 10, 2016)

Compton v. Alpha Kappa Alpha Sorority Inc., 650 Fed. App'x 35 (D.C. Cir. 2016)

Sack v. U.S. Dep't of Justice, 650 Fed. App'x 30 (D.C. Cir. 2016)

Shah v. Lynch, No. 14-5280, 2016 WL 3545671 (D.C. Cir. June 3, 2016)

Hill v. Lynch, 650 Fed. App'x 30 (D.C. Cir. 2016)

Friends of Animals v. Jewell, 824 F.3d 1033 (D.C. Cir.), *cert. denied*, 137 S. Ct. 388 (2016)

New York v. U.S. Nuclear Regulatory Comm'n, 824 F.3d 1012 (D.C. Cir. 2016)

DuBerry v. D.C., 824 F.3d 1046 (D.C. Cir. 2016)

Spectrum Pharm., Inc. v. Burwell, 824 F.3d 1062 (D.C. Cir. 2016)

United States v. Gordon, 653 Fed. App'x 762 (D.C. Cir. 2016)

Williams v. Court Servs. & Offender Supervision Agency, No. 15-5275, 2016 WL 10968672 (D.C. Cir. May 31, 2016), *cert. denied*, 138 S. Ct. 1266 (2018)

Johnson v. BAE Sys., Inc., 650 Fed. App'x 28 (D.C. Cir. 2016)

Schmidt v. Maybus, No. 15-5298, 2016 WL 3040153 (D.C. Cir. May 18, 2016)

Coleman v. Johnson, No. 15-5258, 2016 WL 3040902 (D.C. Cir. May 18, 2016)

Wise v. United States, 654 Fed. App'x 2 (D.C. Cir. 2016)

Wilson v. James, No. 15-5338, 2016 WL 3043746 (D.C. Cir. May 17, 2016), *cert. denied*, 137 S. Ct. 695 (2017)

GSS Grp. Ltd. v. Nat'l Port Auth. of Liberia, 822 F.3d 598 (D.C. Cir. 2016)

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Schu v. United States, 204 Fed. App'x 26 (D.C. Cir. 2006)

Schu v. Seventh Day Adventist Headquarters, 204 Fed. App'x 25 (D.C. Cir. 2006)

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United States v. Hurt, No. 06-3060, 2006 WL 2521277 (D.C. Cir. Aug. 24, 2006)

Stephens v. Wynne, No. 06-5176, 2006 WL 2521275 (D.C. Cir. Aug. 24, 2006), *cert. denied*, 548 U.S. 942 (2006)

Alexander v. Washington Gas Light Co., No. 06-7040, 2006 WL 3798858 (D.C. Cir. Aug. 24, 2006)

Consol. Edison Co. of New York v. Bodman, No. 06-5101, 2006 WL 3431687 (D.C. Cir. Aug. 7, 2006)

In re Veteto, No. 06-5153, 2006 WL 6933877 (D.C. Cir. Aug. 4, 2006)

Veteto v. Ginsburg, No. 06-5107, 2006 WL 3093809 (D.C. Cir. Aug. 4, 2006)

Lyons v. Gordon, No. 06-5076, 2006 WL 1982905 (D.C. Cir. June 30, 2006)

Below is a list of all cases where I was a panel member but did not write an opinion in my name, and where an unpublished decision was issued. In compiling this list, others acting on my behalf relied on information provided by the Administrative Office of the U.S. Courts. Copies of these unpublished decisions are supplied.

ACE American Insurance Co. v. Fed. Crop Insurance Corp., No. 16-5348 (D.C. Cir. July 13, 2018)

Brown v. J. Edgar Hoover Building FBI Director, No. 18-5052 (D.C. Cir. July 13, 2018)

Al-Baluchi v. United States, No. 18-1152 (D.C. Cir. June 27, 2018)

Barber v. United States, No. 15-3036 (D.C. Cir. June 22, 2018)

In re Stewart Basil, No. 18-8004 (D.C. Cir. June 22, 2018)

Judicial Watch v. U.S. Dep't of Justice, No. 17-5283 (D.C. Cir. June 22, 2018)

Shephard v. Trump, No. 18-5013 (D.C. Cir. June 21, 2018)

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Simmons v. Comm'r, No. 17-1114 (D.C. Cir. Mar. 29, 2018)

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Olive v. Robinson, No. 17-5115 (D.C. Cir. Mar. 29, 2018)

Barroca v. Sessions, No. 17-5237 (D.C. Cir. Mar. 29, 2018)

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Swecker v. Midland Power Cooperative, No. 17-5208 (D.C. Cir. Nov. 3, 2017)

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Texas v. Pruitt, No. 17-1053 (D.C. Cir. Nov. 2, 2017)

McKinney v. United States, No. 17-3032 (D.C. Cir. Nov. 1, 2017)

Hogue v. Coastal Int'l, Inc., No. 17-7094 (D.C. Cir. Oct. 27, 2017)

Hargan v. Garza, No. 17-5236 (D.C. Cir. Oct. 20, 2017)

Harris v. United States, No. 17-3072 (D.C. Cir. Oct. 12, 2017)

Byrd v. Washington Metro. Area Transit Auth., No. 17-7084 (D.C. Cir. Sept. 22, 2017)

Dean v. Comm'r, No. 17-1123 (D.C. Cir. Sept. 13, 2017)

Passmore v. U.S. Dep't of Justice, No. 17-5083 (D.C. Cir. Sept. 13, 2017)

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Paul v. Didizian, No. 16-7149 (D.C. Cir. May 12, 2017)

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County of Westchester v. FERC, No. 02-1338 (D.C. Cir. Aug. 7, 2006)

Exxon Mobil Corporation v. FERC, No. 06-1153 (D.C. Cir. Aug, 7, 2006)

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Drake v. Cappelle, No. 05-5199 (D.C. Cir. Aug. 3, 2006)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5348 **September Term, 2017**

FILED ON: JULY 13, 2018

ACE AMERICAN INSURANCE COMPANY, ET AL.,
APPELLEES

AMERICAN AGRI-BUSINESS INSURANCE COMPANY,
APPELLANT

v.

FEDERAL CROP INSURANCE CORPORATION, A CORPORATION WITHIN THE UNITED STATES DEPARTMENT OF AGRICULTURE AND RISK MANAGEMENT AGENCY, AN AGENCY WITHIN THE UNITED STATES DEPARTMENT OF AGRICULTURE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01992)

Before: GRIFFITH, KAVANAUGH, and WILKINS, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the judgment of the district court be **AFFIRMED**.

Appellant American Agri-Business Insurance Corporation ("Agri-Business") raised numerous claims in district court against the Federal Crop Insurance Corporation (FCIC). We agree with the district court that dismissal of those claims was proper.

The Federal Crop Insurance Act (the "Act"), codified as amended at 7 U.S.C. § 1501 *et seq.*, authorizes FCIC to "insure, or provide reinsurance for insurers of, producers of agricultural commodities grown in the United States." *Id.* § 1508(a)(1); *see id.* § 1507(c). Accordingly, FCIC enlists private crop insurers to sell "policies written on terms, including premium rates, approved

by [FCIC]." 7 C.F.R. § 400.166; *see* 7 U.S.C. § 1508(k)(1). The Department of Agriculture's Risk Management Agency supervises and administers the federal crop insurance program on behalf of FCIC, *see* 7 U.S.C. § 6933, and we refer to both collectively as FCIC throughout this judgment. *See Am. Growers Ins. Co. v. Fed. Crop Ins. Corp.*, 532 F.3d 797, 798 (8th Cir. 2008).

The private crop insurers obtain reinsurance from FCIC pursuant to a Standard Reinsurance Agreement (SRA) negotiated between FCIC and the private crop insurance industry. FCIC requires the private crop insurers to renew these reinsurance contracts annually, although the Act limits renegotiation of "the financial terms and conditions" of the SRA to once in every five-year period. *See* 7 U.S.C. § 1508(k)(8). As relevant here, FCIC and the private crop insurers, including Agri-Business, negotiated a new SRA to become effective in the 2011 crop year. The SRA detailed how FCIC would take a share of the premiums collected from insured farmers in exchange for reimbursing the private crop insurers for certain administrative expenses and providing them with reinsurance against the risk of loss. Importantly, however, nothing in the 2011 SRA dictated what premium rates the private crop insurers could charge insured farmers or the methodology by which FCIC would calculate those rates. The 2011 SRA simply incorporated the Act, which requires FCIC to set premium rates that are actuarially sound and provides that the ratemaking methodology is subject to change. *See, e.g.*, 7 U.S.C. §§ 1506(n), 1508(d), 1508(i); *cf.* 7 C.F.R. § 400.164. FCIC thus calculates approved premiums annually using its prevailing ratemaking methodology.

After negotiating the 2011 SRA, FCIC modified its ratemaking methodology, effective the following year. This resulted in lower premium rates than had been authorized in 2011 and allegedly cost the private crop insurers hundreds of millions of dollars in underwriting.

The private crop insurers sought relief from the Risk Management Agency's Deputy Administrator for Insurance Services. When that failed, they appealed to the Civilian Board of Contract Appeals (the "Board"), arguing that this modification to the ratemaking methodology violated both the duty of good faith and fair dealing implied in the 2011 SRA and the Act's limitation on renegotiating financial terms and conditions, codified at 7 U.S.C. § 1508(k)(8). In the alternative, the private crop insurers argued for reformation or rescission of the 2011 SRA on the ground that the parties had mistakenly assumed that the ratemaking methodology in place when they agreed to the 2011 SRA was actuarially sound. The private crop insurers further invoked promissory estoppel based on alleged representations by FCIC that the ratemaking methodology and subsequent premiums would remain unchanged for the five years the 2011 SRA would be in place. The Board determined it had no jurisdiction to decide the claim of promissory estoppel and granted summary relief to FCIC on all other claims. *ACE Am. Ins. Co.*, CBCA 2876-FCIC, et al., 14-1 BCA ¶ 35,791.

The private crop insurers brought this suit in November 2014, but significantly, they did not seek judicial review of the Board's decision. Instead, they raised anew the claims they had made to the Board. They also brought additional claims alleging that FCIC had unjustly enriched itself and had failed to "tak[e] into consideration the financial condition of the reinsured companies" when making SRA decisions as required by the Act, codified at 7 U.S.C. § 1508(k)(3). The district court dismissed all their claims, *ACE Am. Ins. Co. v. Fed. Crop Ins. Corp.*, 209

F. Supp. 3d 343 (D.D.C. 2016), and Agri-Business appealed. We affirm the judgment of the district court on each issue.

First, Agri-Business cannot pursue again in district court claims it had previously raised before and were already adjudicated by the Board. This is so because "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)); *see also B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) ("[W]here a single issue is before a court and an administrative agency . . . . 'courts may take it as given that Congress has legislated with the expectation that [preclusion] will apply except when a statutory purpose to the contrary is evident.'" (quoting *Astoria*, 501 U.S. at 108)). Agri-Business can only seek review under the Administrative Procedure Act (APA) of the Board's decision on these claims. *See* 5 U.S.C. § 704; *see also Am. Growers Ins. Co.*, 532 F.3d at 800 (reviewing a Board adjudication under the APA); *Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 947 F.2d 269, 282 (7th Cir. 1991) (reviewing an FCIC adjudication under the APA).

Agri-Business responds that the Act overrides this default rule when it vests federal district courts with "exclusive original jurisdiction . . . of all suits brought by or against [FCIC]." 7 U.S.C. § 1506(d). Agri-Business thus reasons "the district court should disregard the decision of [the Board] in favor of a *de novo* trial" on all claims. Agri-Business Br. 20. We are unpersuaded. Nothing in "exclusive original jurisdiction" suggests Agri-Business can re-litigate in a de novo proceeding claims already raised before and adjudicated by the Board, especially in light of the neighboring statutory provision that requires exhaustion of administrative procedures, discussed below. *See* 7 U.S.C. § 6912(e); *see also Rain & Hail Ins. Serv. v. Fed. Crop Ins. Corp.*, 229 F. Supp. 2d 710, 715-17 (S.D. Tex. 2002); *Am. Growers Ins. Co. v. Fed. Crop Ins. Corp.*, 210 F. Supp. 2d 1088, 1091-93 (S.D. Iowa 2002). The word "exclusive" preempts jurisdiction in state courts and the Court of Federal Claims, *see Tex. Peanut Farmers v. United States*, 409 F.3d 1370, 1372-74 (Fed. Cir. 2005), and "original" designates federal district court as the initial Article III court to consider each case, *cf. United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) ("[T]he function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction as well as by an appellate tribunal."); *NO Gas Pipeline v. FERC*, 756 F.3d 764, 769 (D.C. Cir. 2014) (explaining the default rule that parties can obtain review of administrative decisions under the grant of original jurisdiction in 28 U.S.C. § 1331). *See generally* H.R. Rep. 96-1272, at 12-13 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 3082, 3082-83 (discussing suits by or against FCIC).

Agri-Business argues that it also sought APA review of the Board decision, but we can find no evidence of such pleading in its complaint. There is no reference to the APA, the proper standard of review, or even a request that the district court review the Board decision. And Agri-Business made no effort to amend its complaint to address such defects when FCIC moved to dismiss the case on those grounds. Although we do not require the invocation of "magic words," we will not manufacture a claim that is otherwise absent from the pleading. *Broderick v. Donaldson*, 437 F.3d 1226, 1232 (D.C. Cir. 2006).

Second, Agri-Business cannot pursue a claim in district court that FCIC violated § 1508(k)(3) by changing the ratemaking methodology without considering the financial condition of the reinsured companies unless Agri-Business first raised that issue in the administrative proceedings below. The Act requires plaintiffs to "exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law before the person may bring an action in a court of competent jurisdiction." 7 U.S.C. § 6912(e). Therefore, a private crop insurer who "believes [FCIC] has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement" must file those claims with the Deputy Administrator and the Board. 7 C.F.R. § 400.169; *see ACE Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 995-1002 (8th Cir. 2006). This requirement is mandatory but not jurisdictional. *Munsell v. Dep't of Agric.*, 509 F.3d 572, 580-81 (D.C. Cir. 2007).

Agri-Business counters that the Secretary did not establish administrative procedures for claims that FCIC violated the Act, arguing that the phrase "action that is not in accordance with the provisions of the Standard Reinsurance Agreement" limits the exhaustion requirement to express breach-of-SRA claims. According to Agri-Business, there were no prescribed procedures to exhaust. For the same reason, Agri-Business continues, the Board actually lacked jurisdiction to adjudicate whether FCIC changed the financial terms and conditions of the SRA in violation of § 1508(k)(8) as well. Agri-Business describes a "two-track" system whereby breach-of-SRA claims must be submitted to the Deputy Administrator and Board while claims that FCIC violated the Act can be filed directly in district court. Agri-Business Br. 12.

This argument overlooks that Agri-Business raised its statutory arguments in an effort to recover damages for breach of the 2011 SRA, which expressly incorporates the Act. Agri-Business cannot circumvent the administrative process by disguising its breach-of-SRA claims as statutory claims. *Cf. Westberg v. FDIC*, 741 F.3d 1301, 1306 (D.C. Cir. 2014) (determining administrative exhaustion requirements by the "functional" nature of a claim as opposed to the formal pleading); *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 77-79 (D.C. Cir. 1985) ("We begin with the well-accepted proposition that a plaintiff may not avoid the jurisdictional bar of the [Contract Disputes Act] merely by alleging violations of regulatory or statutory provisions rather than breach of contract."); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 969 (D.C. Cir. 1982) (discussing "disguised" contract claims). And while Agri-Business insists the Board itself "concluded that it lacked jurisdiction over [Agri-Business]'s statutory claims," Agri-Business Br. 31, even the most cursory review of the Board's decision refutes that notion, *see ACE Am. Ins. Co.*, 14-1 BCA at 175,059-60.

Third, Agri-Business's promissory estoppel and unjust enrichment claims are foreclosed by the existence of the 2011 SRA. As we have previously explained, "Underscoring the nature of promissory estoppel and unjust enrichment as remedies for failed agreements, courts tend not to allow either action to proceed in the presence of an actual contract between the parties." *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 280 (D.C. Cir. 2009). The ratemaking methodology and subsequent premiums "were repeatedly discussed during negotiations as they closely relate to the standard agreement," *ACE Am. Ins. Co.*, 209 F. Supp. 3d at 347-48, and cannot qualify as some

separate quasi-contract that could be the basis for additional equitable remedies. The district court was correct to dismiss these claims as well.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5052 **September Term, 2017**

1:18-cv-00080-UNA

Filed On: July 13, 2018

Jerome Julius Brown,

Appellant

v.

J. Edgar Hoover Building FBI Director,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Kavanaugh and Katsas, Circuit Judges; Sentelle, Senior Circuit Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief and appendix filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing and the motion to amend the case caption, it is

ORDERED that the motion to amend the case caption be denied. In accordance with Federal Rule of Appellate Procedure 12(a), this appeal was properly docketed under the title of the district court action. It is

FURTHER ORDERED AND ADJUDGED that the district court order filed January 24, 2018 be affirmed. This court previously affirmed the order of the district court enjoining appellant from proceeding in forma pauperis in the district court. See Brown v. Lyons Mane P'ship, No. 10-mc-7 (D.D.C. Mar. 1, 2010), aff'd, No. 10-7027 (D.C. Cir. June 7, 2010). The district court properly applied that injunction to deny appellant's motion to proceed in forma pauperis and to dismiss the complaint and this civil action without prejudice.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5052 **September Term, 2017**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1152 **September Term, 2017**

CMCR-18-003

Filed On: June 27, 2018

In re: Ammar Al-Baluchi, also known as Ali Abdul Aziz Ali,

Petitioner

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and appendix, the response thereto and the ex parte, in camera supplement, and the reply; and the motion to disclose an ex parte, in camera filing, and the response thereto, it is

ORDERED that the motion to disclose be denied. The ex parte, in camera filing sought by petitioner is not relevant to the court's disposition of the petition for mandamus. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown that he is entitled to the extraordinary remedy of mandamus. See Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-81 (2004). In particular, petitioner has failed to demonstrate that he lacks an adequate alternative remedy. Id. There is currently a stay in effect until August 18, 2018, preventing the destruction of the site petitioner seeks to preserve. The government represents that it will consent to motions filed by petitioner before the Military Commission seeking additional extensions of that stay, until the United States Court of Military Commissions Review is so constituted that it may review the Commission order in dispute. Given that representation, and the Military Commission's past practice of granting unopposed motions to stay the destruction of the site, mandamus relief is currently inappropriate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3036 **September Term, 2017**

FILED ON: JUNE 22, 2018

UNITED STATES OF AMERICA,
APPELLEE

v.

CORNELL W. BARBER,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cr-00239-1)

Before: GARLAND, *Chief Judge*, and KAVANAUGH and SRINIVASAN, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED and ADJUDGED that the judgment of the district court be affirmed.

Cornell Barber appeals his conviction, pursuant to a plea agreement, for D.C. Unlawful Possession of a Firearm, D.C. Code § 22-4503(a)(1). He argues the plea agreement should be rescinded because it was based on a mutual mistake of material fact and also that the district court abused its discretion in accepting the plea because that acceptance was premised on a clearly erroneous understanding of facts. Finally, he argues that, for related reasons, his counsel was constitutionally ineffective.

As counsel acknowledged at oral argument, all of Barber's claims rise or fall on a single legal claim: that a conviction for D.C. Assault with a Dangerous Weapon (ADW), D.C. Code § 22-402, is not a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B). But for the reasons given in our opinion in *United States*

v. Haight, No. 16-3123 (June 22, 2018), D.C. ADW *is* a "violent felony." We therefore reject the claimed grounds for relief and affirm the judgment of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-8004 **September Term, 2017**

1:16-cv-01084-RJL

Filed On: June 22, 2018

In re: Stewart Deus Basil,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of the petition for permission to appeal, it is

ORDERED that the petition be denied. Petitioner seeks permission to appeal the district court's February 17, 2017 order, which has already been affirmed by this court. See Basil v. U.S. Citizenship & Immigration Servs., 708 F. App'x 697 (D.C. Cir. Jan. 3, 2018); see also id., No. 17-5034 (D.C. Cir. Feb. 4, 2018) (order denying petition for rehearing); id., No. 17-5034 (D.C. Cir. May 7, 2018) (order denying motion to recall the mandate). Consideration of this petition is therefore barred by the law-of-the-case doctrine. According to this doctrine, "the same issue presented a second time in the same case in the same court should lead to the same result." LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (emphasis removed). In addition, the petition does not meet the requirements of Federal Rule of Appellate Procedure 5.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5283 **September Term, 2017**

1:16-cv-01888-RMC

Filed On: June 22, 2018

Judicial Watch, Inc.,

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of the motion to vacate the judgment and for remand and the response in support thereof, it is

ORDERED that the motion be granted. The law enforcement proceeding that served as the basis for the assertion of Freedom of Information Act Exemption 7(A) in this case is no longer pending. The court therefore vacates the district court's October 20, 2017 order granting appellee's motion for summary judgment and denying appellant's cross-motion for summary judgment based on Exemption 7(A). See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (noting that for Exemption 7(A) to apply, an enforcement proceeding must be pending at the time of the court's decision and that "reliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close"). It is

FURTHER ORDERED that the case be remanded to the district court for further proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the district court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5013 **September Term, 2017**

1:17-cv-01694-UNA

Filed On: June 21, 2018

In re: Alonzo Dean Shephard,

Petitioner

Consolidated with 18-5025

BEFORE: Kavanaugh, Wilkins, and Katsas, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus; the court's January 24, 2018, and January 30, 2018, orders directing petitioner to show cause why he should not be required to pay the full appellate filing fees for these now-consolidated cases; the response thereto, which contains a request for initial hearing en banc; and the supplements to the response, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED that the request for initial hearing en banc be denied. See Fed. R. App. P. 35(a). It is

FURTHER ORDERED that petitioner be barred from proceeding in forma pauperis in these consolidated cases. See 28 U.S.C. § 1915(g). While incarcerated, petitioner has brought at least three civil actions that were dismissed on the grounds that they were frivolous, malicious, or failed to state a claim. See Shephard v. Bush, No. 02-5181 (D.C. Cir. Oct. 29, 2002) (per curiam). Because petitioner has failed to demonstrate the requisite imminent danger of serious physical injury at the time he filed the complaint, he is barred from proceeding without prepayment of the full fee. See 28 U.S.C. § 1915(g); Pinson v. Samuels, 761 F.3d 1, 4-5 (D.C. Cir. 2014); Mitchell v. Fed. Bureau of Prisons, 587 F.3d 415, 421-22 (D.C. Cir. 2009). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5013 **September Term, 2017**

FURTHER ORDERED that the petition for writ of mandamus, No. 18-5013, be denied. The writ is available only if (1) the petitioner has "'no other adequate means to attain the relief he desires,'" (2) the petitioner shows "'that his right to issuance of the writ is clear and indisputable,'" and (3) "'the issuing court, in the exercise of its discretion, [is] satisfied that the writ is appropriate under the circumstances.'" In re al-Nashiri, 791 F.3d 71, 78 (D.C. Cir. 2015) (quoting Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-81 (2004)). Here, petitioner has another adequate means to attain review of the district court's denial of leave to proceed in forma pauperis and dismissal of his complaint: his pending appeal, No. 18-5025. Moreover, this court's determination that petitioner may not proceed in forma pauperis is applicable to the decision of the district court, which reached the same conclusion; so petitioner has no clear and indisputable right to relief from that decision by way of a petition for writ of mandamus. It is

FURTHER ORDERED that petitioner pay the $505 docketing and filing fee for the appeal, No. 18-5025, to the district court within 30 days of the date of this order. Failure to pay the fee will result in dismissal of No. 18-5025 for lack of prosecution. See D.C. Cir. Rule 38.

The Clerk is directed to send a copy of this order to petitioner by whatever means necessary to ensure receipt.

Pursuant to D.C. Circuit Rule 36, the disposition of No. 18-5013 will not be published.

Per Curiam

FOR THE COURT:

By: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5233 **September Term, 2017**

1:15-cv-01683-CRC

Filed On: June 20, 2018

Henry Francis,

Appellant

v.

United States Department of Justice Office of Information Policy,

Appellee

BEFORE: Kavanaugh, Wilkins, and Katsas, Circuit Judges

O R D E R

Upon consideration of the motion to appoint counsel; appellant's "procedural motion" and "dispositive motion," both of which this court construes as motions for summary reversal, the response thereto, and the reply; the motion for summary affirmance, and the response thereto; and the motion to supplement the record, it is

ORDERED that the motion to supplement the record be dismissed as moot. The district court's August 21, 2017 memorandum opinion is already part of the record on appeal, because it was part of the district court record. See Fed. R. App. P. 10(a). It is

FURTHER ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted, and the motions for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly concluded that the government's search in response to appellant's Freedom of Information Act request was adequate, and the court properly relied on the declaration of Megan Hoobler, who performed a search for records in response to appellant's request. See Mobley v. CIA,

806 F.3d 568, 580 (D.C. Cir. 2015) ("Agency affidavits – so long as they are relatively detailed and non-conclusory – are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents."). Nor has appellant demonstrated that the evidence he submitted to the district court to challenge that declaration was probative of the adequacy of the search. The fact that the search failed to locate any responsive records did not automatically render the search inadequate. See Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("The adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.").

With respect to appellant's post-judgment motion for judicial notice and reconsideration, the district court correctly concluded that the motion presented no grounds for reconsideration. Furthermore, appellant has not shown that the district court abused its discretion by declining to accept his motion for judicial notice after judgment had already been entered, see Whiting v. AARP, 637 F.3d 355, 364 (D.C. Cir. 2011) (reviewing for abuse of discretion district court's disposition of a motion for judicial notice), or that the materials for which he sought judicial notice would have affected the outcome of this case in the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5088 **September Term, 2017**

1:15-mc-01461-UNA

Filed On: May 9, 2018

In re: Jane Doe and Jane Doe,

Petitioners

BEFORE: Griffith, Kavanaugh, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the motion to proceed in forma pauperis, the motions for waiver of fees, the motion to use the pseudonym Jane Doe, the motion for reasonable accommodation, and the petition for writ of prohibition and/or mandamus, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motions to waive fees be dismissed as moot, as petitioners have not requested copies of any documents. It is

FURTHER ORDERED that the motion to use the pseudonym Jane Doe be granted. It is

FURTHER ORDERED that the motion for reasonable accommodation, which the court construes as a motion to appoint counsel, be denied. It is

FURTHER ORDERED that the petition for writ of prohibition and/or mandamus be denied. Petitioners have not shown a clear and indisputable right to the extraordinary remedy of mandamus. See Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 381 (2004); In re al-Nashiri, 791 F.3d 71, 78 (D.C. Cir. 2015). Specifically, Petitioners have not shown that they complied with the district court's April 29, 2016 order by submitting a complaint suitable for public filing.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1315 **September Term, 2017**

FILED ON: MAY 4, 2018

DAVID SAXE PRODUCTIONS, LLC AND VEGAS! THE SHOW, LLC AND DAVID SAXE PRODUCTIONS, LLC AND FAB FOUR LIVE, LLC,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 16-1340

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: HENDERSON, ROGERS, and KAVANAUGH, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the petition for review and cross-application for enforcement of an order of the National Labor Relations Board ("Board") and were argued by counsel. On consideration thereof, and of the letter filed by the Board on January 5, 2018, requesting a partial voluntary remand, it is

ORDERED and **ADJUDGED** that the petition for review be granted in part and denied in part, and the Section 8(a)(1) violations based on the non-renewal of Carter's contract for *Vegas! The Show* and Carter's discharge from the *BeatleShow* be remanded to the Board; the cross-application for summary enforcement be granted as to the Board's unchallenged findings that the companies violated Section 8(a)(1) by prohibiting and discouraging employees from engaging in protected concerted activity through threats, disparagement, and discrimination; and the Board's request for remand of its findings that the companies violated Section 8(a)(1) as a result of the non-disclosure and non-contractual clauses be granted, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: May 4, 2018

Opinion for the court filed by Circuit Judge Rogers.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1315 **September Term, 2017**

NLRB-28CA075461
NLRB-28CA084151

Filed On: June 11, 2018

David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four Live, LLC,

Petitioners

v.

National Labor Relations Board,

Respondent

Consolidated with 16-1340

BEFORE: Henderson, Rogers, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the proposed judgment submitted to the court on May 15, 2018, by the National Labor Relations Board, and the proposed judgment submitted to the court on May 22, 2018, by the petitioners, and the reply, it is

ORDERED that the National Labor Relations Board's proposed judgment be adopted as the judgment of the court, replacing the judgment entered May 4, 2018.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID SAXE PRODUCTIONS, LLC AND VEGAS! THE SHOW, LLC AND DAVID SAXE PRODUCTIONS, LLC AND FAB FOUR LIVE, LLC,	:	ORIGINAL
Petitioner/Cross-Respondent	:	Nos. 16-1315,
v.	:	16-1340
NATIONAL LABOR RELATIONS BOARD	:	
Respondent/Cross-Petitioner	:	

JUDGMENT

Before: HENDERSON, ROGERS, and KAVANAUGH, Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by the David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four Live LLC to review an Order of the National Labor Relations Board dated August 26, 2016, in Case Nos. 28-CA-075461 and 28-CA-084151, reported at 364 NLRB No. 100, and upon a cross-application for enforcement filed by the National Labor Relations Board to enforce said Order. The Court heard argument of the parties and has considered the briefs and agency record filed in this cause. On May 4, 2018, the Court, being fully advised in the premises, handed down its opinion granting in part the petition of David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four Live LLC and granting in part the Board's cross-petition for enforcement. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four

Live LLC, its officers, agents, successors, and assigns, shall abide by said order (See Attached Order and Appendix).

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

ENTERED: June 11, 2018

DAVID SAXE PRODUCTIONS, LLC AND VEGAS! THE SHOW, LLC, AND DAVID SAXE PRODUCTIONS, LLC AND FAB FOUR LIVE, LLC

v.

NATIONAL LABOR RELATIONS BOARD

ORDER

David Saxe Productions, LLC and *Vegas! The Show*, LLC, and David Saxe Productions, LLC and Fab Four Live, LLC, Las Vegas, Nevada, their officers, agents, successors, and assigns shall

1. Cease and desist from

   (a) Prohibiting employees from engaging in protected concerted activities.

   (b) Disparaging employees for engaging in protected concerted activities.

   (c) Threatening employees with unspecified reprisals because they engaged in protected concerted activities.

   (d) Impliedly threatening employees with discharge for engaging in protected concerted activities.

   (e) Instructing employees that their failure to cease complaining about protected activity will result in the non-renewal of their employment contracts and thereby result in discharge.

   (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other

electronic means, if the Respondent in question customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If any Respondent has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by that Respondent at any time since September 27, 2011.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official of each respective Respondent on a form provided by the Region attesting to the steps that that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from engaging in protected concerted activities.

WE WILL NOT disparage you for engaging in protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals because you engaged in protected concerted activities.

WE WILL NOT impliedly threaten you with discharge for engaging in protected concerted activities.

WE WILL NOT instruct you that your failure to cease complaining about protected activity will result in the non-renewal of your employment contracts and thereby result in your discharge.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

DAVID SAXE PRODUCTIONS, LLC AND *VEGAS! THE SHOW*, LLC, AND DAVID SAXE PRODUCTIONS, LLC AND FAB FOUR LIVE, LLC, SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/28-CA-075461 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273–1940.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID SAXE PRODUCTIONS, LLC AND VEGAS! THE SHOW, LLC AND DAVID SAXE PRODUCTIONS, LLC AND FAB FOUR LIVE, LLC,	:	
Petitioner/Cross-Respondent	:	Nos. 16-1315,
v.	:	16-1340
NATIONAL LABOR RELATIONS BOARD	:	
Respondent/Cross-Petitioner	:	

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2018, I electronically filed the foregoing document with the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, D.C.
this 15th day of May, 2018

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1114 **September Term, 2017**

USTC-7989-16W

Filed On: May 30, 2018

Albert C. Simmons,

Appellant

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for certification and the petition for rehearing, it is

ORDERED that the motion for certification be denied. While the court's staff attorneys make recommendations for the disposition of contested motions, the panel of judges considers and decides the motions. See D.C. Circuit Handbook of Practice and Procedures 31 (2018). It is

FURTHER ORDERED that the March 29, 2018 order be amended on page two to delete the reference to "district court" and to substitute "Tax Court." It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1119 **September Term, 2017**

USTC-021277-13W
USTC-21276-13W

Filed On: March 29, 2018 [1724417]

Whistleblower 21276-13W,

Appellee

v.

Commissioner of Internal Revenue Service,

Appellant

Consolidated with 17-1120

BEFORE: Henderson and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the joint stipulation for dismissal of appeals, it is

ORDERED that the Clerk note on the docket that these cases are dismissed. No mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5115 **September Term, 2017**

1:17-cv-00045-UNA

Filed On: March 29, 2018

In re: Jose Manuel Olive and Vincent Dale Ross,

Petitioners

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, the court's May 24, 2017 order and the responses thereto, the motions for judicial notice, and the court's October 27, 2017 order and the responses thereto, it is

ORDERED that petitioner Ross be dismissed from this case for lack of prosecution. See D.C. Cir. Rule 38. Petitioner Ross has not filed a signed, unconditional consent form for the collection of fees from his trust account in compliance with the Prison Litigation Reform Act, as this court directed him to do by order filed October 27, 2017. It is

FURTHER ORDERED that petitioner Olive's motions for judicial notice be denied. Petitioner has not shown that the matters of which judicial notice is sought are either relevant to the court's review or proper subjects for judicial notice, see Fed. R. Evid. 201(b). It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The petition does not specify what relief is sought, much less a clear and indisputable right to that relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). To the extent petitioner is challenging the imposition of any filing fees, this court has upheld the constitutionality of the filing-fee provision of the Prison Litigation Reform Act. Tucker v. Branker, 142 F.3d 1294, 1297-1301 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5237 **September Term, 2017**

1:17-cv-01570-APM

Filed On: March 29, 2018

In re: Robert W. Barroca,

Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for a writ of mandamus, the memorandum of law and fact in support of the petition, and the motion to proceed in forma pauperis, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The district court did not abuse its discretion in transferring petitioner's habeas action to the United States District Court for the Central District of California, see In re: Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam), which has jurisdiction over petitioner's custodian, see Rumsfeld v. Padilla, 542 U.S. 426, 434-40 (2004); Day v. Trump, 860 F.3d 686, 689 (D.C. Cir. 2017). As the district court noted, this court has stated that "issuance of an order to show cause is the most appropriate step prior to sua sponte transfer" of a habeas petition. Chatman-Bey v. Thornburgh, 864 F.2d 804, 814 (D.C. Cir. 1988). The district court nevertheless provided sufficient notice to petitioner and an opportunity to contest the transfer order by delaying the order's effect. See In re Asemani, 455 F.3d 296, 300 (D.C. Cir. 2006) (citing Starnes v. McGuire, 512 F.2d 918, 935 (D.C. Cir. 1974) (en banc) (procedural recommendation of a 20-day delay between the transfer order and physical transfer of a prisoner's case)). In fact, the district court considered and addressed petitioner's arguments in opposition to the transfer in a memorandum opinion denying reconsideration and upholding its determination that this district is not the proper forum to hear petitioner's claim.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5181 **September Term, 2017**

1:16-cv-00164-UNA

Filed On: March 28, 2018

Ya'shua Amen Shekhem El Bey,

Appellant

v.

United States of America and Alison Julie Nathan, Judge, U.S. District Court for the Southern District of New York,

Appellees

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed November 30, 2017, the response thereto, and the affirmation in support of the response; and the motion for en banc reconsideration and the affirmation in support of the motion, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for en banc reconsideration of the court's November 30, 2017 order be denied. See Fed. R. App. P. 35(a). It is

FURTHER ORDERED, on the court's own motion, that the district court's minute order filed July 18, 2017 be summarily affirmed. The merits of this appeal are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly denied appellant's motion to vacate the order dismissing his complaint "[i]n light of the Court of Appeals' affirmance of the order of dismissal for want of subject matter jurisdiction." Minute Order July 18, 2017. Indeed, as this court previously held in Nos. 16-5102, et al., "[t]he complaint was properly dismissed for lack of subject matter jurisdiction because a district court in one district or circuit lacks authority to review the decision of a district court in another district or circuit." Judgment Apr. 4, 2017. As this court explained in its November 30, 2017 order, appellant has not shown that the issuance of the minute

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5181 **September Term, 2017**

order was concealed in any way or obstructed his ability to appeal. The entire text of the July 18, 2017 order is on the public docket. There is no memorandum opinion or any other document distinct from and accompanying that minute order.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5026 **September Term, 2017**

1:15-cv-02123-UNA

Filed On: March 28, 2018

In re: David Lee Smith,

Petitioner

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not shown a clear and indisputable right to relief, see Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), or that he has no other adequate means to obtain the relief requested, see Allied Chem. Corp. v. Daiflon, 449 U.S. 30, 35 (1980). To the extent petitioner seeks to reduce his sentence, the proper vehicle to challenge his sentence in federal court is an application filed under 28 U.S.C. § 2254 in the district court with jurisdiction over petitioner's custodian. See, e.g., Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004). Petitioner may not use a mandamus petition to circumvent § 2254.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3056 **September Term, 2017**

1:14-cr-00169-CRC-1

Filed On: March 5, 2018

United States of America,

Appellee

v.

Quincy Lamont Bufford,

Appellant

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the response thereto, which the court construes as containing a request for a certificate of appealability; and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to dismiss be granted, because appellant did not file a timely notice of appeal. Appellant filed his notice of appeal on September 22, 2016, which was more than 60 days after entry of the challenged order on March 3, 2016. See Fed. R. App. P. 4(a)(1)(B). Further, appellant has failed to present any arguments in response to the motion to dismiss as to why the appeal should be considered timely. See United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived."). It is

FURTHER ORDERED that the request for a certificate of appealability be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3056 **September Term, 2017**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7111 **September Term, 2017**

1:17-cv-01110-UNA

Filed On: March 1, 2018

Gene Allen,

Appellant

v.

State of Nevada, et al.,

Appellees

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel, the brief, and the motion for reconsideration, construed as a renewed motion for a certificate of appealability, it is

ORDERED that the motion for appointment of counsel be denied. It is

FURTHER ORDERED that the renewed motion for a certificate of appealability be denied and that the appeal be dismissed. See 28 U.S.C. § 2253(c)(1). Appellant has not shown "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Therefore, no certificate of appealability is warranted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5212 **September Term, 2017**

1:14-cv-01808-ABJ

Filed On: February 26, 2018

In re: Matthew August LeFande,

Petitioner

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of prohibition, the court's order to show cause filed on November 17, 2017, the response thereto, and the supplement to the response, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the petition be denied. Petitioner has not shown that his right to the requested relief is clear and indisputable, and that no other adequate means to attain the relief exist. In re Sealed Case, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5039 **September Term, 2017**

Filed On: February 21, 2018

In re: Jeremy Pinson,

Petitioner

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the response thereto, and the reply; the motions to appoint counsel; and the motion for leave to file an addendum to the petition, it is

ORDERED that the motion for leave to file an addendum to the petition be granted. It is

FURTHER ORDERED that the motions to appoint counsel be denied. It is

FURTHER ORDERED that the petition for writ of mandamus be granted as to Pinson, the only petitioner remaining in the case. The district court is directed to file the complaint (which is attached to the petition for writ of mandamus) as to Pinson. See In re Williams, No. 10-5122 (D.C. Cir. Jan. 4, 2012). The request for apportionment of fees is moot because Pinson is the only remaining petitioner. At this time, the court takes no position on the merits of the complaint. Because this court has granted Pinson's motion for leave to proceed in forma pauperis based on the Prison Litigation Reform Act's imminent danger exception, 28 U.S.C. § 1915(g), the district court shall allow Pinson to proceed in forma pauperis in the newly filed case.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit to the district court a copy of this order and Pinson's complaint.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1248 **September Term, 2017**

FCC-16-166

Filed On: February 16, 2018

In re: Sandwich Isles Communications, Inc.,

Petitioner

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the opposition thereto, and the reply, it is

ORDERED that the petition be denied. Petitioner has not shown a "clear and indisputable right" to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) (internal quotation marks omitted).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1270 **September Term, 2017**

FERC-161FERC62119

Filed On: February 7, 2018

In re: Boyce Hydro Power, LLC,

Petitioner

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of petitioner's emergency motion to stay an order of the Federal Energy Regulatory Commission ("FERC"), construed as a petition for writ of mandamus, the response thereto, and the reply; and the motion to supplement the record, it is

ORDERED that the motion to supplement the record be granted. It is

FURTHER ORDERED that the petition be granted in part and denied in part. The provision of FERC's order issued November 20, 2017 requiring petitioner to cease generation at the Edenville Hydroelectric Project No. 10808 is hereby stayed pending further order of the court. This court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to issue writs in aid of its ultimate jurisdiction. See In re GTE Serv. Corp., 762 F.2d 1024, 1026 (D.C. Cir. 1985). A stay may be granted under the All Writs Act if the statutorily prescribed remedy is "clearly inadequate" and the petitioner meets the "well established requirements that [this court] routinely appl[ies] to motions for stay pending appeal." See Reynolds Metals Co. v. FERC, 777 F.2d 760, 762 (D.C. Cir. 1985). With respect to the cease generation directive, petitioner's ordinary remedy is inadequate, see id., and petitioner has satisfied the stringent requirements for a stay pending court review. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2017). The petition is denied in all other respects.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1271 **September Term, 2017**

FERC-CP16-10-000
FERC-CP16-13-000

Filed On: February 2, 2018

Appalachian Voices, et al.,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

Mountain Valley Pipeline, LLC,
Intervenor

Consolidated with 18-1002, 18-1006

BEFORE: Griffith, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the emergency motions for stay pending judicial review and the petition for writ of mandamus, the responses thereto, and the replies; and the motion to dismiss, it is

ORDERED that the motions for stay be denied. Petitioners have not satisfied the stringent requirements for a stay pending court review. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2017). It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioners have not shown a clear and indisputable right to the extraordinary remedy of mandamus. See Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1271 **September Term, 2017**

FURTHER ORDERED that the motion to dismiss be referred to the merits panel to which these consolidated cases are assigned. The parties are directed to address in their briefs the issues presented in the motion to dismiss, rather than incorporate those arguments by reference.

Pursuant to D.C. Circuit Rule 36, the disposition in No. 18-1006 will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1426 **September Term, 2017**

DOE-FE-15-63-LNG

Filed On: January 30, 2018 [1715453]

Sierra Club,

Petitioner

v.

United States Department of Energy,

Respondent

Sabine Pass Liquefaction, LLC,
Intervenor

BEFORE: Garland, Chief Judge; and Kavanaugh and Katsas, Circuit Judges

O R D E R

Upon consideration of petitioner's unopposed motion for voluntary dismissal, it is

ORDERED that the motion be granted and this case is dismissed.

The Clerk is directed to issue the mandate forthwith to the agency.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 3, 2017 Decided December 22, 2017

No. 16-5379

DANA-FARBER CANCER INSTITUTE,
APPELLEE

v.

ERIC D. HARGAN, ACTING SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01269)

Carleen M. Zubrzycki, Attorney, U.S. Department of Justice, argued the cause for appellant. With her on the briefs were *Michael S. Raab*, Attorney, *Janice L. Hoffman*, Associate General Counsel, U.S. Department of Health & Human Services, and *Susan Maxson Lyons*, Deputy Associate General Counsel for Litigation. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Douglas H. Hallward-Driemeier argued the cause for appellee. With him on the brief was *Deborah K. Gardner*.

Before: ROGERS, KAVANAUGH, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The issue on appeal concerns Medicare reimbursement owed to the Dana-Farber Cancer Institute, Inc. for a tax that it paid monthly to the Commonwealth of Massachusetts, the receipts of which Massachusetts used to compensate Dana-Farber for services provided to uninsured, low-income individuals. The Provider Reimbursement Review Board in the U.S. Department of Health and Human Services determined that by statute and regulation Dana-Farber was entitled to reimbursement only for the net of Medicare's share of the tax and compensation Dana-Farber received from Massachusetts. Dana-Farber appealed, and the district court granted it partial summary judgment, agreeing that Dana-Farber was entitled to full reimbursement of Medicare's share of the tax paid and vacating the Board's decision. The Secretary of Health and Human Services appeals, and for the following reasons, we reverse.

I.

Medicare is a federal insurance program that compensates hospitals for certain healthcare services provided to eligible patients. 42 U.S.C. § 1395 *et seq*. Eligible patients must be at least 65 years of age or suffering from disabilities. *Id.* § 1395c. The Secretary is authorized to award Medicare compensation only for "reasonable costs," *id.* § 1395f(*l*), which Congress has determined is the "cost actually incurred," *id.* § 1395x(v)(1)(A). The Secretary is also to establish methods for determining "reasonable costs" so "the necessary costs of efficiently delivering covered services to individuals covered by [Medicare] will not be borne by individuals not so covered,

and the costs with respect to individuals not so covered will not be borne by [Medicare.]" *Id.* The Secretary, acting through the Centers for Medicare and Medicaid Services ("CMS"), 42 U.S.C. § 1395b-9(a)(1), (3), has by regulation defined "reasonable costs" as "all necessary and proper costs incurred in furnishing the [Medicare] services," 42 C.F.R. § 413.9(a). "All discounts, allowances, and refunds of expenses are reductions in the cost of goods or services purchased and are not income." *Id.* § 413.98(c). Thus, "refunds of previous expense payments are clearly reductions in costs and must be reflected in the determination of allowable costs." *Id.* § 413.98(d)(2).

Since 1985, Massachusetts has levied a tax on acute care hospitals based upon each hospital's share of private-sector care provided. 1985 Mass. Acts 855. CMS approved the tax ("Hospital Tax") as a permissible means for generating revenue to fund Medicaid payments; the tax is uniformly imposed, broadly based, and does not contain a "hold harmless" feature, 42 U.S.C. § 1396b(w)(1)(A)(ii), (iii), (4); 42 C.F.R. § 433.68(b), (f). Revenue from the Hospital Tax is deposited into a trust fund ("Fund"), which is also funded by State appropriations and private insurance companies. The Fund is used to reimburse hospitals for care provided to low-income individuals under Medicaid, as well as to compensate medical care organizations and experimental programs supporting low-income individuals.

In the scheme administered by Massachusetts, acute care hospitals are notified monthly of their estimated Hospital Tax liabilities and Fund payments, if any. A Fund payment is deposited into the hospital's designated bank account. Next, the hospital deposits its estimated tax liability minus the anticipated Fund payment into the same account — a net amount. Finally, Massachusetts collects the entire amount of

money in the hospital's bank account, which is the sum of the deposited Fund payment and tax liability.

The parties agree that the Hospital Tax is an allowable cost under Medicare. From fiscal years 2004 to 2008, Dana-Farber incurred and paid a total of $23,402,239 in Hospital Tax liability. Dana-Farber also received Fund payments during each fiscal year, totaling $9,001,366. Dana-Farber then sought Medicare reimbursement for the full amount of Hospital Tax assessment attributable to Medicare. A Medicare intermediary ruled Dana-Farber was entitled only to the net of the Hospital Tax assessment less the Fund payments received in each fiscal year. For example, in fiscal year 2007 Dana-Farber paid $5,245,830 in Hospital Tax liability and received $2,479,708 in Fund payments, so the intermediary determined Dana-Farber actually incurred only the net of these two amounts, $2,766,122.

Dana-Farber consolidated its challenges to the intermediary's decisions and appealed to the Provider Reimbursement Review Board. *See* 42 U.S.C. § 1395oo; 42 C.F.R. § 405.1845. The Board affirmed the intermediary's decisions, except for a mathematical error not relevant to this appeal. The Board determined that the statutory directive to reimburse providers only for "reasonable cost[s] . . . actually incurred," 42 U.S.C. § 1395x(v)(1)(A), and the implementing regulations, 42 C.F.R. §§ 413.9, 413.98, meant that Dana-Farber was entitled to reimbursement only for the net amount of the Hospital Tax it actually paid. Further, the Board concluded that, under 42 U.S.C. § 1395x(v)(1)(A) and 42 C.F.R. § 413.9, "the uncompensated care payments *act as a refund to reduce cost* (*i.e.*, the Tax)" and that this interpretation was consistent with 42 C.F.R. § 413.98 and the Provider Reimbursement Manual, pub. 15-1, pt. 1 §§ 800, 804. *Dana Farber Cancer Inst.*, 2014 WL 11127854, at *10 (May 28,

2014) (emphasis added). When the Administrator of CMS declined to review the Board's decision, and the Secretary took no action to revise or reverse it, the Board decision became final. 42 U.S.C. § 1395oo(f)(1); 42 C.F.R. § 405.1877(b)(2).

Dana-Farber appealed, arguing in the district court that the decision to offset the Fund payments from the gross amount of Dana-Farber's Hospital Tax was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. The parties filed cross motions for summary judgment, and the district court partially granted Dana-Farber's motion. The district court reasoned that under a "plain reading" of the regulation, a refund has a "temporal and substantive relationship" such that "the amount paid back must be for a 'previous expense payment' to reduce the 'related expense.'" *Dana-Farber Cancer Inst. v. Burwell*, 216 F. Supp. 3d 49, 58-59 (D.D.C. 2016) (quoting 42 C.F.R. § 413.98(a)). Finding the Fund payments were made to reduce Dana-Farber's costs of providing care to under- and uninsured patients, and not to reduce the expense of the Hospital Tax, the district court vacated the Board's decision. *Id.* at 59-60. The district court also noted the Board's interpretation of the regulation did not account for the circumstance where a hospital's Fund payments exceeded the amount it paid in hospital taxes. *Id.* at 60.

The Secretary appeals, and this court reviews the grant of summary judgment *de novo*, "review[ing] the administrative record directly." *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 54 (D.C. Cir. 2015) (internal quotation marks and citation omitted).

II.

At issue is the Board's interpretation of two regulations expounding upon the statutory directive to reimburse only

"reasonable cost[s] . . . actually incurred," 42 U.S.C. § 1395x(v)(1)(A). Under 42 C.F.R. § 413.9(b)(1), the "[r]easonable cost of any services must be determined in accordance with regulations establishing the method or methods to be used." Under 42 C.F.R. § 413.98, which prescribes the method for taking into account offsets such as refunds, the stated "[p]rinciple" is: "Discounts and allowances received on purchases of goods or services are reductions of the costs to which they relate. Similarly, refunds of previous expense payments are reductions of the related expense." *Id.* § 413.98(a). The regulation further provides that, under the "[n]ormal accounting treatment," refunds "are reductions in the cost of goods or services purchased and are not income." *Id.* § 413.98(c). Thus, under the plain terms of the regulation, refunds "must be reflected in the determination of allowable costs." *Id.* § 413.98(d)(2). The Manual similarly instructs that discounts, allowances, and refunds "are reductions of the cost" or "related expense," Manual § 800, explaining that "[t]he true cost of goods and services is the net amount actually paid for the goods or services," *id.* § 804.

Because Dana-Farber does not maintain that the regulations are contrary to the statute, the question for the court is whether the Board's interpretation of the regulations was reasonable. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 506, 512 (1994). The court may only "hold unlawful and set aside agency action," 5 U.S.C. § 706(2), that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A). In addressing that question, a court must accord substantial deference to an agency's interpretation of its own regulations, particularly where the regulations involve "a complex and highly technical regulatory program," such as Medicare. *Thomas Jefferson*, 512 U.S. at 512 (internal quotation marks and citation omitted). Regardless of whether a court determines a different

interpretation "best serves the regulatory purpose," the court is to give the agency's interpretation "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)). We find no such error or inconsistency.

A.

The Board determined that its interpretation is "consistent with the principles for accounting of refunds described in 42 C.F.R. § 413.98 and [the Manual] §§ 800 and 804." *Dana Farber*, 2014 WL 11127854, at *10. On appeal, the Secretary contends "the Board properly concluded[] those principles preclude providers from receiving Medicare reimbursement for the costs of Hospital Tax payments to the extent that the hospitals received payments funded by the proceeds from that very tax, effectively reducing the net economic impact of the assessed tax." Appellant's Br. 14. Regardless of whether the payments constitute refunds or function analogous to refunds, we conclude this interpretation was reasonable. Because the tax is imposed to generate revenue for the Fund payments, the tax and payments were, as the Board concluded, "inextricably linked," *Dana Farber*, 2014 WL 11127854, at *10, and thus they were related as required by 42 C.F.R. § 413.98(a).

The relatedness of the tax and Fund payment is clear from the manner in which Massachusetts administered the Hospital Tax, seeking only a net payment from Dana-Farber. In its decision, the Board provided the following example of Massachusetts's administration of the Hospital Tax and Fund payments:

> [I]f a provider is notified in advance for a particular month that its Tax liability will be $20 and the uncompensated care payment will be $5, then that provider need only deposit $15 into its designated

> account to cover the tax liability because the $5 payment for uncompensated care will be deposited into that account prior to it being swept for the Tax liability. Thus, through these mechanics, the actual cost incurred by the Provider in this scenario is the net amount due to the [Fund].

Dana Farber, 2014 WL 11127854, at *10. The example shows that the Fund payment of $5 reduced the cost of the provider's tax liability. *See* 42 C.F.R. § 413.98(c). Following the regulatory requirement that refunds be "reflected" in the allowable costs, *id.* § 413.98(d)(2), the Board took the Fund payment into account when calculating the allowable cost. Thus, as administered by Massachusetts, Dana-Farber's "actually incurred" cost is the amount of tax it deposits into the Fund, rather than its nominal liability without reference to the Fund payment it receives. This analysis also comports with 42 C.F.R. § 413.9(c)(3)'s direction that a provider is "reimbursed [for] the actual costs of providing quality care," because in the example, the provider actually paid $15, and the Board found this cost allowable. The example was thus consistent with the relevant regulations, and Dana-Farber has not distinguished what happened in its case from this example.

Dana-Farber nonetheless offers a different interpretation, maintaining that the denial of full compensation for Medicare's share of the Hospital Tax violated statutory and regulatory requirements as well as APA procedural requirements, and it was arbitrary and capricious.

First, Dana-Farber maintains that it actually incurred the full amount of the Hospital tax because the Fund payments were neither refunds nor analogous to refunds. Appellee's Br. 40. It interprets 42 C.F.R. § 413.98 as providing that "only specifically enumerated categories — discounts, allowances,

and refunds, all of which [have] . . . the very purpose of making a provider whole for some or all of the original cost — are considered reductions of that original cost." Appellee's Br. 38. Additionally, Dana-Farber insists that an offset must have a "close substantive connection" with the cost. *Id.* at 37.

Dana-Farber, much as the district court, overreads the regulation, which defines refunds as "amounts paid back or a credit allowed on account of an overcollection." 42 C.F.R. § 413.98(b)(3). Nowhere in this definition does the agency require the refund to have the specific purpose to reduce the tax or substantive connection that Dana-Farber advances. *See id.* § 413.98. And even if Dana-Farber's interpretation were plausible, the regulatory text does not require that the regulation be interpreted as Dana-Farber suggests. The Board's interpretation need not be "the only possible interpretation." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). The Board reasonably focused on "the guiding principle [of] . . . the statutory and regulatory language, which instructs that reimbursement is allowed only for costs actually incurred." Appellant's Br. 15 (quoting *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 550 (7th Cir. 2012) (internal quotation marks omitted)).

Second, Dana-Farber maintains that the Board's decision violates the statutory and regulatory requirement, 42 U.S.C. § 1395x(v)(1)(A); 42 C.F.R. 413.9(b)(1), that Medicare costs cannot be passed off onto non-Medicare entities. Dana-Farber points out that the Hospital Tax and Fund payments are calculated based upon independent factors — private sector care and care provided to low-income individuals, respectively. So, Dana-Farber concludes, Fund payments cannot "simultaneously represent" compensation for services to low-income patients and compensation for Medicare costs incurred under the Hospital Tax. Appellee's Br. 33. By considering the

Fund payments to be refunds of the tax liability, Dana-Farber maintains, the Board is essentially denying Dana-Farber its reimbursement for care to low-income patients.

The Board did not shift Medicare costs onto non-Medicare entities. The Board acknowledged the separate purposes of the Hospital Tax and Fund, noting the latter is "set up solely to pay for uncompensated care," and explained that, nonetheless, under "[t]he methodology utilized by" Massachusetts, the Fund payments reduce the amount of tax Dana-Farber must deposit in its bank account. *Dana Farber*, 2014 WL 11127854, at *10. Dana-Farber minimizes the implications of Massachusetts's methodology by referring to it as one of "administrative convenience." Appellee's Br. 26. But the fact remains that Massachusetts has chosen to structure its compensation for low-income care in a manner that this compensation serves to reduce the Hospital Tax liability owed. *See* 42 U.S.C. § 1396a(a)(13)(A)(iv).

B.

Dana-Farber's remaining objections that the Board's decision failed to adhere to notice-and-comment requirements and was, in any event, arbitrary and capricious are unpersuasive. The APA includes notice-and-comment procedures requiring that "[g]eneral notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. § 553(b), and "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation," *id.* § 553(c). Dana-Farber objects that the "inextricably linked" standard upon which the Board relied violates these notice-and-comment requirements because this standard is not contained in the refund regulation and therefore constitutes a substantive new

legal standard that should have been subject to notice and comment.

As an initial matter, it is doubtful the "inextricably linked" phrase constitutes a new rule or policy. Nowhere did the Board's decision state a payment must be inextricably linked to a cost in order to constitute a refund. Instead, the Board reasoned that because it found that the payments and tax were inextricably linked and that the payments reduced the cost of Dana-Farber's tax liability, the payments "act as a refund to reduce cost[s] (*i.e.*, the Tax) under 42 U.S.C. § 1395x(v)(1)(A) and 42 C.F.R. § 413.9." *Dana Farber*, 2014 WL 11127854, at *10. This interpretation is consistent with the regulatory requirements that refunds must be related to and reduce an expense. 42 C.F.R. § 413.98(a), (d).

But even assuming a new "inextricably linked" standard was announced, APA notice and comment was not required. An agency "has the option of choosing whether to establish new policies through notice-and-comment rulemaking or adjudication," *Masters Pharm., Inc. v. DEA*, 861 F.3d 206, 219 (D.C. Cir. 2017), and here Dana-Farber's challenges were addressed by adjudication. *See also Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017 (D.C. Cir. 2016). Dana-Farber's reliance on *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014), is misplaced. In that case, the Department of Labor issued two letters providing special procedures, *id.* at 1008, that the court concluded "substantively affect[ed] the regulated public" and thus were substantive rules subject to notice-and-comment requirements, *id.* at 1024 (internal quotation marks and citation omitted) (alteration in original). That case did not involve an adjudication. Neither did the court hold, as Dana-Farber suggests, that substantive rules announced in adjudications must undergo notice and comment. Because, even assuming the "inextricably linked" phrase constitutes a new standard, the

agency exercised its discretion to announce the standard through an adjudication, Dana-Farber's procedural objection fails.

C.

To determine whether the Board's decision was arbitrary or capricious, the court must

> consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency [decision] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted). Dana-Farber suggests that the decision was arbitrary and capricious for three reasons. None has merit.

1. Dana-Farber views the decision as inconsistent with CMS's August 16, 2010 Medicare Program Rule, 75 Fed. Reg. 50,042 ("Offset Guidance"). The Offset Guidance was issued, in part, to "clarify [CMS's] policy concerning when provider taxes may be considered allowable costs under Medicare." *Id.* at 50,363. The Guidance became effective October 1, 2010, *id.* at 50,042, after the years at issue here. Even assuming the Offset Guidance applies, Dana-Farber's challenge fails.

The Guidance states, in relevant part, that when States tax hospitals and then pay hospitals from funds generated from that tax,

> the treatment of these types of payments on the Medicare cost report should be analogous to the adjustments described at § 413.98 of the regulations. . . . In situations in which payments that are associated with the assessed tax are made to providers *specifically* to make the provider whole or partly whole for the tax expenses, Medicare should similarly recognize only the net expense incurred by the provider. Thus, while a tax may be an allowable Medicare cost in that it is related to beneficiary care, the provider may only treat as a reasonable cost the net expense; that is, the tax paid by the provider, reduced by payments the provider *received* that are associated with the assessed tax.

Id. at 50,363 (first emphasis added).

Dana-Farber reads the word "specifically" to mean that "*only* associated payments that have a specific substantive link to the tax can properly be considered refunds." Appellee's Br. 39. This reading ignores the plain text of the Offset Guidance, which lists such situations as an example of when a payment constitutes an offset, but nowhere states that these are the only situations where a payment is considered an offset of a tax. The Guidance follows this specific example with the more general principle that when a tax is "reduced by payments the provider *received* that are associated with the assessed tax," those payments are offsets. 75 Fed. Reg. 50,363. *See Breckinridge Health, Inc. v. Burwell*, 193 F. Supp. 3d 788, 796 (W.D. Ky. 2016), *aff'd sub nom. Breckinridge Health, Inc. v. Price*, 869

F.3d 422 (6th Cir. 2017). Dana-Farber reads into the Offset Guidance a requirement that does not exist.

In any event, the Board's decision was consistent with the Offset Guidance. The Board determined that the Fund payments were "analogous to the adjustments" in 42 C.F.R. § 413.98 in that they "act as a refund" by reducing the Tax payments Dana-Farber owed. *Dana-Farber*, 2014 WL 11127854, at *10. Thus, in accordance with the Offset Guidance, the Board concluded Dana-Farber had incurred the reasonable cost of the net expense of the Tax payments less the Fund payments.

2. Dana-Farber suggests that the Board's interpretation of the refund regulation will produce absurd results. Its position rests on hypotheticals involving other hospitals, including a scenario where Hospital A pays $40,000 in tax but receives no Fund payments, rendering the entire tax payment a reimbursable cost. Dana-Farber poses a hypothetical where Hospital A merges with Hospital B, which paid no tax but received $40,000 in Fund payments, and speculates that Hospital A cannot claim any portion of the $40,000 tax as a reimbursable cost, an arbitrary result. Appellee's Br. 48-49.

The Board's decision does not bear on the Medicare reimbursement owed to a hospital that merges with another hospital. Thus, "the hypothetical problem posed by [Dana-Farber] is inapposite." *R.I. Hosp. v. Leavitt*, 548 F.3d 29, 37 (1st Cir. 2008). As to Dana-Farber's hypothetical in which a hospital receives a greater Fund payment than the tax liability it incurred, Appellee's Br. 49, the Fund payment would still reduce the cost of the tax liability incurred. And to the extent Dana-Farber posits hypotheticals in which the incurred cost has a purpose unrelated to low-income care, such as a payroll tax, *id.* at 42-43, this simply reprises Dana-Farber's flawed position

that Fund payments cannot represent both compensation for low-income care and refunds of the Hospital Tax. *See* discussion § II(A) at 9-10.

3. Dana-Farber also maintains that the Board's decision is inconsistent with CMS's approval of the Hospital Tax under Medicaid. In order for a tax to be permissible under Medicaid, it may not contain a hold harmless feature. 42 U.S.C. § 1396b(w)(1)(A)(iii); 42 C.F.R. § 433.68(b)(3). If a state "provides (directly or indirectly) for any payment, offset, or waiver that guarantees to hold taxpayers harmless for any portion of the costs of the tax," then the tax has a hold harmless feature. 42 U.S.C. § 1396b(w)(4)(C)(i). Dana-Farber suggests that by treating the Fund payments as a refund of the Hospital Tax, the Board's decision effectively treats the Tax as having a "hold harmless" feature for hospitals that receive Fund payments. Dana-Farber relies on *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970).

Although "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed," *id.*, Dana-Farber has not shown that the Board's decision involved a change in agency analysis of or policy involving the Tax. The Board did not revoke or otherwise change the determination that the Hospital Tax remains a permissible tax — and thus does not contain a hold harmless feature — under Medicaid. Moreover, to the extent that the decision may appear to be in tension with the approval of the tax under Medicaid, and the court has no occasion to decide whether it is, Dana-Farber has pointed to no authority stating that an agency must interpret two different statutory phrases — "reasonable cost" and "hold harmless" — in two different statutory frameworks — Medicare and Medicaid — in the same manner. To the contrary, the court has held that it is "not impermissible . . . for an agency to

interpret [a] term differently in two separate sections of a statute which have different purposes," *Verizon Cal., Inc. v. F.C.C.*, 555 F.3d 270, 276 (D.C. Cir. 2009) (internal quotation marks and citation omitted), and so it certainly may be permissible to interpret two separate terms differently. Nor has Dana-Farber shown that interpretations under Medicaid control analysis under Medicare. *See Abraham Lincoln*, 698 F.3d at 553. "[B]ecause Medicare and Medicaid are two separate and independent programs, we cannot conclude that CMS's decisions under Medicaid necessarily control [its] decisions under Medicare, such that the [Board's] [d]ecision at issue here was arbitrary, capricious or contrary to law." *Id.* at 554.

Accordingly, because the Board's interpretation is reasonable and Dana-Farber fails to show otherwise — much less that the interpretation violates the APA — the court appropriately defers to it, and we reverse the grant of partial summary judgment to Dana-Farber.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5208 **September Term, 2017**

1:16-cv-01434-CRC

Filed On: May 9, 2018

Gregory R. Swecker and Beverly F. Swecker,

Appellants

v.

Midland Power Cooperative, et al.,

Appellees

BEFORE: Tatel, Griffith, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly concluded that appellants failed to meet their burden to make a prima facie showing that the court could exercise personal jurisdiction over appellees Midland Power Cooperative and Central Iowa Power Cooperative. See First Chicago Int'l v. United Exch. Co., 836 F.2d 1375, 1378 (D.C. Cir. 1988). Appellants' argument that proper venue over one party can establish personal jurisdiction over other parties is unavailing because personal jurisdiction and venue are distinct concepts that must be analyzed and established separately. See Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest., 760 F.2d 312, 316 (D.C. Cir. 1985).

The Clerk is directed to issue a briefing schedule for the remainder of the appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1314 **September Term, 2017**

EPA-81FR45039
EPA-81FR89870

Filed On: November 2, 2017

Samuel Masias, et al.,

Petitioners

v.

Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency,

Respondents

Union Electric Company and Utility Air Regulatory Group,

Intervenors

Consolidated with 16-1318, 16-1384, 16-1424, 17-1053, 17-1055, 17-1173, 17-1174

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motions to sever and hold in abeyance, the responses thereto, and the reply; the motion to dismiss as moot, the responses thereto, and the reply; the motion to sever and transfer, the responses thereto, and the reply; and the motions to govern and the responses thereto, it is

ORDERED that the motion to sever and hold in abeyance Sierra Club's challenge to EPA's designation of portions of Franklin County and St. Charles County, Missouri be granted, and that the issue be severed, assigned a separate docket number, No. 17-1227, captioned Sierra Club v. Environmental Protection Agency, and

held in abeyance. The parties are directed to file status reports at 180-day intervals beginning 180 days from the date of this order, and to file motions to govern future proceedings within 30 days of the completion of the relevant administrative reconsideration proceedings. It is

FURTHER ORDERED that the unopposed motion to sever and hold in abeyance Nos. 17-1173 and 17-1174 be granted. The parties are directed to file status reports at 90-day intervals beginning 90 days from the date of this order, and to file motions to govern future proceedings within 30 days of the completion of the relevant administrative reconsideration proceedings. It is

FURTHER ORDERED that the motion to dismiss be denied. It is

FURTHER ORDERED that the motion to sever and hold in abeyance Sierra Club's challenge to EPA's designation of portions of Gallia County, Ohio be denied. It is

FURTHER ORDERED that the motions to sever and transfer Nos. 16-1424, 17-1053, and 17-1055 be granted, and those cases be transferred to the United States Court of Appeals for the Fifth Circuit. See 28 U.S.C. § 2112(a)(5) (permitting transfer to any other court of appeals "[f]or the convenience of the parties in the interest of justice"). The transfer is without prejudice to the parties' right to raise the issue of venue under 42 U.S.C. § 7607(b)(1) before the Fifth Circuit. The Clerk is directed to send a copy of this order and the original file to the United States Court of Appeals for the Fifth Circuit. It is

FURTHER ORDERED that the motion to hold in abeyance Nos. 16-1424, 17-1053, and 17-1055 be dismissed as moot. It is

FURTHER ORDERED that the following briefing format and schedule apply in the remaining active cases:

Statements of Issues and Docketing Statements	November 9, 2017
Brief for Petitioners in No. 16-1314 (not to exceed 5,500 words)	November 27, 2017

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1314 **September Term, 2017**

Brief for Sierra Club (not to exceed 7,500 words)	November 27, 2017
Brief for Kansas City Board of Public Utilities (not to exceed 6,000 words)	November 27, 2017
Brief for EPA (not to exceed 19,000 words)	February 12, 2018
Brief for Intervenors Union Electric Co. and Utility Air Regulatory Group (not to exceed 9,100 words)	March 5, 2018
Reply Brief for Petitioners in No. 16-1314 (not to exceed 2,750 words)	April 4, 2018
Reply Brief for Sierra Club (not to exceed 3,750 words)	April 4, 2018
Reply Brief for Kansas City Board of Public Utilities (not to exceed 3,000 words)	April 4, 2018
Joint Deferred Appendix	April 25, 2018
Final Briefs	May 16, 2018

All issues and arguments must be raised by petitioners in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief. The court reminds the parties that

> In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1314 **September Term, 2017**

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 41 (2017); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

Mark J. Langer
Clerk

(202) 216-7300

NOTICE TO COUNSEL:

SCHEDULING ORAL ARGUMENT

The court has entered an order setting a briefing schedule in a case in which you are counsel of record. Once a briefing order has been entered, the case may be set for oral argument.

You will be notified by separate order of the date and time of oral argument. Once a case has been calendared, the Clerk's Office cannot change the argument date, and ordinarily the court will not reschedule it. Any request to reschedule must be made by motion, which will be presented to a panel of the court for disposition. The court disfavors motions to postpone oral argument and will grant such a motion only upon a showing of "extraordinary cause." See D.C. Cir. Rule 34(g).

If you are the arguing counsel, and you will be unavailable to appear for oral argument on a date in the future, so advise the Clerk's Office by letter, filed electronically. The notification should be filed as soon as possible and updated if a potential scheduling conflict arises later, or if there is any change in availability. To the extent possible, the Clerk's Office will endeavor to schedule oral argument to avoid conflicts that have been brought to the court's attention in advance. See D.C. Circuit Handbook of Practice and Internal Procedures at IX.A.1, XI.A.

Counsel must notify the court when serious settlement negotiations are underway, when settlement of the case becomes likely, and when settlement is reached. Such notice allows for more efficient allocation of judicial resources. Additionally, counsel should promptly notify the court if settlement negotiations are terminated. Notice must be given in an appropriate motion or by letter to the Clerk at the earliest possible moment. See, e.g., D.C. Circuit Handbook of Practice and Internal Procedures at X.D., XI.A.

Rev. March 2017

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1314 **September Term, 2017**

EPA-81FR45039
EPA-81FR89870

Filed On: November 2, 2017

Samuel Masias, et al.,

Petitioners

v.

Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency,

Respondents

Union Electric Company and Utility Air Regulatory Group,

Intervenors

Consolidated with 16-1318, 16-1384, 16-1424, 17-1053, 17-1055, 17-1173, 17-1174

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motions to sever and hold in abeyance, the responses thereto, and the reply; the motion to dismiss as moot, the responses thereto, and the reply; the motion to sever and transfer, the responses thereto, and the reply; and the motions to govern and the responses thereto, it is

ORDERED that the motion to sever and hold in abeyance Sierra Club's challenge to EPA's designation of portions of Franklin County and St. Charles County, Missouri be granted, and that the issue be severed, assigned a separate docket number, No. 17-1227, captioned Sierra Club v. Environmental Protection Agency, and

held in abeyance. The parties are directed to file status reports at 180-day intervals beginning 180 days from the date of this order, and to file motions to govern future proceedings within 30 days of the completion of the relevant administrative reconsideration proceedings. It is

FURTHER ORDERED that the unopposed motion to sever and hold in abeyance Nos. 17-1173 and 17-1174 be granted. The parties are directed to file status reports at 90-day intervals beginning 90 days from the date of this order, and to file motions to govern future proceedings within 30 days of the completion of the relevant administrative reconsideration proceedings. It is

FURTHER ORDERED that the motion to dismiss be denied. It is

FURTHER ORDERED that the motion to sever and hold in abeyance Sierra Club's challenge to EPA's designation of portions of Gallia County, Ohio be denied. It is

FURTHER ORDERED that the motions to sever and transfer Nos. 16-1424, 17-1053, and 17-1055 be granted, and those cases be transferred to the United States Court of Appeals for the Fifth Circuit. See 28 U.S.C. § 2112(a)(5) (permitting transfer to any other court of appeals "[f]or the convenience of the parties in the interest of justice"). The transfer is without prejudice to the parties' right to raise the issue of venue under 42 U.S.C. § 7607(b)(1) before the Fifth Circuit. The Clerk is directed to send a copy of this order and the original file to the United States Court of Appeals for the Fifth Circuit. It is

FURTHER ORDERED that the motion to hold in abeyance Nos. 16-1424, 17-1053, and 17-1055 be dismissed as moot. It is

FURTHER ORDERED that the following briefing format and schedule apply in the remaining active cases:

Statements of Issues and Docketing Statements	November 9, 2017
Brief for Petitioners in No. 16-1314 (not to exceed 5,500 words)	November 27, 2017

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1314 **September Term, 2017**

Brief for Sierra Club (not to exceed 7,500 words)	November 27, 2017
Brief for Kansas City Board of Public Utilities (not to exceed 6,000 words)	November 27, 2017
Brief for EPA (not to exceed 19,000 words)	February 12, 2018
Brief for Intervenors Union Electric Co. and Utility Air Regulatory Group (not to exceed 9,100 words)	March 5, 2018
Reply Brief for Petitioners in No. 16-1314 (not to exceed 2,750 words)	April 4, 2018
Reply Brief for Sierra Club (not to exceed 3,750 words)	April 4, 2018
Reply Brief for Kansas City Board of Public Utilities (not to exceed 3,000 words)	April 4, 2018
Joint Deferred Appendix	April 25, 2018
Final Briefs	May 16, 2018

All issues and arguments must be raised by petitioners in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief. The court reminds the parties that

> In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1314 **September Term, 2017**

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 41 (2017); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

Mark J. Langer
Clerk

(202) 216-7300

NOTICE TO COUNSEL:

SCHEDULING ORAL ARGUMENT

The court has entered an order setting a briefing schedule in a case in which you are counsel of record. Once a briefing order has been entered, the case may be set for oral argument.

You will be notified by separate order of the date and time of oral argument. Once a case has been calendared, the Clerk's Office cannot change the argument date, and ordinarily the court will not reschedule it. Any request to reschedule must be made by motion, which will be presented to a panel of the court for disposition. The court disfavors motions to postpone oral argument and will grant such a motion only upon a showing of "extraordinary cause." See D.C. Cir. Rule 34(g).

If you are the arguing counsel, and you will be unavailable to appear for oral argument on a date in the future, so advise the Clerk's Office by letter, filed electronically. The notification should be filed as soon as possible and updated if a potential scheduling conflict arises later, or if there is any change in availability. To the extent possible, the Clerk's Office will endeavor to schedule oral argument to avoid conflicts that have been brought to the court's attention in advance. See D.C. Circuit Handbook of Practice and Internal Procedures at IX.A.1, XI.A.

Counsel must notify the court when serious settlement negotiations are underway, when settlement of the case becomes likely, and when settlement is reached. Such notice allows for more efficient allocation of judicial resources. Additionally, counsel should promptly notify the court if settlement negotiations are terminated. Notice must be given in an appropriate motion or by letter to the Clerk at the earliest possible moment. See, e.g., D.C. Circuit Handbook of Practice and Internal Procedures at X.D., XI.A.

Rev. March 2017

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3032 **September Term, 2017**

1:07-cr-00113-RBW-1

Filed On: November 1, 2017

In re: Duane McKinney,

Petitioner

BEFORE: Henderson, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a second or successive motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 and the opposition thereto; and the motion for leave to amend the petition and the opposition thereto, it is

ORDERED that the motion for leave to amend be granted. It is

FURTHER ORDERED that the petition for leave to file a second or successive § 2255 motion be denied. A second or successive § 2255 motion must rely on either "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h). Petitioner relies on a claim of newly discovered evidence, but does not clearly identify such evidence. Nor has he demonstrated that the facts underlying his claims "could have been discovered through the exercise of due diligence" only within the past year. 28 U.S.C. § 2255(f); see also Walker v. Martin, 562 U.S. 307, 318 (2011). Moreover, petitioner has not shown that, viewed "in light of the evidence as a whole," his proffered evidence is "sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense." 28 U.S.C. § 2255(h)(1).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7094 **September Term, 2017**

1:17-mc-01077-UNA

Filed On: October 27, 2017

Ronnie C. Hogue,

Appellant

v.

Coastal International, Inc. and Akal Security, Inc.,

Appellees

BEFORE: Henderson and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the notice of appeal, challenging the district court's order denying leave to proceed in forma pauperis and closing the action, appellant's brief, and the district court's order granting leave to proceed in forma pauperis on appeal, it is

ORDERED that this case be remanded for the district court to reconsider appellant's motion for leave to proceed in forma pauperis in the civil action, in light of his changed circumstances and the more detailed information set forth in the July 13, 2017 motion for leave to proceed in forma pauperis on appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5236 **September Term, 2017**

1:17-cv-02122-TSC

Filed On: October 20, 2017

Rochelle Garza, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated,

Appellee

v.

Eric D. Hargan, Acting Secretary, Health and Human Services, et al.,

Appellants

BEFORE: Henderson,* Kavanaugh, and Millett,** Circuit Judges

O R D E R

Upon consideration of the emergency motion for stay pending appeal, the opposition, the supplement thereto, and the reply; the brief of amici curiae; the administrative stay entered on October 19, 2017; and the oral argument of the parties, it is

ORDERED that the administrative stay be dissolved. It is

FURTHER ORDERED that the District Court's temporary restraining order entered on October 18, 2017, be vacated as to paragraphs 1 and 2 of the order and that the case be remanded to the District Court.[1]

The Government argues that, pursuant to standard HHS policy, a sponsor may be secured for a minor unlawful immigrant in HHS custody, including for a minor who is seeking an abortion. The Government argues that this process – by which a minor is released from HHS custody to a sponsor – does not unduly burden the minor's right under Supreme Court precedent to an abortion. We agree, so long as the process of securing a sponsor to whom the minor is released occurs expeditiously. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992); *Ohio v. Akron Center for Reproductive*

[1] As both parties agree, we have jurisdiction over this appeal because the District Court's temporary restraining order was more akin to preliminary injunctive relief and is therefore appealable under 28 U.S.C. § 1292(a)(1). *See Sampson v. Murray*, 415 U.S. 61, 86 n.58 (1974).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5236 **September Term, 2017**

Health, 497 U.S. 502, 513 (1990). The District Court is directed to allow HHS until Tuesday, October 31, 2017, at 5:00 p.m. Eastern Time for a sponsor to be secured for J.D. and for J.D. to be released to the sponsor. If a sponsor is secured and J.D. is released from HHS custody to the sponsor, HHS agrees that J.D. then will be lawfully able, if she chooses, to obtain an abortion on her own pursuant to the relevant state law. If a sponsor is not secured and J.D. is not released to the sponsor by that time, the District Court may re-enter a temporary restraining order, preliminary injunction, or other appropriate order, and the Government or J.D. may, if they choose, immediately appeal. We note that the Government has assumed, for purposes of this case, that J.D. – an unlawful immigrant who apparently was detained shortly after unlawfully crossing the border into the United States – possesses a constitutional right to obtain an abortion in the United States. It is

FURTHER ORDERED that the emergency motion for stay pending appeal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the District Court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

*Although Circuit Judge Henderson concurs in this order, her reasoning therefor will follow in a separate statement to be filed within five days of the date of this order.

**Circuit Judge Millett would deny the emergency motion for stay. A statement by Judge Millett, dissenting from the disposition of this case, will issue shortly.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED ON: OCTOBER 24, 2017

No. 17-5236

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,
APPELLEE

v.

ERIC D. HARGAN, ACTING SECRETARY, HEALTH AND HUMAN SERVICES, ET AL.,
APPELLANTS

On Petition for Rehearing En Banc

Before: Garland, *Chief Judge*; Henderson***, Rogers, Tatel, Griffith***, Kavanaugh***, Srinivasan, Millett**, Pillard*, and Wilkins, *Circuit Judges*

O R D E R

Upon consideration of appellee's petition for rehearing en banc and the supplements thereto, the response to the petition and the supplement to the response, the corrected brief for amici curiae States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Massachusetts, Oregon, Pennsylvania, Vermont, and Washington, and the District of Columbia in support of appellee's petition, and the vote in favor of the petition by a majority of the judges eligible to participate;

and appellee's motion to recall the mandate and petition for en banc consideration of appellee's motion to recall the mandate, it is

ORDERED that the mandate be recalled. The Clerk of the district court is directed to return forthwith the mandate issued October 20, 2017. It is

FURTHER ORDERED that appellee's petition for rehearing en banc be granted. This case has been considered by the court sitting en banc without oral argument, no judge having requested oral argument. It is

FURTHER ORDERED that the order filed October 20, 2017 be vacated, except that the administrative stay remains dissolved. It is

FURTHER ORDERED that appellants' emergency motion for stay pending appeal be denied because appellants have not met the stringent requirements for a stay pending appeal, *see Nken v. Holder*, 556 U.S. 418, 434 (2009), substantially for the reasons set forth in the October 20, 2017 dissenting statement of Circuit Judge Millett.[1] The case is hereby remanded to the district court for further proceedings to amend the effective dates in paragraph 1 of its injunction. The dates in paragraph 1 have now passed, and the parties have proffered new evidence and factual assertions concerning the expected duration of custody and other matters. The district court is best suited to promptly determine in the first instance the appropriate dates for compliance with the injunction. In so doing, the district court retains full discretion to conduct proceedings and make any factual findings deemed necessary and appropriate to the district court's exercise of its equitable judgment, consistent with this order, including with regard to any of the factual disputes that were raised for the first time on appeal. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330-31 (2006); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 305 (D.C. Cir. 2006).

The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

* Circuit Judge Pillard did not participate in this matter.

** A statement by Circuit Judge Millett, concurring in the disposition of the case, is attached to this order.

*** A statement by Circuit Judge Henderson, dissenting from the disposition of the case, is attached to this order.

*** A statement by Circuit Judge Kavanaugh, joined by Circuit Judges Henderson and Griffith, dissenting from the disposition of the case, is attached to this order.

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[1] As both parties agree, the court has jurisdiction over this appeal because the district court's temporary restraining order was more akin to preliminary injunctive relief and is therefore appealable under 28 U.S.C. § 1292(a)(1). *See Sampson v. Murray*, 415 U.S. 61, 86 n.58 (1974).

MILLETT, *Circuit Judge*, concurring:

While I disagreed with the panel order, I recognize that my colleagues labored hard under extremely pressured conditions to craft a disposition that comported with their considered view of the law's demands.

Fortunately, today's decision rights a grave constitutional wrong by the government. Remember, we are talking about a child here. A child who is alone in a foreign land. A child who, after her arrival here in a search for safety and after the government took her into custody, learned that she is pregnant. J.D. then made a considered decision, presumably in light of her dire circumstances, to terminate that pregnancy. Her capacity to make the decision about what is in her best interests by herself was approved by a Texas court consistent with state law. She did everything that Texas law requires to obtain an abortion. That has been undisputed in this case.

What has also been expressly and deliberately uncontested by the government throughout this litigation is that the Due Process Clause of the Fifth Amendment fully protects J.D.'s right to decide whether to continue or terminate her pregnancy. The government—to its credit—has never argued or even suggested that J.D.'s status as an unaccompanied minor who entered the United States without documentation reduces or eliminates her constitutional right to an abortion in compliance with state law requirements.

Where the government bulldozed over constitutional lines was its position that—accepting J.D.'s constitutional right and accepting her full compliance with Texas law—J.D., an unaccompanied child, *has the burden of extracting herself from custody* if she wants to exercise the right to an abortion that the government does not dispute she has. The government has insisted that it may categorically blockade exercise of her constitutional right unless this child (like some kind of legal Houdini) figures her own way out of detention by either (i)

surrendering any legal right she has to stay in the United States and returning to the abuse from which she fled, or (ii) finding a sponsor—effectively, a foster parent—willing to take custody of her and to not interfere in any practical way with her abortion decision.

That is constitutionally untenable, as the en banc court agrees. Settled precedent from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), establishes that the government may not put substantial and unjustified obstacles in the way of a woman's exercise of her right to an abortion pre-viability. The government, however, has identified no constitutionally sufficient justification for asserting a veto right over J.D. and Texas law.

Judge Kavanaugh's dissenting opinion claims that the court has somehow broken new constitutional ground by authorizing "immediate abortion on demand" by "unlawful immigrant minors" (Judge Kavanaugh's Dissent Op. 1). What new law? It cannot be J.D.'s status as an undocumented immigrant because the government has accepted that her status does not affect her constitutional right to an abortion, as Judge Kavanaugh's opinion acknowledges on the next page (Dissent Op. 2). Accordingly, in this litigation, J.D., like other minors in the United States who satisfy state-approved procedures, is entitled under binding Supreme Court precedent to choose to terminate her pregnancy. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979). The court's opinion gives effect to that concession; it does not create a "radical" "new right" (Judge Kavanaugh Dissent Op. 1) by doing so.[1]

[1] Because at no point in its briefing or oral argument in this court or the district court did the government dispute that J.D. has a constitutional right to obtain an abortion, the government has forfeited any argument to the contrary. *See, e.g.*, *Koszola v. FDIC*,

Beyond that, it is unclear why undocumented status should change everything. Surely the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for unlawful entry be forcing a child to have a baby. The bedrock protections of the Fifth Amendment's Due Process Clause cannot be that shallow.

Abortion on demand? Hardly. Here is what this case holds: a pregnant minor who (i) has an unquestioned constitutional right to choose a pre-viability abortion, and (ii) has satisfied every requirement of state law to obtain an abortion, need not wait additional weeks just because she—in the government's inimitably ironic phrasing—"refuses to leave" its custody, Appellants' Opp'n to Reh'g Pet. 11. That sure does not sound like "on demand" to me. Unless Judge Kavanaugh's dissenting opinion means the demands of the Constitution and Texas law. With that I would agree.

1. Sponsorship

The centerpiece of the panel order (and now Judge Kavanaugh's dissenting opinion at 2-3) was the conclusion that forcing J.D. to continue her pregnancy for multiple more weeks is not an "undue burden" as long as the sponsorship search is undertaken "expeditiously." Panel Order at 1. The panel order then treated its ordered eleven-day delay as just such an expeditious process.

But that starts the clock long after the horses have left the gate. The sponsorship search has already been underway for

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393 F.3d 1294, 1299 n.1 (D.C. Cir. 2005). In fact, at oral argument, government counsel affirmed, in response to a direct question, that the argument was waived in this case. Oral Arg. 17:50; *see, e.g.*, *GSS Group Ltd. v. National Port Auth. of Liberia*, 822 F.3d 598, 608 (D.C. Cir. 2016).

now-almost *seven weeks*. Throughout all of that time, the government was under a statutory obligation to find a sponsor if one was available. *See* 8 U.S.C. § 1232(c)(2). None materialized. Tacking on another eleven days to an already nearly seven-week sponsorship hunt—that is, enforcing an almost *nine week* delay before J.D. can even start again the process of trying to exercise her right—is the antithesis of expedition. A nine-week waiting period before litigation can start or resume, if adopted by a State, would plainly be unconstitutional. *Cf. Whole Woman's Health*, 136 S. Ct. at 2318 (striking restrictions on abortion providers as unduly burdensome, noting in part "clinics' experiences since the admitting-privileges requirement went into effect of 3-week wait times") (citations omitted).

For very good reason, the sponsorship process is anything but expeditious. The sponsor is much like a foster parent, someone who chooses to house and provide for a child throughout her time in the United States, and who promises to ensure her appearance at all immigration proceedings. To protect these acutely vulnerable children from trafficking, sexual exploitation, abuse, and neglect, Congress requires the Department of Health and Human Services to be careful in its review and restrictive in who can apply. *See* 8 U.S.C. § 1232. To that end, agency regulations provide that potential sponsors must either be related to J.D. or have some "bona fide social relationship" with the child that "existed before" her arrival in the United States.[2]

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[2] Office of Refugee Resettlement, Section 2: Safe and Timely Release from ORR Care, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 (last visited Oct. 24, 2017) ("In the absence of sufficient evidence of a *bona fide social relationship* with the child and/or the child's family that existed *before* the child

On top of that, the panel's order did not say that, at the end of its eleven days, J.D. could terminate her pregnancy if no sponsor were found. Quite the opposite: The order just stopped everything—except, critically, the continuation of J.D.'s pregnancy—until October 31st, at which time J.D. would have to restart the litigation all over again unless a sponsor was lucked upon. There is nothing expeditious about the prolonged and complete barrier to J.D.'s exercise of her right to terminate her pregnancy that the panel order allowed the government to perpetuate.

Nor was any constitutionally sound justification for the order's imposition of eleven more days on top of the already elapsed seven weeks ever advanced by the government. In fact, the government (i) never requested a stay to find a sponsor; (ii) never asked for a remand; (iii) never suggested in briefing or oral argument that there was any prospect of finding a sponsor at all, let alone finding one in the next eleven days or even in the foreseeable future; (iv) never even hinted, since no family member has been approved as a sponsor, that a non-family member could be identified, vetted, and take custody of J.D. within eleven days; and (v) never made any factual or legal argument contending that the already-seven-week-long-and-counting sponsorship process was an "expeditious" process or the type of short-term burden that could plausibly pass muster under Supreme Court precedent to bar an abortion.

All the government argues with respect to sponsorship was that its flat and categorical prohibition of J.D.'s abortion was permissible because she could leave government custody if a sponsor were found or she surrendered any claim of legal right to stay here and voluntarily departed. Oral Arg. 12:35; 24:30–

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migrated to the United States, the child will *not* be released to that individual.") (emphases added).

25:15. Custody, the government insists, is the unaccompanied child's problem to solve.

A detained, unaccompanied minor, however, has precious little control over the sponsorship process. The Department of Health and Human Services is statutorily charged with finding, vetting, and approving sponsors. *See* 8 U.S.C. § 1232(c); 6 U.S.C. § 279. So the government's position that J.D. cannot exercise her constitutional right unless the government approves a sponsor imposes a flat prohibition on her reproductive freedom that J.D. has no independent ability to overcome.

Nor does sponsorship bear any logical relationship to J.D.'s decision to terminate the pregnancy. Because J.D. has obtained a judicial bypass order from a Texas court that allows her to decide for herself whether an abortion is in her own best interests, a sponsor would have no ability to control or influence J.D.'s decision. *See* Texas Family Code § 33.003(i-3). Accordingly, finding a sponsor and allowing J.D. to exercise her unchallenged constitutional right are not mutually exclusive. The two can and should proceed simultaneously.

Judge Kavanaugh's dissenting opinion (at 4) suggests that it would be good to put J.D. "in a better place when deciding whether to have an abortion." That, however, is not any argument the government ever advanced. The only value of sponsorship identified by the government was that sponsorship, like voluntary departure from the United States, would get J.D. and her pregnancy out of the government's hands.

In any event, even if sponsorship, as Judge Kavanaugh supposes, might be more optimal in a policy sense, J.D. has already made her decision, and neither the government nor the dissenting opinion identifies a constitutionally sufficient justification consistent with Supreme Court precedent for

requiring J.D. to wait for what may or may not be a better environment. The dissenting opinion further assumes that J.D. is different because she lacks a "support network of friends and family." Judge Kavanaugh's Dissent Op. 5. Unfortunately, the central reason for the bypass process is that pregnant girls and women too often find themselves in dysfunctional and sometimes dangerous situations—such as with sexually or physically abusive parents and spouses—in which those networks have broken down. *See* Texas Family Code § 33.003(i-3) (authorizing bypass when the court finds that "the notification and attempt to obtain consent would not be in the best interest of the minor[]"). It thus would require a troubling and dramatic rewriting of Supreme Court precedent to make the sufficiency of someone's "network" an added factor in delaying the exercise of reproductive choice even after compliance with all state-mandated procedures.

"Voluntary" departure is not a constitutionally adequate choice either given both the life-threatening abuse that J.D. claims to face upon return, and her potential claims of legal entitlement to remain in the United States. *See* Sealed Decl.; 8 U.S.C. § 1101(a)(27)(J) (special immigrant juvenile status); 8 C.F.R. § 204.11.[3] Notably, while presenting a legal argument

[3] While the government now objects that J.D. has not previously identified on which statutory basis she would seek relief from removal, Appellants' Opp'n to Reh'g Pet. 5–6, 14, J.D. has argued all along that her exercise of her unchallenged right under the Due Process Clause to an abortion could not be conditioned on her "giv[ing] up her opportunity to be reunited with family here in the United States, or forcing her to return to her home country and abuse." Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 18; *see* Pl.'s Reply in Supp. of Mot. for TRO 6 ("The government should not be allowed to use her constitutional right to access abortion as a bargaining chip to trade for immigration status[.]"). While she had not yet cited to particular statutory

that relied heavily on voluntary departure to defend its abortion prohibition, government counsel was unable to confirm at oral argument whether or how voluntary departure actually works for unaccompanied minors over whom the government is exercising custody. *See* Oral Arg. 28:15–28:50; *cf.* 6 U.S.C. § 279(b)(2)(B) (restricting the release of unaccompanied minors on their own recognizance). The government has put nothing in the record to suggest that it is in the practice of putting children on airplanes all alone and just shipping them back to abusive and potentially life-endangering situations.

2. Facilitation

The government argues that it need not "facilitate" J.D.'s decision to terminate her pregnancy. But the government is engaged in verbal alchemy. To "facilitate" something means "[t]o make (an action, process, *etc*.) easy or easier; to promote, help forward; to assist in bringing about (a particular end or result)."[4] This case does not ask the government to make things easier for J.D. The government need not pay for J.D.'s abortion; she has that covered (with the assistance of her guardian *ad litem*). The government need not transport her at any stage of the process; J.D. and her guardian *ad litem* have arranged for that. Government officials themselves do not even have to do any paperwork or undertake any other administrative measures. The contractor detaining J.D. has advised that it is willing to handle any necessary logistics, just as it would for medical appointments if J.D. were to continue her pregnancy. The government also admitted at oral argument

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provisions, that presumably is because the government has not yet initiated removal proceedings.

[4] *See* OXFORD ENGLISH DICTIONARY ONLINE ("facilitate" def. 1(a)), http://www.oed.com/view/Entry/67460?redirectedFrom=facilitate#eid (last visited Oct. 24, 2017).

that, in light of the district court's order, the Department of Health and Human Services does not even need to complete its own self-created internal "best interests" form. *See* Oral Arg. 31:40–33:15. So on the record of this case, the government does not have to facilitate—make easier—J.D.'s termination of her pregnancy. It just has to not interfere or make things *harder*.

The government's suggestion of sponsorship as a facilitation-free panacea also overlooks that it would require substantial governmental effort and resources for J.D. to be placed into the hands of a sponsor who must enter into an agreement with the government and is responsible for ensuring the minor's appearance at all immigration proceedings.[5] While after expending all of its resources to find, vet and approve the transfer, the government's ongoing ties to sponsors are presumably less than for a grantee, the government has put no facts in the record or any argument as to why that difference in degree should be constitutionally sufficient. In any event, transferring J.D. into the custody of the guardian *ad litem* to obtain the abortion would require far *less* use of governmental resources and personnel and far less facilitation. The government's desire to have as little to do as possible with J.D.'s exercise of her constitutional right while in custody thus seems erratic.

The government's claim that it does not think that an abortion is in J.D.'s best interests does not work either. The judicial bypass already put that best interests decision in J.D.'s hands. On top of that, the government does not even claim that it is making an individualized "best interests" judgment in

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[5] *See* Office of Refugee Resettlement, Section 2.8.1: After Care Planning, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 (last visited Oct. 24, 2017).

forbidding J.D.'s abortion. It is simply supplanting her legally authorized best interests judgment with its own categorical position against abortion—which is something not even a parent or spouse or State could do. Only the big federal government gets this veto, we are told.

The government unquestionably is fully entitled to have its own view preferring the continuation of pregnancy, and to even require the disclosure of information expressing that view. But the government's mere opposition to J.D.'s decision is not an individualized "best interests" judgment within any legally recognized meaning of that term, and its asserted categorical bar to abortion is without constitutional precedent.

3. Abuse of Discretion Review

In resolving this case, it must be remembered that this case arises on abuse-of-discretion review of a district court's injunctive order. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). And the expedition with which the panel and now the en banc court have acted underscores that time is a zero-sum matter in this case. J.D. is already into the second trimester of her pregnancy, which means that, as days slip by, the danger that the delayed abortion procedure poses to her health increases materially. We are told that waiting even another week could increase the risk to J.D.'s health, the potential complexity of the procedure, and the great difficulty of locating an abortion provider in Texas.[6] The sealed declaration filed in this case attests that a

[6] Oral Arg. 1:13:45-1:15:10 (Counsel for J.D.: "Texas law requires counseling at least 24 hours in advance of the procedure by the same doctor who is to provide the abortion. Because of the limited availability of doctors to provide abortions in Texas, the same doctor is not always at the facility in south Texas. So, for example, the doctor that provided the counseling yesterday to J.D. is there

compelled return to her country at this time would expose her to even more life-threatening physical abuse.

The irreparable injury to J.D. of postponing termination of her pregnancy—the weekly magnification of the risks to her health and the ever-increasing practical barriers to obtaining an abortion in Texas—have never been factually contested by the government. J.D.'s counsel has advised, and the government has not disputed, that she is on the cusp of having to travel

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today and on Saturday, but is not the same doctor who is there next week. So next week, there is a different doctor there on Monday and Tuesday, so if J.D. were allowed to have the abortion next week, she would have to be, unless this court declares otherwise, * * * counseled by this different doctor there on Monday and wait 24 hours to have the abortion on Tuesday. * * * [After Tuesday October 24, 2017], we are looking at the following week. The doctor that is there Thursday, Friday and Saturday, the following week * * * [is the doctor that only performs abortions at 15.6 weeks]. And we are very concerned that she is on the cusp, so even if she is able to go next week, she may be past the limit for that particular doctor."); Reh'g Pet. 4–5; Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 3; *see Williams v. Zbaraz*, 442 U.S. 1309, 1314–1315 (1979) (Stevens, J., sitting as Circuit Justice) (evidence of an increased risk of "maternal morbidity and mortality" supports a claim of irreparable injury); Linda A. Bartlett, *et al.*, *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, 103:4 OBSTETRICS & GYNECOLOGY 729 (April 2004) (relative risk from abortion increases 38% each gestational week); Cates, W. Jr, Schulz, K.F., Grimes, D.A., Tyler, C.W. Jr., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, FAMILY PLANNING PERSPECTIVES 1977; 9:266, 273 ("[I]f a woman delays beyond the eighth week up to 10 weeks, the major morbidity rate is 0.36, which is 57 percent higher than her risk at eight or fewer weeks. Similarly, if she delays her abortion procedure until the 11-12-week interval, she increases her relative risk of major morbidity by 91 percent.").

hundreds of miles to obtain an abortion. *See* Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 9 (representing that, as of October 19, 2017, depending on which doctor is available, it may be that J.D.'s "only option next week would be to travel hundreds of miles to a more remote clinic"); Reh'g Pet. 5; *supra* note 6. Likewise, at no time before the district court or the panel did the government's briefing or oral argument dispute J.D.'s claim of severe child abuse or ask for fact finding on that claim.

On the other side of the balance, the government asserts only its opposition to an abortion by J.D. as an unaccompanied minor in the custody of a Department of Health and Human Services grantee. That is an acutely selective form of resistance since the government acknowledges it would not apply were J.D. to turn 18 and be moved to Immigration and Customs Enforcement custody or were she a convicted criminal in Bureau of Prisons custody. Oral Arg. 9:20–11:45. Under current governmental policy and regulations, those women are permitted to terminate their pregnancies.[7] Given that dissonance in the government's position, the balancing of interests weighs heavily in J.D.'s favor.

In short, I fully agree with the en banc court's decision to deny the government's motion for a stay and to remand for further expeditious proceedings and any appropriate fact finding, especially in light of the factual disputes surfaced for the first time in the rehearing papers.

Because J.D.'s right to an abortion under the Due Process Clause is unchallenged and because J.D. has done everything that Texas law requires (and more) to obtain an abortion, the government bore the burden of coming forward with a

[7] *See* ICE Guidelines, Detention Standard 4.4, Medical Care, available at https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf; 28 C.F.R. § 551.23.

constitutionally sufficient justification for flatly forbidding termination of her pregnancy. The government's mere hope that an unaccompanied, abused child would make the problem go away for it by either (i) surrendering all of her legal rights and leaving the United States, or (ii) finding a sponsor the government itself could never find is not a remotely constitutionally sufficient reason for depriving J.D. of any control over this most intimate and life-altering decision. The court today correctly recognizes that J.D.'s unchallenged right under the Due Process Clause affords this 17-year-old a modicum of the dignity, sense of self-worth, and control over her own destiny that life seems to have so far denied her.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting: Does an alien minor who attempts to enter the United States eight weeks pregnant—and who is immediately apprehended and then in custody for 36 days between arriving and filing a federal suit—have a constitutional right to an elective abortion? The government has inexplicably and wrongheadedly failed to take a position on that antecedent question. I say wrongheadedly because at least to me the answer is plainly—and easily—no. To conclude otherwise rewards lawlessness and erases the fundamental difference between citizenship and illegal presence in our country.

The en banc Court endorses or at least has no problem with this result. By virtue of my colleagues' decision, a pregnant alien minor who attempts to enter the United States illegally is entitled to an abortion, assuming she complies with state abortion restrictions once she is here. Under my colleagues' decision, the minor need not have "developed substantial connections with this country," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), as the plaintiff here plainly has not. Under my colleagues' decision, the minor need not have "effected an entry into the United States," *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), because the plaintiff here did not, *see id.* (alien "paroled into the United States pending admissibility," without having "gained [a] foothold," has "not effected an entry"). Under my colleagues' decision, it is difficult to imagine an alien minor anywhere in the world who will not have a constitutional right to an abortion in this country. Their action is at odds with Supreme Court precedent. It plows new and potentially dangerous ground. Accordingly, I dissent from the vacatur of the stay pending appeal.

I. BACKGROUND

In or about early July 2017, 17-year-old Jane Doe (J.D.) became pregnant. On or about September 7, 2017, she attempted to enter the United States illegally and

unaccompanied. By J.D.'s own admission, authorities detained her "upon arrival." District Court Docket Entry (Dkt. No.) 1-13 at 1. She has since remained in federal custody—in a federally funded shelter—because she is an "unaccompanied alien child." 6 U.S.C. § 279(g)(2) ("unaccompanied alien child" is "a child who," *inter alia*, "has no lawful immigration status in the United States" and "has not attained 18 years of age").

The Office of Refugee Resettlement (ORR) of the United States Department of Health and Human Services (HHS) is responsible for "unaccompanied alien children who are in Federal custody by reason of their immigration status." 6 U.S.C § 279(b)(1)(A). In March 2008, HHS announced a "[p]olicy" that "[s]erious medical services, including . . . abortions, . . . require heightened ORR involvement." HHS, *Medical Services Requiring Heightened ORR Involvement* (Mar. 21, 2008), perma.cc/LDN8-JNL5. In March 2017, consistent with that policy, ORR further announced that shelter personnel "are prohibited from taking any action that facilitates an abortion without direction and approval from the Director of ORR." Dkt. No. 3-5 at 2.

According to the declaration of an ORR official, J.D. was physically examined while in custody and "was informed that she [is] pregnant." Dkt. No. 10-1 at 2. J.D.'s counsel interprets the declaration to say that "J.D. did not learn that she was pregnant until after her arrival in the United States." Pl.'s Opp. to Defs.' Emergency Mot. for Stay Pending Appeal (Opp.) 22-23; *see also* Panel Dissent of Millett, J. (Panel Dissent) 2 ("After entering the United States, [J.D.] . . . learned that she is pregnant."). But the declaration does not rule out that J.D. knew she was pregnant even before the examination. Nor has J.D. herself alleged that she first learned of her pregnancy in this country. *See generally* Dkt. No. 1-13 at 1 (J.D.'s

declaration in support of complaint). And it is highly likely she knew when she attempted to enter the United States that she was pregnant, as she was at least eight weeks pregnant at the time.[1] Notably, elective abortion is illegal in J.D.'s home country. Oral Arg. Recording 29:19-29:34.

J.D. requested an abortion. The evidence before us is that it is an elective abortion: nothing indicates it is necessary to preserve J.D.'s health.[2] J.D.'s request was relayed to the ORR Director, who denied it. On October 13, 2017—having spent a mere 36 days in the United States, all of them in custody—J.D. filed suit in district court, enlisting this country's courts to vindicate (*inter alia*) her alleged Fifth Amendment right to an abortion. The next day, she applied for a temporary restraining order (TRO) and moved for a preliminary injunction.

The government opposed J.D.'s application and motion. For reasons known only to the government, it did not take a position on whether J.D.—as an alien who attempted to enter the United States illegally and who has no substantial connections with this country—has any constitutional right to an abortion. Instead the government argued that ORR has placed no "undue burden" on the alleged right. Dkt. No. 10 at 11-16 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). At the TRO hearing, the district court repeatedly pressed the government about whether J.D. has a constitutional right to an abortion. The government emphasized that it was

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[1] A recent declaration filed under seal by J.D.'s attorney ad litem provides further circumstantial evidence that J.D. left her home country because of her pregnancy. Cortez Decl. ¶ 8.

[2] At oral argument, HHS stated its policy is that an emergency abortion, which it interprets to include a "medically necessary" abortion, would be allowed. Oral Arg. Recording 20:00-20:27.

"not taking a . . . position" but was "not going to give [the court] a concession" either. Opp., Supplement 14.

The district court issued a TRO requiring that the government allow J.D. to be transported to an abortion provider for performance of the procedure. The government appealed the TRO to this Court and sought a stay pending appeal. At oral argument, the government repeatedly stated that it takes no position on whether J.D. has a constitutional right to an abortion, Oral Arg. Recording 8:10-8:46, 16:43-17:12, and that it instead "assume[s] for the purposes of . . . argument" that she has such a right, Oral Arg. Recording 17:27-17:52.[3]

On October 20, 2017, over a dissent, a motions panel of this Court issued an order directing the district court to allow HHS until close of business October 31 to find a suitable sponsor to take custody of J.D. so that HHS can release her from its custody. Without deciding whether J.D. has a constitutional right to an abortion, the panel concluded that a short delay to secure a sponsor does not unduly burden any alleged right if the process is expeditiously completed by close of business October 31.

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[3] Under insistent pressure to state whether the government was "waiving" the issue, counsel for the government said yes in the heat of the moment. Oral Arg. Recording 17:41-17:52. But the next moment, when reminded of the difference between forfeiture and waiver—a distinction that lawyers often overlook or misunderstand, *cf. Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) (even "jurists often use the words interchangeably")—counsel effectively retracted the foregoing statement, saying she was "not authorized to take a position" on whether J.D. has a constitutional right to an abortion, Oral Arg. Recording 17:52-18:51.

On October 22, 2017, J.D. filed a petition for rehearing en banc. Today, the Court grants the petition, vacates the panel's October 20 order and denies the government's motion for stay pending appeal "substantially for the reasons set forth in" the panel dissent.

II. ANALYSIS

As I noted at the outset, the en banc Court's decision in effect means that a pregnant alien minor who attempts to enter the United States illegally is entitled to an abortion, assuming she complies with state abortion restrictions once she is here. Although the government has for some reason failed to dispute that proposition, it is not the law.

A. WE CAN AND MUST DECIDE THE ANTECEDENT QUESTION OF WHETHER J.D. HAS A CONSTITUTIONAL RIGHT TO AN ABORTION.

The Supreme Court has held that if a party "fail[s] to identify and brief" "an issue 'antecedent to . . . and ultimately dispositive of' the dispute," an appellate court may consider the issue *sua sponte*. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *cf. United States v. Bowie*, 198 F.3d 905, 913 (D.C. Cir. 1999) ("We are never bound to accept the government's confession of error" (citing *Young v. United States*, 315 U.S. 257, 258 (1942), *United States v. Pryce*, 938 F.2d 1343, 1351-52 (D.C. Cir. 1991) (Randolph, J., concurring))). Here, the question of whether J.D. has a constitutional right to an abortion is "antecedent to" any issue of undue burden. And the antecedent question is "dispositive of" J.D.'s Fifth Amendment claim, at least now that my colleagues have reinstated the TRO on the apparent theory that the claim is likely meritorious. Accordingly, we can and should expressly decide the antecedent question.

True, we should not ordinarily confront a broad constitutional question "if there is also present some other ground upon which the case may be disposed of," *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), including if the alternative is a "narrower" constitutional ground, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999).[4] But in the analogous context of qualified immunity, we are "permitted . . . to avoid avoidance—that is, to determine whether a right exists before examining" the narrower question of whether the right "was clearly established" at the time an official acted. *Camreta v. Greene*, 563 U.S. 692, 706 (2011). Our discretion in that area rests on the recognition that it "is sometimes beneficial to clarify the legal standards governing public officials." *Id*. at 707. The same interest is, to put it mildly, implicated here. Border authorities, immigration officials and HHS itself would be well served to know ex ante whether pregnant alien minors who come to the United States in search of an abortion are constitutionally entitled to one. And under today's decision, pregnant alien minors the world around seeking elective abortions will be on notice that they should make the trip.[5]

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[4] We cannot duck a broad constitutional question if the alternative ground is not "an adequate basis for decision." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184. At the panel stage, the possibility of expeditious sponsorship was an adequate narrower basis for our decision to briefly *delay* J.D.'s abortion. By contrast, today's result—which has the real-world effect of *entitling* J.D. to an abortion—is difficult to explain unless it rests at least in part on the proposition that J.D. has a constitutional right to an abortion. Even if I were to assume, without in any way conceding, that J.D. had such a constitutional right, I would nonetheless stand by the panel order.

[5] The panel dissent paid lip service to constitutional avoidance, Panel Dissent 8, before sweepingly declaring that when alien minors

Granted, because of the government's failure to take a position,[6] we in theory have discretion *not* to decide the antecedent question. But in reality the ship has sailed: as a result of my colleagues' decision, J.D. will soon be on her way to an abortion procedure she would not receive absent her invocation of the Fifth Amendment. If ever there were a case in which the public interest compels us to exercise our "independent power to identify and apply the proper construction of governing law" irrespective of a party's litigating position, *U.S. Nat'l Bank of Or.*, 508 U.S. at 446 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99

"find themselves on our shores and pregnant" and seeking an abortion, "the *Constitution* forbids the government from directly or effectively prohibiting their exercise of that *right* in the manner it has done here." Panel Dissent 9-10 (emphases added). That is not judicial modesty.

[6] I could not disagree more strongly with Judge Millett's characterization of the government's position on the merits—i.e., that it outright "waived" any contention that J.D. has no constitutional right to an abortion. Millett Concurrence 2-3 n.1. She must have read different papers and listened to a different argument from the ones I read and listened to. A waived argument "is one that a party has knowingly and intelligently relinquished." *Wood v. Milyard*, 132 S. Ct. 1826, 1832 n.4 (2012). The government has declared time and again that it is not taking a position on whether J.D. has a constitutional right to an abortion. That is not waiver. Government counsel in the district court stated that he was neither raising nor conceding the point. That is not waiver. Government counsel in this Court stated that she lacked authority to take a position. That, too, is not waiver: counsel who disclaims such authority cannot relinquish an argument any more than she can advance one. All this is beside the point, however, because of our independent duty to declare the law. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 446.

(1991)), this is it. The stakes, both in the short run and the long, could scarcely be higher.

B. J.D. HAS NO CONSTITUTIONAL RIGHT TO AN ABORTION.

J.D. is not a U.S. citizen. She is not a permanent resident, legal or otherwise. According to the record, she has no connection to the United States, let alone "substantial" connections. Despite her physical presence in the United States, J.D. has never entered the United States as a matter of law and cannot avail herself of the constitutional rights afforded those legally within our borders. Accordingly, under a correct interpretation of the law, J.D. has virtually no likelihood of success on the merits and the TRO issued by the district court should remain stayed. *See Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (preliminary injunctive relief unavailable if the plaintiff cannot establish a likelihood of success on the merits).

"The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Thus a young girl detained at Ellis Island for a year, and then released to live with her father in the United States for nearly a decade, "was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). Even after she was no longer detained, "[s]he was still in theory of law at the boundary line and had gained no foothold in the United States." *Id*. Nearly six decades ago the Supreme Court had already said that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the

United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

Aliens who have entered the United States—even if illegally—enjoy "additional rights and privileges not extended to those . . . who are merely 'on the threshold of initial entry.'" *Id*. at 187 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Until then—before developing the "substantial connections" that constitute "entry" for an illegally present alien—"[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

We have repeatedly recognized this principle, as have our sister circuits and, most important, as has the Supreme Court. *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment); *Demore v. Kim*, 538 U.S. 510, 546 (2003); *Shaughnessy*, 345 U.S. at 215; *Kaplan*, 267 U.S. at 230; *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (alien petitioner, "although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate"); *Kiyemba v. Obama*, 555 F.3d 1022, 1036-37 n.6 (D.C. Cir. 2009) (Rogers, J., concurring in the judgment) (quoting *Mezei*, *Leng May Ma* and *Ju Toy* in support of proposition that habeas court can order detainee brought within U.S. territory without thereby effecting detainee's "entry" for any other purpose), *vacated on other grounds*, 559 U.S. 131 (2010); *Ukrainian-Am. Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374, 1383 (D.C. Cir. 1990) (Sentelle, J., concurring)

(summarizing the entry doctrine).[7] Because she has never entered the United States, J.D. is not entitled to the due process protections of the Fifth Amendment. *See Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) ("As an unadmitted alien present in the United States, Albathani's due process rights are limited"). This is, or should be, clear from the controlling and

[7] *See also Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003); *Nwozuzu v. Holder*, 726 F.3d 323, 330 n.6 (2d Cir. 2013) (discussing *Kaplan*); *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954) ("in a literal and physical sense a person coming from abroad enters the United States whenever he reaches any land, water or air space within the territorial limits of this nation" but "those who have come from abroad directly to [an inspection] station seeking admission in regular course have not been viewed by the courts as accomplishing an 'entry' by crossing the national boundary in transit or even by arrival at a port so long as they are detained there pending formal disposition of their requests for admission"); *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) ("the crime of illegal entry inherently carries this additional aspect that leaves an illegal alien's status substantially unprotected by the Constitution in many respects"); *Gonzalez v. Holder*, 771 F.3d 238, 245 (5th Cir. 2014) (alien who entered the United States illegally at age seven and remained for the next 17 years was, under *Kaplan*, deportable and ineligible for derivative citizenship despite his father's intervening naturalization); *Vitale v. INS*, 463 F.2d 579, 582 (7th Cir. 1972) (paroled alien "did not effect an entry into the United States"); *Montgomery v. Ffrench*, 299 F.2d 730, 733 (8th Cir. 1962) (discussing *Kaplan*); *United States v. Argueta-Rosales*, 819 F.3d 1149, 1158 (9th Cir. 2016) ("for immigration purposes, 'entry' is a term of art requiring not only physical presence in the United States but also freedom from official restraint"); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1286, 1288 (11th Cir. 1991) (reversing conviction of alien "found in" the United States illegally because alien never "entered" the United States in the sense of *Kaplan* and *Leng May Ma*).

persuasive authorities marshaled above, which are only a fraction of the whole.

Even if J.D. did enjoy the protections of the Due Process Clause, however, due process is not an "all or nothing" entitlement. In some cases "[i]nformal procedures will suffice," *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); "consideration of what procedures due process may require" turns on "the precise nature of the government function" and the private interest. *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). What the Congress and the President have legitimately deemed appropriate for aliens "on the threshold" of our territory, the judiciary may not contravene. "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter. . . . As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, *are due process of law*." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (emphasis added). There is a "class of cases" in which "the acts of executive officers, done under the authority of congress, [are] conclusive." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 284 (1855). Among that class of cases are those brought by aliens abroad, including those who are "abroad" under the entry doctrine. *See Din*, 135 S. Ct. at 2139-40 (Kennedy, J., concurring in the judgment); *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972).

Mandel teaches that the Congress's "plenary power" over immigration requires the courts to strike a balance between private and public interests different from the due process that typically obtains. The Supreme Court "without exception has sustained" the Congress's power to exclude aliens, a power

"inherent in sovereignty," consistent with "ancient principles" of international law and "to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765-66. Indeed, "over no conceivable subject is the legislative power of Congress more complete." *Id*. at 766 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)) (alteration omitted). The Congress's power to exclude includes the power "to prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." *Id*. (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)). Whatever the merits of different applications of due process "were we writing on a clean slate," "the slate is not clean." *Id*. (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)). We must therefore yield to the Executive, exercising the power lawfully delegated to him, when he "exercises this power negatively on the basis of a facially legitimate and bona fide reason." *Id*. at 770. Moreover, this deference is required even when the constitutional rights of U.S. citizens are affected: we may not "look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of *citizens* "who seek personal communication with" the excluded alien. *Id*. Thus in *Mandel*, the Executive permissibly prohibited an alien communist intellectual to travel to the United States, where he had been scheduled to speak at several universities.

Applying *Mandel*, the Supreme Court recently approved the Executive's denial of entry to an Afghan man whose U.S.-citizen wife was waiting for him in this country. *Din*, 135 S. Ct. at 2131 (plurality opinion). The Court in *Din* was divided not only over whether the wife had any due process interest in her husband's attempt to immigrate but also over whether that hypothetical interest had been infringed. *Compare id*.

(plurality opinion) (three justices concluding that there is no due process right "to live together with [one's] spouse in America"), *with id*. at 2139 (Kennedy, J., concurring in the judgment) (two justices concluding that, even if such a right exists, the Government's visa-denial notice is all that due process can require). Citing *Mandel*, Justice Kennedy reasoned that the government's action in *Din* was valid, even though it "burden[ed] a citizen's own constitutional rights," because it was made "on the basis of a facially legitimate and bona fide reason." *Id*. at 2139 (Kennedy, J., concurring in the judgment) (quoting *Mandel*, 408 U.S. at 770).[8] Justice Scalia, writing for himself, the Chief Justice and Justice Thomas, criticized the dissent's endorsement of the novel substantive due process right asserted by the plaintiff, which he characterized as, "in any world other than the artificial world of ever-expanding constitutional rights, nothing more than a deprivation of her spouse's freedom to immigrate into America." *Id*. at 2131 (plurality opinion).

Mandel applies with all the more force here, where a substantive due process right is asserted not by a U.S. citizen, nor by a lawful-permanent-resident alien, nor even by an *illegally* resident alien, but by an alien minor apprehended attempting to cross the border illegally and thereafter detained by the federal government. If J.D. can be detained indefinitely—which she can be, *see Zadvydas*, 533 U.S. at 693 (distinguishing *Shaughnessy*, 345 U.S. 206)—and if she can be returned to her home country to prevent her from engaging in disfavored political speech in this country—which she can be, *Mandel*, 408 U.S. at 770—and if she can be paroled into the United States for a decade or more, *Kaplan*, 267 U.S. at 230,

[8] Justice Kennedy's opinion in *Din*, because it is narrower than the plurality opinion, is controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

register for the draft, *Ng Lin Chong v. McGrath*, 202 F.2d 316, 317 (D.C. Cir. 1952), and see her parents naturalized, *Gonzalez v. Holder*, 771 F.3d 238, 239 (5th Cir. 2014), only for her *still* to be deported with cursory notice, 8 U.S.C. § 1225—then she cannot successfully assert a due process right to an elective abortion.

In concluding otherwise, the Court elevates the right to elective abortion above every other constitutional entitlement. Freedom of expression, *Mandel*, 408 U.S. at 770, freedom of association, *Galvan*, 347 U.S. at 523, freedom to keep and bear arms, *United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012), freedom from warrantless search, *Verdugo-Urquidez*, 494 U.S. at 274-75, and freedom from trial without jury, *Johnson v. Eisentrager*, 339 U.S. 763, 784-85 (1950) all must yield to the "plenary authority" of the Congress and the Executive, acting in concert, to regulate immigration; but the freedom to terminate one's pregnancy is more fundamental than them all? This is not the law.[9]

[9] The panel dissent simply assumed that the Supreme Court's abortion decisions involving U.S. citizen women—from *Roe v. Wade* to *Whole Woman's Health*—apply *mutatis mutandis* to illegal alien minors. There is no legal analysis to support this assumption, *see generally* Panel Dissent 3-6, which is untenable for the reasons I have described. Judge Millett's subsequent opinion concurring in the Court's en banc disposition does nothing to address that deficit, offering scarce authority to support its assertion of the thwarting of a "grave constitutional wrong" by the government and none that addresses the antecedent constitutional question, which the Court must decide but which Judge Millett dismisses as waived. Millett Concurrence 2-3 n.1.

The panel dissent warned of outlandish scenarios that will follow from staying the TRO,[10] Panel Dissent 9, but a stay maintains the legal status quo. The United States remains a signatory to the U.N. Convention Against Torture; our law imposes civil liability on government agents who commit torts and criminal liability on those who commit crimes; and counsel have access to detained alien minors, as have J.D.'s counsel.

I cannot improve on the Chief Justice's criticism of the "false premise" that

> our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that "[i]f it is not necessary to decide more, it is necessary not to decide more," sometimes it *is* necessary to decide more. There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them."

Citizens United v. FEC, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) (quoting *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.)).

[10] My colleague's characterization of this case, *see, e.g.*, Millett Concurrence 13, gives it an undeservedly melodramatic flavor—and indeed, from the record, especially the sealed affidavit of ORR's Jonathan White, is contrary to fact. Sealed Supp. to Defs.' Resp. to Pl.'s Pet. for Reh'g En Banc (Oct. 23, 2017). J.D. may be sympathetic. But even the sympathetic are bound by longstanding law.

The Constitution does not, and need not, answer every question but diabetics, rape victims and women whose pregnancies threaten their lives are nevertheless provided for. *Contra* Panel Dissent 9.

Although the panel dissent found "deeply troubling" the argument "that J.D. is not a person in the eyes of our Constitution," the argument is nevertheless correct.[11] The panel dissent's contrary conclusion is based on a misunderstanding of the Supreme Court's immigration due process decisions, including a mistaken reliance on the dissent in *Jean v. Nelson*, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting). Writing for the Court in *Jean*, then-Justice Rehnquist expressly declined to opine on the alien plaintiffs' due process rights, *see id.* at 857 (majority opinion), much less to hold—as Justice Marshall would have done—that "regardless of immigration status, aliens within the territorial jurisdiction of the United States are 'persons' entitled to due process under the Constitution." The Supreme Court has never so held.[12] *Contra* Panel Dissent 9.

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[11] J.D.'s "personhood" has nothing to do with it. "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans." *Eisentrager*, 339 U.S. at 783. No one suggests that members of the military—or here, J.D.—are thereby not "persons."

[12] The panel dissent's handling of *Zadvydas v. Davis* also merits clarification. *See* Panel Dissent 9. *Zadvydas* is careful to distinguish "an alien who has *effected an entry* into the United States and one who has never entered" and restates *Kaplan*'s holding that "despite nine years' presence in the United States, an 'excluded' alien 'was still in theory of law at the boundary line and had gained no foothold in the United States'" only three sentences before observing, in the

It is the panel dissent's (and now the Court's) position that will unsettle the law, potentially to dangerous effect. Having discarded centuries of precedent and policy, the majority offers no limiting principle to constrain this Court or any other from following today's decision to its logical end. If the Due Process Clause applies to J.D. with full force, there will be no reason she cannot donate to political campaigns, despite 52 U.S.C. § 30121's prohibition on contributions by nonresident foreign nationals inasmuch as freedom of political expression is plainly fundamental to our system of ordered liberty. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010). I see no reason that she may not possess a firearm, notwithstanding 18 U.S.C. § 922(g)(5)'s prohibition on doing so while "illegally or unlawfully in the United States," *see Carpio-Leon*, 701 F.3d at 975, inasmuch as "the Second Amendment conferred an individual right to keep and bear arms," *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), in recognition of the "basic right" of self-defense, *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). Even the government's ability to try accused war criminals before U.S. military commissions in theater must be reconsidered as it is premised on the Fifth Amendment's territoriality requirement, which today, by vacating the stay, the Court has so summarily eroded. *See Eisentrager*, 339 U.S. at 784-85.

Heedless of the entry doctrine, its extensive pedigree in our own precedent and its controlling effect in this case, the Court today assumes away the question of what (if any) process is due J.D. and proceeds to a maximalist application of some of the most controverted case law in American jurisprudence. It does so over the well-founded objections of an Executive

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passage quoted by the panel dissent, that "once an alien *enters* the country, the legal circumstance changes." *Zadvydas*, 533 U.S. at 693 (emphasis added). *Zadvydas* uses "entry" in its technical sense.

authorized to pursue its legitimate interest in protecting fetal life. *See Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("the government has a legitimate and substantial interest in preserving and promoting fetal life"); *Casey*, 505 U.S. at 853 (recognizing States' "legitimate interests in protecting prenatal life"); *Roe v. Wade*, 410 U.S. 113, 150 (1973) (recognizing "the State's interest—some phrase it in terms of duty—in protecting prenatal life"). Far from faithfully applying the Supreme Court's abortion cases, this result contradicts them, along with a host of immigration and due-process cases the Court declines even to acknowledge. *Garza v. Hargan* today takes its place in the pantheon of abortion-exceptionalism cases.

Accordingly, I respectfully dissent.

KAVANAUGH, *Circuit Judge*, with whom *Circuit Judges* HENDERSON and GRIFFITH join, dissenting:

The en banc majority has badly erred in this case.

The three-judge panel held that the U.S. Government, when holding a pregnant unlawful immigrant minor in custody, may seek to expeditiously transfer the minor to an immigration sponsor before the minor makes the decision to obtain an abortion. That ruling followed from the Supreme Court's many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion. The Supreme Court has repeatedly held that the Government may further those interests so long as it does not impose an undue burden on a woman seeking an abortion.

Today's majority decision, by contrast, "substantially" adopts the panel dissent and is ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision. The majority's decision represents a radical extension of the Supreme Court's abortion jurisprudence. It is in line with dissents over the years by Justices Brennan, Marshall, and Blackmun, not with the many majority opinions of the Supreme Court that have repeatedly upheld reasonable regulations that do not impose an undue burden on the abortion right recognized by the Supreme Court in *Roe v. Wade*.[1]

[1] The majority's decision rules against the Government "substantially for the reasons set forth in" the panel dissent. Given this ambiguity, the precedential value of this order for future cases will be debated. But for present purposes, we have no choice but to

To review: Jane Doe is 17 years old. She is a foreign citizen. Last month, she was detained shortly after she illegally crossed the border into Texas. She is now in a U.S. Government detention facility in Texas for unlawful immigrant minors. She is 15-weeks pregnant and wants to have an abortion. Her home country does not allow elective abortions.

All parties to this case recognize *Roe v. Wade* and *Planned Parenthood v. Casey* as precedents we must follow. All parties have assumed for purposes of this case, moreover, that Jane Doe has a right under Supreme Court precedent to obtain an abortion in the United States. One question before the en banc Court at this point is whether the U.S. Government may expeditiously transfer Jane Doe to an immigration sponsor before she makes the decision to have an abortion. Is that an undue burden on the abortion right, or not?

Contrary to a statement in the petition for rehearing en banc, the three-judge panel's order did not avoid that question. The panel confronted and resolved that question.

First, the Government has assumed, presumably based on its reading of Supreme Court precedent, that an unlawful immigrant minor such as Jane Doe who is in Government custody has a right to an abortion. The Government has also expressly assumed, again presumably based on its reading of Supreme Court precedent, that the Government lacks authority to block Jane Doe from obtaining an abortion. For purposes of

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assume that the majority agrees with and adopts the main reasoning for the panel dissent. Otherwise, the majority would have no explanation for the extraordinary step it is taking today. For accuracy, I therefore use the word "majority" when describing the main points of the panel dissent. (If any members of the majority disagreed with any of the main points of the panel dissent, they were of course free to say as much.)

this case, all parties have assumed, in other words, that unlawful immigrant minors such as Jane Doe have a right under Supreme Court precedent to obtain an abortion in the United States.

Second, under Supreme Court precedent in analogous contexts, it is not an undue burden for the U.S. Government to transfer an unlawful immigrant minor to an immigration sponsor before she has an abortion, so long as the transfer is expeditious.

For minors such as Jane Doe who are in U.S. Government custody, the Government has stated that it will not provide, pay for, or otherwise facilitate the abortion but will transfer custody of the minor to a sponsor pursuant to the regular immigration sponsor program. Under the regular immigration sponsor program, an unlawful immigrant minor leaves Government custody and ordinarily goes to live with or near a sponsor. The sponsor often is a family member, relative, friend, or acquaintance. Once Jane Doe is transferred to a sponsor in this case, the Government accepts that Jane Doe, in consultation with her sponsor if she so chooses, will be able to decide to carry to term or to have an abortion.[2]

The panel order had to make a decision about how "expeditious" the transfer had to be. Given the emergency posture in which this case has arisen, the panel order prudently did not purport to define "expeditious" for all future cases. But the panel order set a date of October 31 – which is 7 days from now – by which the transfer had to occur. For future cases, the term "expeditious" presumably would entail some combination of (i) expeditious from the time the Government learns of the

[2] The minor of course also has to satisfy whatever state-law requirements are imposed on the decision to obtain an abortion.

pregnant minor's desire to have an abortion and (ii) expeditious in the sense that the transfer to the sponsor does not occur too late in the pregnancy for a safe abortion to occur.[3] In this case, although the process by which the case has arrived here has been marked by understandable confusion over the law and by litigation filed by plaintiff in multiple forums, the panel order concluded that a transfer by October 31 – which is 7 days from now – was permissibly expeditious. This would entail transfer in week 16 or 17 of Jane Doe's pregnancy, and the Government agrees that she could have the abortion immediately after transfer, if she wishes.

Third, what happens, however, if a sponsor is not found by October 31 in this case? What happens generally if transfer to a sponsor does not occur expeditiously? To begin with, a declaration we just received from the Government states: "while difficult, it is possible to complete a sponsorship process for J.D. by 5 P.M. Eastern on October 31, 2017." The declaration also lists several ongoing efforts regarding the sponsorship process. The declaration adds that all components of the U.S. Government "are willing to assist in helping expedite the process."

But if transfer does not work, given existing Supreme Court precedent and the position the Government has so far advanced in this litigation, it could turn out that the Government will be required by existing Supreme Court precedent to allow the abortion, even though the minor at that point would still be residing in a U.S. Government detention facility. If so, the Government would be in a similar position as it is in with adult women prisoners in federal prison and with

[3] To be clear, under Supreme Court precedent, the Government cannot use the transfer process as some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur.

adult women unlawful immigrants in U.S. Government custody. The U.S. Government allows women in those circumstances to obtain an abortion. In any event, we can immediately consider any additional arguments from the Government if and when transfer to a sponsor is unsuccessful.

In sum, under the Government's arguments in this case and the Supreme Court's precedents, the unlawful immigrant minor is assumed to have a right under precedent to an abortion; the Government may seek to expeditiously transfer the minor to a sponsor before the abortion occurs; and if no sponsor is expeditiously located, then it could turn out that the Government will be required by existing Supreme Court precedent to allow the abortion, depending on what arguments the Government can make at that point. These rules resulting from the panel order are consistent with and dictated by Supreme Court precedent.

The three-judge panel reached a careful decision that prudently accommodated the competing interests of the parties.

By contrast, under the panel dissent, which is "substantially" adopted by the majority today, the Government has to *immediately* allow the abortion upon the request of an unlawful immigrant minor in its custody, and cannot take time to first seek to expeditiously transfer the minor to an immigrant sponsor before the abortion occurs.[4]

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[4] The majority's order denies the Government's emergency motion for stay pending appeal and thus does not disturb the District Judge's injunction (with adjusted dates), which required the Government to facilitate an immediate abortion for Jane Doe. Therefore, unless the Government can somehow convince the District Judge to suddenly reconsider her decision, which is extremely unlikely given the District Judge's prior ruling on this matter, the majority's order today necessarily means that the

The majority seems to think that the United States has no good reason to want to transfer an unlawful immigrant minor to an immigration sponsor before the minor has an abortion. But consider the circumstances here. The minor is alone and without family or friends. She is in a U.S. Government detention facility in a country that, for her, is foreign. She is 17 years old. She is pregnant and has to make a major life decision. Is it really absurd for the United States to think that the minor should be transferred to her immigration sponsor – ordinarily a family member, relative, or friend – before she makes that decision? And keep in mind that the Government is not forcing the minor to talk to the sponsor about the decision, or to obtain consent. It is merely seeking to place the minor in a better place when deciding whether to have an abortion. I suppose people can debate as a matter of policy whether this is always a good idea. But unconstitutional? That is far-fetched. After all, the Supreme Court has repeatedly said that the Government has permissible interests in favoring fetal life, protecting the best interests of the minor, and not facilitating abortion, so long as the Government does not impose an undue burden on the abortion decision.

It is important to stress, moreover, that this case involves a minor. We are not dealing with adults, although the majority's rhetoric speaks as if Jane Doe were an adult. The law does not always treat minors in the same way as adults, as the Supreme Court has repeatedly emphasized in the abortion context.

The majority points out that, in States such as Texas, the minor will have received a judicial bypass. That is true, but is irrelevant to the current situation. The judicial bypass confirms

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Government must allow an immediate abortion while Jane Doe remains in Government custody.

that the minor is capable of making a decision. For most teenagers under 18, of course, they are living in the State in question and have a support network of friends and family to rely on, if they choose, to support them through the decision and its aftermath, even if the minor does not want to inform her parents or her parents do not consent. For a foreign minor in custody, there is no such support network. It surely seems reasonable for the United States to think that transfer to a sponsor would be better than forcing the minor to make the decision in an isolated detention camp with no support network available. Again, that may be debatable as a matter of policy. But unconstitutional? I do not think so.

The majority apparently thinks that the Government must allow unlawful immigrant minors to have an immediate abortion on demand. Under this vision of the Constitution, the Government may not seek to first expeditiously transfer the minor to the custody of an immigration sponsor before she has an abortion.[5] The majority's approach is radically inconsistent with 40 years of Supreme Court precedent. The Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes. These include parental consent laws, parental notice laws, informed consent laws, and waiting periods, among other regulations. Those laws, of course, may have the effect of delaying an abortion. Indeed, parental consent laws in practice can occasion real-world delays of several weeks for the minor to decide whether to seek her

[5] The precedential value of the majority's decision for future cases is unclear and no doubt will be the subject of debate. But one limit appears clear and warrants mention: The majority's decision requires the Government to allow the abortion even while the minor is residing in Government custody, but it does not require the Government to pay for the abortion procedure itself. The Government's policy on that issue remains undisturbed.

parents' consent and then either to obtain that consent or instead to seek a judicial bypass. Still, the Supreme Court has upheld those laws, over vociferous dissents. *See, e.g.*, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 532 (1990) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting) ("Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy.") (citation omitted); *Hodgson v. Minnesota*, 497 U.S. 417, 465 (1990) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) ("[T]he prospect of having to notify a parent causes many young women to delay their abortions . . . ."); *H.L. v. Matheson*, 450 U.S. 398, 439 (1981) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) ("[T]he threat of parental notice may cause some minor women to delay past the first trimester of pregnancy . . . .").

To be sure, this case presents a new situation not yet directly confronted by the Supreme Court. But that happens all the time. When it does, our job as lower court judges is to apply the precedents and principles articulated in Supreme Court decisions to the new situations. Here, as I see it and the panel saw it, the situation of a pregnant unlawful immigrant minor in a U.S. Government detention facility is a situation where the Government may reasonably seek to expeditiously transfer the minor to a sponsor before she has an abortion.

It is undoubtedly the case that many Americans – including many Justices and judges – disagree with one or another aspect of the Supreme Court's abortion jurisprudence. From one perspective, some disagree with cases that allow the Government to refuse to fund abortions and that allow the Government to impose regulations such as parental consent, informed consent, and waiting periods. That was certainly the position of Justices Brennan, Marshall, and Blackmun in many cases. From the other perspective, some disagree with cases

holding that the U.S. Constitution provides a right to an abortion.

As a lower court, our job is to follow the law as it is, not as we might wish it to be. The three-judge panel here did that to the best of its ability, holding true to the balance struck by the Supreme Court. The en banc majority, by contrast, reflects a philosophy that unlawful immigrant minors have a right to immediate abortion on demand, not to be interfered with even by Government efforts to help minors navigate what is undeniably a difficult situation by expeditiously transferring them to their sponsors. The majority's decision is inconsistent with the precedents and principles of the Supreme Court – for example, the many cases upholding parental consent laws – allowing the Government to impose reasonable regulations so long as they do not unduly burden the right to abortion that the Court has recognized.

This is a novel and highly fraught case. The case came to us in an emergency posture. The panel reached a careful decision in a day's time that, in my view, was correct as a legal matter and sound as a prudential matter. I regret the en banc Court's decision and many aspects of how the en banc Court has handled this case.[6]

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[6] The Court never should have reheard this case en banc in the first place. As the Supreme Court has instructed, "En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960). Federal Rule 35 provides that rehearing en banc is reserved for cases that involve "a question of exceptional importance." This Court's judges have adhered to that principle, even while entertaining doubts about a panel's application of the law to individual litigants. Here,

I respectfully dissent.

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on the law, the three-judge panel's order was unpublished; therefore, it constituted no legal precedent for future cases. As to the facts of this one case, if the panel's order had blocked Jane Doe from obtaining an abortion, the en banc consideration might be different. If the panel's order had forced Jane Doe to the cusp of Texas's 20-week abortion cutoff, the en banc consideration might be different. If the panel's order had significantly delayed Jane Doe's decision, the en banc consideration might be different.

But the panel's order did none of those things. The panel was faced with an emergency motion involving an under-developed factual record that is still unclear and hotly contested. Indeed, the parties have submitted new evidence by the hour over the past two days – none of which was presented to the panel. The panel's unpublished order recognized Jane Doe's interests without prematurely requiring the Government to act against its interests. The panel decision was prudent and reasonable, given all of the circumstances. Indeed, as noted above, the Government represents that, while difficult, it is possible for Jane Doe to obtain a sponsor by "5:00 P.M. Eastern on October 31, 2017." This case, as handled by the three-judge panel, therefore was on a path to a prompt resolution that would respect the interests of all parties – until the en banc Court unwisely intervened. This case did not meet the standard for rehearing en banc.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3072 **September Term, 2017**

1:14-cr-00150-RMC-1

Filed On: October 12, 2017

United States of America,

Appellee

v.

Joe Harris, also known as Mohamad Aziz,
also known as Ezekiel Maza,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Kavanaugh, and Millett, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant, which the court construes as a memorandum of law and facts. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. Rule 36(d). It is

ORDERED AND ADJUDGED that the order of the district court entered on September 7, 2017, denying appellant's motion to extend his travel permit, be affirmed. Appellant has not demonstrated that the district court's order constitutes an abuse of discretion. See United States v. Hunt, 843 F.3d 1022, 1030 (D.C. Cir. 2016) (reviewing district court's management of supervised release for abuse of discretion); see also United States v. Mosby, 719 F.3d 925, 930 (8th Cir. 2013) ("We review for abuse of discretion a district court's denial of a motion to modify the terms of supervised release."). Insofar as appellant seeks to challenge the validity of his conviction or his terms of supervised release, those issues are outside the scope of the order on appeal.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3072 **September Term, 2017**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7084 **September Term, 2017**

1:17-cv-00210-UNA

Filed On: September 22, 2017

Donetta Byrd, also known as Donetta Michelle Byrd-Sanders,

Appellant

v.

Washington Metropolitan Area Transit Authority,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Kavanaugh and Pillard, Circuit Judges, and Ginsburg, Senior Circuit Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed on January 31, 2017, be affirmed, but the order is hereby modified to reflect that the dismissal is without prejudice. The district court properly dismissed appellant's complaint for failure to comply with Federal Rule of Civil Procedure 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks omitted); see also Ciralsky v. CIA, 355 F.3d 661, 668-71 (D.C. Cir. 2004). The dismissal without prejudice allows appellant to file a new complaint that complies with Rule 8(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7084 **September Term, 2017**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1123 **September Term, 2017**

USTC-12854-14L

Filed On: September 13, 2017

Ward Dean,

Appellant

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the opposition thereto; and the motion to remand and the opposition thereto, it is

ORDERED that the motion to remand be denied and the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987). Appellant filed his notice of appeal on April 24, 2017, and it is therefore untimely as to both the Tax Court's decision, filed on November 9, 2016, and the order, filed on January 6, 2017, denying appellant's first motion to vacate or revise. See 26 U.S.C. § 7483. Appellant's second motion to vacate or revise did not toll the appeals period because that motion was itself untimely, see Fed. R. App. P. 13(a)(1)(B); Tax Court Rule 162, and successive motions to vacate or revise "may not be tacked together to perpetuate the prescribed time for appeal," Okon v. C.I.R., 26 F.3d 1025, 1026 (10th Cir. 1994); cf. American Sec. Bank, N.A. v. John Y. Harrison Realty, Inc., 670 F.2d 317, 320-21 (D.C. Cir. 1982) (subsequent motion to reconsider an order denying a Rule 59 motion, or other time-tolling motion, does not itself toll the running of the appeal period). This court therefore lacks subject matter jurisdiction to review the Tax Court's decision and its order denying the first motion to vacate or revise. See Bowles v. Russell, 551 U.S. 205, 209 (2007); Murray v. D.C., 52 F.3d 353, 356 (D.C. Cir. 1995).

The appellant did timely appeal the Tax Court's order denying his second motion to vacate or revise. The Tax Court did not abuse its discretion in denying this motion.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1123 **September Term, 2017**

See Ark Initiative v. Tidwell, 749 F.3d 1071, 1075 (D.C. Cir. 2014); see also Estate of Quirk v. C.I.R., 928 F.2d 751, 759 (6th Cir. 1991) ("The granting of a motion for reconsideration rests within the discretion of the Tax Court . . . ."). The second motion to vacate or revise was itself untimely under Tax Court Rule 162 because it was filed more than 30 days after the Tax Court's disposition of the first motion to vacate or revise. Further, the second motion lacked any request for leave to file out of time, and it raised several issues that were substantively similar to those raised in appellant's first motion to vacate or revise.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5083 **September Term, 2017**

1:14-cv-01742-EGS

Filed On: September 13, 2017

John Passmore,

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly concluded that appellee's search for responsive records was adequate under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq. See Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (summary judgment proper when agency has shown "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents"). Appellant's unsupported and speculative allegations that the FBI possesses, but is withholding, additional emails do not raise substantial doubt as to the adequacy of the search. See Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.").

The district court did not err in determining appellant to be ineligible for a fee waiver, as disclosure of the records was not "likely to contribute significantly to public understanding of the operations or activities of the government." See 5 U.S.C. § 552(a)(4)(A)(iii). Thus, the FBI had no obligation to provide copies of more than 100 pages—out of the 16,039 it originally identified as responsive to appellant's

request—without his agreement to pay copying fees. See id. § 552(a)(4)(A)(iv)(II); 28 C.F.R. § 16.10(d)(4)(i); see also Judicial Watch, Inc. v. U.S. Dep't of Justice, 365 F.3d 1108, 1127 (D.C. Cir. 2004). Appellant asked the FBI to include specific categories of emails within that 100-page allotment, and he objects that the 100 pages the FBI produced were non-responsive to his specification. The FBI had no obligation to spend more than two hours searching free of charge. See 28 C.F.R. § 16.10(d)(4)(ii). But the record does not reflect that the FBI asked appellant to pay for staff time required to search within the 16,039 pages for the categories appellant prioritized. Nonetheless, the FBI appears to have ultimately searched within the documents in its possession and provided copies of the only ten pages of emails it had that fell within the specific categories appellant prioritized.

Further, to the extent appellant argues that the search was inadequate because appellee failed to search for emails within the files of two employees of Yahoo, Inc., or their successors, appellee had no obligation to retrieve documents from third parties. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 155 (1980). Appellant has forfeited any challenge to the remaining portions of the district court's decision granting summary judgment by not addressing them on appeal. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.").

Finally, the district court did not abuse its discretion in denying appellant's motion to compel discovery. See Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006) (stating that discovery in FOIA cases is "rare," and unwarranted when requester "offered no evidence of bad faith to justify additional discovery") (internal citations omitted); see also SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) ("This court will overturn the district court's exercise of its broad discretion to manage the scope of discovery only in unusual circumstances.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1057 **September Term, 2017**

DOJ 12/19/16 Letter

Filed On: September 8, 2017

Shellielle S. Youhoing-Nanan, et al.,

Petitioners

v.

United States Department of Justice,

Respondent

BEFORE: Kavanaugh and Pillard, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the motion to hold that motion in abeyance, and the response thereto; the motion to amend the petition for review; and the motion to dismiss and the response thereto, it is

ORDERED that the motion to hold in abeyance be denied, and the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to dismiss be granted. Petitioners have not demonstrated a basis for this court to exercise jurisdiction over their claims. "'Only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action' may a party seek initial review in an appellate court," rather than seeking relief first from a district court. Micei Intern. v. Dep't of Commerce, 613 F.3d 1147, 1151 (D.C. Cir. 2010) (quoting Watts v. SEC, 482 F.3d 501, 505 (D.C. Cir. 2007)). Petitioners have identified no such direct-review statute in this case. Because decisions by federal agencies to investigate and prosecute complaints are committed to agency discretion, those decisions are presumptively unreviewable by the judicial branch. See Heckler v. Cheney, 470 U.S. 821, 831 (1985); 5 U.S.C. § 701(a)(2). For this reason, contrary to petitioners' suggestion, transfer of this case would not be "in the interest of justice." 28 U.S.C. § 1631. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1057 **September Term, 2017**

FURTHER ORDERED that the motion to amend the petition for review be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3024 **September Term, 2016**

2008-CF2-1552

Filed On: August 30, 2017

In re: Michael S. Gorbey,

Petitioner

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a second or successive motion under 28 U.S.C. § 2254, the opposition thereto, and the reply, which contains a motion for oral argument; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for oral argument be denied. It is

FURTHER ORDERED that the petition for leave to file a second or successive § 2254 motion be denied. Petitioner's claim of conspiracy to deny him effective assistance of appellate counsel must be dismissed because it was presented in his prior § 2254 motion. See 28 U.S.C. § 2244(b)(1). Moreover, petitioner has not shown that any of his claims are based on facts that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1145 **September Term, 2016**

FCC-16-54

Filed On: August 29, 2017

AT&T, Inc., et al.,

Petitioners

v.

Federal Communications Commission and
United States of America,

Respondents

CenturyLink, et al.,
Intervenors

Consolidated with 16-1166, 16-1177

BEFORE: Brown, Kavanaugh, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the motion for voluntary remand, the response thereto, and the reply, it is

ORDERED that the motion for voluntary remand be granted and these cases be remanded to the Federal Communications Commission for further proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5188 **September Term, 2016**

FILED ON: AUGUST 1, 2017

METLIFE, INC.,
APPELLEE

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,
APPELLEE

BETTER MARKETS, INC.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-00045)

Before: GARLAND, *Chief Judge*, and KAVANAUGH and SRINIVASAN, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be reversed, the judgment be vacated, and the case be remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: August 1, 2017

Opinion for the court filed by Chief Judge Garland.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7013 **September Term, 2016**

1:13-cv-00758-RMC

Filed On: May 17, 2017 [1675656]

Fox Television Stations, Inc., et al.,

Appellees

v.

FilmOn.TV Networks Inc., et al.,

Appellants

Alkiviades David,

Appellee

BEFORE: Garland, Chief Judge; Kavanaugh and Millett, Circuit Judges

O R D E R

Upon consideration of appellants' unopposed motion for voluntary dismissal pursuant to Federal Rule of Appellate Procedure 42(b), it is

ORDERED that the motion be granted, and this case is hereby dismissed.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7149 **September Term, 2016**

1:16-cv-00688-UNA

Filed On: May 12, 2017

Ghislaine Paul,

Appellant

v.

Noubar A. Didizian, et al.,

Appellees

BEFORE: Kavanaugh and Millett, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the court's order to show cause filed March 15, 2017, the response thereto, and appellant's brief, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the appeal be dismissed as to the district court's orders entered on April 15, 2016, and September 22, 2016. The notice of appeal was filed on December 9, 2016, more than 30 days after entry of these orders, and was therefore untimely as to them. See Fed. R. App. P. 4(a)(1)(A) (notice of appeal must be filed within 30 days after entry of the judgment or order appealed from). The notice of appeal was timely only as to the district court's order entered on November 16, 2016, denying leave to file a motion. It is

FURTHER ORDERED that the district court's November 16, 2016 decision to deny appellant leave to file a motion be affirmed. The district court did not abuse its discretion in denying appellant leave to file the motion, which sought to amend the complaint in a manner that would have been futile. See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (explaining that a district court does not abuse its discretion in denying leave to amend a complaint where amendment would be futile). Removing the physician as a defendant would not cure the defect in appellant's claim against the District of Columbia, which was dismissed for failure to identify a constitutional violation

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7149 **September Term, 2016**

or to allege facts to support a municipal liability claim under 42 U.S.C. § 1983. See Baker v. District of Columbia, 326 F.3d 1302, 1306 (D.C. Cir. 2003).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5030 **September Term, 2016**

1:14-cv-02173-UNA

Filed On: May 12, 2017

In re: Edward Roy Newsome,

Petitioner

BEFORE: Kavanaugh and Millett, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, the memorandum of law and fact, the motions for leave to proceed in forma pauperis, and the motion to appoint counsel, it is

ORDERED the motions for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to appoint counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed to the extent it seeks review of the district court's transfer of petitioner's habeas action, and in all other respects be denied. The transfer of the district court file deprives this court of jurisdiction to review the transfer unless there is a substantial issue whether the district court had the power to transfer, see In re Asemani, 455 F.3d 296, 299-301 (D.C. Cir. 2006), and petitioner has not identified any substantial issue. With respect to petitioner's other requests for relief, petitioner has not shown he has a "clear and indisputable right" to a writ of mandamus. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5346 **September Term, 2016**

1:16-cv-02171-UNA

Filed On: April 18, 2017

Mohammed Abdallah Omran,

Appellant

v.

James B. Comey, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, and the motion to appoint counsel, it is

ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED AND ADJUDGED that the district court's October 31, 2016 order be affirmed. Appellant's complaint did not set forth sufficient facts to state a plausible claim for relief against any of the individual defendants. See Ashcroft v. Iqbal, 556 U.S. 662, 678-83 (2009) (complaint against government officials did not state a claim because it did not contain facts plausibly showing that officials purposefully adopted a discriminatory policy). The facts alleged in the complaint concern government employees who acted in other jurisdictions, not the high-level government officials named as defendants. The complaint did not contain facts plausibly showing that the defendant officials promulgated any unlawful policy or otherwise violated

appellant's rights. Moreover, because the facts concern events that occurred outside of the District of Columbia, and appellant does not reside here, the District Court for the District of Columbia is not the proper forum for adjudicating appellant's Federal Tort Claims Act claims. See 28 U.S.C. § 1402(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5095 **September Term, 2016**

FILED ON: APRIL 18, 2017

WILLIAM C. TUTTLE,
APPELLANT

v.

RYAN ZINKE, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00365)

Before: BROWN, KAVANAUGH, and WILKINS, *Circuit Judges*.

J U D G M E N T

This appeal of a grant of summary judgment from the United States District Court for the District of Columbia was considered on the record and on the parties' briefs. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the District Court's grant of summary judgment be affirmed.

This case concerns the alleged wrongful termination of a lease between William C. Tuttle ("Mr. Tuttle") and the Colorado River Indian Tribes (the "Tribe"). The lease at issue was executed on March 31, 1977, between the Tribe, Mr. Tuttle, and Robert E. Tuttle ("Robert"),[1] and concerned a 98.24-acre tract of tribal land. The lease was made pursuant to the provisions of the Act of April 30, 1964, 78 Stat. 188, and incorporated by reference the regulations contained in 25 C.F.R. Part 131 and all amendments to that section relevant to business leases on restricted Indian lands. Mr. Tuttle voluntarily signed the lease. The Bureau of Indian Affairs ("BIA"), an agency of the U.S. Department of the Interior, administers certain aspects of the lease because

[1] Mr. Tuttle inherited Robert's ownership interest in the lease after Robert's death. Robert is not a party to this appeal.

the United States holds the land in trust for the Tribe. Accordingly, the Superintendent of the Colorado River Agency ("Superintendent"), a division of the BIA, acted pursuant to authority delegated from the Secretary of the Interior ("Secretary"), and approved the lease. In June 1986, the Tuttles and the Tribe entered into a lease modification. The BIA and Interior Board of Indian Appeals ("IBIA") upheld the validity of the lease modification.

Subsequently, Mr. Tuttle defaulted on his lease. On September 30, 2009, the Tribe and Superintendent sent Mr. Tuttle a notice of default. Mr. Tuttle responded to the notice of default on October 14, 2009, but the Superintendent concluded that his explanations and documentation were insufficient to cure the default. On March 2, 2010, the Superintendent informed Mr. Tuttle of the deficiencies in his response, and notified him of the decision to terminate his lease. Both the notice of default and notice of cancellation were signed by the Superintendent.

Mr. Tuttle appealed the notice of cancellation to the BIA on April 1, 2010. On July 19, 2010, the Acting Western Regional Director of the BIA affirmed the Superintendent's decision to cancel the lease. The IBIA then affirmed the BIA's decision on December 18, 2012. Mr. Tuttle subsequently filed suit in the District Court challenging the IBIA's decision. The District Court affirmed the IBIA's decision on summary judgment and held that the cancellation did not violate any applicable regulations or provisions of the lease. *See Tuttle v. Jewell*, 168 F. Supp. 3d 299, 309-13 (D.D.C. 2016). The present appeal followed.[2] We have jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291.

We review *de novo* the District Court's decision to grant summary judgment. *Grimes v. District of Columbia*, 794 F.3d 83, 88-89 (D.C. Cir. 2015). Summary judgment is appropriate if there is no genuine issue of material fact, and judgment can be granted as a matter of law. FED. R. CIV. P. 56(a). In assessing a summary judgment motion, the Court must view all evidence in the light most favorable to the nonmoving party. *Carter v. George Wash. Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004). Summary judgment will only be granted if no reasonable jury could find for the nonmoving party. *See Jones v. Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009); *Carter*, 387 F.3d at 878.

Appellant, Carol Tuttle, Trustee for the William C. Tuttle and Carol M. Tuttle Family Trust, requests that the Court reverse the District Court's grant of summary judgment. *First*, Appellant argues that the District Court erred by concluding that the BIA (and by extension, the Secretary) did not delegate its authority to the Tribe when it cancelled the lease. *See* Appellant Br. 13-16. In particular, Appellant contends that the BIA erroneously permitted the Tribe to determine whether the lease should be terminated, when the regulations require the Secretary to make that decision. This argument lacks merit. Nothing in the lease prohibits the BIA or Secretary from consulting with the Tribe; in fact, the opposite is true. The lease expressly incorporates the BIA's leasing regulations by reference. These leasing regulations require the BIA to consult with the Tribe on lease violations once the cure period has expired. 25 C.F.R. § 162.467(a). This is particularly important given that the Tribe – not the BIA – has the authority to waive any breaches of the lease. Thus, there is no conflict with the BIA consulting with the Tribe – which is the lessor, and thus, a direct party to the lease – regarding the lease termination.

[2] Mr. Tuttle's estate filed the appeal in this matter.

Further, there is no evidence in the record that mere consultation with the Tribe resulted in a delegation of authority. The Superintendent – not the Tribe – signed the notice of cancellation and explained the reasons for the lease's termination. The BIA's Western Regional Director and IBIA – not the Tribe – then affirmed this decision to cancel the lease in two separate opinions. Thus, the BIA always retained the ultimate authority to cancel the lease and did not delegate the termination. Appellant cannot point to anything in the record to support a contrary assertion.

Second, Appellant claims that the District Court erred by concluding that the Secretary's "ex post facto and conflicting regulations control the lease termination." Appellant Br. 16 (capitalization altered) (emphasis omitted); *see id.* at 16-21. In particular, Appellant contests the applicability of the 25 C.F.R. Part 162 regulations to the lease because these regulations were promulgated "long after the Tuttle Lease was executed," and cannot be given retroactive effect. *Id.* at 16, 20-21. Appellant also maintains that the terms of the lease control if they conflict with the Part 162 regulations, and that the BIA failed to comply with these terms in cancelling the lease. *Id.* at 18-19. These arguments are without merit. The lease is subject to the BIA's leasing regulations "and any amendments thereto relative to business leases on restricted Indian lands." J.A. 2; *see* Appellee Br. 15. Thus, the regulations contained in 25 C.F.R. Part 162, which were promulgated as amendments to the BIA's leasing regulations, are fully applicable even though they did not take effect until five years after the lease was signed.

Moreover, the BIA adhered to all relevant regulations and provisions of the lease when it terminated the contract. Article 17 of the lease required the BIA to send Mr. Tuttle a written notice of default and provide 60 days to cure the violations. If Mr. Tuttle failed to timely cure the default, the BIA was authorized to terminate the lease. The regulations provide for this same procedure. Part 162 of the regulations states that if a lease is violated, the BIA must send the tenant a notice of violation. 25 C.F.R. § 162.466(b).[3] Within ten business days, the tenant is required to cure, dispute the notice, or request additional time to cure. *Id.* § 162.466(b)(2). Where the tenant fails to cure, the BIA is required to consult with the Indian landowner – in this case, the Tribe – to decide whether to cancel the lease or pursue other remedies. *Id.* § 162.467(a). If the BIA decides to terminate the lease, it must send a notice of cancellation along with an explanation and notice of right to appeal. *Id.* § 162.467(c).

The BIA complied with all of these procedures. Specifically, the Superintendent and the Tribe sent Mr. Tuttle a notice of default on September 30, 2009. This notice satisfied the requirements set forth in both Article 17 of the lease and Part 162 of the regulations. The notice of default adequately described the numerous lease violations and provided Mr. Tuttle with ten business days to cure these violations, dispute the default, or request additional time.[4] On

[3] We reference the current version of the statute for simplicity. When the Superintendent issued the notice of cancellation in 2009, the regulations at 25 C.F.R. §§ 162.618-.619 applied. The District Court referenced an updated provision in its opinion as 25 C.F.R. § 162.618(a). The substance of the regulations remains consistent despite the change in citations.

[4] A discrepancy exists between the cure period provided for in the lease and the regulations. The lease states that Mr. Tuttle will have 60 days to cure, while the regulations grant Mr. Tuttle only 10 business days to cure, 25 C.F.R. § 162.466(b)(2). Thus, an argument could have been made before the BIA that the notice of default did not comply with the lease on this basis. Mr. Tuttle, however, never made this

October 14, 2009, Mr. Tuttle sent the Tribe a letter purporting to cure the violations. However, the BIA and the Tribe found that Mr. Tuttle's letter did not cure any of the violations listed in the notice of default. Mr. Tuttle made no other proper attempt to cure the violations before the Superintendent issued a notice of cancellation on March 2, 2010. Thus, the BIA fully satisfied all lease and regulatory requirements.

Third, Appellant argues that the District Court erred by applying the Act of April 30, 1964 to the lease. *See* Appellant Br. 21-24. This argument was not raised before the BIA or the District Court and, therefore, will not be considered by this Court on appeal. *See Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (stating that courts of appeal should only address issues raised for the first time on appeal in "exceptional circumstances"); *Peralta v. U.S. Attorney's Office*, 136 F.3d 169, 173 (D.C. Cir. 1998) ("[B]ecause the government raised this argument for the first time on appeal, we shall not consider it."); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 468 (D.C. Cir. 1996) ("[A]s a general rule, we will not consider an argument raised for the first time on appeal.").

Fourth, as a final side argument, Appellant claims that Mr. Tuttle only signed the lease and lease modification under duress and coercion. Appellant Br. 14. In particular, Appellant alleges that Mr. Tuttle never received any consideration for executing the lease modification, thus implying that the modification agreement is void. *Id.* These arguments are raised too late, as the IBIA ruled on the validity of the lease modification back in 2008, and no direct appeal was ever taken from that decision. *Cf. O'Hearne v. United States*, 66 F.2d 933, 935 (D.C. Cir. 1933) ("If appellant considered the decree in the injunction proceeding unlawful, his remedy was to appeal therefrom, which he did not do then, and which he cannot do now by collateral attack in the contempt proceeding."). Thus, any reference to impropriety with regard to signing the lease and lease modification is outside the scope of this appeal.

Therefore, the District Court's grant of summary judgment in favor of Appellees is affirmed. Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

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argument before any agency, and Appellant does not challenge the adequacy of the notice of default on appeal. Further, Mr. Tuttle actually received 153 days to cure – far more than required under the lease or regulations.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1380 **September Term, 2016**

FCC-DA16-547

Filed On: April 4, 2017

In re: PMCM TV, LLC,

Petitioner

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the response thereto, and the reply, it is

ORDERED that the petition be denied. "[M]andamus is a 'drastic' remedy, 'to be invoked only in extraordinary circumstances.'" In re: al-Nashiri, 791 F.3d 71, 78 (D.C. Cir. 2015) (quoting Fornaro v. James, 416 F.3d 63, 69 (D.C. Cir. 2005)). Mandamus "is not available unless 'no adequate alternative remedy exists.'" In re: al Nashiri, 791 F.3d at 78 (quoting Barnhart v. Devine, 791 F.2d 1515, 1524 (D.C. Cir. 1985)). Petitioner has filed applications for review with the Commission seeking the same relief it requests in its mandamus petition and has failed to show that the statutory process providing for administrative and judicial review set forth in 47 U.S.C. §§ 155(c)(4) and 402(a) is not an adequate remedy. To the extent petitioner asserts the Commission has unreasonably delayed in acting on the applications for review, it has not demonstrated "the agency's delay is so egregious as to warrant mandamus." Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984). Denial of this aspect of the mandamus petition is without prejudice to renewal in the event of additional significant delay.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-8001 **September Term, 2016**

1:15-cv-01328-RBW

Filed On: April 4, 2017

In re: Pension Benefit Guaranty Corporation,

Petitioner

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition for permission to appeal pursuant to 28 U.S.C. §1292(b), the response thereto, and the reply, it is

ORDERED that the petition for permission to appeal be granted. See 28 U.S.C. § 1292(b). Grant of the petition is without prejudice to reconsideration by the merits panel.

The Clerk is directed to transmit a copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Fed. R. App. P. 5. The district court is to certify and transmit the preliminary record to this court, after which the case will be assigned a general docket number and proceed in the normal course.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5300 **September Term, 2016**

1:14-cv-01419-CRC

Filed On: April 4, 2017

Citizens for Responsibility and Ethics in Washington and Melanie T. Sloan,

Appellees

v.

Federal Election Commission,

Appellee

American Action Network, Inc.,

Appellant

Consolidated with 16-5343

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion to hold the case in abeyance, the response thereto, and the replies; and the motion to dismiss, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss these consolidated appeals be granted. The district court order remanding the case to the Federal Election Commission is not a final, appealable order, see Pueblo of Sandia v. Babbitt, 231 F.3d 878, 880 (D.C. Cir. 2000), and American Action Network has not shown that this court has jurisdiction under the Federal Election Campaign Act in spite of this lack of finality, see Meredith v. Fed. Mine Safety and Health Review Comm'n, 177 F.3d 1042, 1048 (D.C. Cir. 1999) (requiring a party to show "clear evidence that Congress intended a more generous review than the norm"). It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5300 **September Term, 2016**

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5300 **September Term, 2016**

1:14-cv-01419-CRC

Filed On: April 4, 2017

Citizens for Responsibility and Ethics in Washington and Melanie T. Sloan,

Appellees

v.

Federal Election Commission,

Appellee

American Action Network, Inc.,

Appellant

Consolidated with 16-5343

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion to hold the case in abeyance, the response thereto, and the replies; and the motion to dismiss, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss these consolidated appeals be granted. The district court order remanding the case to the Federal Election Commission is not a final, appealable order, see Pueblo of Sandia v. Babbitt, 231 F.3d 878, 880 (D.C. Cir. 2000), and American Action Network has not shown that this court has jurisdiction under the Federal Election Campaign Act in spite of this lack of finality, see Meredith v. Fed. Mine Safety and Health Review Comm'n, 177 F.3d 1042, 1048 (D.C. Cir. 1999) (requiring a party to show "clear evidence that Congress intended a more generous review than the norm"). It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5300 **September Term, 2016**

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7137 **September Term, 2016**

1:07-cv-01721-RBW

Filed On: April 4, 2017

Sonya Pettaway,

Appellant

v.

Teachers Insurance and Annuity Association of America, et al.,

Appellees

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal and the responses thereto, and the motions for summary affirmance and the responses thereto, it is

ORDERED that the motions for summary affirmance be granted and the motion for summary reversal denied. The merits of the parties' positions are so clear as to warrant summary affirmance. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's July 2015 motion was grounded on a theory that the district court had lacked subject matter jurisdiction. Based on that contention, the district court denied the motion. The district court did not abuse its discretion in denying Pettaway's motion. See United States v. Philip Morris USA, Inc., 840 F.3d 844, 852 (D.C. Cir. 2016). A challenge to subject matter jurisdiction may not form the basis of a collateral attack on an adverse judgment where there was a prior opportunity to litigate the issue, where principles of res judicata apply to jurisdictional determinations, and where the lawsuit is no longer still pending. See Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 n.9 (1982); Delta Foods Ltd. v. Republic of Ghana, 265 F.3d 1068, 1070 (D.C. Cir. 2001); see also City of South Pasedena v. Mineta, 284 F.3d 1154, 1157 (9th Cir. 2002) (subject matter jurisdiction objections may not be raised for the first time by way of collateral challenge in a subsequent action).

The district court did not consider a new argument – fraud – that appellant raised for the first time in her reply to defendant's response to her July 2015 motion. See

Baloch v. Norton, 517 F. Supp. 2d 345, 348-49 n.2 (D.D.C. 2007) ("If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court [may] ignore those arguments in resolving the motion...."), aff'd sub nom. Baloch v. Kempthorne, 550 F.3d 1191 (D.C. Cir. 2008) (without addressing the district court's cited statement). Because appellant failed to raise her fraud argument sufficiently in district court, it need not be entertained on appeal. See District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1078 (D.C. Cir. 1984) ("Although appellate courts retain the discretion to entertain new theories, the usual rule is that such theories will not be heard except in exceptional cases."). We find no basis to justify departing from "the usual rule." See id. Even if we did, however, the fraud argument would be untimely. See Fed. R. Civ. P. 60(c)(1) (Rule 60(b)(3) motion alleging fraud must be filed no more than one year after the judgment was entered).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1043 **September Term, 2016**

STB-FD-35873

Filed On: March 31, 2017

James Riffin,

Petitioner

v.

Surface Transportation Board and United States of America,

Respondents

Norfolk Southern Railway Company,
Intervenor

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, and the lodged opposition thereto; the motion for leave to file, and the opposition thereto; the motions to govern further proceedings; and the motion for leave to intervene, and the opposition thereto, it is

ORDERED that the motion for leave be granted. The Clerk is directed to file the lodged opposition. It is

FURTHER ORDERED that respondents' motion to govern and motion to dismiss be granted. Only a "party aggrieved" by an order of the Surface Transportation Board (STB) has standing to file a petition for review challenging that order. 28 U.S.C. § 2344. Petitioner has not established that he was "aggrieved" by the STB's ruling approving the proposed acquisition, or its ancillary orders, because he has not shown that these rulings caused him to suffer an injury in fact, an "actual or imminent, not conjectural or hypothetical" invasion of a legally protected interest. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotations omitted). To the extent petitioner contends that he suffered a procedural injury, his claimed injury is insufficient by itself to establish standing. See Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation

No. 16-1043 **September Term, 2016**

— a procedural right *in vacuo* — is insufficient to create Article III standing."); see also City of Orrville, Ohio v. FERC, 147 F.3d 979, 985 (D.C. Cir. 1998). It is

FURTHER ORDERED that petitioner's motion to govern and the motion to intervene be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1237 **September Term, 2016**

SEC-3-16346
SEC-3-16348

Filed On: March 31, 2017

William Michael Cunningham,

Petitioner

v.

Securities and Exchange Commission,

Respondent

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motions for leave to proceed in forma pauperis; the motion for summary affirmance, the opposition thereto, and the reply; the motion to extend time to file a response to the reply, the opposition thereto, and the lodged response to the reply; the motion for leave to adduce additional evidence, the opposition thereto, and the reply; and petitioner's brief, it is

ORDERED that the motions for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to extend time to file a response to the reply concerning the motion for summary affirmance be denied. Responses to replies, known as surreplies, are disfavored, and petitioner has not shown any grounds for filing one here. To the extent that he seeks an extension of time to file a response to the motion for summary affirmance, he has already filed such a response. Thus, the court will not consider the response to the reply, also captioned as a "reply to motion for summary disposition," submitted on January 17, 2017. It is

FURTHER ORDERED that the motion for leave to adduce additional evidence be denied. Petitioner has not shown any basis for considering material that was not considered by respondent when it made the challenged decision. See, e.g., Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision."). It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1237 **September Term, 2016**

FURTHER ORDERED that the motion for summary affirmance be granted and that respondent's order dated June 9, 2016, be affirmed to the extent that respondent denied petitioner's claim for a whistleblower award. The merits of the parties' positions are so clear as to warrant summary action. See Cascade Broadcasting Group, Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam). Petitioner has not shown any error in respondent's decision that he did not provide original information that led to a successful enforcement action or in respondent's rejection of his constitutional claims. See generally 15 U.S.C. § 78u-6.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5349 **September Term, 2016**

1:16-cv-00651-RDM

Filed On: March 31, 2017

Robert B. Tracy,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto and the reply; the motion for summary reversal, the response thereto, and the reply; and the motion to file a surreply and the lodged surreply, it is

ORDERED that the motion to file a surreply be granted. The Clerk is directed to file the lodged surreply. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Appellant has failed to supply sufficient "'factual matter' that permits the court to infer 'more than the mere possibility of misconduct.'" Atherton v. Dist. of Columbia Office of Mayor, 567 F.3d 672, 681-82 (D.C. Cir. 2009) (quoting Iqbal, 556 U.S. at 679).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5193 **September Term, 2016**

1:15-cv-00983-ESH

Filed On: March 30, 2017

Hameedullah Amini Airaj,

Appellant

v.

United States Department of State,

Appellee

BEFORE: Rogers, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly held that the United States Department of State, through its declarations, fulfilled its burden of demonstrating that its search for responsive records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq., was adequate. See Iturralde v. Comptroller of Currency, 315 F.3d 311, 313-16 (D.C. Cir. 2003); see also SafeCard Svcs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991) ("Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them."). Appellant does not challenge on appeal the agency's claimed exemptions.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5378 **September Term, 2016**

1:16-cv-02395-UNA

Filed On: March 15, 2017

In re: Fernando Sanchez,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to proceed in forma pauperis, the petition for writ of mandamus, the memoranda of law and fact, and the request for waiver of the filing fee, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the request for waiver of the filing fee be dismissed as moot. Because petitioner is seeking habeas relief in the underlying case, the court will not apply the filing fee requirements of the Prison Litigation Reform Act in this case. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court did not abuse its discretion in transferring petitioner's habeas action to the District Court for the Western District of Pennsylvania, which has jurisdiction over petitioner's immediate physical custodian. See Rumsfeld v. Padilla, 542 U.S. 426, 434-40 (2004); Stokes v. United States Parole Comm'n, 374 F.3d 1235, 1238 (D.C. Cir. 2004); In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5385 **September Term, 2016**

3:00-cr-00057-16

Filed On: March 15, 2017

In re: Michael Puzey,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and the motion to proceed in forma pauperis, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. To the extent petitioner seeks to challenge his conviction, he must file a motion under 28 U.S.C. § 2255 in the sentencing court. To the extent he wants this court to order the Department of Justice to act on an attorney misconduct complaint, he has not shown a clear and indisputable right to mandamus relief. See Gulfstream Aerospace Corp. v. Mayacamas, 485 U.S. 271, 289 (1988). "'[A]gency refusals to institute investigative or enforcement proceedings' are presumed immune from judicial review under 5 U.S.C. § 701(a)(2)," Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1481 (D.C. Cir. 1995) (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)), and appellant has shown no basis for rebutting the presumption.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1307 **September Term, 2016**

NLRB-32CA119054
NLRB-32CA126896

Filed On: February 21, 2017

Tarlton and Son, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Robert C. Munoz,
Intervenor

BEFORE: Rogers, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion to hold in abeyance and the intervenor's joinder in that motion, the response thereto, and the reply; and the motion to transfer and the intervenor's joinder in that motion, the response thereto, and the reply, it is

ORDERED that the motion to transfer be granted. The first valid petition for review of the agency order at issue in this case was filed in the United States Court of Appeals for the Ninth Circuit. See Industrial Union Dep't, AFL-CIO v. Bingham, 570 F.2d 965 (D.C. Cir. 1977) (a premature petition for review cannot be the "first filed" petition within the meaning of 28 U.S.C. § 2112(a)(1), even if it is filed earlier in time than all competing petitions for review); Tarlton & Son v. NLRB, No. 16-1141 (D.C. Cir. Oct. 18, 2016) (dismissing petition for review as incurably premature). The Clerk is directed to send a copy of this order and the original file to the United States Court of Appeals for the Ninth Circuit. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1307 **September Term, 2016**

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7144 **September Term, 2016**
FILED ON: FEBRUARY 17, 2017

UNITED STATES, EX REL. JULIE MCBRIDE,
AND
JULIE MCBRIDE,
APPELLANT

LINDA WARREN AND DENIS MAYER,
APPELLEES

v.

HALLIBURTON COMPANY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:05-cv-00828)

Before: KAVANAUGH and WILKINS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: February 17, 2017

Opinion for the court filed by Circuit Judge Wilkins.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1305 **September Term, 2016**

NLRB-29CA077359

Filed On: February 15, 2017

GVS Properties, LLC,

Petitioner

v.

National Labor Relations Board,

Respondent

International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447,

Intervenor

Consolidated with 15-1350

BEFORE: Brown, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion of the National Labor Relations Board to dismiss the petition for review and cross-application for enforcement, cancel oral argument, and vacate the Board's order as moot, the response thereto, and the reply, it is

ORDERED that the motion be granted. These cases are hereby removed from the February 17, 2017 oral argument calendar. It is

FURTHER ORDERED that the petition for review be dismissed and the cross-application be dismissed with prejudice. The case is remanded to the Board with instructions to vacate its order as moot.

The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1305 **September Term, 2016**

NLRB-29CA077359

Filed On: February 15, 2017

GVS Properties, LLC,

Petitioner

v.

National Labor Relations Board,

Respondent

International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447,

Intervenor

Consolidated with 15-1350

BEFORE: Brown, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion of the National Labor Relations Board to dismiss the petition for review and cross-application for enforcement, cancel oral argument, and vacate the Board's order as moot, the response thereto, and the reply, it is

ORDERED that the motion be granted. These cases are hereby removed from the February 17, 2017 oral argument calendar. It is

FURTHER ORDERED that the petition for review be dismissed and the cross-application be dismissed with prejudice. The case is remanded to the Board with instructions to vacate its order as moot.

The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5334 **September Term, 2016**

1:16-cv-00420-CRC
1:16-cv-01053-CRC
1:16-cv-01384-CRC
1:16-cv-01458-CRC
1:16-cv-01768-CRC

Filed On: February 15, 2017

Gary Dwaileebe,

Appellant

v.

Michael J. Martineau, Personally, et al.,

Appellees

Consolidated with 16-5335, 16-5336, 16-5337, 16-5338

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, and the "notice of improvident opening," it is

ORDERED that these consolidated appeals be dismissed. Appellants assert they did not intend for these appeals to be opened.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the district court.

Per Curiam

FOR THE COURT:

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5334 **September Term, 2016**

1:16-cv-00420-CRC
1:16-cv-01053-CRC
1:16-cv-01384-CRC
1:16-cv-01458-CRC
1:16-cv-01768-CRC

Filed On: February 15, 2017

Gary Dwaileebe,

Appellant

v.

Michael J. Martineau, Personally, et al.,

Appellees

Consolidated with 16-5335, 16-5336, 16-5337, 16-5338

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, and the "notice of improvident opening," it is

ORDERED that these consolidated appeals be dismissed. Appellants assert they did not intend for these appeals to be opened.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the district court.

Per Curiam

FOR THE COURT:

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5334 **September Term, 2016**

1:16-cv-00420-CRC
1:16-cv-01053-CRC
1:16-cv-01384-CRC
1:16-cv-01458-CRC
1:16-cv-01768-CRC

Filed On: February 15, 2017

Gary Dwaileebe,

Appellant

v.

Michael J. Martineau, Personally, et al.,

Appellees

Consolidated with 16-5335, 16-5336, 16-5337, 16-5338

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, and the "notice of improvident opening," it is

ORDERED that these consolidated appeals be dismissed. Appellants assert they did not intend for these appeals to be opened.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the district court.

Per Curiam

FOR THE COURT:

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5334 **September Term, 2016**

1:16-cv-00420-CRC
1:16-cv-01053-CRC
1:16-cv-01384-CRC
1:16-cv-01458-CRC
1:16-cv-01768-CRC

Filed On: February 15, 2017

Gary Dwaileebe,

Appellant

v.

Michael J. Martineau, Personally, et al.,

Appellees

Consolidated with 16-5335, 16-5336, 16-5337, 16-5338

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, and the "notice of improvident opening," it is

ORDERED that these consolidated appeals be dismissed. Appellants assert they did not intend for these appeals to be opened.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the district court.

Per Curiam

FOR THE COURT:

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5334 **September Term, 2016**

1:16-cv-00420-CRC
1:16-cv-01053-CRC
1:16-cv-01384-CRC
1:16-cv-01458-CRC
1:16-cv-01768-CRC

Filed On: February 15, 2017

Gary Dwaileebe,

Appellant

v.

Michael J. Martineau, Personally, et al.,

Appellees

Consolidated with 16-5335, 16-5336, 16-5337, 16-5338

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, and the "notice of improvident opening," it is

ORDERED that these consolidated appeals be dismissed. Appellants assert they did not intend for these appeals to be opened.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the district court.

Per Curiam

FOR THE COURT:

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5375 **September Term, 2016**

1:16-cv-01426-APM

Filed On: February 15, 2017

In re: Harold W. Van Allen,

Petitioner

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for judicial notice, and the petition for writ of mandamus, it is

ORDERED that the motion for judicial notice be denied. Petitioner has not demonstrated that the materials of which judicial notice is sought are necessary to the disposition of this case. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a clear and indisputable right to the extraordinary remedy of mandamus. See Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-3031 **September Term, 2016**

1:10-cr-00220-TFH-1

Filed On: December 9, 2016

United States of America,

Appellee

v.

Andrew Joseph Novak,

Appellant

BEFORE: Tatel, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which is construed as including a request for a certificate of appealability ("COA"); and the motion to dismiss for lack of a COA, and the opposition thereto, it is

ORDERED that the motion for a COA be denied and the motion to dismiss be granted. Because appellant has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-3113 **September Term, 2016**

3:98-cr-00047-1

Filed On: November 29, 2016

In re: Kelvin Andre Spotts,

Petitioner

BEFORE: Kavanaugh and Millett, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for a writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has failed to demonstrate a clear and indisputable right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas, 485 U.S. 271, 289 (1988). The relief petitioner seeks is available, if at all, only in the sentencing court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7101 **September Term, 2016**

1:16-cv-00614-UNA

Filed On: November 28, 2016

Deborah Diane Fletcher,

Appellant

v.

Supergirl,

Appellee

BEFORE: Tatel and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed August 22, 2016, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed for lack of a timely notice of appeal. Appellant's August 10, 2016 notice of appeal from the district court's order entered April 6, 2016 was filed beyond the 30-day period provided by Fed. R. App. P. 4(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5241 **September Term, 2016**

1:16-cv-01371-UNA

Filed On: November 28, 2016

In re: Mikeal Glenn Stine,

Petitioner

BEFORE: Tatel and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, captioned "Motion for Assistance of the Court"; the motion for leave to proceed in forma pauperis; and the motions for injunction, expedition, judicial notice, and joinder, it is

ORDERED that the petition for writ of mandamus be dismissed as moot insofar as petitioner seeks an order directing the district court to file his verified emergency petition. As directed by this court in No. 15-5024, In re Stine, the district court filed the verified emergency petition for writ of mandamus. See Stine v. Samuels, No. 16cv01371 (D.D.C. June 29, 2016). It is

FURTHER ORDERED that the petition for writ of mandamus be denied as to the request for an order prohibiting transfer of the verified emergency petition to the United States District Court for the District of Colorado. The district court did not abuse its discretion in transferring that petition to the Colorado district court, a permissible jurisdiction. See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). It is

FURTHER ORDERED that the motions for injunction, expedition, judicial notice, and joinder be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5260 **September Term, 2016**

1:16-cv-01343-UNA

Filed On: November 28, 2016

Demika Porterfield,

Appellant

v.

United States Army,

Appellee

BEFORE: Tatel and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed September 15, 2016, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed for lack of a timely notice of appeal. Appellant's September 12, 2016 notice of appeal from the district court's order entered June 28, 2016 was filed beyond the 60-day period provided by Fed. R. App. P. 4(a), and that time limit is mandatory and jurisdictional. See Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7099 **September Term, 2016**

1:16-cv-00619-UNA

Filed On: November 28, 2016

Deborah Diane Fletcher,

Appellant

v.

Christopher Reed, (Superman),

Appellee

BEFORE: Tatel and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed August 16, 2016, the response thereto, and the supplement, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed for lack of a timely notice of appeal. Appellant's August 10, 2016 notice of appeal from the district court's order entered April 6, 2016 was filed beyond the 30-day period provided by Fed. R. App. P. 4(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1203 **September Term, 2016**

NLRB-12CA109207

Filed On: September 19, 2016

Schwarz Partners Packaging, LLC, doing business as MaxPak,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC,

Intervenor

Consolidated with 15-1235

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to remand, the response thereto, and the reply, it is

ORDERED that the motion be granted. The June 26, 2015 decision of the National Labor Relations Board is hereby vacated and the case remanded to the Board for further proceedings. See NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). It is

FURTHER ORDERED that the cross-application for enforcement be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the National Labor Relations Board.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1203 **September Term, 2016**

NLRB-12CA109207

Filed On: September 19, 2016

Schwarz Partners Packaging, LLC, doing business as MaxPak,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC,

Intervenor

Consolidated with 15-1235

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to remand, the response thereto, and the reply, it is

ORDERED that the motion be granted. The June 26, 2015 decision of the National Labor Relations Board is hereby vacated and the case remanded to the Board for further proceedings. See NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). It is

FURTHER ORDERED that the cross-application for enforcement be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the National Labor Relations Board.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7124 **September Term, 2016**

1:14-cv-00439-BAH

Filed On: September 16, 2016

John M. Peterson,

Appellant

v.

AT&T Mobility Services, LLC,

Appellee

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for reconsideration, which includes a motion for summary affirmance; the motion to extend time to file a brief and the response thereto; and appellant's lodged brief, it is

ORDERED that the motion for reconsideration be denied. It is

FURTHER ORDERED that the motion to extend time to file be granted. The Clerk is directed to file the lodged brief. It is

FURTHER ORDERED that the motion for summary affirmance be granted. Appellant's brief has placed the merits of the appeal squarely before the court, and the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant raises no argument on appeal challenging the district court's grant of summary judgment with respect to his breach of contract claim. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) (argument not made on appeal is deemed waived). Appellant also concedes that the district court correctly held that appellee's actions up to and including his firing did not constitute wrongful termination.

Appellant's sole argument on appeal is that the district court erroneously failed to address his argument that appellee wrongfully prevented him from obtaining comparable employment at another company following his termination. Appellant has not demonstrated that appellee's post-termination conduct is relevant to his claim of wrongful termination. But even if it were, it is insufficient to support a finding of wrongful termination of at-will employment, because appellant has not made "a clear showing,

based on some identifiable policy that has been 'officially declared' in a statute or municipal regulation, or in the Constitution," that appellant's decision to label him "Non-Rehirable" violated public policy. Carl v. Children's Hosp., 702 A.2d 159 (D.C. 1997) (quoting Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. 1991)) (footnote omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1119 **September Term, 2016**

FERC-RP10-1398-000
FERC-RP10-1398-003
FERC-RP10-1398-004

Filed On: September 16, 2016

Southwest Gas Corporation,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

BP Energy Company, et al.,
Intervenors

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to hold in abeyance and the response thereto; the motion to consolidate and hold in abeyance; and the order to show cause filed June 7, 2016, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the petition for review be dismissed. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110-11 (D.C. Cir. 2002). A petition for review is incurably premature even if the request for agency rehearing raises issues different from those raised by the petition for review. See Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[A]n agency action cannot be considered nonfinal for one purpose and final for another. Thus, once a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as

to that party.") (citations omitted). The dismissal is without prejudice to a new petition for review of the challenged orders once FERC has issued a final, reviewable order. See Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980, 981 (D.C. Cir. 1993) (per curiam). It is

FURTHER ORDERED that the motion to hold in abeyance and the motion to consolidate and hold in abeyance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1140 **September Term, 2015**

ARMY-AR20150014150

Filed On: September 8, 2016

Washington Windsor,
Petitioner

v.

Army Discharge Review Board,
Respondent

BEFORE: Brown and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to vacate and remand, the motion to dismiss and the opposition thereto, the motion for oral argument and to compel filing of the certified index to the record, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to vacate and remand be denied and the motion to dismiss be granted. The burden of establishing this court's subject matter jurisdiction falls on petitioner. See Moms Against Mercury v. FDA, 483 F.3d 824, 828 (D.C. Cir. 2007). Petitioner has not met his burden of showing that this court has jurisdiction to review directly a decision of the Army Discharge Review Board. It is

FURTHER ORDERED that the motion for oral argument and to compel filing of the certified index to the record be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5276 **September Term, 2015**

1:15-cv-00560-UNA

Filed On: July 26, 2016

Charles Edward Fields,

Appellant

v.

Scott S. Harris,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Kavanaugh and Srinivasan, Circuit Judges, and Ginsburg, Senior Circuit Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's dismissal order, filed April 13, 2015, be affirmed. Only the Supreme Court has inherent and exclusive supervisory authority over the Supreme Court Clerk. See In re Marin, 956 F.2d 339, 340 (D.C. Cir. 1992) (per curiam). Further, clerks, like judges, are immune from damages suits for performance of tasks that are an integral part of the judicial process. See Sindram v. Suda, 986 F.2d 1459, 1460 (D.C. Cir. 1993) (per curiam). Finally, to the extent the district court dismissed the complaint for failure to state a claim, pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), and appellant did not allege, at the time the complaint was filed, he was "under imminent danger of serious physical injury," the district court appropriately characterized the dismissal as appellant's third "strike" for purposes of 28 U.S.C. § 1915(g).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5276 **September Term, 2015**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken Meadows
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1130 **September Term, 2015**

USTC-2482-14

Filed On: July 22, 2016

Gerd Topsnik,

Appellant

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Rogers, Kavanaugh, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Pursuant to 26 U.S.C. § 7482(a)(1), this court has jurisdiction over final decisions of the Tax Court. See InverWorld, Ltd. v. Commissioner, Internal Revenue, 979 F.2d 868, 872 (D.C. Cir. 1992). Applying the principles from appeals of district court decisions pursuant to 28 U.S.C. § 1291, "[a] decision is final only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Cincinnati Ins. Co. v. All Plumbing, Inc., 812 F.3d 153, 156 (D.C. Cir. 2016) (citations omitted). Because the Tax Court's order filed January 20, 2016, did not resolve all the issues in the case, it was neither final nor did it fall within the "small class of orders" that may qualify for interlocutory appeal under the collateral order doctrine. See, e.g., Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 106 (2009). When the Tax Court disposes of the remaining issues in the case, the January 20, 2016 order granting partial summary judgment will be reviewable.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5021 **September Term, 2015**

1:13-cv-02021-RMC

Filed On: July 22, 2016

Terence K. Bethea,

Appellant

v.

United States of America,

Appellee

BEFORE: Rogers, Kavanaugh, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the government's motion to dismiss for lack of a certificate of appealability ("COA"); and petitioner's motion for a COA and opposition to the motion to dismiss, it is

ORDERED that the motion for a COA be denied and the motion to dismiss be granted. Because appellate has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 473-84 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-3051 **September Term, 2015**

1:03-cr-00092-CKK-1

Filed On: July 13, 2016

In re: Melvin Lawrence,

Petitioner

BEFORE: Rogers, Kavanaugh, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a second or successive motion pursuant to 28 U.S.C. § 2255 and the response thereto; the motion for leave to proceed in forma pauperis; the notice filed by petitioner; and the Rule 28(j) letters, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for leave to file a second or successive motion pursuant to 28 U.S.C. § 2255 be denied. Petitioner cites Johnson v. United States, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause contained in the definition of "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague. Petitioner, however, was sentenced as a career offender under Section 4B1.1 of the Sentencing Guidelines because he has two prior felony convictions for controlled substance offenses. See United States v. Lawrence, 662 F.3d 551, 553 (D.C. Cir. 2011). Because petitioner's career offender classification was not based on a crime of violence, he has not made a prima facie showing that his claim relies on Johnson. See 28 U.S.C. § 2244(b). To the extent petitioner asserts that he is "actually innocent" because the evidence presented at trial was insufficient to convict him, he cites no new evidence to support this claim, and thus he has not made a prima facie showing that the claim relies on newly discovered evidence. Id.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5002 **September Term, 2015**

1:15-cv-00109-UNA

Filed On: July 12, 2016

In re: Cherron Marie Phillips,

Petitioner

BEFORE: Kavanaugh and Srinivasan, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to appeal in forma pauperis; the petition for writ of mandamus; the motion for release on bail pending review of the current motions before the court, and the supplement thereto; and the motion to clarify the January 12, 2016 Clerk's order regarding payment of the docketing fee, it is

ORDERED that the motion to appeal in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Mandamus cannot be used as a substitute for an appeal, see Will v. U.S., 389 U.S. 90, 96 (1967), notwithstanding that the original appeal was dismissed for failure to prosecute. See Phillips v. Lynch, et al., No. 15-5066, unpublished order (D.C. Cir. May 21, 2015). It is

FURTHER ORDERED that the motions to clarify and for release be dismissed as moot in light of the grant of in forma pauperis status and denial of mandamus.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5079 **September Term, 2015**

Filed On: July 12, 2016

In re: Charles Alpine,

Petitioner

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, which includes a request for appointment of counsel; and the Clerk's order filed April 18, 2016, and the response thereto, it is

ORDERED that the request for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition for mandamus be dismissed. To the extent petitioner seeks habeas relief, he can obtain that relief only in the U.S. District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian, see Rumsfeld v. Padilla, 542 U.S. 426 (2004), and transfer would not be in the interest of justice, see 28 U.S.C. § 1631. Further, to the extent petitioner complains about the actions of the Supreme Court Clerk, only the Supreme Court has inherent and exclusive supervisory authority over its Clerk. See In re Marin, 956 F.2d 339, 340 (D.C. Cir. 1992) (per curiam). None of petitioner's claims meets the demanding standard for mandamus relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) ("clear and indisputable" right to mandamus relief).

Pursuant to D.C .Cir. Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7007 **September Term, 2015**

1:15-cv-00086-RJL

Filed On: July 12, 2016

George Walsh,

Appellant

v.

JPMorgan Chase Bank, National Association, et al.,

Appellees

BEFORE: Kavanaugh and Srinivasan, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the notice of appeal; the order to show cause filed February 2, 2016, why the appeal should not be dismissed as untimely, and the response thereto; and the motions to dismiss or for summary affirmance, the response thereto, and the replies, it is

ORDERED, on the court's own motion, that the order to show cause be discharged. It is

FURTHER ORDERED that the motions to dismiss be granted. The notice of appeal was filed more than 30 days after entry of the district court's memorandum order. See Fed. R. App. P. 4(a)(1)(A); see generally Budinich v. Becton Dickinson & Co., 485 U.S. 196, 203 (1988) (timely notice of appeal is "mandatory and jurisdictional"). Appellant did not move for timely relief under Rule 4(a)(5)(A). Cf. Baker v. Raulie, 879 F.2d 1396, 1399-400 (6th Cir. 1989) (filing a notice of appeal does not require much thought or time; the fact that an attorney is "busy" does not amount to excusable neglect).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7007 **September Term, 2015**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 16, 2015 Decided July 5, 2016

No. 14-1285

ROSEBUD MINING COMPANY AND PARKWOOD RESOURCES, INC.,
PETITIONERS
v.
MINE SAFETY AND HEALTH ADMINISTRATION AND JOSEPH A. MAIN, ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH,
RESPONDENTS

No. 14-1286

CANYON FUEL COMPANY, LLC, ET AL.,
PETITIONERS
v.
MINE SAFETY AND HEALTH ADMINISTRATION AND JOSEPH A. MAIN, ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH,
RESPONDENTS

On Petitions for Review of Decisions of the Assistant Secretary of Labor for Mine Safety and Health

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Ralph Henry Moore II argued the cause for the petitioners. *Patrick W. Dennison* was with him on brief.

Lynne B. Dunbar, Attorney, United States Department of Labor, argued the cause for the respondents. *W. Christian Schumann*, Counsel, was with her on brief.

Before: HENDERSON, ROGERS and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Several coal mine operators—Rosebud Mining Company, Parkwood Resources, Inc., Canyon Fuel Company, LLC, Mountain Coal Company, LLC, Bowie Resources, LLC and Peabody Sage Creek Mining, LLC (collectively, petitioners)—seek review of two orders of the United States Department of Labor (Labor)—per its Mine Safety and Health Administration (MSHA)—modifying the application of mandatory mine safety standards to their respective mines. The petitioners contend that the orders contain three conditions unnecessary to ensure adequate mine safety, thus making them arbitrary and capricious. For the reasons set forth below, we deny the petitions for review.

I. BACKGROUND

Under section 101(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. §§ 801 *et seq*., the Labor Secretary must promulgate "mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. § 811(a). The Assistant Secretary of Labor for Mine Safety and Health (Assistant Secretary)[1] may grant mine-specific modifications of the

[1] For MSHA matters, the Labor Secretary acts through the Assistant Secretary. 29 U.S.C. § 557a.

standards if he finds that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine." *Id.* § 811(c). Thus, the statute permits modification if an equally effective alternative exists or if the standard *itself* negatively affects mine safety.[2] To satisfy either option, MSHA conducts a two-step inquiry which asks, first, whether the proposed alternative "promote[s] the same safety goals as the original standard with no less than the same degree of success" and, second, whether the "modification would achieve a net gain, or at least equivalence, in *overall* mine safety." *United Mine Workers of Am., Int'l Union v. MSHA*, 928 F.2d 1200, 1202 (D.C. Cir. 1991) (*S. Ohio Coal Co.*) (emphasis added).[3] At the second step, "both advantages and

[2] The latter scenario seems counter-intuitive—MSHA plainly does not intend to harm miners—but can be conceptualized as follows: assume *arguendo* that MSHA requires all elevator shafts to be manually operated, reasoning that elevators with electrical components could spark and start a mine fire. An operator with an especially deep shaft might argue that the requirement nonetheless results in a diminution in mine safety because a manual elevator is relatively slow and, in a mine disaster, could prevent miners from surfacing quickly. For another example, *see Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 924 F.2d 340 (D.C. Cir. 1991) (*Quarto Mining*).

[3] We have concluded that the "diminution of safety" clause requires only that the Assistant Secretary determine "whether application of a particular mandatory safety regulation would be unsafe" and that "the Assistant Secretary need not balance the efficacy of the existing rule against the net benefits produced by the proposed modification," *Quarto Mining*, 924 F.2d at 343, basing our interpretation on the Assistant Secretary's practice at the time.

disadvantages of the alternative method" are weighed, including those that are unrelated to the original standard. *Id.* The party seeking modification has the burden of proof to establish that the proposed modification complies with section 811(c). 30 C.F.R. § 44.30(b).

The modification process begins with an operator's filing a petition for modification with MSHA. *See id.* § 44.10. After an investigation, the MSHA Administrator issues a proposed order. *Id.* § 44.13. The operator may request a hearing before an administrative law judge (ALJ), *id.* §§ 44.14, 44.15, 44.20, who, after investigation/hearing, issues his decision, *id.* § 44.32. Any party—including MSHA—may then appeal to the Assistant Secretary. *Id.* § 44.33. The Assistant Secretary's order may contain "special terms and conditions" which "shall have the same effect as a mandatory safety standard." *Id.* § 44.4(c). "Only a decision by the Assistant Secretary [is] final agency action for purposes of judicial review." *Id.* § 44.51.

These six petitions for review involve MSHA's "permissibility" requirements, which, in general, mandate that certain equipment located in certain mine areas be approved by MSHA (*i.e.*, that they be permissible). The focus of the permissibility requirements is to "assure that [electrically operated] equipment will not cause a mine explosion or mine

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See id. at 344. The record reveals some confusion, however, about whether MSHA now applies the *Southern Ohio Coal Co.* test to *both* statutory options or to the first only. *Compare* ALJ's Decision and Order at 14, Rosebud Mining Co., Case Nos. 2010-MSA-1, 2011-MSA-2, -11, -12 (Dep't of Labor Apr. 11, 2013) (Rosebud ALJ Order I) *with* Assistant Secretary's Decision and Order at 13, Case Nos. 2010-MSA-1, 2011-MSA-2, -11, -12 (Dep't of Labor Nov. 14, 2013) (Rosebud Order I). Because the petitioners do not raise this issue, we do not reach it.

fire . . . . " 30 C.F.R. § 75.2; *see also* Administrator's Proposed Decision and Order at 5, Canyon Fuel Co., Docket No. M-2009-025-C (Dep't of Labor May 6, 2011) ("MSHA requirements for permissible . . . equipment are intended to prevent mine explosions from unpredicted methane accumulations, methane outbursts, or float coal dust in suspension by removing a possible ignition source."). MSHA does not define "non-permissible" but its definition of "permissible" substantially illuminates the former. Permissible equipment includes, as relevant here, "completely assembled electrical machine[ry]" for which MSHA has issued "a formal approval." 30 C.F.R. § 18.2. Thus, electrical equipment without this approval is non-permissible and, accordingly, unauthorized in certain mine areas.[4] Not all mine equipment is subject to the permissibility scheme—for example, "[m]echanical surveying equipment," which "poses no risk of ignition," requires no modification order for use. Rosebud ALJ Order I at 5.[5] For our review, the permissibility scheme breaks down into three categories: (1) non-permissible equipment to which the non-use in certain mine areas restriction applies; (2) non-permissible equipment with a MSHA modification which removes the non-use restriction and (3) equipment (like mechanical surveying equipment) for

[4] The parties stipulated that "[t]he concern with any electrical equipment is that if used in an explosive atmosphere it will produce a spark, fire or heating with enough energy that an ignition of methane and/or coal dust may result, possibly leading to a fire or explosion." Stipulations ¶ 19, In re Rosebud Mining Co., Docket Nos. 2010 MSA-1, 2011 MSA-2, 2011-MSA-12, 2011 MSA-11 (Dep't of Labor Mar. 28, 2013) (hereinafter Stipulations).

[5] Relatedly—although not relevant for our review—MSHA deems permissible "intrinsically safe" equipment, that is, equipment "incapable of releasing enough electrical or thermal energy . . . to cause ignition." 30 C.F.R. § 18.2.

which no modification order is needed to authorize its use in certain mine areas.[6]

The petitioners sought to use non-permissible equipment and petitioned for modification of the following MSHA safety standards: (1) 30 C.F.R. § 75.500, the standard requiring, *inter alia*, that electrical equipment used in or inby the last crosscut[7] constitute permissible equipment, (2) *Id.* § 75.507-1, the standard requiring that electrical equipment used in return

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[6] As the parties stipulated, there is a difference between category two equipment and "permissible" equipment. The parties refer to category two equipment as "permitted" equipment—meaning it is "non-permissible equipment allowed to be used at a particular mine pursuant to the granting of a petition for modification." Stipulations ¶ 29. By contrast, *permissible* equipment has "a formal approval [without conditions] . . . issued by MSHA[]." *Id.*

[7] Throughout the record, this area of the mine is referred to as "in or inby the last *open* crosscut." *See, e.g.*, Rosebud Order I at 17 (emphasis added); *see also FMC Wyoming Corp., v. MSHA*, 16 FMSHRC 1787, 1994 WL 445344, at *4 (Aug. 16, 1994) ("the term 'last open crosscut' is interchangeable with 'last crosscut' "). MSHA defines "[t]he area of a coal mine inby the last open crosscut" as the "working place." 30 C.F.R. § 75.2. The parties stipulated that the "the 'last open crosscut' is the last crosscut without a permanent stopping in a line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses. This area includes the most advanced mining area in the mine, where the ventilating air reaches the areas of active coal removal and deepest penetration and starts its course back out of the coal mine." Stipulations ¶ 10. " 'Inby' refers to something facing the direction of the coal face. Conversely, 'outby' refers to the direction facing the mine entrance (the surface)." *Andalex Res., Inc. v. MSHA*, 792 F.3d 1252, 1254 n.2 (10th Cir. 2015).

airways[8] constitute permissible equipment and (3) *Id.* § 75.1002, the standard requiring that electrical equipment used within 150 feet of pillar workings or longwall faces[9] constitute permissible equipment. In short, the modification petitions sought authorization to use non-permissible equipment in three mine locations where use of the equipment was otherwise off-limits. Each of the three described locations is "more likely to have an explosive environment" than other mine areas, thus triggering the applicable standard. Assistant Secretary's Decision and Order at 27, Canyon Fuel Co., Case Nos. 2011-MSA-00006 to 00009, 2011-MSA-00014 to 00021, 2013-MSA-00012, -00024, -00025, -00037 (Dep't of Labor Nov. 24, 2014) (Canyon Fuel Order).

A. MSHA Proceedings Regarding Rosebud and Parkwood

Petitioners Parkwood Resources and Rosebud Mining filed identical modification petitions in December 2008 and January 2009.[10] Each operator sought to use non-permissible

[8] Return air is "[a]ir that has ventilated the last working place on any split of any working section or any worked-out area whether pillared or nonpillared. If air mixes with air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For purposes of § 75.507–1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air." 30 C.F.R. § 75.301.

[9] Pillar workings and longwall faces are simply "areas in which miners extract coal." *Andalex Res.*, 792 F.3d at 1254.

[10] The Parkwood and Rosebud petitions were subsequently consolidated at the administrative level and we follow suit, hereinafter referring to them as the Rosebud petitioners.

equipment—specifically, battery-powered (*i.e.*, electrical) surveying instruments—[11]in or inby the last open crosscut and in return airways. *See* 30 C.F.R. §§ 75.500; 75.507-1. They maintained that the two applicable safety standards hampered both their ability to accurately and quickly map the mines—resulting in a "diminution of safety" to miners, *see* 30 U.S.C. § 811(c)—[12]as well as their compliance with other MSHA regulations, *see* 30 C.F.R. § 75.372 (requiring "up-to-date map of the mine drawn to a scale of not less than 100 nor more than 500 feet to the inch"), *id.* § 75.1200 (requiring mine operator to maintain "accurate and up-to-date map" of mine "in a fireproof repository located in an area on the surface of the mine"), and state law, *see* 52 PA. STAT. ANN. § 690-224 (requiring "professional quality map of the mine on a scale of not less than 200 feet to the inch"), that require current and accurate mine maps. To obtain the modification, the Rosebud petitioners proposed seven conditions on their use of the NPESE, *see generally S. Ohio Coal Co.*, 928 F.2d at 1202 (alternative must "promote the same safety goals as the original standard with no less than the same degree of

[11] This equipment is hereinafter referred to as non-permissible electronic surveying equipment (NPESE).

[12] According to all six petitioners, accurate surveying is critical because it "prevents intersection of the mine with abandoned working of other mines which may contain water in large quantities, explosive gas or the absence of oxygen." Pet'rs' Br. at 12. Surveying is also necessary to avoid "sealed areas," *id*. at 13, which areas MSHA subjects to regular "monitoring." *See* 30 C.F.R. § 75.336.

success"), one of which—no use when float coal dust[13] is in suspension[14]—is of particular relevance to our review.[15]

1. ADMINISTRATOR'S DECISION

The Rosebud petitioners' "diminution of safety" argument pressed that the NPESE was needed in order to accurately map mines because of its ability to obtain measurements superior to non-electric (mechanical) surveying equipment. The Administrator rejected the Rosebud petitioners' arguments for two reasons. First, he determined that "when using [NPESE] the equipment need not be taken into return air or inby the last open crosscut if the surveying is carefully coordinated with the mining activity." Administrator's Proposed Decision and Order at 5, Parkwood Res. Inc., Docket No. M-2008-054-C (Dep't of Labor Jan. 29, 2010). In other words, he found that the Rosebud petitioners could use their preferred surveying tools—the NPESE—without violating the permissibility regulations because they did not need to use the equipment in the areas to which the permissibility regulations apply. Thus the regulations restricting the areas into which the operators could

[13] "Float coal dust" is defined as "coal dust consisting of particles of coal that can pass a No. 200 sieve." 30 C.F.R. § 75.400–1(b).

[14] MSHA regulations do not define the term "in suspension" but the parties stipulated that it means dust "suspended in the air during mining." Stipulations ¶ 33.

[15] The other conditions included: (1) regular examination of the NPESE, (2) continuous monitoring for methane during use of NPESE, (3) mandatory shutdown if methane concentration reaches a certain level, (4) changing and charging of batteries in fresh air, (5) proper training of personnel using NPESE and (6) use of NPESE after MSHA inspection only.

use NPESE did not impair the miners' ability to map the mines to the desired accuracy level and likewise did not (because of inaccurate mapping) result in a diminution of safety. Second, the Administrator determined that "levels of accuracy fully capable of protecting miners can be achieved using optical non-electric surveying equipment"—*i.e.*, mechanical equipment—and "can achieve even higher levels of accuracy . . . through repetition of measurements and statistical applications." *Id.* Thus, to him, use of NPESE was not necessary.

In addition, the Administrator found the proposed conditions duplicative because many of them simply tracked MSHA regulations; those that did not were found insufficient because they failed to ensure an adequate level of safety. Thus, the Rosebud petitioners' proposed conditions did not "promote the same safety goals as the original standard with no less than the same degree of success." *See S. Ohio Coal Co.*, 928 F.2d at 1202. Regarding the proposed float coal dust ban, the Administrator found that its implementation was impossible unless mining were to cease during surveying.

2. ALJ'S DECISION

The Rosebud petitioners sought ALJ review. The ALJ held two separate hearings on the consolidated petitions, made findings of fact and issued his decision on April 11, 2013.

The ALJ first explained how methane and coal dust can result in a mine fire. First, he observed that methane is explosive at an aerial concentration between five and fifteen per cent. According to him, coal dust can also result in a mine fire but that, in order to ignite, the dust must be "in suspension . . . [and] sufficiently thick that you couldn't see a light bulb that was turned on about four feet in front of you."

Rosebud ALJ Order I at 6 (alterations and quotations omitted). He next recognized that mechanical surveying equipment "poses no risk of ignition" and that, although NPESE *does* present such a risk, nonetheless "it has a low potential for ignition." *Id.* at 5. For support on the latter point, the ALJ relied on the testimony of MSHA electrical engineer Chad Huntley and fire-and-explosion expert Noah Ryder. Huntley estimated "the possibility that both the methane detector would fail and the electronic surveying equipment would ignite at the same time is one in ten thousand." *Id.* at 4. Ryder testified that the potential for a coal dust ignition "inside one of the[] [NPESE]" was "nonexistent" because, through water immersion and dust swab tests, he found that dust would "*settle* on . . . component[s]" in the devices and, "if it settled there, it's not in suspension and won't ignite." *Id.* at 6 & n.9 (emphasis added). Ryder also testified that NPESE was less dangerous than other equipment MSHA has approved via modification petitions.

Some findings were in apparent tension with others. For example, Rosebud surveying manager Michael Groff testified that NPESE "does not get hot when it's running" and that he had "never seen a spark or arc when removing the battery." *Id.* at 5 n.6. But Huntley and Ryder both testified that sparking could occur when "the battery was physically disconnected" or if "an inside component broke." *Id.* at 6. Huntley testified that NPESE could "overheat . . . and ignite methane" but also noted that it had "a thermal breaker for de-energizing the battery pack at a temperature *below* the ignition temperature for methane." *Id.* at 5 n.6 (emphasis added). Some NPESE equipment also came with a manufacturer safety warning indicating that it should not be used in an underground coal mine and that an explosion could

result if so used.[16] Because the manufacturer was unable to testify as to the basis of the warning, however, the ALJ gave it no weight. The ALJ also recognized that Rosebud had been using NPESE "in all areas of [its] mine[s]" for over 20 years and that MSHA, by not issuing any citation during that time, had "tacitly approved [its] use." *Id.* at 13.

The ALJ, concluding that mechanical surveying equipment was "obsolete, far less accurate than electronic surveying equipment, and above all, not realistically available on the commercial market except in used condition," *id.* at 2, approved the petitions. He anticipated that the conditions he set out in his order "promote[d] the same safety goals as the original standard with no less than the same degree of success." *Id.* at 14 (quoting *S. Ohio Coal Co.*, 928 F.2d at 1202). The ALJ's conditions were substantially similar to those contained in the petitions, including the prohibition on surveying in the presence of float coal dust. He added a requirement that the Rosebud petitioners gradually phase out old equipment so that, within five years, the NPESE in use would be no more than five years old. The ALJ thought this condition would "prevent the degradation of [NPESE] seals" through which float coal dust could enter and cause ignition. *Id.* at 17. He observed that his conditions closely replicated those included in an earlier MSHA consent decree allowing NPESE. *Id.* at 4 n.5; *see* Initial Decision Approving Settlement and Order of Dismissal at 2–4, Twentymile Coal Co., Case No. 2007-MSA-00002 (Dep't of Labor Dec. 5, 2007) (Twenty Mile Consent Order).

[16] Specifically, the warning stated: "Safety Cautions; Warning; May ignite explosively. Never use an instrument near flammable gas, liquid matter, and do not use in a coal mine." Rosebud ALJ Order I at 3.

The ALJ also concluded that "granting [the] petitions for modification would engender a *net gain* in miner safety." Rosebud ALJ Order I at 15 (emphasis in original); *see also S. Ohio Coal Co.*, 928 F.2d at 1202 (asking whether "modification would achieve a net gain, or at least equivalence, in overall mine safety"), because, although "mechanical surveying equipment can meet . . . accuracy requirement[s]," "the use of mechanical equipment may require multiple set ups, increasing the length of surveyors' exposure to hazardous conditions." Rosebud ALJ Order at 15. Moreover, "mechanical parts cannot be reliably calibrated or repaired . . . [and] surveyors are not currently trained in their use. . . . Therefore, application of the [permissibility] standard[s] is less safe than application of the modification, as it is unsafe to use equipment that is not calibrated or repaired properly, or that surveyors have not been trained to use." *Id.* Finally, he reasoned that NPESE "is 8-10 times more accurate than mechanical equipment" and "greater accuracy leads to increased safety in the mines." *Id.*[17]

3. ASSISTANT SECRETARY'S DECISION

The Administrator appealed the ALJ's order to the Assistant Secretary who, applying a *de novo* standard of review, conducted an independent analysis of the evidence and rejected many of the ALJ's factual findings. For

[17] The ALJ made no finding regarding diminution of safety, treating the case as one arising under the first prong of 30 U.S.C. § 811(c) (asking whether "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard"). But, as noted, *see supra* n.3, the Rosebud petitioners do not challenge MSHA's application of both section 101(c)'s "alternative method" option and its "diminution of safety" option to their petitions.

example, although MSHA never sanctioned Rosebud for its 20-year use of NPESE, the Assistant Secretary declined to conclude that MSHA had thus tacitly approved thereof in view of the fact that Rosebud produced no evidence that MSHA knew of the use; moreover, MSHA *had* sanctioned other operators for similar use. The Assistant Secretary also disputed Ryder's opinion that the Rosebud petitioners' NPESE was "well-sealed against [methane] gas and [coal] dust" ingress because Ryder had tested "none of . . . the specific instruments that [the Rosebud petitioners] identified in [the] petitions." Rosebud Order I at 28–29. Moreover, the Assistant Secretary found Ryder's assertion that he tested substantially similar equipment "suspect" given Ryder's failure to "take apart any of the specific instruments identified in the petitions" to determine their similarity *vel non*. *Id.* at 29. In addition, the Assistant Secretary credited Huntley's testimony that tended to discredit Ryder's tests—specifically, that, according to International Electrotechnical Commission standards, "ingress protection tests" using "dust and moisture" were not proper surrogates for gas. *Id.* at 30. And, even assuming Ryder's tests were fair proxies, "moisture was detected inside all of the pieces of used equipment that Ryder tested." *Id.*

The Assistant Secretary also rejected the ALJ's characterization of some of Huntley's testimony. For instance, the "one-in-ten-thousand probability" of both the "methane detector failing and the electronic surveying equipment igniting" was based on a premise with which Huntley explicitly disagreed. *Id.* at 28–29 n.12. The Assistant Secretary also rejected the ALJ's Ryder-supported conclusion that coal dust did not present an ignition concern. Although "Ryder testified that coal dust . . . would settle on a component and not remain in suspension"—thus, not igniting—Huntley testified that coal dust can "enter non-

permissible electronic equipment, layer itself on internal components, and cause the equipment to overheat and ignite methane." *Id.* at 32. The Assistant Secretary also disagreed with the ALJ's conclusion that, "because the equipment has internal thermal breakers that are designed to de-energize the battery pack at a temperature below the ignition temperature of methane, coal dust layering on the internal components . . . is not a concern," *id.* at 32–33, because, the Assistant Secretary opined, "thermal breakers can fail, and there [wa]s no evidence concerning their reliability," *id.* at 33. Moreover, he noted the likelihood of a coal dust-based explosion even in the absence of the required aerial concentration because coal dust can "be rapidly placed in suspension, [and] even a vigilant surveyor may not have the time to de-energize his instrument before it encounters an explosive concentration of coal dust." *Id.*

Finally, the Assistant Secretary disagreed with the ALJ on the importance of the NPESE warning. Although the manufacturer was unable to explain the reason for the warning, "[the Rosebud petitioners], not the Administrator, ha[d] the burden of proof in th[e] proceeding." *Id.* at 34 (citing 30 C.F.R. § 44.30(b)).

On November 14, 2013, the Assistant Secretary issued his decision upholding the ALJ's modification grant but substantially modifying and tightening the conditions. In addition to prohibiting NPESE use when float coal dust was in suspension, the Assistant Secretary required that coal production shut down while the equipment was used in or inby the last open crosscut and in return air and that, if "viable" *mechanical* equipment became available, use of NPESE must cease. Rosebud Order I at 50. With these conditions in place, the Assistant Secretary concluded that the modification "promotes the same safety goals as [the

standards] with no less than the same degree of safety. . . . [and] that the overall effect of the proposed alternative method, including the modifications . . . will achieve at least a net least [sic] equivalence in overall mine safety." *Id.* at 14 (applying *S. Ohio Coal Co.* test, 928 F.2d at 1202).

The Assistant Secretary remanded to the ALJ to consider two conditions for which the record contained insufficient support (and which are not before us on appeal). The ALJ subsequently approved a consent agreement applying four new conditions (in lieu of the remanded pair) and the Rosebud petitioners then appealed to the Assistant Secretary to renew their objections to the originally disputed conditions and to facilitate judicial review therefrom.[18] *See* 30 C.F.R. § 44.51 ("Only a decision by the Assistant Secretary [is] final agency action for purposes of judicial review."). On November 24, 2014, the Assistant Secretary issued Rosebud Order II, once again rejecting the Rosebud petitioners' arguments.

The Rosebud petitioners argued in the second round before the Assistant Secretary that three of the unchanged requirements "[we]re unnecessary to meet [the modification] standard." Rosebud Order II at 3. It was undisputed that, with the Assistant Secretary's conditions, the modification grant "guarantee[d] no less than the same measure of protection afforded the miners of such mine by" the permissibility standards, *see S. Ohio Coal Co.*, 928 F.2d at

[18] The Administrator asserted that the Rosebud petitioners' objections "essentially reargue[d] matters already unsuccessfully litigated" and the Assistant Secretary accordingly treated them "in the nature of a motion for reconsideration." Assistant Secretary's Decision and Order at 3–4, Rosebud Mining Co., Case Nos. 2010-MSA-1, 2011-MSA-2, -11, -12 (Dep't of Labor Nov. 24, 2014) (Rosebud Order II).

1202. The Rosebud petitioners argued that cessation of coal production while surveying took place was unnecessary because (1) "surveying will not be conducted in an entry where production is occurring," Rosebud Order II at 4; (2) "surveying will not be set up close to the face" of the mine, *id.*; (3) "surveying generally will be upwind of the . . . mining machine, and, even when it is downwind, methane and [coal] dust will be removed by the ventilation system" and other safeguards, *id.* at 4–5; (4) "surveyors spend minimal time in or inby the last open crosscut or in the return," *id.* at 7; (5) "surveying equipment . . . does not [cut into or] liberate methane or generate coal dust," *id.*; and (6) the ALJ-imposed condition that, "if one percent methane is detected," use of NPESE was to cease, was sufficient to protect against methane explosions, *id.* at 8.

The Assistant Secretary was not persuaded. He concluded that the first, second and fourth objections relied on factual assertions rebutted by the record.[19] He found the third objection "d[id] not offset the decrease in safety from using" NPESE because the ventilation system and other safety features were "present whether surveyors use mechanical, permissible, or non-permissible surveying equipment." *Id.* at 5–6. Further, he reasoned that "ventilation systems do not always work effectively and [that] operators do not always comply with ventilation requirements." *Id.* at 6. He rejected the fifth objection because, although it "might mean that the risk of using non-permissible surveying equipment is less than

[19] *See id.* at 4 n.2 (Rosebud surveyors testified only that "*usually* we coordinate ourselves in different entries") (emphasis in original); *id.* n.3 ("Rosebud Surveying Manager Groff testified that he has taken shots as close as 50 feet from the face."); *id.* at 7 n.4 ("Groff . . . acknowledged that he does not always set up in the middle of the entry.").

the risk of using other types of non-permissible equipment," it did not mean that NPESE was safe. *Id.* at 7–8. Finally, the Assistant Secretary criticized the methane monitoring condition because the "detectors may fail" and because there "is a lag time in methane detectors and that if there were a sudden inundation of methane, by the time the methane detector registered one percent methane, and by the time the surveyor reacted to shut the surveying equipment off, there might already be an explosive amount of methane surrounding the equipment." *Id.* at 8.

The Rosebud petitioners also argued that the prohibition on surveying when float coal dust existed was both unclear and unnecessary and that the requirement to switch to "viable" mechanical surveying equipment if it became available was unreasonable. Regarding the first claim, the Rosebud petitioners asserted that float coal dust in suspension always exists. But, as the Assistant Secretary observed, the condition could be implemented if production ceased. Moreover, he clarified and interpreted the condition to allow for a "visual determination of whether there is float coal dust in suspension." *Id.* at 11 n.7. As to the latter objection, the Assistant Secretary explained that mechanical equipment would be viable if "sufficiently accurate for use in underground mines" and that MSHA's resources should not be spent on ensuring the NPESE's compliance with conditions if viable mechanical equipment—*i.e.*, equipment that can be used without conditions—exists. *Id.* at 15.

B. MSHA Proceedings Regarding Canyon Fuel and Mountain Coal (Canyon Fuel petitioners)

On July 15, 2009 petitioners Canyon Fuel and Mountain Coal filed nearly identical petitions for modification, seeking to use NPESE in or inby the last crosscut, in return airways

and within 150 feet of pillar workings and longwall faces. *See* 30 C.F.R. §§ 75.500, 75.507-1, 75.1002. As did the Rosebud petitioners, Canyon Fuel and Mountain Coal claimed that the mandatory standards resulted in diminution in miner safety and inability to meet mapping requirements and they proposed comparable conditions, with one exception (the float coal dust condition was omitted). The Administrator denied the petitions for reasons substantially similar to his denial of the Rosebud petitioners' petitions.

The MSHA ALJ held a hearing on the consolidated Canyon Fuel and Mountain Coal petitions and released a decision on April 3, 2014.[20] In light of the intervening Rosebud Order I, MSHA agreed that the petitions should be granted if the Assistant Secretary's conditions set forth in Rosebud Order I were imposed. *See* ALJ's Decision and Order at 7, Canyon Fuel Co., Docket Nos. 2011-MSA-00006 to 00009, 00014 to 00021, 2013-MSA-00024, -00025, -00037 (Dep't of Labor April 3, 2014) ("The issues have evolved since the petitions were first filed. No longer is the issue . . . whether the proposed modification should be granted . . . . The question now is simply what conditions are necessary."). The ALJ subsequently revised the Rosebud Order I conditions—as applied to Canyon Fuel—in three significant respects.

First, he found that it was "not appropriate" to disallow NPESE if and when "viable new mechanical surveying equipment" became available. *Id.* at 13–14. To him, the

[20] Petitioners Peabody Sage Creek and Bowie Resources had similar petitions pending and filed a letter with the ALJ agreeing to be bound by his decision in the Canyon Fuel case. Canyon Fuel references hereinafter include not only Canyon Fuel and Mountain Coal but also Peabody Sage Creek and Bowie Resources.

accuracy of mechanical surveying equipment—even, apparently, "viable" mechanical surveying equipment—was inferior and reduced miner safety. He also found the ban on surveying when float coal dust was in suspension "vague and ambiguous" because the condition did not include a measurement of float coal dust and because surveying would be "impossible"—due to "visibility restrictions"— long before an explosive quantity was in suspension. *Id.* at 20. Finally, he narrowed the restriction on surveying during coal production, requiring only that surveying not occur at "the longwall or a working face during production." *Id.* at 23. The Administrator appealed once more to the Assistant Secretary who issued a final order simultaneously with the Rosebud II Order with identical conditions based on materially similar reasoning.

Both sets of operators timely filed petitions for review.[21] Our jurisdiction arises under section 101(d) of the Mine Act. 30 U.S.C. § 811(d).[22]

II. ANALYSIS

Our review of the Assistant Secretary's two final orders is pursuant to the Administrative Procedure Act, that is, we

[21] The Rosebud petitioners, however, did not petition for modification of 30 C.F.R. § 75.1002 (permissibility requirement for "equipment . . . located within 150 feet of pillar workings or longwall faces"). With this exception, both sets of petitioners challenge the same conditions and are therefore hereinafter referred to as the petitioners. Because Canyon Fuel made no discrete argument regarding 30 C.F.R. § 75.1002, we reject its challenge thereto without more.

[22] Both sets of petitioners filed a consolidated brief and we likewise consolidate the petitions for disposition.

determine "whether the granting of the petition for modification was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *Int'l Union, United Mine Workers of Am. v. MSHA*, 830 F.2d 289, 292 (D.C. Cir. 1987) (*Emerald Mine Corp.*) (citing 5 U.S.C. § 706(2)(A)). This "[h]ighly deferential" standard, *AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003), is especially applicable when we review "technical determinations on matters to which the agency lays claim to special expertise." *Bldg. and Const. Trades Dep't v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988); *see also Int'l Union, United Mine Workers of Am. v. MSHA*, 407 F.3d 1250, 1258 (D.C. Cir. 2005) (*Jim Walter Res., Inc.*) (equivalent safety determination is within Assistant Secretary's expertise). We uphold the agency if it "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (internal quotation marks omitted). Because the challenged orders involve "an area within the [Assistant] Secretary's expertise," *Jim Walter Res., Inc.*, 407 F.3d at 1258, and because they are supported by "substantial evidence and . . . a reasoned explanation," *Bldg. and Const. Trades Dep't.*, 838 F.2d at 1266, we deny the petitions for review.

The thrust of the petitioners' argument is that the three above-discussed conditions—the requirement that coal production cease while surveying with NPESE occurs in or inby the last open crosscut, in return air or within 150 feet of longwall faces or pillar workings (high risk areas), the bar on surveying with NPESE when float coal dust is in suspension and the instruction to use viable mechanical surveying equipment if it becomes available—are unnecessary and

therefore arbitrary and capricious.[23] But the Assistant Secretary weighed the relevant factors—whether the alternative "promote[s] the same safety goals as the original standard with no less than the same degree of success" and whether it improves "overall mine safety," *S. Ohio Coal Co.*, 928 F.2d at 1202—and "articulated a rational connection between the facts found and the choice made," *Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1228 (internal quotation marks omitted). In so concluding, we note that "the Mine Act and its standards require *redundant* safety measures." Rosebud Order II at 6 (emphasis added).

A. CESSATION OF PRODUCTION

It is uncontested that the condition requiring coal production to stop while the NPESE is used in high risk areas enhances mine safety. What is at issue is whether this

[23] The petitioners also contend that the Assistant Secretary's *de novo* review of the ALJ orders and factual findings is *ultra vires*. Section 101(c) of the Mine Act provides that a petition for a modification hearing is subject to section 554 of the Administrative Procedure Act (APA). 30 U.S.C. § 811(c). Section 554 of the APA in turn cross-references section 557 which provides that "[o]n appeal from or review of [an] initial decision, the agency has *all the powers which it would have in making the initial decision*." 5 U.S.C. § 557(b) (emphasis added); *see also Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) ("The law is settled that an agency is not required to adopt the credibility determinations of an administrative law judge."); *id.* (agency not in position analogous to appellate court reviewing trial court). We have suggested that findings dependent on "*demeanor* of witnesses" must be "given special weight," *Mathew Enter., Inc. v. NLRB*, 498 F. App'x. 45, 46 (D.C. Cir. 2012) (quoting 2 Richard J. Pierce, Jr., Administrative Law Treatise § 11.2 (5th ed. 2010)) (emphasis added), but demeanor is not at issue here.

condition is unnecessary and, indeed, whether it is so unnecessary as to fail arbitrary and capricious review. The objections of the petitioners break down into the following groups: (1) surveying equipment is not used to mine coal, (2) use of the NPESE must stop if the methane level approaches a level well below its explosive threshold, (3) even while production is ongoing, the NPESE will not come in contact with methane and coal dust, (4) the NPESE has a slight potential for ignition, (5) it is unlikely methane or coal dust will enter the NPESE compartments that contain electrical components, (6) previously approved modification petitions manifest that this condition is unnecessary and (7) the manufacturer's warning about use of NPESE in coal mines was "not probative," Pet'rs' Br. at 61. We address the objections *in seriatim*.

1. Surveying equipment is not used to mine coal

The petitioners argue that the Assistant Secretary failed to appreciate the differences between NPESE and other—riskier—mine equipment. For example, they claim that he failed to account for the fact that the NPESE does not cut coal, that it is peripheral in the mining process and that it does not cause methane to disperse or coal dust to be in suspension. But the Assistant Secretary addressed this argument. He reasoned that "[a]lthough these circumstances . . . might mean that the risk of using non-permissible surveying equipment is *less* than the risk of using other types of non-permissible equipment, nothing in the record convinces me that the circumstances would sufficiently offset the dangers of using" NPESE in high risk areas. Rosebud Order II at 7–8 (emphasis added). Moreover, MSHA has, by regulation, applied its permissibility requirements to equipment other than that which "cuts into coal." Canyon Fuel Order at 41. *See, e.g.*, 30 C.F.R. § 75.500(d) ("*All* . . . electric face equipment which

is taken into or used inby the last crosscut of any coal mine" must be permissible) (emphasis added). The petitioners' contention that the NPESE—although non-permissible—is relatively safe suggests only that this condition is less necessary than others, not that it is arbitrary. In addition, the Assistant Secretary noted that the petitioners used the Twenty Mile consent order, Case No. 2007-MSA-00002 (Dep't of Labor Dec. 5, 2007), as a template for their petition and Twenty Mile included the same condition.

2. Methane detection and shutdown requirement guards against explosions

The petitioners next contend that, because the ALJ imposed a condition that operators cease using NPESE if the methane level reaches a 1% concentration and, because a 5% concentration is the minimum concentration necessary for ignition, the requirement that production cease during NPESE use is arbitrary. The Assistant Secretary amply rebutted this argument. He noted that although the 1% methane concentration condition "provide[s] some protection from the increased risk of a methane ignition posed by using non-permissible equipment . . . [it is] not enough." Rosebud Order I at 35–36. As he explained, the record indicated that methane detectors are not always properly calibrated and also may fail. Moreover, he cited testimony that a "lag time" exists between an increase in methane concentration and its detection. Rosebud Order II at 8. Thus, if there were a "sudden inundation of methane," the methane detector might not register it before an explosive quantity accumulated near the NPESE. *Id.*

3. NPESE will not encounter methane or float coal dust

The petitioners next contend that, as a matter of practice, surveying *generally* does not occur in areas where methane

and coal dust are present and that, even when it does, the ventilation systems will prevent an explosion. First, we note that much of this argument is equivocal.[24] To second-guess the Assistant Secretary on this ground would require us to weigh the evidence *de novo* and usurp MSHA's statutorily conferred authority to determine whether a specific mine hazard—once its existence is conceded—is substantial enough to impose restrictions. *See, e.g.*, *Partington v. Houck*, 723 F.3d 280, 291 (D.C. Cir. 2013) ("we do not substitute our judgment for that of the agency or evaluate *de novo*" its factual findings).

In any event, the Assistant Secretary adequately addressed the objection with a reasoned explanation. First, he observed that the record was ambiguous about whether surveying sometimes occurred in the areas the petitioners claimed to avoid.[25] Moreover, he observed that nothing in the

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[24] *See, e.g.*, Pet'rs' Br. at 44 (there is "*little or no* exposure to either" dust or methane) (emphasis added); *id.* at 45 (in "*most* instances, the surveying equipment will be positioned upwind of the continuous miner and thus not exposed in any way to methane or dust") (emphasis added); *id.* ("surveyors are *generally* upwind of the entry where production is occurring") (emphasis added); *id.* at 46 ("it is clear that the instrument will *not often* be in close proximity downwind of the continuous miner") (emphasis added).

[25] *See* Rosebud Order II at 4 n.2 ("Although initially stating that he did not survey in the entry where the continuous miner is mining, . . . Groff then testified that '*usually* we coordinate ourselves in different entries.' " (emphasis in original)); *id.* at n.3 ("The evidence does not support Rosebud's assertion that surveying is not conducted close to the face. . . . Groff testified that he has taken shots as close as 50 feet from the face."); *id.* at 7 n.4 ("The evidence does not support Rosebud's assertion that surveying equipment is always used in the middle of the entry. . . . [Groff]

ALJ orders "require[d] that the equipment be used" only in the areas identified by the petitioners—*i.e.*, in different mine entries, a sufficient distance from the face or in the middle of mine entries. Canyon Fuel Order at 41–42. Regarding whether surveying often or always occurred upwind of production, the Assistant Secretary noted the same ambiguity, *i.e.*, that the petitioners occasionally surveyed *downwind*. *See id.* at 42–43 n.18 (Canyon Fuel expert "testified that when one surveys in the longwall tailgate return production is 'most always' upstream.") Moreover, the conditions of use did not *require* that surveying equipment be used only outside the designated areas—that the Assistant Secretary was unmoved by the assertion that this would *almost* always be the case was not arbitrary.[26]

Regarding ventilation, the Assistant Secretary noted that MSHA regulations already require ventilation so that it does not "offset the decrease in safety from using" NPESE. Rosebud Order II at 6. In addition, "ventilation systems do not always work effectively and operators do not always comply with ventilation requirements." *Id.* Ventilation is but one of many "redundant safety measures . . . the Mine Act and its standards require" to guard "against ignitions and explosions." *Id.* at 5–6; *see also* Canyon Fuel Order at 40

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acknowledged that he does not always set up in the middle of the entry.").

[26] It is unclear from the record whether the risk of NPESE use is mitigated entirely if its use is limited to, *inter alia*, areas upwind of production or in entries where production is not occurring. The Assistant Secretary did not reach this issue and thus we need not reach it. The petitioners do not argue that it was arbitrary to impose the cessation of production condition in lieu of a condition requiring, for example, that surveyors always remain upwind of production.

("One of the most frequently cited violations is the failure to comply with ventilation requirements."). In addition, even if the ventilation system functioned properly, the Assistant Secretary concluded that it captured only "significant amount[s] of dust and methane"—not all of it. *Id.* Record evidence supports his conclusion. *See id.*at 40 n.14 (citing ALJ hearing transcript).

4. NPESE has low ignition potential

The petitioners also argue that NPESE is unlikely to cause an explosion. *See, e.g.*, Pet'rs' Br. at 52 (although NPESE is not "permissible," it nonetheless "has a very low potential for ignition of methane or coal dust"); *id.* at 53 (NPESE "does not generate heat"). Substantial evidence supports the Assistant Secretary's rejection of this argument.

The Assistant Secretary considered—and rejected—expert testimony on the relative ignition potential of the equipment. For example, he noted that as part of the test for determining whether equipment is permissible, "MSHA layers dust onto components to see if dust will smolder." Canyon Fuel Order at 35. Smoldering corresponds to overheating, which can result in ignition. Granted, record evidence suggested that if there is significant overheating, "components inside the devices would 'likely' fail, the equipment would not function, and there would be no safety hazard." *Id.* But the Assistant Secretary observed that the evidence was equivocal and not supported with test results. There was also testimony indicating that "if there were internal sparking or overheating it would not be detected." *Id.* at 36. The Assistant Secretary further observed that the safety warning contained in the manual indicated that certain equipment "[m]ay ignite explosively." *Id.*

The petitioners supplement their argument about the equipment's relative safety with the observation that it cannot create sparks. *See* Pet'rs' Br. at 63 ("[U]nlike a continuous miner or roofbolter, [NPESE] creates no sparks."). *But see id.* at 53 ("[T]he changing of batteries has a potential for creating sparks."). They argue, therefore, that "dust or methane would necessarily have to enter the instrument" in order for an explosion to occur. *Id*. at 63. But the Assistant Secretary disagreed and record evidence supports his skepticism. For example, Ryder "acknowledged that non-permissible electronic surveying equipment can spark if there is something wrong with the device such as a loose connection." Canyon Fuel Order at 28 n.8. And a MSHA witness "testified that batteries in the equipment can short out and cause an arc." *Id.*

5. Methane and dust will not enter NPESE electrical compartments

Based on their dubious contention that sparking cannot occur, the petitioners argue that ignition can result only if dust or methane gets into the NPESE. *See* Pet'rs' Br. at 63 ("dust or methane would necessarily have to enter the instrument" for ignition to occur). And the petitioners contend that the devices were adequately sealed and that the ALJ-imposed condition requiring updating of equipment sufficiently guarded against degradation of seals. The Assistant Secretary concluded that the record rebutted this claim.

The premise that the devices were well-sealed was based on Ryder's faulty water immersion and dust swab tests. As the Assistant Secretary explained, the test results were performed on equipment different from that the petitioners sought to use. Ryder claimed that the equipment he inspected was substantially similar to the petitioners' but he "did not

take apart" the latter; and Huntley testified that, absent such an examination, it would be difficult to conclude that it was similar. Rosebud Order I at 29. Moreover, even assuming Ryder tested sufficiently similar devices, Huntley testified that it was "suspect" to use water as a surrogate for gas and, in any event, moisture was found in all of the equipment Ryder tested. Rosebud Order I at 30. Although Ryder testified that the water entered only because the seals were degraded, the Assistant Secretary observed that there was no record evidence documenting how long it took a seal to degrade. And, again, the petitioners had the burden of proof. 30 C.F.R. § 44.30(b).

The petitioners argue that, even if dust or methane can enter the electrical compartments, the openings "are sufficiently small in most cases to prevent the escape of flame outside the compartment." Pet'rs' Br. at 58. We once again note the petitioners' equivocal language and also observe that the Assistant Secretary referenced testimony rebutting this contention. *See* Rosebud Order I at 31 ("I credit Huntley's . . . testimony that internal pressures from an ignition could create larger openings.").

6. Other petitions

The petitioners next contend that the Assistant Secretary improperly analogized to other petitions in imposing the condition that coal production cease when surveying occurs in high-risk areas. We need make only two brief observations. First, we question the relevance of this claim. The petitioners contend, for example, that MSHA "permits photography [in high-risk areas] with less extensive requirements than the [NPESE] petitions and permits cutting and welding under less extensive conditions which do not involve cessation of production." Pet'rs' Br. at 60 n.23. But we have no basis on

this record to conclude either that that equipment poses the same (or greater) risk as the NPESE or that the conditions imposed on the use of that equipment, even if not identical, are not nonetheless more stringent. Even if we could reach those conclusions, they do not establish, on their own, that the condition MSHA placed on NPESE is arbitrary. Second, the petitioners apparently encouraged the Assistant Secretary to rely on other petitions such as Twenty Mile. *See* Canyon Fuel Order at 40 ("Canyon Fuel expert witness Hartsog acknowledged . . . reli[ance] on other granted-petitions [sic] for modification of permissibility standards that allow the use of diagnostic and testing equipment in high risk areas as well as the modification in *In re Twentymile Coal Co*."); Rosebud Order I at 39 ("Rosebud mining engineer Cobaugh acknowledged that the Twentymile consent agreement was a template for Rosebud's petitions for modification in this case."). And the Twenty Mile petition *did* involve NPESE. The petitioners now contend that Twenty Mile was "never subjected to the test of litigation and a decision by an impartial ALJ." Pet'rs' Br. at 60. Although accurate, their backtracking does little to establish that the conditions are arbitrary or capricious. The Assistant Secretary's conditions are supported by the record before him and his reference to Twenty Mile was little more than an aside. *See* Rosebud Order I at 39 ("I also note that the same requirement is contained in the Consent Agreement in [Twenty Mile].").

7. Reliance on device warning

The petitioners also argue that the Assistant Secretary improperly relied on the manufacturer's warning inasmuch as neither MSHA nor the manufacturer could explain its basis. The petitioners again overlook that they bear the burden of proof in the modification petition process. *See* 30 C.F.R. § 44.30(b). And, in any event, it was not arbitrary for the

Assistant Secretary to rely on the warning applicable to the very equipment the petitioners sought to use. The manufacturer, after all, "is in the best position to know about the ignition risks of the equipment it manufactures." Rosebud Order I at 34; *see also* Canyon Fuel Order at 37 ("[T]he manufacturers of the equipment are in the best position to evaluate its ignition potential.").

B. FLOAT COAL DUST CONDITION

The petitioners separately argue that the condition prohibiting surveying in high-risk areas when float coal dust is in suspension is arbitrary. It is uncontested that this condition enhances mine safety. What is at issue is whether the Assistant Secretary reasonably concluded that it is necessary. We note, first, that the petitioners' arguments repeat earlier contentions. *See* Pet'rs' Br. at 63 ("[T]here is nothing about use of a surveying instrument that liberates dust or methane."); *id.* ("it creates no sparks"); *id.* at 65 (for explosion to occur "dust must still find its way into the insides of the electronic surveying instrument which is highly unlikely"). Only two contentions require analysis: the condition is unclear and impossible to implement and the condition is self-regulating because surveying becomes impossible at a dust concentration well below an explosive point.

The petitioners rely on the Administrator's statements in his denial of their original petitions that "it is not possible for the petitioner to implement this action item [because] [f]loat coal dust cannot be entirely eliminated during the cutting process of mining. . . . Unless all mining were to cease, float coal dust would be generated." Administrator's Proposed Decision and Order at 6, Parkwood Res. Inc., Docket No. M-2008-054-C (Dep't of Labor Jan. 29, 2010). But, given that

the Assistant Secretary has required coal production to cease while surveying is conducted in the high-risk areas, the petitioners' point is weakened. And we have found no other record support for this argument.[27] Regarding whether the condition is clear enough to be implemented, the Assistant Secretary resolved its vagueness by noting that a "visual determination" suffices to determine if dust is in suspension. Rosebud Order II at 11 n.7.

The petitioners also contend that this condition is unnecessary because it is "self-regulating." Pet'rs' Br. at 63. They claim that "far less than a sufficient amount of dust to be explosive would preclud[e] surveying" by reducing visibility below levels necessary for surveying. *Id.* But the Assistant Secretary reasonably rejected this argument. As he explained, "coal dust can be rapidly placed in suspension . . . [and] even a vigilant surveyor may not have the time to de-energize his instrument before it encounters an explosive concentration of coal dust." Rosebud Order I at 33.

C. VIABLE MECHANICAL SURVEYING EQUIPMENT

The final condition under challenge is that the petitioners must switch to viable mechanical surveying equipment when it becomes commercially available. We first note that it is MSHA's position that the use of NPESE, under the conditions of use imposed by the Assistant Secretary's two orders, is no more dangerous than the use of mechanical surveying

[27] The petitioners argue in the alternative that the prohibition on surveying in high-risk areas while production is ongoing renders this condition redundant. But the record reflects that coal dust can also be placed in suspension from "methane explosions, bumps, fans, roof falls, brushing up against insufficiently rock-dusted float coal dust, and the exhaust from large pieces of equipment." Canyon Fuel Order at 35.

equipment. *See* Rosebud Order I at 44 ("I have found that the [NPESE], including the modifications and additional conditions in the [ALJ's] decision and order, as modified and supplemented by the conditions in this decision and order, will at all times promote the same safety goals as the original standards [allowing mechanical equipment] with no less than the same degree of success."). If that were not so, the modification grant here would be improper. *See S. Ohio Coal Co.*, 928 F.2d at 1202 (modification must "promote the same safety goals as the original standard with no less than the same degree of success."). And the petitioners contend that NPESE (with the conditions of use) is not only as safe as, but *safer* than, mechanical surveying equipment.

The petitioners make two arguments to suggest that mechanical surveying equipment, even when "viable," is less safe than NPESE. First, they argue that surveying with NPESE is faster and thus surveyors are exposed to the dangers of mines for less time than they would be with mechanical equipment. But the Assistant Secretary observed that this assertion was unsupported by data, *see* Rosebud Order I at 45 n.25 ("The evidence concerning the increased likelihood of injury from the asserted increase in exposure time is general and not quantified and does not establish that the increase in exposure time would result in anything more than an insubstantial decrease in safety."), and it did not consider "the additional time needed to comply with the conditions for use" of NPESE, *id.*

The petitioners also assert that even "viable" mechanical surveying equipment will have inferior accuracy. The record supports this assertion, *compare* Rosebud Order I at 44 n.23 (suggesting "1 foot-in-10,000 feet accuracy levels" viable) *with* Petition for Modification Stipulations ¶ 21, In re Rosebud Mining Co., Docket Nos. 2010-MSA-1, 2011-MSA-

2, -11, -12 (reflecting NPESE achieved 1 foot in 81,507 feet accuracy), but, even assuming the accuracy gap is more than *de minimis*, we have no way to measure its impact on mine safety. *See* Rosebud Order I at 44 n.23 (expert testimony reflecting that "there are no safety issues when surveying equipment achieves 1 foot-in-10,000 feet accuracy levels."). Thus, whatever accuracy gain is made by using NPESE, it is not plain that it improves mine safety more than would viable mechanical equipment.

Finally, the Assistant Secretary identified a mine safety risk from the use of NPESE that would not exist with viable mechanical surveying equipment—the use of "MSHA's limited resources . . . spent ensuring compliance with the terms and conditions" of use. Rosebud Order I at 45. Because MSHA must assess what effect modifications will have on "overall mine safety," *S. Ohio Coal Co.*, 928 F.2d at 1202, the preservation of finite resources for use in ensuring compliance with *other* standards is a reasonable basis upon which to include this condition.

For the foregoing reasons, we deny the petitions for review.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 22, 2016 Decided July 1, 2016

No. 11-1479

UNITED AIRLINES, INC., ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

BP WEST COAST PRODUCTS LLC, ET AL.,
INTERVENORS

Consolidated with 12-1069, 12-1070, 12-1073, 12-1086, 15-1101, 15-1105, 15-1107

On Petitions for Review of Orders of the Federal Energy Regulatory Commission

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Thomas J. Eastment argued the cause for Shipper Petitioners. With him on the briefs were *Gregory S. Wagner*, *Richard E. Powers, Jr.*, *Melvin Goldstein*, and *Steven A.*

Adducci. *Frederick G. Jauss* and *Marcus W. Sisk Jr.* entered appearances.

Charles F. Caldwell argued the cause for Petitioner SFPP L.P. With him on the briefs were *Dean Lefler* and *Daniel W. Sanborn*. *Deborah R. Repman* entered an appearance.

Ross R. Fulton and *Lisa B. Luftig*, Attorneys, Federal Energy Regulatory Commission, argued the causes for respondents. On the brief were *William J. Baer*, Assistant Attorney General, U.S. Department of Justice, *James J. Fredricks* and *Robert J. Wiggers*, Attorneys, *Robert H. Solomon*, Solicitor, Federal Energy Regulatory Commission, *Beth G. Pacella*, Deputy Solicitor, and *Elizabeth E. Rylander*, Attorney.

Steven A. Adducci, *Thomas J. Eastment*, *Gregory S. Wagner*, *Richard E. Powers Jr.*, and *Melvin Goldstein* were on the brief for Shipper Intervenors in support of Federal Energy Regulatory Commission.

Charles F. Caldwell, *Dean H. Lefler*, and *Daniel W. Sanborn* were on the brief for intervenor SFPP, L.P. in support of respondents. *Elizabeth B. Kohlhausen* entered an appearance.

Before: GRIFFITH and KAVANAUGH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: Petitioners SFPP, L.P. ("SFPP") and several shippers—"*i.e.*, firms that pay to transport petroleum products over SFPP's pipelines,"

ExxonMobil Oil Corp. v. FERC, 487 F.3d 945, 947 (D.C. Cir. 2007)—challenge aspects of three orders from the Federal Energy Regulatory Commission ("FERC") related to filings by SFPP for cost-of-service tariffs on its pipelines. SFPP disputes FERC's choice of data for calculating SFPP's return on equity and the Commission's decision to grant only a partial indexed rate for the 2009 index year. The shipper-petitioners (the "Shippers") claim that FERC's tax allowance policy for partnership pipelines, such as SFPP, is arbitrary or capricious and results in unjust and unreasonable rates. We grant-in-part and deny-in-part SFPP's petition and grant the Shippers' petition for review.

I. BACKGROUND

SFPP is a Delaware limited-partnership, common-carrier oil pipeline. The pipeline transports refined petroleum products from California, Oregon, and Texas to various locations throughout the southwestern and western United States. On June 30, 2008, SFPP filed tariffs to increase rates on its West Line, which transports petroleum products throughout California and Arizona. These new tariffs had an effective date of August 1, 2008. Also on June 30, 2008, SFPP made a separate tariff filing to decrease the rates on its East Line, which runs from West Texas to Arizona. The purported impetus for these filings was increased throughput on SFPP's East Line due to a recently completed expansion, which accordingly decreased throughput on the West Line. Several shippers protested the West Line tariff filing by raising challenges to SFPP's cost of service.

On December 2, 2009, an administrative law judge issued an Initial Decision addressing the shippers' arguments. FERC reviewed the Initial Decision in Opinion 511, 134 FERC ¶ 61,121 (2011), considered a request for rehearing of

that opinion in Opinion 511-A, 137 FERC ¶ 61,220 (2011), and then reviewed a request for rehearing of Opinion 511-A in Opinion 511-B, 150 FERC ¶ 61,096 (2015). Both SFPP and the Shippers[1] petition this Court for review of these three FERC orders.

SFPP makes two arguments in its petition. First, it claims that FERC arbitrarily or capriciously failed to utilize the most recently-available data when assessing its so-called real return on equity. Second, SFPP asserts that FERC erred when it declined to apply the full value of the Commission's published index when setting SFPP's rates for the 2009 index year. We grant SFPP's petition with respect to the first issue but deny the petition with respect to the second.

The Shippers raise a separate challenge to FERC's current policy of granting to partnership pipelines an income tax allowance, which accounts for taxes paid by partner-investors that are attributable to the pipeline entity. Specifically, the Shippers claim that because FERC's ratemaking methodology already ensures a sufficient after-tax rate of return to attract investment capital, and partnership pipelines otherwise do not incur entity-level taxes, FERC's tax allowance policy permits partners in a partnership pipeline to "double recover" their taxes. We agree that FERC has not adequately justified its tax allowance policy for partnership pipelines and grant the Shippers' petition.

[1] The Shippers are: United Airlines, Inc.; Delta Air Lines, Inc.; Southwest Airlines Co.; US Airways, Inc.; BP West Coast Products LLC; Chevron Products Co.; ExxonMobil Oil Corporation; Valero Marketing and Supply Company; and Tesoro Refining and Marketing Company LLC.

II. ANALYSIS

Under the standard dictated by the Administrative Procedure Act, we will vacate FERC ratemaking decisions that are arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A). Conversely, "FERC's decisions will be upheld as long as the Commission has examined the relevant data and articulated a rational connection between the facts found and the choice made." *ExxonMobil*, 487 F.3d at 951. "In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues." *Id.* (quoting *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996)). While we have not expressly stated whether we review for substantial evidence FERC's factual findings within orders under the Interstate Commerce Act, "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same." *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (citation omitted); *cf. Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1499 n.39 (D.C. Cir. 1984) (noting the uncertainty surrounding whether the substantial evidence standard applies to FERC's ratemaking decisions under the Interstate Commerce Act).

The statutory regime governing FERC's ratemaking for oil pipelines is unique. In 1906, as an amendment to the Interstate Commerce Act (the "ICA"), Congress delegated regulatory authority over oil pipelines to the Interstate Commerce Commission. Pub. L. No. 59-337, § 1, 34 Stat. 584, 584. But in 1977, Congress transferred regulatory authority over oil pipelines to FERC. Department of Energy Organization Act, Pub. L. No. 95-91, § 402(b), 91 Stat. 565, 584 (1977); *see also* 49 U.S.C. § 60502. Congress then repealed the ICA in 1978 *except* as related to FERC's regulation of oil pipelines. Pub. L. No. 95-473, § 4(c), 92

Stat. 1337, 1470. For such regulation, the ICA continues to apply "as [it] existed on October 1, 1977 . . . ." *Id.* The relevant provisions of the ICA were last reprinted in the appendix to title 49 of the 1988 edition of the United States Code, to which we refer as necessary. *Cf. BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1271 n.1 (D.C. Cir. 2004).

Substantively, the ICA requires that all rates be "just and reasonable." 49 U.S.C. app. § 1(5)(a) (1988). Just and reasonable rates are "rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital." *ExxonMobil*, 487 F.3d at 951 (citation omitted).

A. FERC's Choice of Data for Assessing SFPP's Real Return on Equity Was Arbitrary or Capricious

SFPP challenges as arbitrary or capricious FERC's reliance on cost-of-equity data from September 2008 when calculating SFPP's so-called "real" return on equity and the Commission's rejection of more recent data from April 2009. FERC argues in response that the more recent cost-of-equity data "encompassed the stock market collapse beginning in late 2008," and was therefore anomalous. FERC's Br. 31-32. We agree that FERC had substantial evidence to support its determination that the 2009 data did not reflect SFPP's long-term cost of equity. However, because the Commission provided no reasoned basis to justify its decision to rely on the September 2008 data, we hold that it engaged in arbitrary or capricious decision-making and therefore grant SFPP's petition on this issue.

The Supreme Court stated in *Federal Power Commission v. Hope Natural Gas Co.*, that "the return to the equity owner [of a pipeline] should be commensurate with returns on investments in other enterprises having corresponding risks." 320 U.S. 591, 603 (1944). Further, "[t]hat return . . . should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.* In accordance with these principles, FERC uses a so-called "discounted cash flow" model to determine a pipeline's rate of return on equity. *See Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048, at 61,271-73 ¶¶ 3-9 (2008) (discussing the mechanics of the discounted cash flow model). "The premise of the [discounted cash flow] model is that the price of a stock is equal to the stream of expected dividends, discounted to their present value." *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 57 (D.C. Cir. 1999). Under the discounted cash flow model, FERC "examin[es] the percentage returns on equity the market requires for members of a proxy group." Opinion 511, 134 FERC ¶ 61,121, at ¶ 242. "The members of the proxy group must fall with[in] a reasonable range of comparable risks and have publically traded securities." *Id.* Based on the stock prices of securities within the proxy group, FERC "calculates the yield (the percentage return) by dividing the dollar amount of the distribution by the stock price." *Id.* ¶ 243. After applying the distribution over the long-term, FERC "discount[s] back at the first year's percentage yield to obtain the return on equity required to attract capital to the firm." *Id.* The resulting figure is the "nominal" return on equity.

Under its so-called "trended original cost" methodology, FERC splits the nominal return on equity into an inflation component and the so-called "real" return on equity, defined as the difference between the nominal return on equity and

inflation. *See Williams Pipe Line Co.*, 31 FERC ¶ 61,377, at 61,833-34 (1985). While the pipeline can recover its real return on equity in its current annual rates, inflation "is written-off or amortized over the life of the property." *Id.* at 61,834; *see also Ass'n of Oil Pipe Lines*, 83 F.3d at 1429.

When assessing the pipeline's cost structure, FERC "uses a 'test year' methodology to determine a pipeline's annual cost of service." *BP West Coast*, 374 F.3d at 1298. This method starts with a "base period" that "consist[s] of 12 consecutive months of actual experience" with some specified adjustments. 18 C.F.R. § 346.2(a)(1)(i). FERC then defines a "test period" that generally "must consist of a base period adjusted for changes in revenues and costs which are known and are measurable with reasonable accuracy at the time of [rate] filing and which will become effective within nine months after the last month of available actual experience utilized in the filing." *Id.* § 346.2(a)(1)(ii). In this case, FERC used a base period from January 1, 2007, through December 31, 2007, meaning that the "nine-month adjustment period for test period changes [wa]s from January 1, 2008, through September 30, 2008." Opinion 511, 134 FERC ¶ 61,121, at ¶ 8.

However, for the discounted cash flow analysis, "the Commission prefers the most recent financial data in the record," *id.* ¶ 208, "because the market is always changing and later figures more accurately reflect current investor needs," *Trunkline Gas Co.*, 90 FERC ¶ 61,017, at 61,117 (2000). In other words, FERC may use post-test period data for purposes of the discounted cash flow analysis, "recognizing that updates are not permitted once the record has been closed and the hearing has concluded." Opinion 511, 134 FERC ¶ 61,121, at ¶ 208.

SFPP initially submitted return-on-equity data for the six-month period ending with the test period, i.e., through September 2008. *See* Exhibit SFP-1, Prepared Direct Testimony of J. Peter Williamson on Behalf of SFPP, L.P., No. IS08-390-002, at 3-22 (FERC June 2, 2009). However, the pipeline later provided two updates, one for the six-month period ending January 2009, *see* Exhibit SFP-76, No. IS08-390-002, at 1 (FERC June 2, 2009), and one for the six-month period ending April 2009, *see* Exhibit SFP-323, No. IS08-390-002, at 1 (FERC June 2, 2009). From the September 2008 data, the nominal return on equity was 12.63 percent, with 7.69 percent representing the real return on equity and 4.94 percent as inflation.[2] Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 255. From the January 2009 data, the nominal return on equity was 14.33 percent, distributed between 14.30 percent real return on equity and 0.03 percent inflation. Exhibit SFP-76, at 1. The April 2009 data showed a nominal return on equity of 14.09 percent with a 14.83 percent real return on equity and -0.74 percent inflation. Exhibit SFP-323, at 1. FERC also "incorporated into the . . . record" SFPP cost-of-equity data for the six-month periods ending in February 2010 and March 2010. Opinion 511, 134 FERC ¶ 61,121, at ¶ 209 & n.339. The nominal return on equity from the February 2010 data was 11.24 percent, 2.14 percent

[2] There is some ambiguity in the record regarding the September 2008 return on equity data. SFPP's initial filings show that the nominal return on equity for this period was 13.01 percent with 5.37 percent inflation and 7.64 percent real return on equity. *See* Exhibit SFP-1, at 21; Exhibit SFP-5, No. IS08-390-002, at 9 (FERC June 2, 2009); Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 252. As the exact numbers do not affect our holding and the parties otherwise agree that 7.69 percent was the real return on equity for the September 2008 period, we refer to that figure. *See* SFPP's Br. 8; FERC's Br. 33-34.

of which was inflation with a 9.09 percent real return on equity. SFPP's Br. App. A. From the March 2010 data, the nominal return on equity was 11.03 percent, inflation was 2.31 percent, and the real return on equity was 8.72 percent. *Id.*

SFPP argues that FERC acted arbitrarily or capriciously when it relied on the September 2008 data, instead of the April 2009 data, in setting SFPP's real return on equity. In particular, SFPP contends that FERC ignored its own "policy of using the most recent equity rate of return data in the record" and provided no explanation for its choice of the September 2008 data. SFPP's Br. 22-23. In FERC's view, the April 2009 data is not "representative of SFPP's cost of capital during the future periods the rates proposed in this case may be in effect." Opinion 511, 134 FERC ¶ 61,121, at ¶ 209. Specifically, that data "reflects the collapse of the stock market in late 2008 and early 2009" and a "minimal or negative inflation rate" not likely to continue into the future. *Id.*

We hold that it was reasonable for FERC to conclude that the April 2009 data was not representative of SFPP's long-term cost of capital. SFPP's argument that FERC has a bright-line policy of relying on the most recently available data to determine the real return on equity is incorrect. As FERC stated in *Trunkline Gas Co.*, the Commission "seeks to find the *most representative figures* on which to base rates." 90 FERC ¶ 61,017, at 61,049 (emphasis added). Therefore, FERC "may adopt test period estimates, or it may adopt other, more representative figures of historical costs . . . if it determines that these other figures are the best, most representative evidence of the pipeline's experience for the test period." *Id.* The real return on equity from the April 2009 data, 14.83 percent, is the highest among each of the

periods FERC considered, and only this data includes negative inflation. Had FERC decided to use the April 2009 data, SFPP would have been able to recoup essentially its entire *nominal* return on equity in its current rates, *see Williams Pipe Line Co.*, 31 FERC ¶ 61,377, at 61,833-34, despite the fact that the February 2010 and March 2010 data indicated that negative inflation was a short-term phenomenon. Substantial evidence therefore supported FERC's finding that the April 2009 data was not the most representative data for assessing SFPP's real return on equity, meaning that FERC did not engage in arbitrary-or-capricious decision-making by rejecting that data. *See* Opinion 511, 134 FERC ¶ 61,121, at ¶¶ 208-09; Opinion 511-A, 137 FERC ¶ 61,220, at ¶¶ 256-59.

However, this conclusion does not end the inquiry. In lieu of the more recently available April 2009 data, FERC relied instead on the September 2008 data to fix SFPP's real return on equity. *See* Opinion 511, 134 FERC ¶ 61,121, at ¶ 209. Because we agree with SFPP that FERC provided no reasoned explanation for its choice of the September 2008 data, we grant SFPP's petition for review and vacate FERC's orders with respect to this issue.

While there may be evidence to support the conclusion that the *nominal* return on equity for September 2008 was in line with historical trends, this evidence does not show that the *real* return on equity for that time period was representative of SFPP's costs. *See* Request for Rehearing of SFPP, L.P., No. IS08-390-002, at 11-12 (FERC Apr. 11, 2011) (SFPP conceding that the September 2008 nominal return on equity is "consistent with historical periods"); *see also* Opinion 511, 134 FERC ¶ 61,121, at ¶ 209; Opinion 511-A, 137 FERC ¶ 61,220, at ¶¶ 252-59. To the contrary, FERC provides only a cursory comparison of real returns on

equity from the September 2008 through the March 2010 time periods, and otherwise appears to have chosen the smallest real return on equity from the data available. *See* Opinion 511, 134 FERC ¶ 61,121, at ¶ 209. FERC was further unable to identify any such explanation in the record when pressed to do so at oral argument. *See* Oral Arg. Tr. 44:6-45:14. While "we are particularly deferential to the Commission's expertise with respect to ratemaking issues," *ExxonMobil*, 487 F.3d at 951 (citation and internal quotation marks omitted), FERC cannot rely in conclusory fashion on its knowledge and expertise without adequate support in the record. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010).

Because we agree that FERC engaged in arbitrary-or-capricious decision-making by adopting the September 2008 real return on equity without reasoned explanation, we need not reach SFPP's alternative argument that FERC improperly rejected SFPP's proposal to adopt an average real return on equity. We grant SFPP's petition on this issue.

B. FERC'S INDEXING ANALYSIS WAS NOT ARBITRARY OR CAPRICIOUS

SFPP also argues that FERC engaged in arbitrary-or-capricious decision-making when it declined to apply the full amount of the 2009 rate index adjustment in calculating SFPP's rates and refunds for the period from July 1, 2009, through June 30, 2010. FERC responds that it complied with the plain text of its regulations when it found that granting SFPP a full indexed rate adjustment would result in unjust and unreasonable rates. We agree with FERC and deny SFPP's petition on this issue.

As part of the Energy Policy Act of 1992, Congress required FERC to "issue a final rule which establishes a simplified and generally applicable ratemaking methodology for oil pipelines in accordance with section 1(5) of part I of the [ICA]." Pub. L. No. 102-486, § 1801(a), 106 Stat. 2776, 3010. Congress also mandated that "the Commission . . . issue a final rule to streamline procedures of the Commission relating to oil pipeline rates in order to avoid unnecessary regulatory costs and delays." *Id.* § 1802(a). In response, FERC released a notice of proposed rulemaking on July 2, 1993, which set forth an indexing scheme for setting oil pipeline rates. *See Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992; Proposed Rulemaking*, 58 Fed. Reg. 37,671, at 37,672 (1993). FERC then issued on November 4, 1993, its final rule implementing the indexing scheme. *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, 58 Fed. Reg. 58,753, at 58,754 (1993).

Under the final rule, FERC required that oil pipelines utilize the indexing system for rate changes unless specified circumstances permit use of an alternative methodology. *Id.* at 58,757. "First, a cost-of-service showing may be utilized to change a rate whenever a pipeline can show that it has experienced uncontrollable circumstances that preclude recoupment of its costs through the indexing system." *Id.*; *see also* 18 C.F.R. § 342.4(a). "Second, whenever a pipeline can secure the agreement of all existing customers, it may file a rate change based on such a settlement." 58 Fed. Reg. at 58,757; *see also* 18 C.F.R. § 342.4(c). Finally, FERC permits market-based ratemaking if the pipeline can show that it "lacks significant market power in the markets in question . . . ." 58 Fed. Reg. at 58,757; *see also* 18 C.F.R. § 342.4(b).

At a general level, FERC's indexing methodology directs pipelines to file initial rates, usually reflecting their costs-of-service. 58 Fed. Reg. at 58,758. Based on the initial rate filings, FERC then calculates rate ceilings for future years based on the change in the Producer Price Index for Finished Goods. *Id.* at 58,760; *see also* 18 C.F.R. § 342.3(d)(2). Importantly, "the index establishes a *ceiling* on rates—it does not establish the rate itself." 58 Fed. Reg. at 58,759. In other words, "a company is not required to charge the ceiling rate, and if it does not, it may adjust its rates upwards to the ceiling at any time during the year upon filing of the requisite data . . . and upon giving the appropriate notice." *Id.* at 58,761. For future years, the index "is cumulative[, meaning that] . . . the index applies to the applicable ceiling rate, which is required to be calculated each year, not to the actual rate charged." *Id.* at 58,762. The stated purpose of this regime is to "preserve[] the value of just and reasonable rates in real economic terms [by] . . . tak[ing] into account inflation, thus allowing the nominal level of rates to rise in order to preserve their real value in real terms." *Id.* at 58,759.

In this case, SFPP filed cost-of-service rates, effective August 1, 2008, proposing to increase the rates charged on its West Line "based upon the cost of providing the service covered by the rate . . . ." 18 C.F.R. § 342.4(a). Because this rate took effect during the 2008 index year—i.e., between July 1, 2008, and June 30, 2009—it also "constitute[d] the applicable ceiling level for that index year." *Id.* § 342.3(d)(5); *see also id.* § 342.3(c) (defining the index year as "the period from July 1 to June 30"). Therefore, to compute the ceiling level for the 2009 index year—i.e., between July 1, 2009, and June 30, 2010—SFPP "multipl[ied] the previous index year's [2008's] ceiling level by the most recent index published by [FERC]." *Id.* § 342.3(d)(1). The index for 2009 was 7.6025 percent.

Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, 127 FERC ¶ 61,184 (2009). SFPP therefore contends that it has the right to apply this full index when calculating its 2009 rates. FERC argues that, because SFPP's cost-of-service rates for 2008 already partially "accounted for the changes in costs associated with the index increase," Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 407, SFPP can only apply that portion of the 2009 index "not reflected in the cost of service adopted by Opinion No. 511 or the rates SFPP must establish [in Opinion No. 511-A]," *id.* ¶ 405. In particular, FERC permitted SFPP to use an index of 1.9006 percent, "correspond[ing] to the three months of 2008 cost changes that are outside" the period of costs already covered by SFPP's proposed rates. *Id.* In other words, FERC limited SFPP's 2009 index to twenty-five percent of the published value for that index year.

Were this information all that the Court had to consider, SFPP's argument that FERC "ignore[d] its regulations, which have the force of law," SFPP's Br. 35, might be plausible in light of the plain text of FERC's indexing regulations, *see* 18 C.F.R. § 342.3. But the analysis is only half-complete. "[M]erely because the Commission regulations permit SFPP to request the index increase does not mean that the Commission is bound to accept the indexed rate increase." Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 407. In particular, "persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act." 18 C.F.R. § 343.2(b). A protest to a proposed rate under 18 C.F.R. § 343.2 must allege "reasonable grounds for asserting that the rate violates the applicable ceiling level, or that the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable, or that the rate decrease is so substantially less than the actual cost

decrease incurred by the carrier that the rate is unjust and unreasonable." *Id.* § 343.2(c)(1). In this case, the Shippers did file protests to SFPP's indexed rates for the 2009 index year. *See* Protest and Comments of Chevron Products Company, ConocoPhillips Company, Continental Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., US Airways, Inc., and Valero Marketing and Supply Company on SFPP, L.P. Compliance Filing ("Protest I"), Nos. IS08-390-002, IS08-390-006, IS11-338-000 (FERC June 15, 2011); Protest of ExxonMobil Oil Corporation and BP West Coast Products LLC of Compliance Filing Implementing Opinion No. 511 ("Protest II"), No. IS08-390-006 (FERC June 15, 2011). Therein, they argued that because "[t]he 2009 index is based on [FERC's] computation of industry-wide cost increases between 2007 and 2008[,]" SFPP should not be permitted to double-recover its costs by combining its 2008 cost-of-service rates with proposed 2009 indexed rates. Protest II, at 12. Equivalently, the Shippers alleged that SFPP's 2009 indexed rate increase was "substantially in excess of the actual cost increases incurred by [SFPP]" during 2008. 18 C.F.R. § 343.2(c)(1). FERC agreed. *See* Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 411; Opinion 511-B, 150 FERC ¶ 61,096, at ¶¶ 27-33. "Because the subject of our scrutiny is a ratemaking—and thus an agency decision involving complex industry analyses and difficult policy choices—the court will be particularly deferential to the Commission's expertise." *Ass'n of Oil Pipe Lines*, 83 F.3d at 1431. With this principle in mind, we discern no error in FERC's decision-making.

SFPP's principal retort to this otherwise straightforward application of FERC's regulations is that the alleged purpose of FERC's indexing procedures is to permit a pipeline to capture future inflation-based cost adjustments, not prior-year cost-of-service changes. FERC responds, somewhat

cryptically, that indexing "allows rates to track inflation in the general economy, essentially preserving pipelines' existing rates in real economic terms." FERC's Br. 43.

SFPP's argument is irrelevant to this case. Admittedly, whether FERC's indexing mechanism is retrospective or prospective is unclear. For example, FERC has previously described the purpose of indexing as "preserv[ing] the value of just and reasonable rates in real economic terms . . . [by] tak[ing] into account inflation, thus allowing the nominal level of rates to rise in order to preserve their real value in real terms." *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, 58 Fed. Reg. at 58,759; *see also SFPP, L.P.*, 117 FERC ¶ 61,271, at 62,337 (2006). By contrast, we have stated that indexing "enable[s] pipelines to recover costs by allowing pipelines to raise rates at the same pace as they are predicted to experience cost increases." *Ass'n of Oil Pipe Lines*, 83 F.3d at 1430. However, once a party files a protest to a pipeline's proposed rates, FERC's regulations state that the Commission will compare the "actual cost increases *incurred* by the carrier" with the proposed rate increase. 18 C.F.R. § 343.2(c)(1) (emphasis added). FERC made this comparison when it noted that SFPP would effectively double-recover its 2008 costs were it to receive the full 2009 index. *See* Opinion 511-A, 137 FERC ¶ 61,220, at ¶¶ 409-11; Opinion 511-B, 150 FERC ¶ 61,096, at ¶¶ 27-33. While admittedly FERC's analysis was less quantitative than in prior rate proceedings, we hold that FERC provided sufficient justification for its decision to reduce SFPP's 2009 index to one-quarter of the published value. *See* Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 411 n.687; *SFPP, L.P.*, 135 FERC ¶ 61,274, at 62,513 ¶¶ 11-12 (2011) (describing the so-called "percentage comparison test"); *see also SFPP, L.P.*, 117 FERC ¶ 61,271, at 62,337 ¶ 5 (denying indexed rate increase to SFPP's East Line rates where base

rates already "recover[ed] all the relevant operating and capital costs").

SFPP's reliance on prior FERC proceedings involving indexing, *see, e.g.*, Opinion 435, 86 FERC ¶ 61,022, at 61,085 (2000); Opinion 435-A, 91 FERC ¶ 61,135, at 61,516 (2000), is inapposite. As SFPP admitted during oral argument, those proceedings at most permitted FERC to apply the full index to SFPP's rates but did not compel it. *See* Oral Arg. Tr. 22:12-:15. Notably, FERC did not address in those cases whether the indexed rates were "so substantially in excess of the actual cost increases incurred by the carrier," 18 C.F.R. § 343.2(c)(1), which it has done here. We otherwise agree with FERC that SFPP "has failed to demonstrate that [FERC's] determination . . . is inconsistent with precedent." FERC's Br. 48.

We therefore deny SFPP's petition on this issue.

C. FERC Must Demonstrate that There Is No Double Recovery of Taxes for Partnership Pipelines

The Shippers argue that FERC engaged in arbitrary-or-capricious decision-making when it granted an income tax allowance to SFPP. Specifically, the Shippers note that, as a partnership pipeline, SFPP is not taxed at the pipeline level. Because FERC's discounted cash flow return on equity already ensures a sufficient after-tax return to attract investment to the pipeline, they argue, the tax allowance results in "double recovery" of taxes to SFPP's partners. In FERC's view, we already decided this issue in *ExxonMobil*, where we held that FERC's policy of permitting partnership pipelines to receive a tax allowance was "not unreasonable" in light of "FERC's expert judgment about the best way to

equalize after-tax returns for partnerships and corporations." 487 F.3d at 953. FERC therefore posits that the Shippers' petition in this case is an impermissible collateral attack on our decision in *ExxonMobil*. Further, FERC denies that granting a tax allowance to SFPP results in a double-recovery of taxes and avers that any disparity in after-tax returns to partners or shareholders arises from the Internal Revenue Code, not from FERC's tax allowance policy. Because we reserved the issue of whether the combination of the discounted cash flow return on equity and the tax allowance results in double recovery of taxes for partnership pipelines, we disagree with FERC's collateral attack argument. Nonetheless, we acknowledge that our opinion in *ExxonMobil* stated that it may be reasonable for FERC to grant a tax allowance to partnership pipelines. However, because FERC failed to demonstrate that there is no double-recovery of taxes for partnership, as opposed to corporate, pipelines, we hold that FERC acted arbitrarily or capriciously. We therefore grant the Shippers' petition.

As all parties acknowledge, this case is not the first time that we have considered FERC's tax allowance policy for oil pipelines. Until our decision in *BP West Coast*, 374 F.3d at 1293, FERC relied on the so-called *Lakehead* policy when granting tax allowances. Named for the FERC decision in which the Commission formalized the policy, *see Lakehead Pipe Line Co.*, 71 FERC ¶ 61,338, at 62,314-15 (1995), the *Lakehead* policy addressed the situation in which a partnership pipeline has both corporate-partners and individual-partners. FERC therein concluded:

> When partnership interests are held by corporations, the partnership is entitled to a tax allowance in its cost-of-service for those corporate interests because the tax cost will be passed on to the corporate owners who must pay corporate income taxes on their allocated share of income directly on their tax returns. . . . However, the Commission concludes that Lakehead should not receive an income tax allowance with respect to income attributable to the limited partnership interests held by individuals. This is because those individuals do not pay a corporate income tax.

Id.

We reviewed the *Lakehead* policy in *BP West Coast* and held that "[w]e cannot conclude that FERC's inclusion of the income tax allowance in SFPP's rates is the product of reasoned decisionmaking." 374 F.3d at 1288. In that case, we started from the principle "that the regulating commission is to set rates in such a fashion that the regulated entity yields returns for its investors commensurate with returns expected from an enterprise of like risks." *Id.* at 1290. Consistent with this principle, we rejected FERC's justifications for its *Lakehead* policy and held that "where there is no tax generated by the regulated entity, either standing alone or as part of a consolidated corporate group, the regulator cannot create a phantom tax in order to create an allowance to pass through to the rate payer." *Id.* at 1291.

Concededly, our use of the term "phantom tax" in *BP West Coast* lacked precision. This was made apparent in *ExxonMobil*, as several shipper-petitioners challenged FERC's revised tax allowance policy, which granted a full income tax allowance to both partnership pipelines and

corporate pipelines, regardless of the identities of the partners or shareholders. 487 F.3d at 950. We rejected the petitioners' arguments in that case, stating that because "investors in a limited partnership are required to pay tax on their distributive shares of the partnership income, even if they do not receive a cash distribution[,] . . . the income received from a limited partnership should be allocated to the pipeline and included in the regulated entity's cost-of-service." *Id.* at 954. FERC did not create a "phantom tax" because it did not arbitrarily distinguish between corporate and individual partners in a partnership pipeline, and the Commission adequately explained why partner taxes could be considered a pipeline cost.

In this case, the Shippers challenge the same tax allowance policy at issue in *ExxonMobil*. Given that nothing has changed with regard to this policy, FERC's argument that the Shippers present an impermissible collateral attack to our *ExxonMobil* decision is, on first consideration, conceivable. However, as the Shippers mention in their reply brief, FERC averred during briefing in *ExxonMobil* that it was addressing the double recovery issue in a separate proceeding. *See* Br. of Resp't at 30-31, *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945 (D.C. Cir. 2007) (Nos. 04-1102 *et al.*). While we did not expressly reserve the issue in our *ExxonMobil* opinion, the fact that FERC took this position both in *ExxonMobil* and in an accompanying case, *see* Br. of Resp't at 29-30, *Canadian Ass'n of Petroleum Producers v. FERC*, 487 F.3d 973 (D.C. Cir. 2007) (No. 05-1382), reflects our implicit reservation of the question. To clarify, we held in *ExxonMobil* that, to the extent FERC has a reasoned basis for granting a tax allowance to partnership pipelines, it may do so. 487 F.3d at 955. The Shippers now challenge whether such a reasoned basis exists based on grounds that FERC agreed were not at

issue in the prior case. We therefore hold that the Shippers' petition is not a collateral attack on that decision.

As to the merits, we hold that FERC has not provided sufficient justification for its conclusion that there is no double recovery of taxes for partnership pipelines receiving a tax allowance in addition to the discounted cash flow return on equity. Despite their attempts to inundate the record with competing mathematical analyses of whether a double recovery of taxes for partnership pipelines exists, the parties do not disagree on the essential facts. First, unlike a corporate pipeline, a partnership pipeline incurs no taxes, except those imputed from its partners, at the entity level. *See* 26 U.S.C. § 7704(d)(1)(E). Second, the discounted cash flow return on equity determines the pre-tax investor return required to attract investment, irrespective of whether the regulated entity is a partnership or a corporate pipeline. *See* Opinion 511, 134 FERC ¶ 61,121, at ¶¶ 243-44; Shippers' Br. 6; *see also supra* Part II.A (discussing the mechanics of the discounted cash flow methodology). Third, with a tax allowance, a partner in a partnership pipeline will receive a higher after-tax return than a shareholder in a corporate pipeline, at least in the short term before adjustments can occur in the investment market. *See* FERC's Br. 29; Shippers' Br. 34-35; Oral Arg. Tr. 32:17-33:2.

These facts support the conclusion that granting a tax allowance to partnership pipelines results in inequitable returns for partners in those pipelines as compared to shareholders in corporate pipelines. Because the Supreme Court has instructed that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks," FERC has not shown that the resulting rates under FERC's current policy are "just and reasonable." *Hope Nat. Gas Co.*, 320 U.S. at 603. FERC

attempts to circumvent this deduction by arguing, first, that there is no "gross-up" in the return rate for partnership pipelines to account for income taxes, and, second, that any disparate treatment between partners in partnership pipelines and shareholders in corporate pipelines is the result of the Internal Revenue Code, not FERC's tax allowance policy. These arguments, which are two sides of the same metaphorical coin, are not persuasive.

The crux of FERC's "gross-up" theory is that "in the context of Commission rate design[,]" Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 290, "the Commission does not gross up a jurisdictional entity's operating revenues or return to cover the income taxes that must be paid to obtain its after-tax return," *id.* ¶ 280. What the Commission apparently means by this rather obscure statement is that it imputes the income taxes paid by partners in a partnership pipeline to the pipeline itself, meaning that an income tax allowance is then necessary to equalize the after-tax "entity-level" rates of return for partnership and corporate pipelines. *See* Opinion 511, 134 FERC ¶ 61,121, at ¶¶ 241-50; *see also* Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 319. Of course, when one then considers the after-tax returns to partners or shareholders, the necessary conclusion is that partners in a partnership pipeline receive a windfall compared to shareholders in a corporate pipeline, a point which FERC concedes. *See* FERC's Br. at 29; Oral Arg. Tr. 32:17-33:2. FERC, in a form of Orwellian doublethink, attributes this disparity in returns to the Internal Revenue Code while simultaneously denying that double-recovery exists. *See* Opinion 511-A, 137 FERC ¶ 61,220, at ¶ 315.

True, FERC has a justifiable basis for its attribution of partner taxes to the partnership pipeline. In *ExxonMobil*, we acknowledged that "investors in a limited partnership are

required to pay tax on their distributive shares of the partnership income, even if they do not receive a cash distribution." 487 F.3d at 954. By contrast, "a shareholder of a corporation is generally taxed on the amount of the cash dividend actually received." *Id.* For this reason, allocation of partner-level taxes to a partnership pipeline may not result in a "phantom tax" of the type we rejected in *BP West Coast*. However, our holding in *ExxonMobil* did not absolve FERC of its obligation to ensure "commensurate . . . returns on investments" for "equity owner[s]" as required under *Hope Natural Gas*, 320 U.S. at 603. Even if FERC elects to impute partner taxes to the partnership pipeline entity, it must still ensure parity between equity owners in partnership and corporate pipelines. FERC's failure to do so in this case is therefore arbitrary or capricious.

The remaining issue is the appropriate remedy. The Shippers do not request that we overturn our decision in *ExxonMobil*, which we are unable to do in any case absent an en banc decision from the Court. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). But we also believe such action is unnecessary. When questioned at oral argument, FERC conceded that it might be able to remove any duplicative tax recovery for partnership pipelines directly from the discounted cash flow return on equity. *See* Oral Arg. Tr. 36:3-:10. We note also that, prior to *ExxonMobil*, FERC considered the possibility of eliminating all income tax allowances and setting rates based on pre-tax returns. *See Policy Statement on Income Tax Allowances*, 111 FERC ¶ 61,139, at 61,741 (2005). To the extent that FERC can provide a reasoned basis for such a policy, we do not read our decision in *ExxonMobil* as foreclosing that option. *See* 487 F.3d at 955 ("Arguably, a fair return on equity might have been afforded if FERC had chosen the fourth alternative of computing return on pretax income and providing no tax

allowance at all for the pipeline owners."). We therefore grant the Shippers' petition, vacate FERC's orders with respect to this issue, and remand for FERC to consider these or other mechanisms for which the Commission can demonstrate that there is no double recovery.

III. CONCLUSION

For the reasons stated herein, the Court: (i) grants-in-part SFPP's petition with respect to the choice of data for assessing SFPP's real return on equity, vacates FERC's orders accordingly, and remands for further proceedings consistent with this opinion; (ii) denies-in-part SFPP's petition with respect to the indexing issue; and (iii) grants the Shippers' petition, vacates FERC's orders with respect to the double recovery issue, and remands to FERC for further proceedings consistent with this opinion.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5053 **September Term, 2015**

1:15-cv-00071-UNA

Filed On: June 6, 2016

Seavon Pierce,

Appellant

v.

Kamala D. Harris, et al.,

Appellees

BEFORE: Rogers and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the court's order filed February 10, 2016, and the response thereto and the notices filed by appellant, it is

ORDERED, on the court's own motion, that this case be dismissed for lack of prosecution. See D.C. Circuit Rule 38. The court's order filed February 10, 2016, directed petitioner to pay the full appellate filing and docketing fees by March 11, 2016, or face dismissal for lack of prosecution. To date, the district court has no record of receipt of payment from the appellant, and appellant offers no valid reason why he should not be required to pay the full appellate filing and docketing fees pursuant to 28 U.S.C. § 1915(g). To the extent appellant reiterates his allegations of imminent danger, this court already determined that appellant has failed to make out the requisite imminence to qualify for an exception to the three-strikes bar. See 12/16/15 Order at 2.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5053 **September Term, 2015**

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BEFORE: Rogers and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

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Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5192 **September Term, 2015**

1:14-cv-01716-RMC

Filed On: June 6, 2016

Kurt Madsen,

Appellant

v.

William Smith,

Appellee

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of appellee's motion to dismiss, and appellant's motion filed October 21, 2015, which the court construes as a response including a request for a certificate of appealability; and the various supplements and notices filed by appellant in support of this motion and his amended petition for a writ of habeas corpus; and the motion to permit pro se electronic filing status, the motion for waiver of PACER fees, the motion to preserve Rule 60(b) objections, the motion for intervention by the United States Congress, the motion for application of the mailbox rule and for certification of District of Columbia records, the emergency motion for discharge and an injunction, the motion for certified discovery, the Ethics in Government Act motion, the motion for release pending appeal, the motion to stay the underlying proceedings, the motion for permission to electronically file exhibits, and the emergency motion for a 28 U.S.C. § 2243 hearing, it is

ORDERED that the request for a certificate of appealability be denied and the motion to dismiss granted. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealabilty is warranted. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In denying reconsideration, the district court correctly concluded it lacked jurisdiction to entertain appellant's habeas petition, and that the petition had become moot, as appellant had since been extradited to the State of Washington. See Stokes v. U.S. Parole Comm'n, 374 F.3d 1235, 1239 (D.C. Cir. 2004) (a district court "may not entertain a habeas petition involving present physical custody unless the respondent custodian is within its territorial jurisdiction"). To the extent that appellant's return to the D.C. Department of Corrections' custody falls within the exception to the mootness doctrine for cases that are "capable of repetition,

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5192 **September Term, 2015**

yet evading review," Spencer v. Kemna, 523 U.S. 1, 17 (1998), dismissal is nonetheless warranted because appellant has not demonstrated that "jurists of reason would find it debatable whether the [habeas] petition states a valid claim of the denial of a constitutional right." Slack, 529 U.S. at 484. It is

FURTHER ORDERED that appellant's request that he be provided with copies of the docket in this case and the supplement filed on December 7, 2015, be granted. The Clerk is directed to send appellant copies of these materials. It is

FURTHER ORDERED that appellant's motions to permit pro se electronic filing status, for waiver of PACER fees, to preserve Rule 60(b) objections, for intervention by the U.S. Congress, for application of the mailbox rule and for certification of District of Columbia records, for discharge and an injunction, for certified discovery, for release pending appeal, to stay the underlying proceedings, for permission to electronically file exhibits, the Ethics in Government Act motion, and the emergency motion for a 28 U.S.C. § 2243 hearing, be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5004 **September Term, 2015**

1:14-cv-00403-RDM

Filed On: June 6, 2016

Sai,

Appellant

v.

Transportation Security Administration, (TSA),

Appellee

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed January 19, 2016, and the appellant's petition for an initial hearing en banc, which the court denied by order filed March 11, 2016; and the lack of any further response to the order to show cause, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed. This court lacks jurisdiction to review on an interlocutory basis the district court's denial of appellant's motion for appointment of counsel. See Ficken v. Alvarez, 146 F.3d 978, 980-83 (D.C. Cir. 1998) (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7001 **September Term, 2015**

1:15-cv-01742-ABJ

Filed On: June 6, 2016

In re: Darren Williams,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, this court's order of January 8, 2016, and the response thereto, which is styled as a memorandum of law in support of petitioner's habeas corpus petition for immediate release; the motion to proceed on appeal in forma pauperis ("IFP"); and the motion to appoint counsel, it is

ORDERED that the motion for leave to proceed IFP be granted. It is

FURTHER ORDERED that the motion to appoint counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. The transfer of the district court file for the habeas petition under 28 U.S.C. § 2241 deprives this court of jurisdiction to review the transfer unless there is a substantial question whether the district court had the power to transfer, see In re Asemani, 455 F.3d 296, 300 (D.C. Cir. 2006), and the petitioner has not identified any substantial question. Because petitioner was convicted in state court, the proper vehicle for challenging his conviction and sentence in federal court is an application for a writ of habeas corpus filed under 28 U.S.C. § 2254 in the U.S. District Court for the Northern District of New York, the district court with jurisdiction over petitioner's custodian. See e.g., Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 22, 2016 Decided June 3, 2016

No. 14-1210

STATE OF NEW YORK, ET AL.,
PETITIONERS

v.

U.S. NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with 14-1212, 14-1216, 14-1217

On Petitions for Review of an Order
of the United States Nuclear Regulatory Commission

Andrew W. Amend, Senior Assistant Solicitor General, Office of the Attorney General for the State of New York, argued the cause for petitioners State of New York, et al. With him on the briefs were *Eric T. Schneiderman*, Attorney

General, *John J. Sipos*, *Kathryn M. DeLuca*, *Laura E. Heslin*, Assistant Attorneys General, *Barbara D. Underwood*, Solicitor General, *Anisha S. Dasgupta*, Deputy Solicitor General, *Monica Wagner*, Deputy Bureau Chief, *Maura Healy*, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, *Seth Schofield*, Assistant Attorney General, *Joseph F. Halloran*, *George Jepsen*, Attorney General, Office of the Attorney General for the State of Connecticut, *Robert D. Snook*, Assistant Attorney General, *William H. Sorrell*, Attorney General, Office of the Attorney General for the State of Vermont, and *Kyle H. Landis-Marinello*, Assistant Attorney General. *Melissa A. Hoffer*, Assistant Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, entered an appearance.

Kevin W. Bell was on the brief for *amicus curiae* The California State Energy Resources Conservation and Development Commission in support of petitioners State of New York, et al.

Geoffrey H. Fettus argued the cause for petitioners Natural Resources Defense Council, Inc., et al. With him on the briefs were *Diane Curran* and *Mindy Goldstein*.

Wallace L. Taylor was on the brief for *amicus curiae* Sierra Club in support of petitioners.

Andrew P. Averbach, Solicitor, U.S. Nuclear Regulatory Commission, argued the cause for federal respondents. With him on the brief were *John C. Cruden*, Assistant Attorney General, U.S. Department of Justice, *John E. Arbab*, Attorney, *Robert M. Rader*, Senior Attorney, U.S. Nuclear Regulatory Commission, and *Michelle D. Albert*, Attorney. *Charles E. Mullins*, Senior Attorney, entered an appearance.

David A. Repka argued the cause for intervenor-respondents. With him on the brief were *Ellen C. Ginsberg*, *Jonathan M. Rund*, *Brad Fagg*, *Jay E. Silberg*, and *Kimberly A. Harshaw*.

Before: KAVANAUGH, *Circuit Judge*, and EDWARDS and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: Several states, a Native American community, and numerous environmental organizations have filed petitions for review of a rule and generic environmental impact statement promulgated by the Nuclear Regulatory Commission (the "NRC"), concerning the continued, and possibly indefinite, storage of spent fuel from nuclear power plants in the United States. The petitioners argue that the NRC fails to comply with its obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* Specifically, the petitioners contend that the NRC did not consider alternatives to and mitigation measures for the continued storage of spent nuclear fuel, miscalculated the impacts of continued storage, and relied on unreasonable assumptions in its environmental impact statement. Because we hold that the NRC did not engage in arbitrary or capricious decision-making, we deny the petitions for review.

I. BACKGROUND

The United States has committed to the development of nuclear energy, yet to-date it lacks a permanent solution for one consequence of that commitment—the generation of spent nuclear fuel, which "poses a dangerous, long-term

health and environmental risk." *New York v. NRC (New York I)*, 681 F.3d 471, 474 (D.C. Cir. 2012). This case is not the first, nor even the second, time that concerned parties have petitioned this Court to address the spent-nuclear-waste problem. *See, e.g.*, *Minnesota v. NRC*, 602 F.2d 412, 413, 418-19 (D.C. Cir. 1979) (remanding the NRC's decision to expand "on-site capacity for the storage of spent nuclear fuel assemblies" in light of "[t]he complex and vexing question of the disposal of nuclear wastes"); *New York I*, 681 F.3d at 483 (vacating the NRC's rule governing the temporary storage of spent nuclear fuel); *see also In re Aiken Cnty.*, 645 F.3d 428, 430 (D.C. Cir. 2011) (considering a challenge to the Department of Energy's attempt to withdraw its application for a permanent repository for spent nuclear fuel); *Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1277 (D.C. Cir. 1996) (requiring the Department of Energy to fulfill its contractual obligations to dispose of spent nuclear fuel generated by operators of civilian nuclear power plants).

In light of this extensive history, we provide only an overview of the spent-nuclear-fuel issue. The so-called "nuclear fuel cycle" consists of three primary phases. *See* Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* 9-11 (2012) [hereinafter BRC Report]. First, "uranium is mined and processed into fuel for use in a nuclear reactor." *Id.* at 9. Second, nuclear plants use the uranium fuel. *Id.* Third, spent fuel, even if reprocessed, ultimately must be sent for disposal. *Id.* The term "nuclear fuel cycle" is therefore somewhat of a misnomer; "every foreseeable approach to the nuclear fuel cycle still requires a means of disposal that assures the very long-term isolation of radioactive wastes from the environment." *Id.* at 11. And "virtually all spent fuel[] remain[s] radioactive for thousands of years . . . ." *Id.* at 14.

Congress passed the Nuclear Waste Policy Act of 1982 for the purpose of "establish[ing] a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and . . . spent nuclear fuel . . . ." Pub. L. No. 97-425, § 111(b)(1), 96 Stat. 2201, 2207 (codified at 42 U.S.C. § 10131(b)(1)). In 2008, after nearly two decades of regulatory and political discord, the Department of Energy sought construction authorization from the NRC to establish a repository at Yucca Mountain in Nevada. *See In re Aiken Cnty.*, 645 F.3d at 431-32. But a change in the presidential administration brought with it a shift in nuclear energy policy, and in 2010 the Department of Energy withdrew its application. *Id.* at 432. Our characterization in *New York I* of the nation's spent-fuel-storage policy still rings true today: "[a]t this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one." 681 F.3d at 474.

Absent a permanent repository, the majority of spent nuclear fuel remains stored on-site at reactors. BRC Report, *supra*, at 14; *see also New York I*, 681 F.3d at 474. After removal from a reactor, "spent fuel is transferred to a deep, water-filled pool . . . for at least five years" in order to cool. BRC Report, *supra*, at 11. Once the spent nuclear fuel has "cooled sufficiently in wet storage [i.e., a pool], it may be transferred to dry storage[,]" which "generally consist[s] of a fuel storage grid placed within a steel inner container and a concrete and steel outer container[,]" also known as a "dry cask." *Id.* "Most [spent nuclear fuel], however, will remain in spent-fuel pools until a permanent disposal solution is available." *New York I*, 681 F.3d at 474.

From 1984 until this Court's decision in *New York I*, the NRC relied on a "Waste Confidence Decision" in order to assess the risk of on-site storage of spent nuclear fuel and the likelihood that a permanent off-site storage solution will be available. *Id.* at 474-75 (citing *Minnesota v. NRC*, 602 F.2d at 418). In *New York I*, we vacated the 2010 update to the NRC's Waste Confidence Decision and its Temporary Storage Rule governing the storage of spent nuclear fuel. *Id.* at 483. In support of the Waste Confidence Decision and the Temporary Storage Rule, the NRC prepared an environmental assessment ("EA") with a finding of no significant impact. *Id.* at 476. We held that the NRC's analysis was deficient because: (1) the Waste Confidence Decision "did not examine the environmental effects of failing to establish a repository"; (2) the NRC "failed to properly examine the risk of [pool] leaks in a forward-looking fashion"; and (3) the NRC "failed to examine the potential consequences of pool fires" in addition to the probabilities that such fires might occur. *Id.* at 478-79.

In response to our *New York I* decision, the NRC altered its approach to the continued storage of spent nuclear fuel. Instead of relying on an EA with a finding of no significant impact, the NRC prepared a Generic Environmental Impact Statement ("GEIS") and proposed a Continued Storage Rule (the "Rule") to codify its analysis of the effects of continued on-site storage of spent nuclear fuel. *See* 79 Fed. Reg. 56,238 (2014) (Continued Storage Rule); 79 Fed. Reg. 56,263 (2014) (notice of GEIS); J.A. 263-1560 (GEIS). The stated purpose of the Rule "is to preserve the efficiency of the NRC's licensing process by adopting into the NRC's regulations the Commission's generic determinations of the environmental impacts of the continued storage of spent nuclear fuel . . . beyond the licensed life for operations of a reactor . . . ." 79 Fed. Reg. at 56,239. The Rule incorporates

the findings of the GEIS into all future reactor licensing proceedings and precludes reconsideration of those findings absent a waiver under 10 C.F.R. § 2.335. *See* 10 C.F.R. § 51.23(b); 79 Fed. Reg. at 56,243.

The petitioners in this case, a group of states and a Native American community (collectively, the "States") along with a group of environmental organizations (collectively, the "NRDC"), submitted comments to both the GEIS and the Rule. The petitioners now challenge the Rule and the GEIS on the basis that the NRC failed to comply with NEPA. *Cf.* 42 U.S.C. § 4332(C) (detailing NEPA's requirements for an environmental impact statement). They request that we vacate the Rule and the GEIS and remand to the NRC for further proceedings.

Because we hold that the NRC did not engage in arbitrary or capricious decision-making, *see* 5 U.S.C. § 706(2)(A), we deny the petitions for review.

II. ANALYSIS

The States and the NRDC raise a panoply of challenges to the NRC's Rule and the GEIS. First, the petitioners contend that the Rule is a major federal action that requires consideration of alternatives and mitigation measures to reactor licensing. Second, they dispute the NRC's assessment of the environmental impacts of the continued storage of spent nuclear fuel, asserting: (a) failure to employ conservative bounding estimates; (b) inadequate determination of the probability of failure to site a permanent geologic repository; (c) insufficient assessment of the cumulative impacts of the continued storage of spent nuclear fuel; and (d) unjustified dismissal of the risks of short-term, high-volume pool leaks. Relatedly, the petitioners challenge

as "illusory" the NRC's process for granting a petition for waiver of the Rule in site-specific licensing proceedings. Finally, the petitioners characterize several of the NRC's underlying assumptions in the GEIS as unreasonable. We hold that none of these arguments is persuasive and deny the petitions.

A. THE NRC APPROPRIATELY CHARACTERIZED ITS RULE AND CONSIDERED ALTERNATIVES AND MITIGATION MEASURES

The parties disagree over the proper characterization of the NRC's Rule. According to the NRC, the Rule "codif[ies] its generic determinations regarding the environmental impacts of continued storage of spent fuel at-reactor, or away-from-reactor sites beyond a reactor's licensed life for operation." 79 Fed. Reg. at 56,241. The NRC contends that "the Rule is *not* a licensing action . . . ." NRC's Br. 16. The States and the NRDC respond that the federal action at issue is reactor licensing. *See* States' Br. 44; NRDC's Br. 20. And because licensing is indisputably a "major Federal action[]" under NEPA, 42 U.S.C. § 4332(C), the States and the NRDC argue that the NRC was required to prepare a complete environmental impact statement ("EIS"), including a consideration of alternatives and mitigation measures for the continued storage of spent fuel. *See* 42 U.S.C. § 4332(C) ("[M]ajor Federal actions significantly affecting the quality of the human environment" require an EIS or its equivalent.); *see also NRDC v. NRC*, -- F.3d --, No. 14-1225, 2016 WL 1639661, at *1 (D.C. Cir. Apr. 26, 2016) (same). We agree with the NRC and hold that, while the Rule is a "major Federal action" under NEPA, the NRC complied with its NEPA obligations by preparing the GEIS. Because the Rule is not a licensing action, the NRC need not have considered

the alternatives to licensing in the GEIS. We therefore deny the petitions for review on this issue.

Under NEPA, an agency must consider both the environmental impacts of a proposed action and alternatives to that action. *See* 42 U.S.C. § 4332(C). Part of the alternatives analysis includes review of measures available to mitigate adverse effects. *See* 40 C.F.R. §§ 1508.25(b), 1502.14(f). "[W]e review both an agency's definition of its objectives and its selection of alternatives under the 'rule of reason.' . . . That is, as long as the agency 'look[s] hard at the factors relevant to the definition of purpose,' we generally defer to the agency's reasonable definition of objectives." *Theodore Roosevelt Conservation P'ship v. Salazar (Theodore Roosevelt II)*, 661 F.3d 66, 73 (D.C. Cir. 2011) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)) (alteration in original). Furthermore, "NEPA does not require agencies to discuss any particular mitigation plans that they might put in place, nor does it require agencies—or third parties—to effect any." *Theodore Roosevelt Conservation P'ship v. Salazar (Theodore Roosevelt I)*, 616 F.3d 497, 503 (D.C. Cir. 2010) (citation and internal quotation marks omitted).

Our decision in *New York I* compels the result that the NRC's Rule is a major federal action requiring the preparation of either an environmental assessment with a finding of no significant impact or an environmental impact statement. *See* 681 F.3d at 476. Like the NRC's prior Waste Confidence Decision and Temporary Storage Rule, the NRC's Rule in this case "ha[s] a preclusive effect in all future licensing decisions . . . ." *Id.* But unlike in *New York I*, the NRC has done exactly what NEPA requires for major federal actions; it prepared an environmental impact statement. *See id.*; 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3. So long as that

environmental impact statement complies with NEPA, and we hold that it does, no more is required.

The face of the NRC's Rule also makes it clear that it is not a licensing action. To the contrary, the Rule "codif[ies] [the NRC's] generic determinations regarding the environmental impacts of continued storage of spent fuel at-reactor, or away-from-reactor sites beyond a reactor's licensed life for operation." 79 Fed. Reg. at 56,241. "[T]he rule does not authorize the storage of spent fuel at any site [and] . . . reflects only the generic environmental analysis for the period of spent fuel storage beyond a reactor's licensed life for operation and before disposal in a repository." *Id.* at 56,243. Because the GEIS is only an input for future site-specific reactor licensing and does not itself impose regulatory requirements on reactors, the NRC need not have considered the alternative of ceasing licensing in the GEIS. The NRC instead analyzes that alternative during site-specific licensing proceedings. *See* J.A. 1040 ("The alternative of not issuing or not renewing a nuclear power plant license is considered during the site-specific review of an individual license application."). The NRC did consider alternatives for the only action it took in the Rule—i.e., incorporating the GEIS into future licensing proceedings. *See* J.A. 338-43.

Furthermore, contrary to the petitioners' claims, the GEIS discusses mitigation measures for pool fires, J.A. 1240-41, 1284-85, and pool leaks, including short-term, high-volume leaks, J.A. 838, 1394-96. It also evaluates measures such as the expedited transfer of spent fuel to dry storage casks, J.A. 973-74, 1454-55, limiting the use of high-burnup fuel, J.A. 912-19, 1246, 1258, 1339, and implementing hardened on-site storage, J.A. 1458. We find nothing in the GEIS to indicate that the NRC went astray of NEPA's rule of reason. Regardless, because mitigation is equally relevant during the

life of a licensed reactor as it is during decommissioning, the NRC can defer consideration of such measures to site-specific review. *See Public Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 282-83 (D.C. Cir. 1990) ("[T]he Commission's deferral of decision on specific mitigation steps until the start of construction, when a more detailed right-of-way would be known, was both eminently reasonable and embraced in the procedures promulgated under NEPA."). Regardless, "NEPA does not require agencies to discuss any particular mitigation plans that they might put in place." *Theodore Roosevelt I*, 616 F.3d at 503 (citation and internal quotation marks omitted).

Our holding with respect to this issue is consistent with our decision in *New York I*. In that case, we held that the NRC's prior Waste Confidence Decision was "a major federal action requiring either a [finding of no significant impact] or an EIS." 681 F.3d at 476. Although we described the Waste Confidence Decision as "a pre-determined 'stage' of each licensing decision," *id.*, nowhere did we conclude that the NRC undertook licensing with its waste confidence rulemaking. The Rule in this case is likewise a major federal action because it has a preclusive effect on *future* licensing proceedings. *See* 10 C.F.R. § 51.23(b). But the proposition that all licensing actions are major federal actions does not imply its converse. When the NRC does make a licensing decision in partial reliance on the GEIS, it must *at that time* ensure that it has fully complied with NEPA. *See* 42 U.S.C. § 4332(C); *cf.* 40 C.F.R. § 1502.14 (delineating the requirements for including alternatives in the EIS); *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 599-600 (D.C. Cir. 2015) (noting that the obligation to comply with NEPA "do[es] not mature until . . . there [has] been an irreversible and irretrievable commitment of resources" by the agency (citation and internal quotation marks omitted) (first alteration

in original)). The NRC acknowledges as much. *See* Oral Arg. Rec. 40:43-41:40 (statements by the NRC that the decision whether to issue a license is site-specific and that the agency will consider mitigation measures and alternatives at that time). At this stage, we take the NRC at its word. But should the agency fail to consider a necessary aspect of the problem during site-specific proceedings, the parties might be able to challenge the final licensing decision. *See, e.g.*, *Massachusetts v. NRC*, 924 F.2d 311, 315 (D.C. Cir. 1991) (adjudicating consolidated petitions for review of "the [NRC's] licensing of Seabrook Nuclear Power Station"); *York Comm. for a Safe Env't v. NRC*, 527 F.2d 812, 813 (D.C. Cir. 1975) (considering a challenge to "a final decision . . . to grant a license . . . for operation of a light-water-cooled nuclear reactor to be used for generating electricity").

We therefore deny the petitions for review on this issue.

B. THE GEIS SUFFICIENTLY ANALYZES THE IMPACTS OF CONTINUED STORAGE OF SPENT NUCLEAR FUEL

1. The GEIS Thoroughly Considers Essentially Common Risks to Reactor Sites

The States argue that the NRC could not generically analyze the impacts of the continued storage of spent nuclear fuel because it failed to employ "conservative bounding assumptions" in the GEIS, particularly with regard to estimating the risks of pool fires and pool leaks. Specifically, the States contend that the NRC based its environmental impact determinations on data from two reactor sites—one in Surry, Virginia, and another near Lake Michigan. According to the States, neither plant captures the full range of risks across the country because the population density near the

Surry plant is 300 people per square mile, and the density near the Lake Michigan plant is 860 people per square mile. *See* J.A. 862-63, 868, 870. Because the GEIS ignores population-wide effects and the impacts at atypical sites, the States posit that the NRC must consider these impacts on a site-specific basis.

We noted in *New York I* that "[b]oth the Supreme Court and this court have endorsed the [NRC's] longstanding practice of considering environmental issues through general rulemaking in appropriate circumstances." 681 F.3d at 480. We also stated that "we see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants." *Id.* Furthermore, "whether the analysis is generic or site-by-site, it must be thorough and comprehensive," *id.* at 481, and we are "most deferential" to the "NRC's technical judgments and predictions . . . [,]" *Blue Ridge Env'tl Def. League v. NRC*, 716 F.3d 183, 195 (D.C. Cir. 2013) (citation and internal quotation marks omitted). While we acknowledged in *New York I* that a generic analysis of impacts is "particularly" appropriate when the NRC utilizes "conservative bounding assumptions and the opportunity for concerned parties to raise site-specific differences at the time of a specific site's licensing," we did not make those factors essential. 681 F.3d at 480. Instead, the cornerstone of our holding was that the NRC may generically analyze risks that are "essentially common" to all plants so long as that analysis is "thorough and comprehensive."

In this case, we are convinced that the NRC has met that standard. True, the NRC's analysis is not "bounding" in a strict sense. For example, in assessing the risks of pool fires, the GEIS relies on seismic data that covers "about 70 percent" of reactor sites. J.A. 870. This data therefore does not

"bound" the environmental impacts of spent fuel storage but instead approximates the variance in harms. For pool leaks, the NRC provides a high-level analysis of spent fuel discharges but neglects any estimate of the expected errors for its input variables, instead averring to specific "low" values for these parameters. *See* J.A. 849. Furthermore, the GEIS attempts to justify its reliance on data from the Surry and Lake Michigan plants by noting that the average risks to individuals are independent of population density. *See* J.A. 868. However, the NRC admits that this data covers only "the 90th percentile population density" and that "the accident consequences could be greater at higher population sites." J.A. 868; *see also* J.A. 1367 (conceding that values in the GEIS "do not represent worst-case values").

Nonetheless, according deference to the NRC's technical decision-making, *see Blue Ridge*, 716 F.3d at 195, we find nothing in the GEIS to undermine the NRC's conclusion that the identified risks are "essentially common" to all reactor sites. The GEIS incorporates research demonstrating how the risk analysis for pool fires is conservative, *see* J.A. 1348, 1366-67, and analyzes the variance in seismic risks, *see* J.A. 870. The NRC also considers "typical hydrologic characteristics at nuclear power plant sites" when assessing the impacts of pool leaks. J.A. 1054. Furthermore, the GEIS "explain[s] qualitatively the factors that may cause the risk to be lower or higher than" at the Surry and Lake Michigan plants. J.A. 1367. Regardless, the NRC need not provide a perfect analysis, only one that is "thorough and comprehensive . . . ." *New York I*, 681 F.3d at 481. We hold that the GEIS meets this requirement.

The States rely on *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 738 (3d Cir. 1989), for the proposition that the NRC cannot generically analyze the site-specific

consequences of reactor accidents, and hence, we are told, also the impacts of continued storage of spent nuclear fuel. However, not only is *Limerick* non-binding on this Court, but we recognized in *NRDC v. NRC* that the Third Circuit's dicta in *Limerick* "did not foreclose the possibility that [reactor accident mitigation alternatives] could be dealt with 'generically' through a subsequent rulemaking." 2016 WL 1639661, at *2; *see also id.* at *2 n.2.

Accordingly, we deny the petitions for review on this issue.

2. The NRC Evaluated the Probability of Failure To Site a Repository

The NRDC argues that the NRC fails to quantify the probability of failure to site a repository. Because we hold that the NRC adequately considered both the probability and consequences of failure to site a permanent repository for spent nuclear fuel, we deny the petitions on this issue.

Under its regulations, the NRC need only quantify "the various factors" in the GEIS "to the fullest extent practicable . . . ." 10 C.F.R. § 51.71(d). However, "[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms." *Id.* The NRC complied with these obligations. The agency provided a qualitative analysis of the likelihood of failure to site a repository, *see* J.A. 290, 770, and considered the reasonably foreseeable impacts of that scenario, *see* J.A. 458, 461, 469-70, 472-73, 476, 480, 487, 496, 501, 509, 511, 517, 521, 523-24, 550, 570, 572, 577, 580, 583, 585, 587-89, 591, 593, 596, 602-03, 605, 607, 610-11, 616, 618, 621. The NRDC provides no indication of how the NRC can or should otherwise assess the risk of failure to site a repository. Nor

does our decision in *New York I* require the NRC to do so. *Cf.* 681 F.3d at 478-80 (noting only that "an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass"). The NRC's analysis was therefore sufficient to comply with NEPA.

3. The GEIS Assesses the Cumulative Impacts of the Continued Storage of Spent Nuclear Fuel

The NRDC argues that the GEIS fails to discuss the cumulative impacts of continued storage of spent nuclear fuel "when added to other past, present, and reasonably foreseeable future actions . . . ." 40 C.F.R. § 1508.7. We disagree.

While it is true that NEPA requires an agency to consider "cumulative or synergistic environmental impact[s]" of related, concurrently pending proposals, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976), "the purpose of the cumulative impact requirement is to prevent agencies from dividing one project into multiple individual actions each of which has an insignificant environmental impact, but which collectively have a substantial impact," *Theodore Roosevelt I*, 616 F.3d at 514 (citation and internal quotation marks omitted). In this case, there are no concurrently pending proposals before the NRC because the NRC is not licensing any reactors. Instead, the NRC has codified the GEIS for use in future licensing proceedings. The GEIS also includes a detailed discussion of the cumulative impacts of continued storage of spent fuel over the lifetime of a licensed reactor. *See* J.A. 628-93. Pursuant to its "tiered" approach to assessing environmental impacts, *see* 40 C.F.R. § 1502.20, the NRC also considers the environmental impacts of waste disposal through 10 C.F.R. § 51.51, Table S-3, prior to any licensing action. *See also* J.A. 351, 1297. Because there is no

indication that the NRC has improperly segmented its environmental impact analysis, we deny the petitions on this issue.

4. The NRC Did Not Ignore Short-Term, High-Volume Leaks

The States argue that the NRC unreasonably "assumed" that short-term, high-volume pool leaks have no environmental consequences. While styled as a challenge to the NRC's assumptions in the GEIS, the crux of the dispute is with the NRC's assessment of the probability and consequences of short-term, high-volume leaks. Because we hold that the NRC adequately considered the risks of short-term, high-volume leaks, we deny the petitions.

The GEIS extensively analyzes the impacts of short-term, high-volume leaks in addition to historic data on spent fuel leakage. *See* J.A. 839-55. In particular, the NRC notes that "[s]pent fuel pool leaks, while unpredictable, seldom occur." J.A. 839. Furthermore, NRC regulations require plant licensees to monitor reactor sites, thereby increasing the likelihood of high-volume leak detection. *See, e.g.*, 10 C.F.R. §§ 20.1501, 50.65; *see also* J.A. 836-37, 840, 1397-98. We therefore find nothing in the record to suggest that the NRC arbitrarily or capriciously disregarded the risks of short-term, high-volume leaks.

5. The NRC's Waiver Process Ensures Consideration of Site-Specific Impacts

Finally, we note that the NRC's regulations already provide a means by which the petitioners can raise site-specific challenges during licensing proceedings. Specifically, under 10 C.F.R. § 2.335(b), "[a] participant to an adjudicatory proceeding [before the NRC] . . . may petition

that the application of a specified Commission rule or regulation or any provision thereof . . . be waived or an exception be made for the particular proceeding." The standard by which the NRC will grant such a petition "is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted." *Id.* We hold that the NRC's waiver provision provides an adequate mechanism by which the petitioners can challenge the GEIS in site-specific proceedings.

The petitioners raise two objections to the NRC's waiver provision. First, they argue that the waiver provision shifts the burden of NEPA compliance from the NRC to the party requesting waiver. Second, the petitioners characterize the waiver process as "illusory." States' Br. 34. Neither argument is persuasive. First, for the reasons stated above, *see supra* Part II.B.1-4, the GEIS fulfills the NRC's NEPA obligation to analyze the impacts of the continued storage of spent nuclear fuel. The NRC, in the GEIS, has therefore presented sufficient evidence to carry its burden of persuasion under NEPA that the impacts of continued storage of spent nuclear fuel are generic to all licensed reactors. The burden of production therefore necessarily shifts to the parties raising objections to provide substantial evidence demonstrating that the GEIS neglects those site-specific considerations, thereby obstructing the GEIS's purpose "to preserve the efficiency of the NRC's licensing process . . . ." 79 Fed. Reg. at 56,239. Of course, the NRC always retains the burden of persuasion under NEPA to consider fully the environmental impacts and alternatives for its proposed action. *See* 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.1.

Second, the NRC conceded during oral argument that we have jurisdiction to review its decision to deny a waiver petition under 10 C.F.R. § 2.335(b). *See* Oral Arg. Rec. 48:11-:40; *see also NRDC v. NRC*, 2016 WL 1639661, at *12 (considering whether the NRC properly denied a waiver petition); *cf. Massachusetts v. NRC*, 708 F.3d 63, 74 & n.17 (1st Cir. 2013) (same). Although we have stated that the NRC's decision whether to grant a waiver petition "is entitled to deference," that deference extends only so far as the NRC's decision is not arbitrary or capricious. *NRDC v. NRC*, 2016 WL 1639661, at *12. Therefore, we expect that the NRC will give due consideration to waiver petitions raising non-frivolous site-specific challenges to reactor licensing. *Cf.* 79 Fed. Reg. at 56,242 (stating that "concerned parties who meet the waiver criteria in 10 C.F.R. § 2.335 *will* be able to raise site-specific issues related to continued storage at the time of a specific license application" (emphasis added)). Furthermore, the petitioners retain the ability to petition the NRC for a rulemaking to amend the GEIS. *Cf. NRDC v. NRC*, 2016 WL 1639661, at *5, *12. "Although rulemaking is far from the fastest route, it has transparency, extensive public input, and broad application to recommend it." *Id.* at *12. We believe these protections are sufficient to prevent the NRC's waiver process from becoming "illusory."

Accordingly, we deny the petitions for review.

C. THE NRC'S ASSUMPTIONS ARE NOT ARBITRARY OR CAPRICIOUS

The States and the NRDC contend that the NRC utilized several unreasonable assumptions, including: (1) that spent nuclear fuel will be removed from spent-fuel pools within sixty years of reactor decommissioning; (2) that after the sixty-year period, spent fuel will be stored in dry casks that

are replaced every one hundred years; and (3) that institutional controls over spent nuclear fuel will exist into perpetuity. We hold that none of these assumptions is so unreasonable as to render the NRC's decision-making arbitrary or capricious. We therefore deny the petitions for review on this issue.

An agency does not engage in arbitrary or capricious decision-making by making "predictive judgment[s]" or even by relying on "[i]ncomplete data." *New York v. EPA*, 413 F.3d 3, 31 (D.C. Cir. 2005). To the contrary, such judgments are "entitled to deference," *id.*, and a challenge to the agency's assumptions must be more than "an effort by [a petitioner] to substitute its own analysis" for the agency's, *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 737 (D.C. Cir. 2000). In this case, the NRC's assumptions in the GEIS are ably supported by the record.

First, NRC regulations already mandate removal of spent nuclear fuel within sixty years of the expiration of a reactor license. *See* 10 C.F.R. § 50.82(a)(3). Furthermore, as the NRC noted in its responses to comments, "(1) there is no need to cool spent fuel in a pool for more than 60 years after a reactor stops operating; (2) operational costs associated with pool storage exceed dry cask storage costs; and (3) experience with decommissioning of nuclear power plants indicates that spent fuel pools are decommissioned before the end of the 60-year period." J.A. 1093. According deference to the NRC's predictive judgments, we hold that the agency's assumption regarding the timeframe for the removal of spent nuclear fuel is reasonable.

Second, the NRC's assumption about the timeframe for dry cask storage and replacement is conservative. The NRC concluded that "the 100-year replacement period provides a

reasonable timeframe for the routine replacement of dry storage systems, and that actual storage facility replacement will be needed less frequently than assumed in the GEIS." *Id.* The agency also noted the "low degradation rates for dry cask storage systems." J.A. 1056. Furthermore, the NRC analyzed the costs of dry cask replacement. *See* J.A. 397-98. This assumption in the GEIS is therefore reasonable.

Third, the record demonstrates that assuming the continuation of institutional controls is both reasonable and necessary. The NRC acknowledged that the impacts of a failure in institutional controls would be "catastrophic." J.A. 794, 798-99. Despite that conclusion, the agency also found that the probability of institutional controls failing is "remote." J.A. 794; *see also* J.A. 796 (noting that it is unlikely that the government would abandon continued storage facilities and that those facilities are "highly visible"). Furthermore, this assumption facilitates the assessment of foreseeable environmental impacts from the continued storage of spent nuclear fuel. *See* J.A. 794-95; *see also* J.A. 1094-1100.

We therefore deny the petitions for review on this issue.

III. CONCLUSION

We acknowledge the political discord surrounding our nation's evolving nuclear energy policy. But the role of Article III courts in this debate is circumscribed. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). To the extent that the petitioners disagree with the NRC's current policy for the

continued storage of spent nuclear fuel, their concerns should be directed to Congress.

For the reasons stated herein, the Court denies the petitions for review.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5280 **September Term, 2015**

1:14-cv-01168-UNA

Filed On: June 3, 2016

Vivek Shah,

Appellant

v.

Loretta E. Lynch, Attorney General for the United States,

Appellee

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for summary reversal, and the motion for expedited consideration of this appeal, it is

ORDERED that the motion for summary reversal be denied, and on the court's own motion, that the district court's order filed July 11, 2014, be summarily affirmed. Because appellant's filing of a motion for summary reversal placed the merits of this appeal before the court, and because the appropriate disposition is so clear, summary action is warranted here. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court correctly dismissed the complaint for lack of standing. See United Presbyterian Church in the US v. Reagan, 738 F.2d 1375, 1383 (D.C. Cir. 1984) (it is the plaintiff's burden to allege facts sufficient to support standing). Appellant does not identify the "course of conduct" he intends to take that would arguably violate 18 U.S.C. §§ 875 and 876, and his bare allegation that he intends to violate the statute is insufficient to support standing. See Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 193 (D.C. Cir. 2006) (although factual allegations in a complaint are presumed true, a court need not accept as true "a legal conclusion couched as a factual allegation"). Moreover, appellant has failed to allege specific facts suggesting he "faces a threat of prosecution under the statute which is credible and immediate, not merely abstract or speculative." Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997); see Seegars v. Gonzales, 396 F.3d 1248, 1255 (D.C. Cir. 2005) ("[P]laintiffs allege no prior threats against them or any characteristics indicating an especially high probability of

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5280 **September Term, 2015**

enforcement against them."). It is

FURTHER ORDERED that the motion for expedited consideration of this appeal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1152 **September Term, 2015**

CMCR-1

Filed On:

In re: Abd Al-Rahim Hussein Muhammed Al-Nashiri,

Petitioner

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

ORDER

Upon consideration of the lodged petition for writ of mandamus and writ of prohibition; the motion for leave to exceed page limits; the corrected motion for stay; and the motion to proceed in forma pauperis, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for leave to exceed page limits be granted. The Clerk is directed to file the lodged petition for writ of mandamus and writ of prohibition. It is

FURTHER ORDERED that the petition for writ of mandamus and writ of prohibition be denied. Petitioner has not shown a "clear and indisputable" right to the extraordinary relief he seeks. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). It is

FURTHER ORDERED that the corrected motion for stay be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

JMR
BMK / cc
RLW

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7076 **September Term, 2015**

1:13-cv-00713-RJL

Filed On: May 18, 2016

Commissions Import Export S.A.,

Appellee

v.

Republic of the Congo,

Appellant

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to voluntarily dismiss the appeal and to withdraw as counsel, the response thereto, and the reply; and appellee's motion for attorneys' fees and sanctions, the opposition thereto, and the reply, it is

ORDERED that the motion for voluntary dismissal be granted and the appeal be dismissed with prejudice. See Fed. R. App. P. 42(b). While the parties have agreed that any costs authorized under Federal Rule of Appellate Procedure 39 and D.C. Circuit Rule 39 should be taxed against appellant, appellee has not incurred any allowable costs at this stage of the appeal. Accordingly, the court finds no basis for an award of costs as a condition for dismissal pursuant to Federal Rule of Appellate Procedure 42(b). It is

FURTHER ORDERED that the motion to withdraw as counsel be granted. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the motion for attorneys' fees and sanctions be denied. Appellee has not shown any basis for such an award under D.C. Circuit Rule 38 or 28 U.S.C. § 1927. See Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137, 1138 (D.C. Cir. 1986) (per curiam); United States v. Wallace, 964 F.2d 1214, 1220 (D.C. Cir. 1992).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7090 **September Term, 2015**

1:12-cv-00743-RCL

Filed On: May 18, 2016

Commissions Import Export S.A.,

Appellee

v.

Republic of the Congo and Caisse Congolaise D'Amortissement,

Appellants

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to voluntarily dismiss the appeal and to withdraw as counsel, the response thereto, and the reply; and appellee's motion for attorneys' fees and sanctions, the opposition thereto, and the reply, it is

ORDERED that the motion for voluntary dismissal be granted and the appeal be dismissed with prejudice. See Fed. R. App. P. 42(b). While the parties have agreed that any costs authorized under Federal Rule of Appellate Procedure 39 and D.C. Circuit Rule 39 should be taxed against appellants, appellee has not incurred any allowable costs at this stage of the appeal. Accordingly, the court finds no basis for an award of costs as a condition for dismissal pursuant to Federal Rule of Appellate Procedure 42(b). It is

FURTHER ORDERED that the motion to withdraw as counsel be granted. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the motion for attorneys' fees and sanctions be denied. Appellee has not shown any basis for such an award under D.C. Circuit Rule 38 or 28 U.S.C. § 1927. See Reliance Ins. Co. v. Sweeney Corp., 792 F.2d 1137, 1138 (D.C. Cir. 1986) (per curiam); United States v. Wallace, 964 F.2d 1214, 1220 (D.C. Cir. 1992).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5338 **September Term, 2015**

1:13-cv-01351-APM

Filed On: May 17, 2016

Layne Wilson,

Appellant

v.

Deborah James, et al.,

Appellees

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; and the motion for summary reversal, the opposition thereto, and the reply, it is

ORDERED that the motion for summary reversal be denied and the motion for summary affirmance be granted for the reasons stated in the memorandum accompanying this order. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

MEMORANDUM

In response to the motion for summary affirmance or in the motion for summary reversal, appellant did not challenge the dismissal as moot of claims predicated on the initial decision to rescind his six-year re-enlistment contract, the grant of summary judgment on his claims under the Fifth Amendment, or the disposition of his Privacy Act claims. Accordingly, appellant has forfeited any challenge to the disposition of those claims. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.").

On de novo review, it is clear that the district court properly granted summary judgment for the appellees on all the remaining claims. See Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006) (a party is entitled to summary judgment if the evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law). In the first disciplinary action, appellant was reprimanded for sending a personal email to a senior officer outside his chain of command, using a Utah Air National Guard computer and his government email account under the Guard's signature block, in violation of rules and regulations and in disobedience of a prior order. Appellant has failed to show this letter of reprimand substantially burdened any religious action or practice so as to violate his rights under the Constitution or the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. See Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008) ("Religious exercise necessarily involves an action or practice."); Mahoney v. Doe, 642 F.3d 1112, 1120-21 (D.C. Cir. 2011) (plaintiff had ample alternative means of spreading his religious message besides chalking the sidewalk in front of the White House).

The second disciplinary action reprimanded appellant for failing to give his superior commissioned officer and commander the dignity and respect due his office. Appellant has failed to refute the district court's determination that his claims challenging the reprimands under the Administrative Procedure Act are nonjusticiable under the principle that such military personnel decisions are not reviewable by this court. See Kreis v. Sec'y of the Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989). Insofar as appellant raised whistleblowing claims, the district court correctly determined appellant was required to exhaust the administrative remedies provided by the Military Whistleblower Protection Act and Department of Defense Directive 7050.06, which appellant concedes he did not do. Moreover, the district court properly ruled appellant lacked standing to challenge the constitutionality of Air Force Instruction 1-1, because he has not shown it formed the basis for either letter of reprimand.

With respect to appellant's challenges to the initiation of a Security Information File and suspension of access to classified information, the district court properly held the claims are nonjusticiable under Department of the Navy v. Egan, 484 U.S. 518 (1988). Like the final revocation of a security clearance, the initiation of a Security Information File and suspension of an employee's security clearance are decisions that require "a sensitive and inherently discretionary judgment call [that] is committed by law to the appropriate agency of the Executive Branch." 484 U.S. at 527-30.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7096 **September Term, 2015**

1:00-cv-00591-RCL-GMH

Filed On: April 11, 2016

Wanda Gertrude Allen, Keith Dominick Allen, a minor by his mother and next friend; in her own behalf and as next friend K.D.A. 03-2139, et al.,

Appellants

Chelsea School, 99-3188,

Appellee

v.

District of Columbia, a municipal corporation,

Appellee

BEFORE: Henderson and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for remand or voluntary dismissal and the response thereto, it is

ORDERED that the appeal be dismissed because the challenged order is not final. See 28 U.S.C. § 1291.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5307 **September Term, 2015**

1:13-cv-00851-RJL

Filed On: April 4, 2016

Larry Elliott Klayman, et al.,

Appellees

v.

Barack Obama, et al.,

Appellants

Roger Vinson,

Appellee

BEFORE: Henderson, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion to vacate preliminary injunction and dismiss appeal on grounds of mootness, the opposition thereto, and the reply, it is

ORDERED that this appeal be dismissed as moot. See Spirit of the Sage Council v. Norton, 411 F.3d 225, 229 (D.C. Cir. 2005). The preliminary injunction entered by the district court enjoined conduct under the "Bulk Telephony Metadata Program," the authority for which has now ended. See USA FREEDOM Act, Pub. L. No. 114-23, §§ 103, 109, 129 Stat. 268, 272 (2015). In addition, the Foreign Intelligence Surveillance Court's order permitting "technical access" to the bulk telephony metadata previously collected expired on February 29, 2016. It is

FURTHER ORDERED that the district court's order filed November 9, 2015, be vacated. See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950); Nat'l Black Police Ass'n v. D.C., 108 F.3d 346, 351-53 (D.C. Cir. 1997).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7006 **September Term, 2015**

1:79-cv-02561-RJL-DAR

Filed On: April 4, 2016

In re: George Hyman Construction Company
and Liberty Mutual Insurance Company,

Petitioners

BEFORE: Henderson, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the petition for mandamus, it is

ORDERED that the petition for mandamus be denied. Petitioner has not shown a clear and indisputable right to the extraordinary remedy of mandamus. See Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3046 **September Term, 2015**

1:04-cr-00355-CKK-1

Filed On: March 31, 2016

United States of America,

Appellee

v.

Miguel Morrow, also known as Julio,

Appellant

BEFORE: Henderson, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which is construed as including a request for a certificate of appealability; and the motion to dismiss for lack of a certificate of appealability and the response thereto, it is

ORDERED that the motion for a certificate of appealability be denied and the motion to dismiss for lack of a certificate of appealability granted. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1079 **September Term, 2015**

FCC-BDISDTA-20131114BTV

Filed On: March 11, 2016

In re: KM LPTV of Chicago-13, L.L.C.,

Petitioner

BEFORE: Henderson, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the emergency petition for writ of mandamus, the response thereto, and the reply, it is

ORDERED that the emergency petition be denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7085 **September Term, 2015**

FILED ON: JANUARY 29, 2016

EVELYN PRIMAS,

APPELLANT

v.

DISTRICT OF COLUMBIA AND CATHY L. LANIER, CHIEF OF POLICE, IN BOTH HER OFFICIAL AND INDIVIDUAL CAPACITIES,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-02317)

Before: BROWN, KAVANAUGH, and PILLARD, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the District Court is hereby **AFFIRMED**.

Evelyn Primas brought an employment discrimination suit against the District of Columbia and Police Chief Cathy Lanier. The case went to trial, and the jury returned a verdict for the defendants. Primas now appeals. She raises three primary arguments, none of which is persuasive.

First, Primas complains that the District Court did not allow her to argue to the jury that she suffered constructive discharge. But Primas proffered insufficient evidence that a reasonable person in her position would have found working conditions untenable to the point of feeling compelled to resign. *See Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010). Therefore, no reasonable jury could find that Primas satisfied the objective test for constructive discharge, and the District Court permissibly prevented Primas from offering that theory to the jury.

Second, Primas objects to the jury instructions' description of the alleged adverse employment action. But the District Court's characterization was consistent with this Court's prior description of Primas's claim. *See Primas v. District of Columbia*, 719 F.3d 693, 697 (D.C. Cir. 2013). Furthermore, Primas's proposed language was not materially different from the language that the District Court used. *See Czekalski v. LaHood*, 589 F.3d 449, 453-55 (D.C. Cir. 2009).

Finally, Primas argues that the District Court improperly limited evidence of (i) the relative qualifications of Primas and Marcus Westover, (ii) Primas's qualifications for other Commander positions within the police department, and (iii) the status of papering reform. But the District Court did not abuse its discretion in concluding that the excluded evidence on all three topics was cumulative, irrelevant, or both. *See* Fed. R. Evid. 401, 403.

Because Primas has not identified any reversible error, the judgment of the District Court is affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1122 **September Term, 2015**

FILED ON: JANUARY 29, 2016

NATIONAL TREASURY EMPLOYEES UNION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

On Petition for Review of an Order of
the Federal Labor Relations Authority

Before: BROWN, KAVANAUGH and PILLARD, *Circuit Judges*.

JUDGMENT

This case was considered on the record and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition be dismissed for lack of jurisdiction.

When reviewing decisions of the Federal Labor Relations Authority ("Authority"), courts may not consider an "objection that has not been urged before the Authority . . . unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("We have enforced section 7123(c) strictly."). To raise an argument on appeal, a party must have "fairly brought the argument to the Authority's attention." *Nat'l Treasury Emps. Union*, 754 F.3d at 1040; *see also* 5 C.F.R. § 2424.25(c)(1) (requiring parties in Authority proceedings to "[s]tate the arguments and authorities supporting [their] opposition to any agency argument" and "include specific citation to any law, rule, regulation, . . . or other authority on which [they] rely").

In this case, the National Treasury Employees Union ("union") challenges the Authority's determination that 5 C.F.R. § 300.201(c) precludes consideration of a union proposal submitted during collective bargaining. The Authority addressed that regulation based on a brief submitted by the government. The union's response regarding the proposal—spanning sixteen pages—

failed to mention that regulation, much less to advance arguments concerning its scope and context. On appeal, the union claims it raised the issue with the blanket statement that no "law creates an absolute bar" to its proposal. J.A. 87. We disagree. Parties need not use "magic words" to preserve arguments. *U.S. Dep't of Commerce v. FLRA*, 672 F.3d 1095, 1102 (D.C. Cir. 2012). But "fairly" raising an argument requires something more than a universal, conclusory declaration. To hold otherwise would entail considering on appeal arguments the Authority had no opportunity to consider. *See Nat'l Treasury Emps. Union*, 754 F.3d at 1040. Mindful of "the initial adjudicatory role Congress gave to the Authority," *id.*, we dismiss the petition for lack of jurisdiction.

Pursuant to D.C. CIRCUIT RULE 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7059 **September Term, 2015**

1:15-cv-00871-UNA

Filed On: January 21, 2016

D'Rayfield Shipman,

Appellant

v.

Disabled American Veterans,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on appellant's brief. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed June 9, 2015 be affirmed. The district court did not abuse its discretion by dismissing appellant's complaint without prejudice for failure to comply with Fed. R. Civ. P. 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks omitted); see also Ciralsky v. CIA, 355 F.3d 661, 668 (D.C. Cir. 2004). The dismissal without prejudice allows appellant to file a new complaint that complies with Rule 8(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5231 **September Term, 2015**

1:15-cv-00676-UNA

Filed On: January 19, 2016

Margaret Kathleen Nickerson-Malpher,

Appellant

v.

United States Federal Corporation, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Kavanaugh and Pillard, Circuit Judges, and Ginsburg, Senior Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order, filed July 22, 2015, denying relief under Fed. R. Civ. P. 60(b), be affirmed. The notice of appeal, filed August 10, 2015, was timely only as to the order denying appellant's Rule 60(b) motion. The Rule 60(b) motion did not toll the time for noting an appeal from the district court's order entered May 5, 2015, see Fed. R. Civ. P. 59(e) (motion to alter or amend judgment must be filed no later than 28 days after entry of judgment), and "an appeal from the denial of Rule 60(b) relief does not bring up the underlying judgment for review," Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978). The district court did not abuse its discretion in denying the Rule 60(b) motion. See Smalls v. United States, 471 F.3d 186, 191-92 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5231 **September Term, 2015**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken Meadows
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5249 **September Term, 2015**

1:15-cv-01185-UNA

Filed On: January 19, 2016

Robert G. Modrall,

Appellant

v.

Marie A. O'Rourke,

Appellee

Consolidated with 15-5261

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Kavanaugh and Pillard, Circuit Judges, and Ginsburg, Senior Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order, filed July 22, 2015, dismissing the complaint for failure to comply with Fed. R. Civ. P. 8(a), be affirmed. The district court did not abuse its discretion in so ruling. See Ciralsky v. CIA, 355 F.3d 661, 668 (D.C. Cir. 2004). Rule 8 requires a "short and plain statement of the claim" that gives the defendant fair notice of the claims against her, see id. at 670 & n.9, and the underlying complaint failed to satisfy that minimum standard. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (Rule 8 pleading standard does not require "detailed factual allegations," but demands more than an "unadorned, the-defendant-unlawfully-harmed-me accusation").

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5249 **September Term, 2015**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken Meadows
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7170 **September Term, 2015**

FILED ON: JANUARY 15, 2016

MICHALI TOUMAZOU, ET AL.,
APPELLANTS

v.

TURKISH REPUBLIC OF NORTHERN CYPRUS, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-01967)

Before: HENDERSON, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that all orders of the district court on appeal be **AFFIRMED**.

The putative Toumazou class is a group of Cypriots who were allegedly displaced during events that led to the formation of the Turkish Republic of Northern Cyprus (TRNC). Before the district court, the putative class asserted numerous claims alleging that the TRNC is engaged in an ongoing conspiracy with HSBC Holdings, PLC and HSBC Bank USA, N.A. to interfere with the class members' real and personal property in Cyprus by, in part, selling property in the United States. The district court dismissed these claims and, at the same time, denied the putative class the opportunity to conduct jurisdictional discovery and leave to file a third amended complaint. We affirm.

The putative class failed to establish that the district court had personal jurisdiction over the TRNC based on the asserted claims. To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2), a plaintiff must make a prima facie showing of specific and pertinent jurisdictional facts that connect the defendant to the forum. *See First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1378-79 (D.C. Cir. 1988). A plaintiff cannot carry this burden by making only bare allegations or conclusory statements. *Id.* And, for specific jurisdiction, a plaintiff must

allege that the defendant's contacts with the forum gave rise to the asserted claims. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011); *see also* D.C. CODE § 13-423. Here, the plaintiffs failed to carry this burden because they never identified any specific sale or advertisement of their property by the defendants that occurred in the United States, much less the District of Columbia. Because the plaintiffs also expressly conceded in their brief before this court that there is no basis for general personal jurisdiction, we do not consider that issue. The district court thus properly dismissed the claims against the TRNC for lack of personal jurisdiction.

For a similar reason, the district court did not abuse its discretion by denying the putative class jurisdictional discovery. A court may deny jurisdictional discovery in "the absence of any specific indication . . . regarding what facts additional discovery could produce that would affect" the court's jurisdictional analysis. *Cheyenne Arapaho Tribes of Okla. v. United States*, 558 F.3d 592, 596 (D.C. Cir. 2009) (quotation marks omitted). Although it was given repeated opportunities to identify such useful facts, the putative class instead continued to base its request for jurisdictional discovery on vague descriptions of an alleged conspiracy and mischaracterizations of the jurisdictional evidence provided by the TRNC. The district court was thus well within its discretion to deny jurisdictional discovery.

The district court also did not abuse its discretion in denying the putative class's request to amend its complaint a third time. While Federal Rule of Civil Procedure 15 requires the court to freely give leave to amend a complaint when justice so requires, leave may be denied due to futility. *See Richardson v. United States*, 193 F.3d 545, 548-49 (D.C. Cir. 1999). The district court properly concluded that amendment would be futile in this case because the putative class's third amended complaint failed to allege any additional specific facts that would cure the deficiencies of its second amended complaint.

Finally, the putative class makes no viable argument that the district court erred by dismissing the claims against the HSBC defendants. We will not consider the putative class's new argument regarding HSBC's liability because the class failed to present that claim to the district court. Because the putative class also does not challenge either of the district court's grounds for dismissing its other claims against the HSBC defendants, we will not consider whether the district court erred in dismissing those claims. *See Harris v. U.S. Dep't of Veterans Affairs*, 776 F.3d 907, 915 (D.C. Cir. 2015).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3024 **September Term, 2015**

1:13-cv-01430-RC

Filed On: January 8, 2016

In re: Kenneth G. Copeland,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for leave to file a second or successive motion under 28 U.S.C. § 2254, the opposition thereto, and the reply; and the motion to proceed on appeal in forma pauperis; and the motion styled as a petition for an evidentiary hearing, it is

ORDERED that the motion to proceed on appeal in forma pauperis be granted. It is

FURTHER ORDERED that the petition for leave to file a second or successive motion under 28 U.S.C. § 2254 be denied. The claims of ineffective assistance of counsel underlying movant's petition do not meet either of the exceptions enumerated in 28 U.S.C. § 2244(b)(2). It is

FURTHER ORDERED that the motion styled as a petition for an evidentiary hearing be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7115 **September Term, 2015**

Filed On: January 8, 2016

In re: Charles Alpine,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for habeas corpus and the order to show cause filed October 26, 2015, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction without prejudice to refiling in the appropriate district court. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian, see Rumsfeld v. Padilla, 542 U.S. 426 (2004), and transfer would not be in the interest of justice, see 28 U.S.C. § 1631.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7115 **September Term, 2015**

Filed On: January 8, 2016

In re: Charles Alpine,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for habeas corpus and the order to show cause filed October 26, 2015, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction without prejudice to refiling in the appropriate district court. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian, see Rumsfeld v. Padilla, 542 U.S. 426 (2004), and transfer would not be in the interest of justice, see 28 U.S.C. § 1631.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7115 **September Term, 2015**

Filed On: January 8, 2016

In re: Charles Alpine,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for habeas corpus and the order to show cause filed October 26, 2015, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction without prejudice to refiling in the appropriate district court. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian, see Rumsfeld v. Padilla, 542 U.S. 426 (2004), and transfer would not be in the interest of justice, see 28 U.S.C. § 1631.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5277 **September Term, 2015**

1:08-cv-02127-UNA

Filed On: January 7, 2016

In re: David Lee Smith,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and the supplement thereto, which is styled as a motion for reconsideration or to amend the petition; and the motion to proceed on appeal in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. The transfer of the district court file for the habeas petition under 28 U.S.C. § 2241 deprives this court of jurisdiction to review the transfer unless there is a substantial question whether the district court had the power to transfer, see In re Asemani, 455 F.3d 296, 300 (D.C. Cir. 2006), and petitioner has not identified any substantial question. Because petitioner was convicted in state court, the proper vehicle for challenging his conviction and sentence in federal court is an application for a writ of habeas corpus filed under 28 U.S.C. § 2254 in the district court with jurisdiction over petitioner's custodian. See e.g., Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1079 **September Term, 2015**

PRC-CR2015-1

Filed On: January 4, 2016

Center for Art and Mindfulness, Inc.,

Petitioner

v.

Postal Regulatory Commission,

Respondent

United States Postal Service,
Intervenor

BEFORE: Kavanaugh and Pillard, Circuit Judges, and Ginsburg, Senior Judge

O R D E R

Upon consideration of the motion to dismiss, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. As this court has long held, a petition for review, filed before the agency has issued its decision on reconsideration is "incurably premature," and subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction. See Gorman v. National Transportation Safety Board, 558 F.3d 580, 586 (D.C. Cir. 2009) (citing TeleSTAR, Inc. v. FCC, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam)). Petitioner's contention that this "is not the present state of the law on incurably premature appeals," response at 16, is misguided, as is petitioner's reliance on Sacks v. Rothberg, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (per curiam), a case that pre-dated TeleSTAR and involved the ripening of a notice of appeal filed before final judgment in district court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1079 **September Term, 2015**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5257 **September Term, 2015**

1:15-cv-00109-UNA

Filed On: January 4, 2016

In re: Cherron Marie Phillips,

Petitioner

BEFORE: Kavanaugh and Pillard, Circuit Judges, and Ginsburg, Senior Judge

O R D E R

Upon consideration of the petition for writ of habeas corpus, and the motion for judicial notice, it is

ORDERED that the petition be dismissed for lack of jurisdiction without prejudice to refiling in the appropriate district court. This court lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). Petitioner can obtain habeas relief only in the federal district court which has jurisdiction over petitioner's custodian, see Rumsfeld v. Padilla, 542 U.S. 426 (2004), and transfer would not be in the interest of justice, see 28 U.S.C. § 1631. It is

FURTHER ORDERED that the motion for judicial notice be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7105 **September Term, 2015**

1:12-cv-01919-ABJ

Filed On: January 4, 2016

Linda Christine Sun,

Appellant

v.

District of Columbia Government, et al.,

Appellees

BEFORE: Kavanaugh and Pillard, Circuit Judges, and Ginsburg, Senior Judge

O R D E R

Upon consideration of the Clerk's order, filed October 13, 2015, to show cause why the appeal should not be dismissed for lack of jurisdiction, citing Fed. R. Civ. P. 54(b), and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed for lack of jurisdiction. The district court's order, filed September 30, 2015, denied appellant's motion for summary judgment, and granted in part and denied in part appellees' motion for summary judgment. It is well-established that an order dismissing fewer than all the claims or parties is not a "final decision" qualifying for an immediate appeal under 28 U.S.C. § 1291, unless the district court enters a judgment under Fed. R. Civ. P. 54(b), which it has not done in this case. See Building Indus. Ass'n v. Babbitt, 161 F.3d 740, 742-43 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7105 **September Term, 2015**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1486 **September Term, 2015**

FCC-14-50

Filed On: December 30, 2015

In re: The Videohouse, Inc., et al.,

Petitioners

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, the opposition thereto, and the reply, it is

ORDERED that the petition be denied without prejudice to refiling in the event the Federal Communications Commission fails to take prompt action on the pending petition for reconsideration. Under the circumstances presented here, petitioners have not shown the agency's delay to be so unreasonable as to warrant the extraordinary remedy of mandamus. See In re: Monroe Commc'ns Corp., 840 F.2d 942, 945 (D.C. Cir. 1988); Telecommunications Research and Action Ctr. v. FCC, F.2d 70, 80 (D.C. Cir. 1984). Based on the agency's representations, see Opposition at 2, 14, the Court expects the Commission to rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016. See FCC 15-78 Public Notice, 30 FCC Rcd 8975 (2015).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3028 **September Term, 2015**

1:04-cr-00355-CKK-6

Filed On: December 21, 2015

United States of America,

Appellee

v.

Aaron Perkins, also known as Short,

Appellant

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability, the opposition thereto and motion to dismiss, and the reply, it is

ORDERED that the motion for a certificate of appealability be denied and the motion to dismiss granted. Appellant has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(1), with respect to his allegations of ineffective assistance of trial counsel and his argument that the district court should have held an evidentiary hearing on his § 2255 motion. He has not shown "that reasonable jurists could debate whether (or, for that matter, agree) that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability will be allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-8008 **September Term, 2015**

14-00582

Filed On: December 9, 2015

In re: Crystal L. Wilkerson,

Petitioner

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition for permission to take a direct appeal and the opposition thereto, it is

ORDERED that permission be granted for the direct appeal of the Memorandum Decision and Order Re Calculation of Disposable Monthly Income for Purposes of Confirmation of Chapter 13 Plan, filed by the United States Bankruptcy Court for the District of Columbia on June 25, 2015, in Case No. 14-00582. In its certification filed August 26, 2015, in Case No. 15cv01199, the district court certified the June 25, 2015 order for review by this court under 28 U.S.C. § 158(d)(2)(A), and we will exercise our discretion to authorize the direct appeal. See Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1695-96 (2015) (analyzing the mechanism for interlocutory review of bankruptcy decisions provided in § 158(d)(2)). Grant of the petition is without prejudice to reconsideration by the merits panel to which this appeal is assigned.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Federal Rule of Appellate Procedure 5(d) and collect the mandatory fees from the appellant. Upon receiving notice of the payment of the fees, the Clerk will assign a general docket number for the appeal, and the record must be forwarded and filed in accordance with Federal Rule of Appellate Procedure 6(c)(1)(C) and (c)(2). The appeal will then proceed in the normal course.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5214 **September Term, 2015**

1:14-cv-00324-RDM

Filed On: December 9, 2015

Amarin Pharmaceuticals Ireland Limited,
Appellee

v.

Food & Drug Administration, et al.,
Appellees

Watson Laboratories Inc.,
Appellant

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss for lack of jurisdiction, the response thereto, and the replies; and the motion for limited remand, the response thereto, and the reply, it is

ORDERED that the motions to dismiss be granted. The district court order remanding to the FDA is not an appealable final order, because it anticipates further agency action not limited to merely "ministerial" proceedings. See Pueblo of Sandia v. Babbitt, 231 F.3d 878, 880 (D.C. Cir. 2000). It is

FURTHER ORDERED that the motion for limited remand be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7036 **September Term, 2015**

1:06-cv-00027-RMC
1:14-cv-01635-RMC
1:14-cv-01636-RMC

Filed On: December 9, 2015

Unitronics 1989 R G Ltd. and Unitronics, Inc.,

Appellees

v.

Samy Gharb,

Appellant

Consolidated with 15-7037, 15-7038

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, or in the alternative, for summary affirmance; and the court's order to show cause filed August 21, 2015, and the responses and corrected response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motions to dismiss be granted. This court lacks jurisdiction because the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review a district court's decision "in any civil action arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Appellant has not demonstrated that transfer would be in the interest of justice. 28 U.S.C. § 1631. It is

FURTHER ORDERED that the motions for summary affirmance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7036 **September Term, 2015**

1:06-cv-00027-RMC
1:14-cv-01635-RMC
1:14-cv-01636-RMC

Filed On: December 9, 2015

Unitronics 1989 R G Ltd. and Unitronics, Inc.,

Appellees

v.

Samy Gharb,

Appellant

Consolidated with 15-7037, 15-7038

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, or in the alternative, for summary affirmance; and the court's order to show cause filed August 21, 2015, and the responses and corrected response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motions to dismiss be granted. This court lacks jurisdiction because the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review a district court's decision "in any civil action arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Appellant has not demonstrated that transfer would be in the interest of justice. 28 U.S.C. § 1631. It is

FURTHER ORDERED that the motions for summary affirmance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7041 **September Term, 2015**

1:14-cv-00232-RC

Filed On: December 9, 2015

Shirley A. Massey,

Appellant

v.

District of Columbia,

Appellee

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel, and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for appointment of counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Because appellant did not mention in her administrative charge any claims based on race discrimination, sex discrimination, disability discrimination, or retaliation, the district court properly determined appellant had failed to exhaust her administrative remedies with respect to those claims. See Park v. Howard, 71 F.3d 904, 907 (D.C. Cir. 1995). The district court also properly dismissed for failure to state a claim appellant's claims of retaliation and discrimination based on age, sex, race, and disability, because her sparse, conclusory, and unsupported allegations were inadequate to "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Finally, the district court correctly determined appellant had failed to state a claim under 42 U.S.C. § 1983. See Brown v. District of Columbia, 514 F.3d 1279, 1283 (D.C. Cir. 2008) (internal quotation marks and citations omitted).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7041 **September Term, 2015**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 17, 2015 Decided November 24, 2015

No. 14-5210

UNITED STATES OF AMERICA EX REL. ROBERT R. PURCELL,
APPELLANT/CROSS-APPELLEE

ROBERT R. PURCELL,
CROSS-APPELLEE

v.

MWI CORPORATION,
APPELLEE/CROSS-APPELLANT

Consolidated with 14-5218

Appeals from the United States District Court
for the District of Columbia
(No. 1:98-cv-02088)

Melissa N. Patterson, Attorney, U.S. Department of Justice, argued the cause for appellant/cross-appellee United States of America. With her on the briefs were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Vincent H. Cohen, Jr.*, Acting U.S. Attorney, and *Michael S. Raab*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Brian Tully McLaughlin and *Robert T. Rhoad* argued the causes for appellee/cross-appellant MWI Corporation. With them on the brief were *Charlotte E. Gillingham* and *Jason C. Lynch*.

Joseph J. Aronica argued the cause and filed the brief for cross-appellee Robert R. Purcell.

Douglas W. Baruch and *Jennifer M. Wollenberg* were on the brief for *amicus curiae* National Association of Manufacturers in support of defendant-appellee/cross-appellant in support of reversal of the decisions finding liability under the False Claims Act.

Before: ROGERS, BROWN and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The United States successfully brought a civil action pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729, based on certifications by MWI Corp. to the Export-Import Bank ("the Bank") to secure loans financing MWI's sale of water pumps to Nigeria. Although the total loan of $74.3 million was to Nigeria, the Bank required MWI to certify that it had paid only "regular commissions" to the sales agent responsible for the sales contract. A jury found the certifications were false and awarded the government $7.5 million in damages. The damages were trebled to $22.5 million pursuant to the FCA. Because an FCA defendant is entitled to an offset from the trebled damages by any amount paid to compensate the government for the harm caused by the false claims, *see United States v. Bornstein*, 423 U.S. 303 (1976), and the district court considered Nigeria's repayment of the loan to be compensatory, MWI's damages were reduced from $22.5 million to $0. MWI thus was subject only to civil penalties,

which the district court imposed at the highest level permitted by the statute, $10,000 for each of the 58 certifications.

The government, having recovered no damages, appeals. It contends the district court should have applied only $7.5 million of Nigeria's loan repayment as an offset against MWI's $22.5 million in trebled damages, because, according to the government, the offset applies against the amount of damages before trebling, not against the trebled damages, and so it is still entitled to recover $15 million in damages. MWI cross appeals on the principal ground that the government failed as a matter of law to establish that it made a false claim or that it had done so knowingly, both of which are required to establish FCA liability.

Because the government failed to establish that MWI knowingly made a false claim, we reverse. At the time MWI made the certifications, the government had yet to inform exporters that, contrary to MWI's understanding of "regular commissions," the term refers to what is normally paid in the industry, and not what an exporter had historically paid to an individual sales agent. Absent evidence that the Bank, or other government entity, had officially warned MWI away from its otherwise facially reasonable interpretation of that undefined and ambiguous term, the FCA's objective knowledge standard, as the Supreme Court clarified while this litigation was pending in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69 70 & n.20 (2007), did not permit a jury to find that MWI "knowingly" made a false claim.

I.

The following facts are undisputed. In 1992, MWI agreed to sell $82.2 million in irrigation pumps and related equipment to seven states in Nigeria. To facilitate the sales, the parties sought financing from the Bank, which finances and facilitates

export of U.S. goods and services by providing loans to foreign purchasers, thereby "contribut[ing] to the employment of United States workers." 12 U.S.C. § 635(a)(1). The Bank agreed to lend Nigeria $74.3 million in eight separate loans. Prior to approving the loans, the Bank had required MWI to submit a "Letter of Credit Supplier's Certificate" in which MWI certified that it had not paid "any discount, allowance, rebate, commission, fee or other payment in connection with the sale" except "*[r]egular commissions* or fees paid or to be paid in the ordinary course of business to [its] regular sales agents." (Emphasis added). Similarly, before it would disburse funds, the Bank required MWI to make an identical certification. Altogether, MWI certified in fifty-eight documents that it had paid only "regular commissions" in connection with the water pump sales.

In 1998, a former MWI employee, Robert Purcell, filed on behalf of the government the FCA complaint on which this lawsuit is based. Purcell, relator here, alleged that non-regular commissions had been paid, pointing to $28 million in commissions over 30% of the loan amount that MWI had paid to its long-term (over twelve years) Nigerian sales agent, Alhaji Indimi. He alleged those commissions were so great that MWI should have disclosed them to the Bank as payments other than "regular commissions."

In 2002, the United States intervened and filed an amended complaint stating two FCA claims and two common law claims. *See* 31 U.S.C. § 3730(b)(2). (The common law claims were subsequently dropped.) Focusing on the unreported commissions, the government alleged that MWI both knowingly submitted false claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1), and knowingly made false statements to obtain a false or fraudulent claim in violation of 31 U.S.C. § 3729(a)(2). The parties filed cross motions for summary

judgment.

The district court denied MWI's motion and granted the government's motion in part. *United States ex rel. Purcell v. MWI Corp.* (*MWI I*), 520 F. Supp. 2d 158, 181 (D.D.C. 2007). MWI argued that the unsettled meaning of the ambiguous term "regular commissions" precluded, as a matter of law, the government from establishing the elements of falsity and knowledge. The district court acknowledged that the Bank had not issued written guidance on the meaning of the term and that "the contours of [the Bank's] interpretation remained unclear until the parties deposed [Bank] officials and related their findings to the court in the instant motions." *Id.* at 175 76. Further, it agreed that the undefined, ambiguous term could support MWI's understanding that a commission is "regular" if it is consistent with what had historically been paid to an individual agent. *Id.* at 175 77. Nonetheless, the district court accepted the meaning the government proposed in its summary judgment briefing: a commission is "regular" only if it is consistent with industry-wide benchmarks. *Id.* at 175 78. This definition was based on the implicit understanding Bank employees had about the meaning of the term. In view of the amount of the commissions at issue, the district court concluded that the term "regular commissions" was not so ambiguous that MWI had not been on notice that, in the government's view, the term "might imply an industry-wide rather than an intra-firm or (as the defendants quite implausibly propose) an individual-agent standard." *Id.* at 176. To the extent that there was a "nimbus of uncertainty" that "may linger around commissions that lie at the fringes of industry-wide benchmarks," the district court suggested that MWI ought to have "assumed the featherweight onus of disclosing any questionable commissions." *Id.* at 177.

Having accepted the government's definition for "regular commissions," the district court left to the jury the question

whether MWI knowingly made a false claim. *See id.* at 177 78, 181. In a later round of summary judgment, the district court determined that the government had proffered sufficient evidence to create triable issues as to whether MWI's claims were false as measured against this industry-wide definition of "regular commissions," whether such claims were material, and whether the government had suffered any actual damages as a result of the false claims. *United States ex rel. Purcell v. MWI Corp.* (*MWI II*), 824 F. Supp. 2d 12, 26 30 (D.D.C. 2011). During this round, the government expanded on its interpretation of the industry benchmark relevant to determining regularity, arguing that the commissions paid to Indimi were so high that they would be considered irregular in any industry. Even so, the government offered evidence that the commissions paid to Indimi would be considered irregular in MWI's industry, which the government defined as the "business of manufacturing and selling pumps and related equipment." *Id.* at 26 27 & n.6. The government resisted MWI's argument that in determining whether commissions were regular it was appropriate to take into account the country in which the work giving rise to the commissions was to be completed.

Because the parties disputed whether MWI's commissions complied with this industry-wide standard, the district court denied both motions for summary judgment on the falsity issue, stating that "a jury is more than capable of resolving any borderline definitional issues" presented by the need to apply an industry-wide standard. *Id.* at 27 & n.6. The district court also rejected MWI's argument that Purcell must be dismissed from the lawsuit, finding his allegations of fraud had not been based on information solely found in the public domain either from news articles speaking generally about potential fraud associated with the MWI-Nigeria deal or any related Freedom of Information Act requests. *Id.* at 22 24; *see* 31 U.S.C. § 3730(e)(4).

A jury found each of MWI's fifty-eight certifications violated the FCA under §§ 3729(a)(1) & (2), and that the government suffered $7.5 million in actual damages. The district court trebled this amount to $22.5 million pursuant to the FCA, 31 U.S.C. § 3729(a), but accepted MWI's argument that the entirety should be offset because Nigeria's repayments of $108 million (the full loan with interest and fees) constituted compensatory payments. *United States ex rel. Purcell v. MWI Corp.* (*MWI III*), 15 F. Supp. 3d 18, 23, 30 (D.D.C. 2014). The district court relied on *Bornstein*, 423 U.S. at 314 17, in which the Supreme Court held that an FCA defendant is entitled to an offset from the trebled damages by any amount paid to compensate the government for harm caused by the false claims. MWI was not completely off the hook, however, because the district court imposed the maximum ($10,000) in civil penalties for each of the fifty-eight false claims. *MWI III*, 15 F. Supp. 3d at 32; *see* 31 U.S.C. § 3729(a). The district court denied MWI's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), finding there was sufficient evidence for a jury to find the Indimi commissions were not regular and to infer knowledge of falsity. *United States ex rel. Purcell v. MWI Corp.* (*MWI IV*), 50 F. Supp. 3d 33, 39 46 (D.D.C. 2014). Concluding that it lacked authority to consider whether MWI's good faith or reasonable understanding of "regular commissions" precluded a knowledge finding, because MWI had an opportunity to argue that theory to the jury, *see id.* at 44 46, the district court found no basis to overturn the jury's determination that MWI did not have a reasonable or good faith interpretation of "regular commissions," *id.* at 46.

Both the government and MWI appeal. The government contends that the district court erred in not confining the offset to the non-trebled portion of the damages award $7.5 million and that it is entitled to recover $15 million in damages. MWI, on cross appeal, contends that the district court erred in

denying its motions for summary judgment and judgment as a matter of law. MWI maintains it could not have been found liable under the FCA because it was entitled to rely on its own reasonable interpretation of "regular commissions" absent timely notice from the government of the meaning of that undefined and ambiguous term. MWI also challenges the district court's ruling that Purcell's claims were not jurisdictionally barred under 31 U.S.C. § 3730(e)(4)(A). In view of our disposition of MWI's cross appeal, the court need not address the government's offset contention. The court also need not address MWI's contention that Purcell's claim is jurisdictionally barred; the court would have jurisdiction even if Purcell is dismissed as relator in this lawsuit, *see Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 476 78 (2007), and the presence of Purcell in the lawsuit makes no material difference to our consideration of the merits of these appeals, *see Military Toxics Project v. Envtl. Prot. Agency*, 146 F.3d 948, 954 (D.C. Cir. 1998); *Aamer v. Obama*, 742 F.3d 1023, 1042 43 (D.C. Cir. 2014).

II.

The False Claims Act prohibits false or fraudulent claims for payment from the United States. 31 U.S.C. § 3729(a); *see United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 835 (D.C. Cir. 2012). The government alleged that MWI violated that prohibition in two separate but related ways: (1) it knowingly presented false claims, 31 U.S.C. § 3729(a)(1), and (2) it used false statements to get false claims paid, *id.* § 3729(a)(2).[1] Under either theory, the government had to prove

[1] Congress modified and renumbered 31 U.S.C. § 3729(a) upon enactment of The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. The government advises that only the amendment to § 3729(a)(2) was made retroactive, but states the amendments are not relevant to this appeal and cites only the pre-2009

"that the defendant presented . . . a claim to the government, that the claim was false, and that the defendant knew that the claim was false." *United States ex rel. Davis v. District of Columbia*, 793 F.3d 120, 124 (D.C. Cir. 2015) (quoting *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003)). The jury found that the government had established liability and damages under both FCA theories.

Focusing on the ambiguity resulting from the government's failure to provide guidance to exporters about the meaning of the term "regular commissions," MWI contends that these FCA claims should have never gone to the jury. First, MWI maintains its reasonable interpretation of the undefined, ambiguous term prevented a jury from finding either the elements of falsity or knowledge under the FCA. Second, MWI maintains this ambiguity means that the district court erred as a matter of law in concluding that MWI had fair notice of its legal obligations when the term could, as the district court found, plausibly have implied MWI's interpretation.

Of course, the government as plaintiff has the burden of proving each element of the FCA, and to prevail, MWI need only show that the government's proof was lacking as to any one element. Contentions like these that a defendant cannot be held liable for failing to comply with an ambiguous term go to whether the government proved knowledge. *See United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008); *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 64 (9th Cir. 1999). And in this context, resolving the knowledge issue makes resolving the notice question unnecessary. Strict enforcement of the FCA's

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version of the statute in its brief. Appellant's Br. 2 n.1. This opinion refers only to the FCA's pre-2009 text. *See United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010).

knowledge requirement helps to ensure that innocent mistakes made in the absence of binding interpretive guidance are not converted into FCA liability, thereby avoiding the potential due process problems posed by "penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad. Co. v. Fed. Commc'ns Comm'n*, 824 F.2d 1, 3 (D.C. Cir. 1987). There is no doubt that MWI has been penalized; in addition to damages, the FCA imposes statutory penalties on those defendants who fail to comply with its terms. *See* 31 U.S.C. § 3729(a). And it is undisputed that the first actual notice of the meaning of "regular commissions" did not come until long after the conduct giving rise to this litigation took place. Faced with concerns like these, a knowledge requirement can play an essential role as it "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

To be liable under the FCA, a defendant must have made the false claims knowingly. *United States ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 29 (D.C. Cir. 2014)*; K & R Ltd.*, 530 F.3d at 983. An entity acts knowingly under the FCA by "(1) having actual knowledge, (2) acting in deliberate ignorance, or (3) acting in reckless disregard." *Folliard*, 764 F.3d at 29. Consistent with the need for a knowing violation, the FCA does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation. *See Oliver*, 195 F.3d at 463 64. Nor does it reach those claims made based on reasonable but erroneous interpretations of a defendant's legal obligations. *See K & R Ltd.*, 530 F.3d at 983 84; *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 91 (8th Cir. 2010); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998); *cf. Safeco Ins.*, 551 U.S. at 69 70 & n.20. As this court has recognized, establishing "even the loosest

standard of knowledge, i.e., acting 'in reckless disregard of the truth or falsity of the information'" is difficult when falsity turns on a disputed interpretive question. *See United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (quoting 31 U.S.C. § 3729(b)(3)).

MWI reads these precedents to mean that the knowledge element presents a pure question of law such that a defendant cannot be held liable under the FCA so long as it has an objectively reasonable interpretation of an ambiguous provision. If this understanding is correct, then the court could reverse in MWI's favor without considering the evidence presented to the jury on the question of knowledge. *Cf. Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012). The interpretive questions whether the term "regular commissions" is ambiguous and whether MWI's interpretation is objectively reasonable are legal questions. *See Oliver*, 195 F.3d at 463; *K & R Ltd.*, 530 F.3d at 983; *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011); *Feld*, 688 F.3d at 783. But this court, looking to Supreme Court guidance, has held that a jury might still find knowledge if there is interpretive guidance "that might have warned [the defendant] away from the view it took." *K & R Ltd.*, 530 F.3d at 983 (quoting *Safeco Ins.*, 551 U.S. at 70). In other words, even if the meaning of "regular commissions" is ambiguous and MWI's interpretation is reasonable, there remains the question whether MWI had been warned away from that interpretation. That question cannot readily be labeled as a "purely legal" question. *See Ortiz*, 562 U.S. at 190 91. Consequently, MWI cannot prevail on the basis that the issue of knowledge should never have gone to the jury because it was entitled to summary judgment on a pure question of law. Proving knowledge is in part an evidentiary question, and "once evidence is presented at a trial, any challenge to evidentiary sufficiency at summary judgment becomes moot." *Feld*, 688 F.3d at 782; *Ortiz*, 562 U.S. at 183 84; *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718 19 (7th Cir. 2003).

MWI must instead show that the evidence before the jury was not sufficient for it to find that MWI acted knowingly.

On the legal questions, we agree with MWI that the meaning of the term "regular commissions" is ambiguous and that MWI's interpretation is reasonable. No party contests that the meaning of "regular commissions" is ambiguous. As the district court found, the term could imply at least three different standards: industry-wide, intra-firm, or individual-agent. *MWI I*, 520 F. Supp. 2d at 176 77. So understood, MWI's individual-agent interpretation of "regular commissions" is objectively reasonable. Furthermore, the definition of "regular" makes clear that something can be "regular" either because it is not unusual in relation to societal norms or because it is not unusual for that individual. *See, e.g.*, *The American Heritage Dictionary of the English Language* (5th ed. online 2015). Consequently, MWI could reasonably have concluded that Indimi's commissions were regular because they were consistent with what MWI had been paying him for over twelve years and were calculated using the same formula MWI used to determine commissions for all of its agents. Moreover, even if "regular commissions" is best understood as referring to an industry-wide standard in light of the Bank's mission, which includes "ridding taxpayer-financed loans of tainted commissions," *MWI I*, 520 F. Supp. 2d at 177, that does not mean MWI's interpretation is objectively unreasonable. This knowledge inquiry is necessary only because MWI's understanding of the term proved to be "erroneous" once the government announced the term's meaning in this litigation. *See Safeco Ins.*, 551 U.S. at 69. Had the government interpreted the term as MWI does, there can be little doubt that the court would owe deference to that interpretation as reasonable. *See Satellite Broad.*, 824 F.2d at 3.

Accepting the reasonableness of MWI's interpretation, the factual question remains whether there was sufficient evidence

that MWI was warned away from its interpretation. The court will not overturn a jury verdict "unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree." *Williams v. Johnson*, 776 F.3d 865, 870 (D.C. Cir. 2015) (quoting *Scott v. District of Columbia*, 101 F.3d 748, 753 (D.C. Cir. 1996)). MWI has met this demanding standard, for the government has not pointed to sufficient record evidence that there was "guidance from the courts of appeals" or relevant agency "that might have warned [MWI] away from the view it took." *Safeco Ins.*, 551 U.S. at 70; *K & R Ltd.*, 530 F.3d at 983. It is undisputed that the government has never published any written guidance on what the term meant. *MWI I*, 520 F. Supp. 2d at 175 76. The Bank first revealed its understanding of "regular commissions" only after this litigation began. Indeed, Bank officials acknowledged at trial that the Bank had preferred to keep the standard flexible in order to make the loan approval process more efficient, having moved away from an overly cumbersome system where exporters listed all expenses and commissions. *See* Tr. at 17 26 (testimony of Warren Glick) (Nov. 20, 2013, PM Session). And even though the Bank was concerned about bribery escaping its detection, it was wary of adopting a rigid standard for "regular commissions" in view of the wide variety of transactions the Bank financed. Tr. at 69 78 (testimony of Dr. Rita Rodriguez) (Nov. 14, 2013, AM Session). In keeping the standard flexible, however, the Bank (and the government) afforded exporters such as MWI the right to rely on its reasonable interpretation of that flexible standard until the Bank (or a court, Congress, or an appropriate agency) indicates otherwise.

Unable to establish that the Bank had made known its implicit understanding of "regular commissions," the government attempts to salvage the jury's knowledge finding by emphasizing other record evidence. First, the government

highlights that even though the Bank's standard was not formally published, there was, in the government's view, evidence that MWI had been warned away from its individual-agent understanding of "regular commissions." The government's best evidence on this point is testimony by a former MWI employee that the Bank, through its Nigeria country officer, had told MWI that even though there were no definitive guidelines for commissions, they should be somewhere near five percent. Tr. at 20 22 (testimony of Juan Ponce) (Nov. 13, 2013, AM Session). But this suggestion hardly amounts to the necessary "authoritative guidance" from the Bank. In *Safeco Insurance*, the Supreme Court explained that informal guidance like the kind described here in that case an informal letter from staff of the Federal Trade Commission is not enough to warn a regulated defendant away from an otherwise reasonable interpretation it adopted. *See id.* at 70 n.19.

Second, the government focuses on testimony by that same MWI employee that he and his fellow employees knew they were applying the wrong definition of "regular commissions" and had concerns about not disclosing Indimi's commissions in the certifications to the Bank. Tr. at 33 36 (testimony of Juan Ponce) (Nov. 13, 2013, AM Session). In the face of an undefined and ambiguous regulatory requirement, it is no wonder that employees of the regulated entity were concerned. More fundamentally, all this evidence might imply is that MWI did not hew to its reasonable interpretation in good faith. Since this litigation began, the Supreme Court clarified that subjective intent including bad faith is irrelevant when a defendant seeks to defeat a finding of knowledge based on its reasonable interpretation of a regulatory term. *See Safeco Ins.*, 551 U.S. at 70 n.20. Under the FCA's knowledge element, then, the court's focus is on the objective reasonableness of the defendant's interpretation of an ambiguous term and whether there is any evidence that the agency warned the defendant away from that

interpretation. See *id.* at 70 & nn.19 20; *K & R Ltd.*, 530 F.3d at 983.

These generalized concerns about the regularity of Indimi's commissions also fail to support a finding that MWI acted recklessly by failing to seek a legal opinion from the Bank resolving MWI's concerns. In *K & R Ltd.*, 530 F.3d at 983 84, the court rejected a similar argument, explaining that the defendant's "failure to obtain a legal opinion or prior [agency] approval cannot support a finding of recklessness without evidence of anything that might have given it reasons to do so." Although MWI may have been concerned generally, there is no evidence that the Bank gave it particular reason to formally inquire about these commissions.

The government's final evidentiary theory fares no better. It maintains that because the sheer amount of these commissions both in absolute dollar amount and percentage terms was so much greater than those paid elsewhere, MWI must have known that they were irregular. As an initial matter, the record does not support that these commissions were so far out of sync with what is seen elsewhere in the world. At oral argument, government counsel emphasized that the basis for this argument was testimony by a former Bank board member, Dr. Rita Rodriguez, that she had never seen commissions in any industry at the rate given to Indimi. Tr. at 27 39, 79 86 (Nov. 14, 2013, AM Session). On cross examination, however, Dr. Rodriguez acknowledged that the Bank pays its own insurance brokers commissions of up to forty percent. *Id.* at 80 87. Although Dr. Rodriguez suggested that the percentages paid by the Bank were likely this high only because the absolute dollar amounts were small, *id.* at 90, the state of the record is far from clear that the government established that Indimi's commissions were so innately irregular that MWI must have known the commissions should have been disclosed.

Even assuming the jury was convinced that these commissions were beyond the pale, the government's position that this establishes knowledge amounts to a backdoor challenge to whether MWI's interpretation was reasonable. The government's desire to avoid results like these where the Bank may not have assessed whether a high commission represents the financing of non-U.S. employment or a bribe might confirm that MWI's interpretation of "regular commissions" is incompatible with the Bank's basic purposes and the government's interpretation the better one. That MWI's interpretation may not be the best interpretation does not demonstrate that MWI's interpretation was necessarily unreasonable. Absent evidence that the negative consequences of an interpretation render it unreasonable, such consequences can play no role in evaluating whether an FCA defendant acted knowingly. *Cf. Safeco Ins.*, 551 U.S. at 70 n.20. Had the government wanted to avoid such consequences, it could have defined its regulatory term to preclude them. Of course, the government may instead determine that its goals are better served by not doing so, much as the Bank officials' testimony implied. This may be the government's choice, but then the FCA may cease to be an available remedy if the government concludes after the fact that a particular commission is not "regular" because it is too high.

Accordingly, we reverse and remand the case with instructions to enter judgment for MWI, and we do not address the damages question presented by the government's appeal or MWI's challenge to the denial of dismissal of relator Purcell.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 17, 2015 Decided November 24, 2015

No. 14-5210

UNITED STATES OF AMERICA EX REL. ROBERT R. PURCELL,
APPELLANT/CROSS-APPELLEE

ROBERT R. PURCELL,
CROSS-APPELLEE

v.

MWI CORPORATION,
APPELLEE/CROSS-APPELLANT

Consolidated with 14-5218

Appeals from the United States District Court
for the District of Columbia
(No. 1:98-cv-02088)

Melissa N. Patterson, Attorney, U.S. Department of Justice, argued the cause for appellant/cross-appellee United States of America. With her on the briefs were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Vincent H. Cohen, Jr.*, Acting U.S. Attorney, and *Michael S. Raab*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Brian Tully McLaughlin and *Robert T. Rhoad* argued the causes for appellee/cross-appellant MWI Corporation. With them on the brief were *Charlotte E. Gillingham* and *Jason C. Lynch*.

Joseph J. Aronica argued the cause and filed the brief for cross-appellee Robert R. Purcell.

Douglas W. Baruch and *Jennifer M. Wollenberg* were on the brief for *amicus curiae* National Association of Manufacturers in support of defendant-appellee/cross-appellant in support of reversal of the decisions finding liability under the False Claims Act.

Before: ROGERS, BROWN and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The United States successfully brought a civil action pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729, based on certifications by MWI Corp. to the Export-Import Bank ("the Bank") to secure loans financing MWI's sale of water pumps to Nigeria. Although the total loan of $74.3 million was to Nigeria, the Bank required MWI to certify that it had paid only "regular commissions" to the sales agent responsible for the sales contract. A jury found the certifications were false and awarded the government $7.5 million in damages. The damages were trebled to $22.5 million pursuant to the FCA. Because an FCA defendant is entitled to an offset from the trebled damages by any amount paid to compensate the government for the harm caused by the false claims, *see United States v. Bornstein*, 423 U.S. 303 (1976), and the district court considered Nigeria's repayment of the loan to be compensatory, MWI's damages were reduced from $22.5 million to $0. MWI thus was subject only to civil penalties,

which the district court imposed at the highest level permitted by the statute, $10,000 for each of the 58 certifications.

The government, having recovered no damages, appeals. It contends the district court should have applied only $7.5 million of Nigeria's loan repayment as an offset against MWI's $22.5 million in trebled damages, because, according to the government, the offset applies against the amount of damages before trebling, not against the trebled damages, and so it is still entitled to recover $15 million in damages. MWI cross appeals on the principal ground that the government failed as a matter of law to establish that it made a false claim or that it had done so knowingly, both of which are required to establish FCA liability.

Because the government failed to establish that MWI knowingly made a false claim, we reverse. At the time MWI made the certifications, the government had yet to inform exporters that, contrary to MWI's understanding of "regular commissions," the term refers to what is normally paid in the industry, and not what an exporter had historically paid to an individual sales agent. Absent evidence that the Bank, or other government entity, had officially warned MWI away from its otherwise facially reasonable interpretation of that undefined and ambiguous term, the FCA's objective knowledge standard, as the Supreme Court clarified while this litigation was pending in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69 70 & n.20 (2007), did not permit a jury to find that MWI "knowingly" made a false claim.

I.

The following facts are undisputed. In 1992, MWI agreed to sell $82.2 million in irrigation pumps and related equipment to seven states in Nigeria. To facilitate the sales, the parties sought financing from the Bank, which finances and facilitates

export of U.S. goods and services by providing loans to foreign purchasers, thereby "contribut[ing] to the employment of United States workers." 12 U.S.C. § 635(a)(1). The Bank agreed to lend Nigeria $74.3 million in eight separate loans. Prior to approving the loans, the Bank had required MWI to submit a "Letter of Credit Supplier's Certificate" in which MWI certified that it had not paid "any discount, allowance, rebate, commission, fee or other payment in connection with the sale" except "*[r]egular commissions* or fees paid or to be paid in the ordinary course of business to [its] regular sales agents." (Emphasis added). Similarly, before it would disburse funds, the Bank required MWI to make an identical certification. Altogether, MWI certified in fifty-eight documents that it had paid only "regular commissions" in connection with the water pump sales.

In 1998, a former MWI employee, Robert Purcell, filed on behalf of the government the FCA complaint on which this lawsuit is based. Purcell, relator here, alleged that non-regular commissions had been paid, pointing to $28 million in commissions over 30% of the loan amount that MWI had paid to its long-term (over twelve years) Nigerian sales agent, Alhaji Indimi. He alleged those commissions were so great that MWI should have disclosed them to the Bank as payments other than "regular commissions."

In 2002, the United States intervened and filed an amended complaint stating two FCA claims and two common law claims. *See* 31 U.S.C. § 3730(b)(2). (The common law claims were subsequently dropped.) Focusing on the unreported commissions, the government alleged that MWI both knowingly submitted false claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1), and knowingly made false statements to obtain a false or fraudulent claim in violation of 31 U.S.C. § 3729(a)(2). The parties filed cross motions for summary

judgment.

The district court denied MWI's motion and granted the government's motion in part. *United States ex rel. Purcell v. MWI Corp.* (*MWI I*), 520 F. Supp. 2d 158, 181 (D.D.C. 2007). MWI argued that the unsettled meaning of the ambiguous term "regular commissions" precluded, as a matter of law, the government from establishing the elements of falsity and knowledge. The district court acknowledged that the Bank had not issued written guidance on the meaning of the term and that "the contours of [the Bank's] interpretation remained unclear until the parties deposed [Bank] officials and related their findings to the court in the instant motions." *Id.* at 175 76. Further, it agreed that the undefined, ambiguous term could support MWI's understanding that a commission is "regular" if it is consistent with what had historically been paid to an individual agent. *Id.* at 175 77. Nonetheless, the district court accepted the meaning the government proposed in its summary judgment briefing: a commission is "regular" only if it is consistent with industry-wide benchmarks. *Id.* at 175 78. This definition was based on the implicit understanding Bank employees had about the meaning of the term. In view of the amount of the commissions at issue, the district court concluded that the term "regular commissions" was not so ambiguous that MWI had not been on notice that, in the government's view, the term "might imply an industry-wide rather than an intra-firm or (as the defendants quite implausibly propose) an individual-agent standard." *Id.* at 176. To the extent that there was a "nimbus of uncertainty" that "may linger around commissions that lie at the fringes of industry-wide benchmarks," the district court suggested that MWI ought to have "assumed the featherweight onus of disclosing any questionable commissions." *Id.* at 177.

Having accepted the government's definition for "regular commissions," the district court left to the jury the question

whether MWI knowingly made a false claim. *See id.* at 177 78, 181. In a later round of summary judgment, the district court determined that the government had proffered sufficient evidence to create triable issues as to whether MWI's claims were false as measured against this industry-wide definition of "regular commissions," whether such claims were material, and whether the government had suffered any actual damages as a result of the false claims. *United States ex rel. Purcell v. MWI Corp.* (*MWI II*), 824 F. Supp. 2d 12, 26 30 (D.D.C. 2011). During this round, the government expanded on its interpretation of the industry benchmark relevant to determining regularity, arguing that the commissions paid to Indimi were so high that they would be considered irregular in any industry. Even so, the government offered evidence that the commissions paid to Indimi would be considered irregular in MWI's industry, which the government defined as the "business of manufacturing and selling pumps and related equipment." *Id.* at 26 27 & n.6. The government resisted MWI's argument that in determining whether commissions were regular it was appropriate to take into account the country in which the work giving rise to the commissions was to be completed.

Because the parties disputed whether MWI's commissions complied with this industry-wide standard, the district court denied both motions for summary judgment on the falsity issue, stating that "a jury is more than capable of resolving any borderline definitional issues" presented by the need to apply an industry-wide standard. *Id.* at 27 & n.6. The district court also rejected MWI's argument that Purcell must be dismissed from the lawsuit, finding his allegations of fraud had not been based on information solely found in the public domain either from news articles speaking generally about potential fraud associated with the MWI-Nigeria deal or any related Freedom of Information Act requests. *Id.* at 22 24; *see* 31 U.S.C. § 3730(e)(4).

A jury found each of MWI's fifty-eight certifications violated the FCA under §§ 3729(a)(1) & (2), and that the government suffered $7.5 million in actual damages. The district court trebled this amount to $22.5 million pursuant to the FCA, 31 U.S.C. § 3729(a), but accepted MWI's argument that the entirety should be offset because Nigeria's repayments of $108 million (the full loan with interest and fees) constituted compensatory payments. *United States ex rel. Purcell v. MWI Corp.* (*MWI III*), 15 F. Supp. 3d 18, 23, 30 (D.D.C. 2014). The district court relied on *Bornstein*, 423 U.S. at 314 17, in which the Supreme Court held that an FCA defendant is entitled to an offset from the trebled damages by any amount paid to compensate the government for harm caused by the false claims. MWI was not completely off the hook, however, because the district court imposed the maximum ($10,000) in civil penalties for each of the fifty-eight false claims. *MWI III*, 15 F. Supp. 3d at 32; *see* 31 U.S.C. § 3729(a). The district court denied MWI's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), finding there was sufficient evidence for a jury to find the Indimi commissions were not regular and to infer knowledge of falsity. *United States ex rel. Purcell v. MWI Corp.* (*MWI IV*), 50 F. Supp. 3d 33, 39 46 (D.D.C. 2014). Concluding that it lacked authority to consider whether MWI's good faith or reasonable understanding of "regular commissions" precluded a knowledge finding, because MWI had an opportunity to argue that theory to the jury, *see id.* at 44 46, the district court found no basis to overturn the jury's determination that MWI did not have a reasonable or good faith interpretation of "regular commissions," *id.* at 46.

Both the government and MWI appeal. The government contends that the district court erred in not confining the offset to the non-trebled portion of the damages award $7.5 million and that it is entitled to recover $15 million in damages. MWI, on cross appeal, contends that the district court erred in

denying its motions for summary judgment and judgment as a matter of law. MWI maintains it could not have been found liable under the FCA because it was entitled to rely on its own reasonable interpretation of "regular commissions" absent timely notice from the government of the meaning of that undefined and ambiguous term. MWI also challenges the district court's ruling that Purcell's claims were not jurisdictionally barred under 31 U.S.C. § 3730(e)(4)(A). In view of our disposition of MWI's cross appeal, the court need not address the government's offset contention. The court also need not address MWI's contention that Purcell's claim is jurisdictionally barred; the court would have jurisdiction even if Purcell is dismissed as relator in this lawsuit, *see Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 476 78 (2007), and the presence of Purcell in the lawsuit makes no material difference to our consideration of the merits of these appeals, *see Military Toxics Project v. Envtl. Prot. Agency*, 146 F.3d 948, 954 (D.C. Cir. 1998); *Aamer v. Obama*, 742 F.3d 1023, 1042 43 (D.C. Cir. 2014).

II.

The False Claims Act prohibits false or fraudulent claims for payment from the United States. 31 U.S.C. § 3729(a); *see United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 835 (D.C. Cir. 2012). The government alleged that MWI violated that prohibition in two separate but related ways: (1) it knowingly presented false claims, 31 U.S.C. § 3729(a)(1), and (2) it used false statements to get false claims paid, *id.* § 3729(a)(2).[1] Under either theory, the government had to prove

[1] Congress modified and renumbered 31 U.S.C. § 3729(a) upon enactment of The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. The government advises that only the amendment to § 3729(a)(2) was made retroactive, but states the amendments are not relevant to this appeal and cites only the pre-2009

"that the defendant presented . . . a claim to the government, that the claim was false, and that the defendant knew that the claim was false." *United States ex rel. Davis v. District of Columbia*, 793 F.3d 120, 124 (D.C. Cir. 2015) (quoting *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003)). The jury found that the government had established liability and damages under both FCA theories.

Focusing on the ambiguity resulting from the government's failure to provide guidance to exporters about the meaning of the term "regular commissions," MWI contends that these FCA claims should have never gone to the jury. First, MWI maintains its reasonable interpretation of the undefined, ambiguous term prevented a jury from finding either the elements of falsity or knowledge under the FCA. Second, MWI maintains this ambiguity means that the district court erred as a matter of law in concluding that MWI had fair notice of its legal obligations when the term could, as the district court found, plausibly have implied MWI's interpretation.

Of course, the government as plaintiff has the burden of proving each element of the FCA, and to prevail, MWI need only show that the government's proof was lacking as to any one element. Contentions like these that a defendant cannot be held liable for failing to comply with an ambiguous term go to whether the government proved knowledge. *See United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008); *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 64 (9th Cir. 1999). And in this context, resolving the knowledge issue makes resolving the notice question unnecessary. Strict enforcement of the FCA's

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version of the statute in its brief. Appellant's Br. 2 n.1. This opinion refers only to the FCA's pre-2009 text. *See United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010).

knowledge requirement helps to ensure that innocent mistakes made in the absence of binding interpretive guidance are not converted into FCA liability, thereby avoiding the potential due process problems posed by "penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad. Co. v. Fed. Commc'ns Comm'n*, 824 F.2d 1, 3 (D.C. Cir. 1987). There is no doubt that MWI has been penalized; in addition to damages, the FCA imposes statutory penalties on those defendants who fail to comply with its terms. *See* 31 U.S.C. § 3729(a). And it is undisputed that the first actual notice of the meaning of "regular commissions" did not come until long after the conduct giving rise to this litigation took place. Faced with concerns like these, a knowledge requirement can play an essential role as it "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

To be liable under the FCA, a defendant must have made the false claims knowingly. *United States ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 29 (D.C. Cir. 2014)*; K & R Ltd.*, 530 F.3d at 983. An entity acts knowingly under the FCA by "(1) having actual knowledge, (2) acting in deliberate ignorance, or (3) acting in reckless disregard." *Folliard*, 764 F.3d at 29. Consistent with the need for a knowing violation, the FCA does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation. *See Oliver*, 195 F.3d at 463 64. Nor does it reach those claims made based on reasonable but erroneous interpretations of a defendant's legal obligations. *See K & R Ltd.*, 530 F.3d at 983 84; *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 91 (8th Cir. 2010); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998); *cf. Safeco Ins.*, 551 U.S. at 69 70 & n.20. As this court has recognized, establishing "even the loosest

standard of knowledge, i.e., acting 'in reckless disregard of the truth or falsity of the information'" is difficult when falsity turns on a disputed interpretive question. *See United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (quoting 31 U.S.C. § 3729(b)(3)).

MWI reads these precedents to mean that the knowledge element presents a pure question of law such that a defendant cannot be held liable under the FCA so long as it has an objectively reasonable interpretation of an ambiguous provision. If this understanding is correct, then the court could reverse in MWI's favor without considering the evidence presented to the jury on the question of knowledge. *Cf. Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012). The interpretive questions whether the term "regular commissions" is ambiguous and whether MWI's interpretation is objectively reasonable are legal questions. *See Oliver*, 195 F.3d at 463; *K & R Ltd.*, 530 F.3d at 983; *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011); *Feld*, 688 F.3d at 783. But this court, looking to Supreme Court guidance, has held that a jury might still find knowledge if there is interpretive guidance "that might have warned [the defendant] away from the view it took." *K & R Ltd.*, 530 F.3d at 983 (quoting *Safeco Ins.*, 551 U.S. at 70). In other words, even if the meaning of "regular commissions" is ambiguous and MWI's interpretation is reasonable, there remains the question whether MWI had been warned away from that interpretation. That question cannot readily be labeled as a "purely legal" question. *See Ortiz*, 562 U.S. at 190 91. Consequently, MWI cannot prevail on the basis that the issue of knowledge should never have gone to the jury because it was entitled to summary judgment on a pure question of law. Proving knowledge is in part an evidentiary question, and "once evidence is presented at a trial, any challenge to evidentiary sufficiency at summary judgment becomes moot." *Feld*, 688 F.3d at 782; *Ortiz*, 562 U.S. at 183 84; *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718 19 (7th Cir. 2003).

MWI must instead show that the evidence before the jury was not sufficient for it to find that MWI acted knowingly.

On the legal questions, we agree with MWI that the meaning of the term "regular commissions" is ambiguous and that MWI's interpretation is reasonable. No party contests that the meaning of "regular commissions" is ambiguous. As the district court found, the term could imply at least three different standards: industry-wide, intra-firm, or individual-agent. *MWI I*, 520 F. Supp. 2d at 176 77. So understood, MWI's individual-agent interpretation of "regular commissions" is objectively reasonable. Furthermore, the definition of "regular" makes clear that something can be "regular" either because it is not unusual in relation to societal norms or because it is not unusual for that individual. *See, e.g.*, *The American Heritage Dictionary of the English Language* (5th ed. online 2015). Consequently, MWI could reasonably have concluded that Indimi's commissions were regular because they were consistent with what MWI had been paying him for over twelve years and were calculated using the same formula MWI used to determine commissions for all of its agents. Moreover, even if "regular commissions" is best understood as referring to an industry-wide standard in light of the Bank's mission, which includes "ridding taxpayer-financed loans of tainted commissions," *MWI I*, 520 F. Supp. 2d at 177, that does not mean MWI's interpretation is objectively unreasonable. This knowledge inquiry is necessary only because MWI's understanding of the term proved to be "erroneous" once the government announced the term's meaning in this litigation. *See Safeco Ins.*, 551 U.S. at 69. Had the government interpreted the term as MWI does, there can be little doubt that the court would owe deference to that interpretation as reasonable. *See Satellite Broad.*, 824 F.2d at 3.

Accepting the reasonableness of MWI's interpretation, the factual question remains whether there was sufficient evidence

that MWI was warned away from its interpretation. The court will not overturn a jury verdict "unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree." *Williams v. Johnson*, 776 F.3d 865, 870 (D.C. Cir. 2015) (quoting *Scott v. District of Columbia*, 101 F.3d 748, 753 (D.C. Cir. 1996)). MWI has met this demanding standard, for the government has not pointed to sufficient record evidence that there was "guidance from the courts of appeals" or relevant agency "that might have warned [MWI] away from the view it took." *Safeco Ins.*, 551 U.S. at 70; *K & R Ltd.*, 530 F.3d at 983. It is undisputed that the government has never published any written guidance on what the term meant. *MWI I*, 520 F. Supp. 2d at 175 76. The Bank first revealed its understanding of "regular commissions" only after this litigation began. Indeed, Bank officials acknowledged at trial that the Bank had preferred to keep the standard flexible in order to make the loan approval process more efficient, having moved away from an overly cumbersome system where exporters listed all expenses and commissions. *See* Tr. at 17 26 (testimony of Warren Glick) (Nov. 20, 2013, PM Session). And even though the Bank was concerned about bribery escaping its detection, it was wary of adopting a rigid standard for "regular commissions" in view of the wide variety of transactions the Bank financed. Tr. at 69 78 (testimony of Dr. Rita Rodriguez) (Nov. 14, 2013, AM Session). In keeping the standard flexible, however, the Bank (and the government) afforded exporters such as MWI the right to rely on its reasonable interpretation of that flexible standard until the Bank (or a court, Congress, or an appropriate agency) indicates otherwise.

Unable to establish that the Bank had made known its implicit understanding of "regular commissions," the government attempts to salvage the jury's knowledge finding by emphasizing other record evidence. First, the government

highlights that even though the Bank's standard was not formally published, there was, in the government's view, evidence that MWI had been warned away from its individual-agent understanding of "regular commissions." The government's best evidence on this point is testimony by a former MWI employee that the Bank, through its Nigeria country officer, had told MWI that even though there were no definitive guidelines for commissions, they should be somewhere near five percent. Tr. at 20 22 (testimony of Juan Ponce) (Nov. 13, 2013, AM Session). But this suggestion hardly amounts to the necessary "authoritative guidance" from the Bank. In *Safeco Insurance*, the Supreme Court explained that informal guidance like the kind described here in that case an informal letter from staff of the Federal Trade Commission is not enough to warn a regulated defendant away from an otherwise reasonable interpretation it adopted. *See id.* at 70 n.19.

Second, the government focuses on testimony by that same MWI employee that he and his fellow employees knew they were applying the wrong definition of "regular commissions" and had concerns about not disclosing Indimi's commissions in the certifications to the Bank. Tr. at 33 36 (testimony of Juan Ponce) (Nov. 13, 2013, AM Session). In the face of an undefined and ambiguous regulatory requirement, it is no wonder that employees of the regulated entity were concerned. More fundamentally, all this evidence might imply is that MWI did not hew to its reasonable interpretation in good faith. Since this litigation began, the Supreme Court clarified that subjective intent including bad faith is irrelevant when a defendant seeks to defeat a finding of knowledge based on its reasonable interpretation of a regulatory term. *See Safeco Ins.*, 551 U.S. at 70 n.20. Under the FCA's knowledge element, then, the court's focus is on the objective reasonableness of the defendant's interpretation of an ambiguous term and whether there is any evidence that the agency warned the defendant away from that

interpretation. See *id.* at 70 & nn.19 20; *K & R Ltd.*, 530 F.3d at 983.

These generalized concerns about the regularity of Indimi's commissions also fail to support a finding that MWI acted recklessly by failing to seek a legal opinion from the Bank resolving MWI's concerns. In *K & R Ltd.*, 530 F.3d at 983 84, the court rejected a similar argument, explaining that the defendant's "failure to obtain a legal opinion or prior [agency] approval cannot support a finding of recklessness without evidence of anything that might have given it reasons to do so." Although MWI may have been concerned generally, there is no evidence that the Bank gave it particular reason to formally inquire about these commissions.

The government's final evidentiary theory fares no better. It maintains that because the sheer amount of these commissions both in absolute dollar amount and percentage terms was so much greater than those paid elsewhere, MWI must have known that they were irregular. As an initial matter, the record does not support that these commissions were so far out of sync with what is seen elsewhere in the world. At oral argument, government counsel emphasized that the basis for this argument was testimony by a former Bank board member, Dr. Rita Rodriguez, that she had never seen commissions in any industry at the rate given to Indimi. Tr. at 27 39, 79 86 (Nov. 14, 2013, AM Session). On cross examination, however, Dr. Rodriguez acknowledged that the Bank pays its own insurance brokers commissions of up to forty percent. *Id.* at 80 87. Although Dr. Rodriguez suggested that the percentages paid by the Bank were likely this high only because the absolute dollar amounts were small, *id.* at 90, the state of the record is far from clear that the government established that Indimi's commissions were so innately irregular that MWI must have known the commissions should have been disclosed.

Even assuming the jury was convinced that these commissions were beyond the pale, the government's position that this establishes knowledge amounts to a backdoor challenge to whether MWI's interpretation was reasonable. The government's desire to avoid results like these where the Bank may not have assessed whether a high commission represents the financing of non-U.S. employment or a bribe might confirm that MWI's interpretation of "regular commissions" is incompatible with the Bank's basic purposes and the government's interpretation the better one. That MWI's interpretation may not be the best interpretation does not demonstrate that MWI's interpretation was necessarily unreasonable. Absent evidence that the negative consequences of an interpretation render it unreasonable, such consequences can play no role in evaluating whether an FCA defendant acted knowingly. *Cf. Safeco Ins.*, 551 U.S. at 70 n.20. Had the government wanted to avoid such consequences, it could have defined its regulatory term to preclude them. Of course, the government may instead determine that its goals are better served by not doing so, much as the Bank officials' testimony implied. This may be the government's choice, but then the FCA may cease to be an available remedy if the government concludes after the fact that a particular commission is not "regular" because it is too high.

Accordingly, we reverse and remand the case with instructions to enter judgment for MWI, and we do not address the damages question presented by the government's appeal or MWI's challenge to the denial of dismissal of relator Purcell.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5323 **September Term, 2014**

1:14-cv-01818-UNA

Filed On: August 6, 2015

In re: William H. Evans, Jr.,

Petitioner

BEFORE: Brown, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which has been construed as a petition for a writ of mandamus, the memorandum of law and fact, the response thereto, and the reply, it is

ORDERED that the petition for a writ of mandamus be denied. This court lacks jurisdiction to review the district court's transfer order because the case was transferred before the petitioner sought review, and no circumstances present here warrant an exception to this rule. See Starnes v. McGuire, 512 F.2d 918, 924 & n.6 (D.C. Cir. 1974) (en banc); In re Briscoe, 976 F.2d 1425, 1426-27 (D.C. Cir. 1992).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5108 **September Term, 2014**

1:14-cv-00478-PLF

Filed On: August 6, 2015

Ronald L. White, JD, Lead Plaintiff,

Appellant

v.

Thomas J. Vilsack, Secretary of the United States Department of Agriculture,

Appellee

BEFORE: Brown, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of appellant's brief; the motion for summary affirmance, the response thereto, and the reply; and the motion for summary reversal, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Appellant contends he does not seek to bring an action on behalf of a putative class, but rather on behalf of individual claimants. His reliance on Taylor v. Sturgell, 553 U.S. 880 (2008), however, is misplaced. Although Taylor holds that persons not parties to an earlier case cannot be precluded from filing their own claims, the decision makes clear that those, like appellant, who were adequately represented as absent class members in a resolved class action are nonetheless subject to preclusion.

Appellant's argument that the putative class on whose behalf he seeks to bring this action lacked adequate notice of the consent decree, Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) (Pigford I), and the settlement agreement, In re Black Farmers Discrimination Litigation, 856 F. Supp. 2d 1 (D.D.C. 2011) (Pigford II), is also unavailing. See, e.g., Pigford v. Johanns, 416 F.3d 12, 20 (D.C. Cir. 2005). Moreover,

United States Court of Appeals
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there is no suggestion that the putative class "opted out" of the Pigford classes. See Pigford II order and judgment (Oct. 27, 2011) ("forever" barring and precluding class members from bringing any and all claims that have or could have been asserted in the case).

Furthermore, because the court will not infer a Bivens remedy where Congress has adopted a "comprehensive remedial scheme," as it did with regard to asserting claims of racial discrimination against the U.S. Department of Agriculture in the administration of farm-related benefit programs, that claim is also without merit. See Davis v. Billington, 681 F.3d 377, 381 (D.C. Cir. 2012) (quoting Wilson v. Libby, 535 F.3d 697, 705 (D.C. Cir. 2008)).

Finally, because appellant does not address the district court's determination that he lacks standing to challenge certain provisions of the consent decree and settlement agreement, he has forfeited that claim. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5144 **September Term, 2014**

1:14-cv-00845-UNA

Filed On: August 4, 2015

Tracy Pinkney,

Appellant

v.

United States of America,

Appellee

BEFORE: Brown and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss for lack of a certificate of appealability, the court's order to show cause filed March 23, 2015, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to dismiss for lack of a certificate of appealability be granted. See 28 U.S.C. § 2253(c). Because appellant has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant may not challenge his District of Columbia convictions in federal court unless his remedy under D.C. Code § 23-110(a) is inadequate or ineffective to test the legality of his detention. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998); see also D.C. Code § 23-110(g). The § 23-110 remedy, however, is not considered inadequate or ineffective simply because the relief requested has been denied. See Garris v.Lindsay, 794 F.2d 772, 727 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5133 **September Term, 2014**

1:15-cv-00674-UNA

Filed On: August 4, 2015

In re: Joseph D. Midyette,

Petitioner

BEFORE: Brown and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for a writ of mandamus, the supporting memoranda of law and fact, the motion for leave to proceed in forma pauperis, and the motion for appointment of counsel, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The district court did not abuse its discretion in transferring petitioner's case to the District Court for the Eastern District of North Carolina. See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). Because he was convicted in state court, petitioner may not proceed under 28 U.S.C. § 2255 within this circuit, but must instead proceed under 28 U.S.C. § 2254 in the district court having jurisdiction over his custodian. See, e.g., Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5138 **September Term, 2014**

1:08-cv-02127-UNA

Filed On: August 4, 2015

In re: David Lee Smith,

Petitioner

BEFORE: Brown and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown a clear and indisputable right to the relief requested. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Because petitioner was convicted in state court, the proper vehicle for challenging his convictions and sentences in federal court is an application for a writ of habeas corpus filed under 28 U.S.C. § 2254 in the district court having jurisdiction over his custodian. See, e.g., Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5045 **September Term, 2014**

Filed On: July 22, 2015

In re: Eric Flores,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for a writ of mandamus, which includes a request for injunctive relief, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not met his burden of demonstrating that this court has subject matter jurisdiction over his claims. See Georgiades v. Martin-Trigona, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984); see also Nat'l Auto. Dealers Assn v. FTC, 670 F.3d 268, 270 (D.C. Cir. 2012) (citations omitted) ("normal default rule" in this circuit is that a challenge to agency action proceeds first to district court, unless the governing statute specifically confers jurisdiction to directly review agency action). Nor has petitioner shown a clear right to relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). It is

FURTHER ORDERED that the request for injunctive relief be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5042 **September Term, 2014**

Filed On: July 21, 2015

In re: Michael T. Verburg,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and the supplements thereto; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown that he has a "clear and indisputable right" to mandamus relief, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), and that there is "no other adequate remedy available" to him, Power v. Barnhart, 292 F.3d 781, 784-86 (D.C. Cir. 2002).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5068 **September Term, 2014**

1:08-cv-02127-UNA

Filed On: July 21, 2015

In re: David Lee Smith,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and supplements thereto; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown that he has a "clear and indisputable right" to mandamus relief, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), and that there is "no other adequate remedy available" to him, Power v. Barnhart, 292 F.3d 781, 784-86 (D.C. Cir. 2002). Because petitioner was convicted in state court, the proper vehicle for challenging his sentence in federal court is an application for a writ of habeas corpus filed under 28 U.S.C. § 2254 in the district court with jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004); Stokes v. U.S. Parole Comm'n, 374 F.3d 1235, 1237-38 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5069 **September Term, 2014**

1:08-cv-02127-UNA

Filed On: July 21, 2015

In re: David Lee Smith,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and supplement thereto; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown that he has a "clear and indisputable right" to mandamus relief, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), and that there is "no other adequate remedy available" to him, Power v. Barnhart, 292 F.3d 781, 784-86 (D.C. Cir. 2002). Nor has petitioner provided any ground to disturb the district court's order in 2009, transferring his habeas petition to the U.S. District Court for the Eastern District of North Carolina. Because petitioner was convicted in state court, the proper vehicle for challenging his sentence in federal court is an application for a writ of habeas corpus filed under 28 U.S.C. § 2254 in the district court with jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004); Stokes v. U.S. Parole Comm'n, 374 F.3d 1235, 1237-38 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5071 **September Term, 2014**

1:08-cv-02127-UNA

Filed On: July 21, 2015

In re: David Lee Smith,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and supplement thereto; the motion for release; the motion for summary disposition and supplement thereto; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a clear and indisputable right to the extraordinary relief requested. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Nor has petitioner provided any ground to disturb the district court's order in 2009, transferring his habeas petition to the U.S. District Court for the Eastern District of North Carolina. Because petitioner was convicted in state court, the proper vehicle for challenging his sentence in federal court is an application for a writ of habeas corpus filed under 28 U.S.C. § 2254 in the district court with jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004); Stokes v. U.S. Parole Comm'n, 374 F.3d 1235, 1237-38 (D.C. Cir. 2004). It is

FURTHER ORDERED that the motions for release and for summary disposition be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1033 **September Term, 2014**

STB-FD-35582

Filed On: July 8, 2015

Rail-Term Corp.,

Petitioner

v.

Surface Transportation Board and United States of America,

Respondents

American Train Dispatchers Association,
Intervenor

BEFORE: Garland, Chief Judge, Kavanaugh, Circuit Judge, and Ginsburg, Senior Judge

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED the motion to dismiss be granted. Petitioner has not shown that the Surface Transportation Board reopened proceedings and issued a new and final order. See Am. Ass'n of Paging Carriers v. FCC, 442 F.3d 751, 756 (D.C. Cir. 2006) ("Reopening . . . does not necessarily occur by dint of an agency's consideration of the merits."). Moreover, an agency's denial of reconsideration is unreviewable where, as here, the petition for reconsideration was based on material error. See ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 278 (1987). Finally, an intent to challenge the underlying Rail Carrier Decision cannot be fairly inferred from the petition for review and contemporaneous filings. See Entravision Holdings LLC v. FCC, 202 F.3d 311, 313 (D.C. Cir. 2000).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1033 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1312 **September Term, 2014**

FILED ON: JULY 7, 2015

STATE OF NORTH CAROLINA,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

CLEAN AIR CAROLINA, ET AL.,
INTERVENORS

Consolidated with 14-1186

On Petitions for Review of Final Agency Action of
the United States Environmental Protection Agency

Before: GRIFFITH and KAVANAUGH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

These petitions for review were considered on the record from the Environmental Protection Agency and on the briefs of the parties and oral argument of counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition in case No. 13-1312 be dismissed as untimely and that the petition in case No. 14-1186 be denied.

The Clean Air Act requires the Environmental Protection Agency (EPA) to establish national ambient air quality standards (NAAQS) for pollutants that contribute to air pollution or threaten public health. 42 U.S.C. §§ 7408-09. After EPA sets a NAAQS, each state must submit to the agency a state implementation plan (SIP) explaining how it will "implement[], maint[ain], and enforce[]" that NAAQS within its boundaries. *Id.* § 7410(a)(1). For areas in a state that attain a given NAAQS, the Act provides various SIP requirements that collectively act as a program for the prevention of significant deterioration of air quality in those areas. *See id.* §§ 7470-92.

For any NAAQS that EPA sets after August 7, 1977, the Act requires the agency to promulgate regulations that will prevent significant deterioration of air quality resulting from emissions of the pollutant relevant to that NAAQS. 42 U.S.C. § 7476(a). To further this undertaking, EPA must set "baseline concentration" levels of the relevant pollutant, which reflect a measurement of the concentration of that pollutant in the air in a specific area on a specific date. *Id*. §§ 7473, 7479(4). The gap between the baseline concentration level and the NAAQS is known as an "increment." Put more simply: After EPA issues a NAAQS, it measures the air quality in a given area (the baseline concentration level) and determines how much more pollution could exist in that area before running afoul of the NAAQS (the increment).

The Act also authorizes EPA "to substitute" an increment for particulate matter equal to or smaller than ten micrometers (PM_{10}) for the existing increments for particular matter (a broad class of pollutants) generally, which are set out in a different section of the Act. 42 U.S.C. § 7476(f). In other words, instead of setting a new baseline date and level and determining for the first time the increment for particulate matter smaller than ten micrometers, the Act authorizes EPA to apply the increment that the Act elsewhere sets forth for particulate matter generally. *See id*. § 7473(b).

EPA exercised its authority under 42 U.S.C. § 7476(a) and set a baseline concentration level and increment for fine particulate matter smaller than 2.5 micrometers in length ($PM_{2.5}$) in a 2010 rule (the Increment Rule). *See* 75 Fed. Reg. 64,864 (Oct. 20, 2010). Petitioner North Carolina challenges the Increment Rule, arguing that EPA cannot treat $PM_{2.5}$ as a new pollutant under section 7476(a). Instead, the State argues, EPA had to set the $PM_{2.5}$ increment using its authority under section 7476(f).

We dismiss this petition because it is untimely. Petitioners seeking to challenge a rule promulgated under the Clean Air Act must bring their challenge within sixty days of when the final rule first appears in the Federal Register. *See* 42 U.S.C. § 7607(b). North Carolina filed its petition for review of the 2010 Increment Rule on December 26, 2013—years after the deadline for petitions expired. North Carolina insists that its petition falls within the Act's exception for petitions "based solely on grounds arising after such sixtieth day" that allows a party to file a petition for review "within sixty days after such grounds arise." *Id*.

North Carolina contends that our January 4, 2013, decision in *NRDC v. EPA*, 706 F.3d 428, 435-37 (D.C. Cir. 2013), constituted after-arising grounds under section 7607(b). But North Carolina brought its petition more than ten months after we issued *NRDC*—well outside of the sixty-day window for petitions that the after-arising grounds exception provides. Even assuming, without deciding, that *NRDC* constituted after-arising grounds, North Carolina's petition is thus still untimely. *See* 42 U.S.C. § 7607(b); *see also Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1113-14 (D.C. Cir. 2009) (holding that a petitioner invoking the after-arising grounds exception must bring its petition within sixty days of when its after-arising claim ripens).

The State explains that it did not bring its claim immediately after *NRDC* because an EPA director suggested that the agency was reviewing the impact that the decision would have on the Increment Rule, and the State understood that "revisions to the Increment Rule," which might have

obviated the need for its petition, "would take time." Pet'r's Br. 29. But the Clean Air Act does not toll filing deadlines for such niceties. The Increment Rule was in full effect and applicable to North Carolina when we handed down our decision in *NRDC*. *See, e.g.*, 75 Fed. Reg. at 64,898 (noting that the Increment Rule set "final $PM_{2.5}$ increments . . . for *all State* [prevention of significant deterioration] programs" (emphasis added)). The State thus had no more than sixty days from when we issued that decision on January 4, 2013, to avail itself of the after-arising grounds exception and file its petition. *See* 42 U.S.C. § 7607(b); *cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (holding that a suit is ripe if the legal issue is fit for judicial resolution and the party challenging an administrative action has felt its effects in a "concrete way"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Since the State failed to meet that deadline, we dismiss the petition as untimely.

North Carolina also asks us to review EPA's denial of the State's administrative petition for reconsideration of the Increment Rule. The Clean Air Act allows petitions for reconsideration "if the grounds for [the] objection arose after the period for public comment (but within the time specified for judicial review) . . . ." 42 U.S.C. § 7607(d)(7)(B). The State filed its petition for reconsideration of the Increment Rule with EPA on December 23, 2013, making the same arguments it has now presented to us. EPA denied that petition for reconsideration for several reasons, including that the State failed to file it within the sixty-day judicial review period following our decision in *NRDC*. *See* J.A. 181-82. For the same reasons that we found North Carolina's petition for review untimely, we hold that the agency did not abuse its discretion in determining that the petition for reconsideration was untimely. *See AT&T v. FCC*, 363 F.3d 504, 509 (D.C. Cir. 2004). ("[A] court will reverse an agency's denial of reconsideration only in the most extraordinary circumstances . . . and only if the agency has engaged in the clearest abuse of discretion." (internal quotations and citation omitted)). We therefore deny the State's petition for review of EPA's decision rejecting the petition for reconsideration.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7150 **September Term, 2014**

Filed On: June 29, 2015

In re: Reginald M. Wooten, also known as R. Asanti Ali,

Petitioner

BEFORE: Kavanaugh and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the Clerk's order filed October 1, 2014, directing petitioner to either pay the docketing fee or file a motion for leave to proceed in forma pauperis, accompanied by a completed Consent to Collection of Fees and Prisoner Trust Account Report, and the response and supplemental response thereto; and the per curiam order filed February 6, 2015, ordering payment of the docketing fee or the filing of the required documents, and the response thereto, it is

ORDERED, on the court's own motion, that the appeal be dismissed. Despite being given several opportunities to either pay the docketing fee or file the required documents, to date, none of petitioner's responses has complied with the court's orders nor has petitioner provided any ground for an exemption therefrom. See D.C. Cir. Rule 38.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 17, 2015 Decided June 26, 2015

No. 14-7133

ANGELA PRICE, PARENT AND NEXT FRIEND OF J.P., A MINOR,
APPELLANT

JEROME PARKER,
APPELLANT

LASHAWN WEEMS, PARENT AND NEXT FRIEND OF D.W.,
A MINOR,
APPELLANT

v.

DISTRICT OF COLUMBIA,
APPELLEE

Consolidated with 14-7138

Appeals from the United States District Court
for the District of Columbia
(No. 1:13-cv-01069)

Adina H. Rosenbaum argued the cause for appellants. With her on the briefs were *Jehan A. Patterson*, *Allison M. Zieve*, and *Charles A. Moran.*

Michael T. Kirkpatrick was on the brief for *amicus curiae* Council of Parent Attorneys and Advocates, Inc. in support of appellants.

Richard S. Love, Senior Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellee. With him on the brief were *Karl A. Racine*, Attorney General, *Todd S. Kim*, Solicitor General, and *Loren L. AliKhan*, Deputy Solicitor General.

Before: BROWN, KAVANAUGH and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Concurring opinion filed by *Circuit Judge* BROWN.

WILKINS, *Circuit Judge*: Appellants in this case successfully pursued administrative proceedings against the District of Columbia Public Schools ("DCPS") to vindicate rights to a free appropriate public education under the Individuals with Disabilities Education Act ("IDEA"). They obtained representation with help from the Juvenile Branch of the Superior Court of the District of Columbia, which appointed an experienced member of that court's Special Education Advocate Panel as counsel. Under the Superior Court orders making the appointments, the D.C. Courts promised to pay the attorney at the statutory rate in the D.C. Criminal Justice Act—$90 per hour—if he was not otherwise compensated by DCPS. After prevailing in their administrative proceedings, Appellants sought from DCPS payment for attorney fees under the IDEA's fee-shifting provision at the rate of $250 per hour. But DCPS refused to pay more than the $90 per hour rate that the D.C. Courts would pay if fee shifting was denied.

Appellants challenged the DCPS fee decision by bringing this lawsuit, pointing to their IDEA entitlement to fee shifting at "prevailing" market rates. The District Court rejected the claim to more than $90 per hour and held that the promise of payment in the court appointments foreclosed any greater recovery. We agree with Appellants that nothing in the orders appointing counsel can preempt IDEA fee shifting. We further agree that the fallback compensation offered by the D.C. Courts is not a proper factor in determining the hourly rate for statutory fee shifting. We therefore reverse.

I.

The IDEA guarantees that children with disabilities will have the opportunity to receive a free appropriate public education. *See* 20 U.S.C. § 1400(d). To protect this right, Congress enacted a fee-shifting provision entitling a "prevailing party" under the Act to "reasonable attorneys' fees." Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415(i)(3)(B)).

There is no dispute that Appellants were prevailing parties in IDEA actions against DCPS. Their attorney, Pierre Bergeron, was in each instance appointed incident to juvenile delinquency proceedings in the D.C. Superior Court.[1] The

[1] Although there are three Appellants in this case, there were only two underlying IDEA administrative proceedings. The first dates to February 22, 2010, when the Superior Court appointed Mr. Bergeron to represent Angela Price as next friend of her minor son, Jerome Parker. Mr. Parker turned eighteen during the pendency of the administrative proceeding and so the Superior Court also appointed Mr. Bergeron to represent him directly. The second IDEA proceeding dates to September 30, 2010, when the Superior Court appointed Mr. Bergeron to represent Lashawn Weems as next friend of her minor child.

court appointment orders for Appellant Price and Appellant Parker each stated that "the District of Columbia Courts will compensate the Educational Attorney pursuant to the Criminal Justice Act if he is not compensated by the District of Columbia Public Schools." Although the appointment order for Appellant Weems did not contain a similar express statement, the parties assume—as do we—that the same term attached.

Following success on the merits in administrative proceedings before DCPS, Appellants sought reimbursement for their attorney fees at $250 per hour. DCPS refused to pay more than $90 per hour, which is the statutory rate at which attorneys are paid by the D.C. Courts under the D.C. Criminal Justice Act. *See* D.C. Code § 11-2604(a). To challenge that refusal, Appellants brought this suit in District Court under 20 U.S.C. § 1415(i)(2) seeking reimbursement at what they contend is the applicable market-based *Laffey* rate of $505 per hour. *See generally Covington v. District of Columbia*, 57 F.3d 1101, 1105 (D.C. Cir. 1995) (explaining U.S. Attorney's Office updates to *Laffey* matrix, derived from *Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984)). Appellants contend in this fee suit that the $250 rate at which pre-litigation reimbursement was sought merely represented an offer to settle.

The District Court granted summary judgment in favor of DCPS, denying Appellants any recovery beyond the $90 per hour they already had received from DCPS. *See Price v. District of Columbia*, 61 F. Supp. 3d 135 (D.D.C. 2014). Appellants timely noticed this appeal.

II.

We review for abuse of discretion a district court's decision regarding the amount of attorney fees to award. *Covington*, 57 F.3d at 1110. An abuse of discretion occurs by definition when the district court does not apply the correct legal standard or misapprehends the underlying substantive law, and we examine *de novo* whether the district court applied the correct legal standard. *Conservation Force v. Salazar*, 699 F.3d 538, 542 (D.C. Cir. 2012).

The starting point of our analysis on the merits is the text of the IDEA fee-shifting provision, which states that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—(I) to a prevailing party who is the parent of a child with a disability." 20 USC § 1415(i)(3)(B)(i).[2] DCPS suggests that this phrase entails near-plenary discretion that could itself be a basis for affirming the District Court's order. But notwithstanding the apparently permissive language of the statute, the Supreme Court has interpreted similar language in other fee-shifting contexts to mean that the prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400,

[2] Although Jerome Parker is a Plaintiff-Appellant in this case, it is uncertain whether he is eligible for fee shifting under the IDEA, which provides for the award of fees "to a prevailing party who is the *parent* of a child with a disability." 20 USC § 1415(i)(3)(B)(i)(I) (emphasis added). "Parent" is defined in the statute and does not expressly include the child himself. *Id.* § 1401(23). But we need not decide this issue because it has not been raised by the parties. In any event, Mr. Parker's mother, Plaintiff-Appellant Angela Price, is a parent eligible for fee shifting based on Mr. Bergeron's work on behalf of Mr. Parker.

402 (1968) (per curiam); *see also Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (per curiam) (same).[3]

The District Court recognized that Appellants were "prevailing parties." The critical question on appeal is whether its reasoning can be read to have arrived at a $90 fee-shifting rate consistent with the applicable law. The IDEA instructs that fees awarded "shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 USC § 1415(i)(3)(C).

The District Court's opinion suggests that it never reached this determination. It held that "court appointment pursuant to a statute that clearly sets a rate of compensation is the beginning and end of the inquiry." It reasoned that because Mr. Bergeron's appointment was made pursuant to the D.C. Criminal Justice Act, that statute controlled the fee-shifting entitlement and marked the end of the matter.

The D.C. Criminal Justice Act invoked by the Superior Court in making the appointments and authorizing fallback compensation does not preempt fee shifting pursuant to the IDEA. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quoting *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974)) (internal

[3] Although both *Newman* and *Lefemine* involved a different fee-shifting statute, where fee-shifting statutes have similar language there is a "strong indication" that they are to be interpreted alike. *Indep. Fed'n. of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (quoting *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973)); *see also Alegria v. District of Columbia*, 391 F.3d 262, 264 (D.C. Cir. 2004) (same).

quotation marks omitted). The D.C. Criminal Justice Act requires the Joint Committee on Judicial Administration of the D.C. Courts to implement a plan for furnishing representation to a person "who is a juvenile and alleged to be delinquent or in need of supervision." D.C. Code § 11-2601(5). Citing this law, the D.C. Courts created the Special Education Advocate ("SEA") Panel, from which Mr. Bergeron was appointed. *See* D.C. Courts Admin. Order No. 02-15 (designating SEA Panel); *see also* D.C. Courts Admin. Order No. 12-02 (re-establishing same). The Superior Court's Juvenile Branch made the relevant appointments from that Panel in connection with juvenile delinquency proceedings. Nothing in the D.C. Code, the D.C. Courts' administrative orders, or the Superior Court appointing orders purports to preempt IDEA fee shifting.[4]

DCPS offers an alternative interpretation of the District Court's order, arguing that the District Court correctly viewed the D.C. Criminal Justice Act statutory compensation rate as preclusive of the "prevailing" rate determination under the IDEA. DCPS contends that "a reasonable fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case," *Perdue v.*

[4] Plaintiffs' attorney in this case has received no compensation from the D.C. Courts, and we need not and do not address the hypothetical case of a plaintiff who seeks IDEA fee shifting from DCPS when his or her attorney already has been paid by the D.C. Courts. Since this case was decided by the District Court, the Superior Court has issued an additional administrative order clarifying that any compensation paid to special education attorneys from CJA funds requires a certification "that the voucher does not include any services for which payment has been made by or requested from DCPS, or that such request has been denied in full by DCPS and such denial has been affirmed by a court of competent jurisdiction." D.C. Courts Admin. Order No. 14-19.

Kenny A., 559 U.S. 542, 552 (2010) (internal quotation marks omitted), and because Mr. Bergeron was willing to accept $90 per hour for his services, any greater compensation would produce an undue windfall.

We disagree for two reasons. First, as a factual matter, the constructive terms of representation that Mr. Bergeron accepted were to receive the benefit of IDEA fee shifting from DCPS if he was successful while retaining a fallback of $90 per hour compensation from the D.C. Courts if his client did not "prevail." That he undertook the representations in this case on those terms does not demonstrate he would have been willing to accept the work on the open market for a fixed rate of $90 per hour. Second, even if Mr. Bergeron accepted these assignments from the Superior Court and would have performed them at a $90 rate because of the public interest nature of the case, his clients remain entitled to fee shifting at the prevailing rate. Our Court has held that the prevailing market rate method applies to "attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals." *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988) (en banc); *see also Blum v. Stenson*, 465 U.S. 886, 895 (1984) (holding that fee shifting is "to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel").[5]

Accordingly, we conclude that the District Court erred as a matter of law in limiting Appellants' recovery to $90 per hour. The $90 per hour statutory compensation rate in the D.C. Criminal Justice Act did not preempt the prevailing-rate

[5] We treat *Save Our Cumberland Mountains* and *Blum* as presumptively applicable, even though each involved a different fee-shifting statute. *See supra* note 3.

determination required in IDEA fee shifting, nor is it an appropriate factor to consider in making the prevailing-rate determination because it was offered by the D.C. Courts and accepted by Mr. Bergeron only as a back-up promise of compensation.

III.

For the foregoing reasons, we reverse the judgment of the District Court and remand the case with instructions to award attorney fees consistent with this opinion and "based on rates prevailing in the community . . . for the kind and quality of services furnished," 20 U.S.C. § 1415(i)(3)(C), appropriately reduced if such rates "unreasonably exceed[] the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience," *id.* § 1415(i)(3)(F)(ii).

So ordered.

BROWN, *Circuit Judge*, concurring: I agree with my colleagues that appellants are entitled to "reasonable attorneys' fees . . . based on rates prevailing in the community . . . for the kind and quality of services furnished." 20 U.S.C. § 1415(i)(3)(C). Like them, I would find the "$90 per hour statutory compensation rate in the D.C. Criminal Justice Act . . . is [not] an appropriate factor to consider in making the prevailing-rate determination."[1] Maj. Op. at 8–9. However, the court's opinion fails to note that the *Laffey* Matrix rate of $505 per hour is also an irrelevant benchmark for administrative proceedings before a D.C. Public Schools ("DCPS") hearing officer.

The *Laffey* Matrix, which is updated annually by the United States Attorney's Office, provides a benchmark for

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[1] As Judge Leon explained in his opinion below, "[b]oth the CJA and the IDEA attorneys' fees provisions are directed to providing competent counsel to individuals who otherwise may not be able to afford it." *Price v. District of Columbia*, 61 F. Supp. 3d 135, 139 (D.D.C. 2014). The court's opinion today holds that, in their current form, the terms of the D.C. CJA and of the D.C. Superior Court's appointment orders do not displace the IDEA's attorneys' fees provision. However, the ruling does not foreclose the possibility that, in the future, plaintiffs who accept representation under the CJA could be required to assign their interest in any award of attorneys' fees—mirroring the common practice of law firms that provide *pro bono* legal services, *see Venegas v. Mitchell*, 495 U.S. 82, 86 (1990).

Such an assignment of interest could help contain the cost of attorneys' fees. Congress has, at times, expressed concern about "the growth of [IDEA] legal expenses . . . and the usurping of resources from education to pay attorney fees," *Calloway v. District of Columbia*, 216 F.3d 1, 4 (D.C. Cir. 2000) (quoting H.R. REP. NO. 105-670, at 50 (1998)), and has even capped the amount of attorneys' fees available to IDEA plaintiffs in the District of Columbia, *see Whatley v. District of Columbia*, 447 F.3d 814 (D.C. Cir. 2006).

reasonable fees in *complex federal litigation*. *See, e.g.*, *Covington v. District of Columbia*, 57 F.3d 1101, 1110 (D.C. Cir. 1995) ("[P]laintiffs submitted a great deal of evidence regarding prevailing market rates for complex federal litigation. This included the *Laffey* matrix . . . ."). Appellants are entitled to the *Laffey* rate only if they can establish that the "relevant legal market in this action," namely representation in IDEA administrative due process hearings, "is subject to the same hourly rates that prevail in . . . complex federal litigation." *Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354, 374 (D.D.C. 1983), *rev'd on other* grounds, 746 F.2d 4 (D.C. Cir. 1984); *see also Covington*, 57 F.3d at 1111–1112 (holding that awards of fees in federal civil rights and employment discrimination actions should be governed by the "same standards which prevail in other types of complex federal litigation"). Absent such a finding, *Laffey* Matrix rates are irrelevant to the prevailing-rate determination.

In deciding what constitutes reasonable attorneys' fees, courts have a tendency to err on the side of awarding too much rather than too little. However, inflated fee awards are far from harmless; they produce windfalls to attorneys at the expense of public education. Around the country, school districts resolve special education disputes through mediation, mediated settlements, or other forms of alternative dispute resolution—and therefore, without triggering the IDEA's attorneys' fees provision. DCPS has the dubious honor of adjudicating the most IDEA disputes per student of any state or territory in the country. In fiscal year 2010–2011, there were 229 fully adjudicated due process complaints for every 10,000 students in the District—over seventy-five times the national average. U.S. DEP'T OF EDUC., 35TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 173–175 (2013). These disputes cost DCPS nearly $6 million in

attorneys' fees awards alone. OFFICE OF THE INSPECTOR GENERAL, GOVERNMENT OF THE DISTRICT OF COLUMBIA, AUDIT OF SPECIAL EDUCATION ATTORNEY CERTIFICATIONS 33 (2013).

While the reasons for this unfortunate state of affairs are many and varied, courts provide no relief when they hold out the promise of above-market fee awards to attorneys who bring due process complaints. The IDEA's attorneys' fees provision is meant to encourage compliance with the statute by "enabl[ing prevailing plaintiffs] to employ reasonably competent lawyers without cost to themselves." *Venegas v. Mitchell*, 495 U.S. 82, 86 (1990). In other words, it is a means "to ensur[ing] that all children with disabilities have available to them a free appropriate education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). However, when courts are too generous in awarding fees, they create an incentive for needless conflict and enrich IDEA lawyers at the expense of public schools, and ultimately the very children the IDEA seeks to protect.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-8001 **September Term, 2014**

1:10-cv-02250-ESH-AK

Filed On: June 26, 2015

In re: District of Columbia, a municipal Corporation,

Petitioner

BEFORE: Kavanaugh, Millett, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition of the District of Columbia for permission to appeal under Fed. R. Civ. P. 23(f), and the briefs and oral argument of the parties, it is

ORDERED that the petition be denied for the reasons stated in the opinion issued herein this date.

Because no appeal has been allowed, no mandate will issue. The Clerk is directed to transmit to the United States District Court for the District of Columbia a certified copy of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5294 **September Term, 2014**

1:14-mc-01149-UNA

Filed On: May 11, 2015

Jeremy Pinson, et al.,

Appellants

v.

United States Department of Justice, et al.,

Appellees

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of appellant Jeremy Pinson's trust account report, and it appearing that he has consented to the collection of fees from his trust account, it is

ORDERED that appellant's custodian is directed to pay on appellant's behalf the initial partial filing fee of $2.11, to be withheld from appellant's trust fund account. See 28 U.S.C. § 1915(b)(1). The payment must be by check or money order made payable to Clerk, U.S. District Court for the District of Columbia.

Appellant's custodian also is directed to collect and pay from appellant's trust account monthly installments of 20 percent of the previous month's income credited to the account, until $168.33, Pinson's share of the $505 docketing fee, has been paid. See 28 U.S.C. § 1915(b)(2). Such payments must be made each month the amount in the account exceeds $10 and must be designated as made in payment of the filing fee for Case No. 14-5294, an appeal from Miscellaneous Action No. 14mc1149. A copy of this order must accompany each remittance. In the event appellant is transferred to another institution, the balance due must be collected and paid in installments to the Clerk by the custodian at appellant's next institution. Appellant's custodian must notify the Clerk, U.S. Court of Appeals for the District of Columbia Circuit and the Clerk, U.S. District Court for the District of Columbia, in the event appellant is released from custody.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5294 **September Term, 2014**

The Clerk is directed to send a copy of this order to appellant by whatever means necessary to ensure receipt, and to the Clerk, U.S. District Court for the District of Columbia. The Clerk is further directed to send to appellant's custodian a copy of this order.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5294 **September Term, 2015**

1:14-mc-01149-UNA

Filed On: October 8, 2015

Jeremy Pinson, et al.,

Appellants

v.

United States Department of Justice, et al.,

Appellees

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for costs, it is

ORDERED, on the court's own motion, that the court's May 11, 2015 orders assessing fees pursuant to 28 U.S.C. § 1915(b) be vacated. Postage and copying costs for documents that are not briefs or appendices are not allowable costs, and could not be taxed against the United States in any event. See Fed. R. App. P. 39(e); D.C. Cir. Rule 39(a); 28 U.S.C. § 1915(f)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1487 **September Term, 2014**

NLRB-24CA11237

Filed On: May 6, 2015

Caribbean International News Corp., doing business as El Vocero De Puerto Rico,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 11-1490, 12-1079

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the Clerk's order filed December 23, 2014, directing the parties to file motions to govern future proceedings within 30 days; the National Labor Relations Board's motion to dismiss and for summary enforcement, and the lack of any response thereto; and the proposed judgment, it is

ORDERED that the petitions for review be dismissed for lack of prosecution. It is

FURTHER ORDERED that the Board file, within 30 days of the date of this order, a supplement to its motion for enforcement, explaining how petitioners' bankruptcies, including any changes in their operating status or ownership, will affect the relief this court can grant by enforcing the judgment. See NLRB v. Continental Hagen Corp., 932 F.2d 828, 834-35 (9th Cir. 1991) (holding that where employer is in bankruptcy, appellate court can enter judgment containing backpay provision, but enforcement of the provision must occur in bankruptcy court); cf. Emhart Indus., Hartford Div. v. NLRB, 907 F.2d 372, 379-80 (2d Cir. 1990) (stating enforcement of NLRB order would "mock reality" because of changed circumstances, including closure of plant named in cease and desist order).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1487 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in Nos. 11-1487 and 11-1490 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5268 **September Term, 2014**

1:13-cv-02019-JEB

Filed On: May 6, 2015

Michael S. Gorbey,

Appellant

v.

Warden, DC Jail and United States Attorney General,

Appellees

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability, and the response thereto, it is

ORDERED that the motion for a certificate of appealability be denied. Because appellant has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5289 **September Term, 2014**

1:12-cv-01403-JDB

Filed On: May 6, 2015

Matthew Richard Palmieri,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion for permission to file an interlocutory appeal or, alternatively, to request mandamus relief, and the opposition thereto; the motion to dismiss or for summary affirmance, the response thereto, and the reply; the motion for leave to file a surreply and the lodged surreply; and the district court's order filed February 12, 2015, denying appellant's motion for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), it is

ORDERED that the motion for permission to file an interlocutory appeal be denied and the motion to dismiss for lack of jurisdiction be granted. The district court's order filed November 3, 2014, is not a final decision that may be appealed under 28 U.S.C. § 1291, and appellant has not demonstrated that it otherwise qualifies for immediate appeal. The appeal is not properly before this court pursuant to 28 U.S.C. § 1292(b), because the district court judge did not certify the order for interlocutory appeal under § 1292(b), which it must do before this court may decide whether to permit the appeal. See 28 U.S.C. § 1292(b); Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978) (Under § 1292(b), "the discretionary power to permit an interlocutory appeal is not, in the first instance, vested in the courts of appeals. A party seeking review of a nonfinal order must first obtain the consent of the trial judge.") (footnote omitted). It is

FURTHER ORDERED that the request for mandamus relief be denied. Appellant has not shown a clear and indisputable right to the extraordinary remedy of mandamus. See In re Exec. Office of President, 215 F.3d 20, 23-25 (D.C. Cir. 2000) (per curiam). Furthermore, an adequate remedy is available to appellant by means of an appeal following entry of a final judgment. See Banks v. Office of the Senate Sergeant-at-Arms, 471 F.3d 1341, 1349-50 (D.C. Cir. 2006). It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5289 **September Term, 2014**

FURTHER ORDERED that the motion for leave to file a surreply be dismissed as moot insofar as appellant seeks leave to respond to and to strike portions of appellees' reply in support of their motion for summary affirmance.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5328 **September Term, 2014**

1:11-cv-00895-JEB

Filed On: May 6, 2015

Securities and Exchange Commission,

Appellee

v.

e-Smart Technologies, Inc., et al.,

Appellees

Mary A. Grace,

Appellant

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction, the court's February 23, 2015 order to show cause why the motion should not be decided without a response, the corrected response to the motion to dismiss, and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to dismiss be granted. The challenged order is not a final decision of the district court appealable under 28 U.S.C. § 1291, and appellant has not demonstrated that the challenged order meets the requirements of the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), or otherwise qualifies for immediate appeal, see Fed. R. Civ. P 54(b); 28 U.S.C. § 1292(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1030 **September Term, 2014**

STB-FD 35861

Filed On: May 4, 2015

Dignity Health, a California nonprofit public benefit corporation,

Petitioner

v.

Surface Transportation Board and United States of America,

Respondents

BEFORE: Henderson and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss case for lack of jurisdiction, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Bellsouth v. FCC, 17 F.3d 1487 (D.C. Cir. 1994); Tennessee Gas Pipeline v. FERC, 9 F.3d 980 (D.C. Cir. 1993). Such a petition for review is "incurably premature," see TeleSTAR, Inc. v. FCC, 888 F.2d 132, 133-34 (D.C. Cir. 1989), and in effect a nullity. The time for filing the petition for review is tolled until all proceedings before the agency have been completed. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5054 **September Term, 2014**

1:14-cv-01495-KBJ

Filed On: May 4, 2015

In re: Serajul Haque,

Petitioner

BEFORE: Henderson and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the notice of appeal, which has been construed as a petition for writ of mandamus, and the memorandum of law and fact in support; the motion for leave to proceed on appeal in forma pauperis; and the motion to appoint counsel, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed for lack of jurisdiction. The physical or electronic transfer of the case file to a "permissible transferee forum" deprives this court of jurisdiction to review the transfer. Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); see also In re Asemani, 455 F.3d 296, 299-300 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7017 **September Term, 2014**

1:15-cv-00108-UNA

Filed On: May 4, 2015

In re: Mark Edward Hennen and Vivian Dorothea Grover-Tsimi,

Petitioners

BEFORE: Henderson and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and the memorandum of law and fact in support; and the motion to proceed in forma pauperis, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the mandamus petition be denied in part and dismissed in part for lack of jurisdiction. To the extent petitioners seek to challenge the district court's order transferring their case to the District Court for the Northern District of Indiana, they have failed to show that the district court abused its discretion in ordering the transfer. See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). To the extent petitioners request relief concerning proceedings in the U.S. Supreme Court and Indiana state court, this court lacks jurisdiction over the petition. See In re Marin, 956 F.2d 339 (D.C. Cir. 1992) (holding this court lacks jurisdiction to compel the Clerk of the Supreme Court to take any action); Clinton v. Goldsmith, 526 U.S. 529, 535 (1999) ("While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction." (quoting 28 U.S.C. § 1651(a))).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-3027 **September Term, 2014**

1:00-cr-00105-PLF-4

Filed On: April 24, 2015

In re: Byron Lamont McDade, also known as Barry,

Petitioner

BEFORE: Kavanaugh and Srinivasan, Circuit Judges; Randolph, Senior Circuit Judge

O R D E R

Under 28 U.S.C. § 2255(h), we deny certification of Byron McDade's § 2255 motion filed in the District Court on July 8, 2013. McDade has not made out a prima facie *Brady* claim. *See Brady v. Maryland*, 373 U.S. 83 (1963). We therefore need not decide whether *Brady* claims are covered by § 2255(h); and if so, what showing would be necessary under § 2255(h)(1) for *Brady* claims or what limits the Constitution or the constitutional avoidance canon may impose on § 2255(h)(1) as applied to *Brady* claims. The Court is grateful to counsel for their thorough briefing of those issues, but we ultimately need not and do not decide them here.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7075 **September Term, 2014**

1:06-cv-00727-JMF
1:08-cv-00529-JMF
1:11-cv-00093-JMF

Filed On: April 21, 2015

Estate of John Buonocore III, by and through CECIL BUONOCORE, et al.,

Appellees

v.

Mu'ammar Al-Qadhafi, Supreme Leader of the Greatest Socialist People's Libyan Arab Jamahiriya, et al.,

Appellees

Syrian Arab Republic, et al.,

Appellants

Consolidated with 13-7076, 14-7065

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion to extend time to file brief to 5/4/2015, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. See D.C. Cir. Rule 28(e)(2) (untimely motions to extend the time to file briefs "will be denied absent exceptional circumstances"). It is

FURTHER ORDERED that these appeals be dismissed for failure to prosecute. See D.C. Cir. Rule 38. Appellants have shown "an egregious disregard of the court's processes," which warrants dismissal. Barber v. Am. Sec. Bank, 841 F.2d 1159, 1162 (D.C. Cir. 1988).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7075 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7075 **September Term, 2014**

1:06-cv-00727-JMF
1:08-cv-00529-JMF
1:11-cv-00093-JMF

Filed On: April 21, 2015

Estate of John Buonocore III, by and through CECIL BUONOCORE, et al.,

Appellees

v.

Mu'ammar Al-Qadhafi, Supreme Leader of the Greatest Socialist People's Libyan Arab Jamahiriya, et al.,

Appellees

Syrian Arab Republic, et al.,

Appellants

Consolidated with 13-7076, 14-7065

BEFORE: Henderson, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion to extend time to file brief to 5/4/2015, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. See D.C. Cir. Rule 28(e)(2) (untimely motions to extend the time to file briefs "will be denied absent exceptional circumstances"). It is

FURTHER ORDERED that these appeals be dismissed for failure to prosecute. See D.C. Cir. Rule 38. Appellants have shown "an egregious disregard of the court's processes," which warrants dismissal. Barber v. Am. Sec. Bank, 841 F.2d 1159, 1162 (D.C. Cir. 1988).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7075 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1052 **September Term, 2014**

FERC-CP13-551-000

Filed On: March 19, 2015

In re: Delaware Riverkeeper Network,

Petitioner

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for relief under the All Writs Act, the oppositions thereto, the supplement to the opposition filed by Transcontinental Gas Pipeline Company, and the replies, it is

ORDERED, on the court's own motion, that the administrative stay entered on March 11, 2015, be dissolved. It is

FURTHER ORDERED that the petition for relief under the All Writs Act be denied. Petitioner has not satisfied the stringent requirements for a stay under the All Writs Act. See, e.g., Reynolds Metals Co. v. FERC, 777 F.2d 760, 762 (D.C. Cir. 1985).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7138 **September Term, 2014**

1:11-cv-00674-JEB

Filed On: March 4, 2015

In the Matter of: Martha A. Akers,

Martha A. Akers,

Appellant

v.

Winward Capital Corporation, et al.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. It is

ORDERED AND ADJUDGED that the district court's order filed November 30, 2012, be affirmed. The district court properly affirmed the Bankruptcy Court's grant of summary judgment for the appellees because appellant failed to show how their handling of the 2009 insurance claim constituted a breach of any duty arising under the deed of trust. And because summary judgment was appropriate, the district court was correct that appellant was not entitled to a jury trial before the Bankruptcy Court. Furthermore, the district court properly determined appellant provided no basis for questioning the Bankruptcy Court's impartiality. See Liteky v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."). Nor has appellant offered any grounds for challenging the jurisdiction of the Bankruptcy Court in her adversary proceeding, or the jurisdiction of the district court to hear her appeal pursuant to 28 U.S.C. § 158(a)(1).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7138 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1238 **September Term, 2014**

FILED ON: FEBRUARY 27, 2015

IN RE: PMCM TV, LLC,
PETITIONER

CBS BROADCASTING, INC., ET AL.,
INTERVENORS

On Petition for Writ of Mandamus

Before: GARLAND, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*

O R D E R

This cause came to be heard on the petition for writ of mandamus, the briefs of the parties, and argument by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). Upon consideration of the foregoing, it is

ORDERED that the petition for writ of mandamus be denied.

Petitioner PMCM TV, LLC seeks a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651, directing the FCC to rescind a letter suspending the operating authority of one of PMCM's stations unless and until PMCM certifies that it will operate the station using "virtual" channel 33, as the FCC had directed, rather than "virtual" channel 3, as PMCM wishes. The FCC order at issue is an interim measure intended to preserve the status quo ante in the relevant service areas while the Commission completes a pending notice-and-comment proceeding. Because PMCM has neither shown that the FCC has violated our mandate in *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012), nor demonstrated that it has a "'clear and indisputable'" right to relief, *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)), under any other relevant source of law, *see, e.g.*, 47 U.S.C. §§ 316, 331(a), 1452(g); 47 C.F.R. § 73.682(d), we deny PMCM's request for a writ of mandamus. It is

FURTHER ORDERED that the stay entered by the Court on November 25, 2014 be dissolved.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1086 **September Term, 2014**

HHS-A-13-84

Filed On: February 20, 2015

Jacksonville Urban League, Inc.,

Petitioner

v.

United States Department of Health and Human Services, Departmental Appeals Board,

Respondent

BEFORE: Griffith and Kavanaugh, Circuit Judge, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed August 21, 2014 and the response thereto, and the motion to dismiss and the unopposed motion to transfer, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to transfer be granted, and that this case be transferred to the United States District Court for the District of Columbia. See 28 U.S.C. § 1631. A party may seek initial review in an appellate court "only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." Watts v. SEC, 482 F.3d 501, 505 (D.C. Cir. 2007). Petitioner has not identified any such direct-review statute applicable to the decision on review. Cf. Camden Council on Economic Opportunity v. HHS, 586 F.3d 992, 993 (D.C. Cir. 2009) (entertaining appeal of district court's resolution of challenge to Head Start termination). It is

FURTHER ORDERED that the motion to dismiss be dismissed as moot.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to transmit the original file of this case and a certified copy of this order to the United States District Court for the District of Columbia.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3050 **September Term, 2014**

1:09-cr-00243-GK-1

Filed On: February 19, 2015

United States of America,

Appellee

v.

Michael M. Monzel,

Appellant

BEFORE: Griffith and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the joint motion to remand, it is

ORDERED that the motion be granted and that this case be remanded to the district court for further proceedings in light of United States v. Malenya, 736 F.3d 554 (D.C. Cir. 2013).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith a certified copy of this order to the district court in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3049 **September Term, 2014**

1:12-cr-00132-JDB-1

Filed On: February 19, 2015

United States of America,

Appellee

v.

Gregory Loreng, also known as Gregory M. Loreng,

Appellant

BEFORE: Griffith and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the joint motion to remand, it is

ORDERED that the motion be granted and that this case be remanded to the district court for further proceedings in light of United States v. Malenya, 736 F.3d 554 (D.C. Cir. 2013).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith a certified copy of this order to the district court in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-3056 **September Term, 2014**

5:13-cv-00213

Filed On: February 18, 2015

In re: Bennie L. Gamble, Jr.,

Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the notice of appeal, which has been docketed as a petition for a writ of mandamus, and the motion for release pending appeal, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown a clear and indisputable right to the extraordinary relief requested. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 272, 279 (1988). This court lacks authority to grant relief with respect to proceedings in the Sixth Circuit. It is

FURTHER ORDERED that the motion for release pending appeal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7143 **September Term, 2014**

Filed On: February 18, 2015

In re: Charles Alpine,

Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the "petition for habeas corpus," which contains a request for the appointment of counsel, and the order to show cause filed September 22, 2014 and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the request for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction without prejudice to refiling in the appropriate district court. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian, see Rumsfeld v. Padilla, 542 U.S. 426 (2004), and transfer would not be in the interest of justice, see 28 U.S.C. § 1631.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5233 **September Term, 2014**

1:13-cv-01420-CKK

Filed On: February 6, 2015

Fawzi Khalid Abdullah Al Odah, Detainee, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss appeal as moot and to vacate district court's memorandum opinion and order and the government's consent thereto, it is

ORDERED that the motion be granted and that this appeal be dismissed as moot in light of appellant's transfer from the United States Naval Base at Guantanamo Bay, Cuba. The district court's Memorandum Opinion and Order are hereby vacated and the case is remanded to the district court with instructions to dismiss the case as moot. See U.S. Bancorp Mortgage Company v. Bonner Mall Partnership, 513 U.S. 21 (1994).

Pursuant to D. C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5233 **September Term, 2014**

1:13-cv-01420-CKK

Filed On: February 6, 2015

Fawzi Khalid Abdullah Al Odah, Detainee, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss appeal as moot and to vacate district court's memorandum opinion and order and the government's consent thereto, it is

ORDERED that the motion be granted and that this appeal be dismissed as moot in light of appellant's transfer from the United States Naval Base at Guantanamo Bay, Cuba. The district court's Memorandum Opinion and Order are hereby vacated and the case is remanded to the district court with instructions to dismiss the case as moot. See U.S. Bancorp Mortgage Company v. Bonner Mall Partnership, 513 U.S. 21 (1994).

Pursuant to D. C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5250 **September Term, 2014**

1:14-cv-00562-ABJ

Filed On: February 6, 2015

Antonia Clark,

Appellant

v.

U.S. Marshals,

Appellee

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed October 21, 2014 and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed. The notice of appeal was filed outside the "mandatory and jurisdictional," Bowles v. Russell, 521 U.S. 205, 207 (2007) (citation and internal quotation marks omitted), time limit established by Fed. R. App. P. 4(a), and the district court denied leave to extend that deadline.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7122 **September Term, 2014**

1:14-cv-00906-UNA

Filed On: February 6, 2015

Demetrius Proctor,

Appellant

v.

Travis McCoy,

Appellee

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed September 2, 2014 and the responses thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed. This court lacks jurisdiction over the appeal because appellant did not file his notice of appeal within the 30-day period established by Fed. R. App. P. 4(a). See Bowles v. Russell, 551 U.S. 205, 209-10 (2007). Because the district court dismissed appellant's complaint without prejudice, he is free to submit the amended complaint to the appropriate district court for filing, subject to any applicable statute of limitations.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7155 **September Term, 2014**

1:14-cv-00163-BAH

Filed On: February 6, 2015

In re: Lashawn D. Lewis, et al.,

Petitioners

BEFORE: Kavanaugh and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the amended petition for a writ of mandamus and the response thereto, it is

ORDERED that the petition be denied. Mandamus is an extraordinary remedy that "may not be invoked as a mere substitute for appeal." In re GTE Service Corp., 762 F.2d 1024, 1026-27 (D.C. Cir.1985); see also AlliedChemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980) (per curiam) (mandamus is an extraordinary remedy and will be granted only when the petitioner cannot obtain relief via an adequate ordinary remedy).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1159 **September Term, 2014**

NTSB-EA-5721
NTSB-SE-19414

Filed On: January 14, 2015

John W. Baker,

Petitioner

v.

Michael P. Huerta, Administrator, Federal Aviation Administration and National Transportation Safety Board,

Respondents

BEFORE: Griffith, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The petition for review is untimely, see 49 U.S.C. §§ 1153, 46110(a); Fed. R. App. P. 25(a), and petitioner has failed to demonstrate reasonable grounds for the late filing under §§ 1153(b)(1), 46110(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5084 **September Term, 2014**

1:14-cv-00389-UNA

Filed On: January 14, 2015

James D. Luedtke,

Appellant

v.

Barack Hussein Obama and Ronald L. Rodgers,

Appellees

BEFORE: Griffith, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the order filed July 22, 2014, the motion to vacate filing fee and PLRA, and the entire record, it is

ORDERED, on the court's own motion, that this case be dismissed. See 28 U.S.C. § 1915(e)(2) (requiring dismissal if the court determines the action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from that relief); cf. Thomas v. Holder, 750 F.3d 899, 901 (D.C. Cir. 2014) (denying three-strikes appellant's motion for reconsideration of dismissal for failure to prosecute, on the ground appellant's claims were "wholly without merit").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5143 **September Term, 2014**

1:99-cv-03373-EGS

Filed On: January 14, 2015

Charles E. Hughes,

Appellant

Robert L. Moore, et al.,

Appellees

v.

Jacob J. Lew, Secretary, U.S. Department of the Treasury,

Appellee

BEFORE: Griffith, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the "petition for rehearing," which has been docketed as a motion for reconsideration of the court's order filed July 23, 2014, the opposition thereto and motion to dismiss or for summary affirmance, and the reply, it is

ORDERED that the motion for reconsideration be denied. Appellant has not demonstrated that reconsideration is warranted. It is

FURTHER ORDERED that the motion to dismiss be granted. The notice of appeal was filed outside the "mandatory and jurisdictional," Bowles v. Russell, 551 U.S. 205, 207 (2007) (citation and internal quotation marks omitted), time limit established by Fed. R. App. P. 4(a), and the district court denied leave to extend that deadline.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7038 **September Term, 2014**

1:98-cv-02051-BJR

Filed On: December 29, 2014

Elena Sturdza,

Appellant

v.

United Arab Emirates, et al.,

Appellees

Consolidated with 14-7161

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

J U D G M E N T

This consolidated appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs, appendices, and supplements to the appendices filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that these appeals be dismissed. As a general matter, after a guardian ad litem is appointed, no other party has standing to represent the ward. Cf. Garrick v. Weaver, 888 F.2d 687, 693 (10th Cir. 1989) (only one party may represent infant or incompetent before a court). This court has affirmed the appointment of the guardian ad litem. See Sturdza v. UAE, et al., No. 00-7279 et al., unpublished order (D.C. Cir. Dec. 17, 2009). In the absence of any unusual circumstances, the court has no occasion to depart from the approach adopted by our sister circuits. See Raley v. Hyundai Motor Co., Ltd., 642 F.3d 1271, 1276 (10th Cir.), cert. denied, 132 S. Ct. 779 (2011); Hull v. United States, 53 F.3d 1125, 1126-27 (10th Cir. 1995); Garrick v. Weaver, 888 F.2d at 692-93; Susan R.M. v. Northeast Independent School District, 818 F.2d 455, 457-58 (5th Cir. 1987). Therefore, appellant lacks standing to challenge the settlements negotiated by her guardian ad litem.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7038 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5318 **September Term, 2014**

1:11-cv-01771-BJR

Filed On: December 17, 2014

Gary Charles Brestle,

Appellant

v.

Charles E. Samuels, Jr., Director of FBOP,

Appellee

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the motion to appoint counsel; the motion for summary reversal; appellant's "dispositive" motions; the motion to govern future proceedings filed August 21, 2014; and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary reversal and the motion to govern future proceedings filed August 21, 2014 be denied. The relief requested in these motions is outside the scope of this Freedom of Information Act ("FOIA") case. It is

FURTHER ORDERED that appellant's "dispositive" motions be denied. It is unclear what relief appellant seeks through these motions. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has failed to demonstrate any error in the district court's conclusions that the Bureau of Prisons conducted adequate searches for documents responsive to his FOIA request; properly withheld information pursuant to FOIA Exemptions 6, 7(C), and 7(F); and released all reasonably segregable information.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5318 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5213 **September Term, 2014**

Filed On: December 16, 2014

In re: Raymond Thomas,

Petitioner

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown that he may seek relief from the court of appeals in the first instance. See, e.g., 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7058 **September Term, 2014**

1:14-cv-00202-RCL

Filed On: December 16, 2014

Grant Goodman and Teri Goodman,

Appellants

v.

Williams & Connolly LLP, et al.,

Appellees

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed September 15, 2014, and the response thereto; the motion for summary affirmance, the response thereto, and the reply; and the motion to strike, the response thereto, and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the appeal be dismissed for lack of a final, appealable order under 28 U.S.C. § 1291, because the challenged orders do not dispose of all claims against all parties. See Fed. R. Civ. P. 54(b); Bldg. Indus. Ass'n of Superior California v. Babbitt, 161 F.3d 740, 742-43 (D.C. Cir. 1998). On April 4, 2014, the district court ordered appellants to show cause why their claims against Union Andina de Cementos S.A.A. and Ricardo Cesar Rizo Patron de la Piedra should be allowed to proceed, and to date, that order to show cause has not been discharged and no order disposing of appellants' claims against those defendants has issued. It is

FURTHER ORDERED that the motion for summary affirmance and the motion to strike be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1274 **September Term, 2014**

FINRA-2012030527503

Filed On: December 11, 2014

In re: Thaddeus J. North,

Petitioner

BEFORE: Griffith, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the emergency petition for writ of mandamus, temporary and permanent injunctive relief, and stay of proceedings before the Financial Industry Regulatory Authority, it is

ORDERED that the petition be denied. The remedy of mandamus "is a drastic one, to be invoked only in extraordinary situations." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980). Petitioner has not met the requirements for such extraordinary relief. See In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014) (stating that a writ of mandamus will issue only if petitioner has no other adequate remedy, its right to relief is clear and indisputable, and the court determines the writ is appropriate under the circumstances).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 9, 2014 Decided December 2, 2014

No. 13-5245

AMADOR COUNTY, CALIFORNIA,
APPELLEE

BUENA VISTA RANCHERIA OF THE ME-WUK INDIANS,
APPELLANT

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:05-cv-00658)

Padraic I. McCoy argued the cause for appellant. With him on the briefs was *Carrell C. Doyle*. *Mark C. Tilden* entered an appearance.

Dennis J. Whittlesey argued the cause and filed the brief for appellee.

Before: KAVANAUGH, *Circuit Judge*, and SENTELLE and RANDOLPH, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

Concurring opinion filed by *Senior Circuit Judge* RANDOLPH.

SENTELLE, *Senior Circuit Judge*: In 2005, Amador County, California brought suit against the Department of Interior challenging the Secretary's approval of a gaming compact between the Buena Vista Rancheria of Me-Wuk Indians (the "Tribe") and the State of California. After nearly six-and-a-half years of litigation, the Tribe sought to intervene for the limited purpose of moving to dismiss the amended complaint under Federal Rule of Civil Procedure 19. The district court denied the motion as untimely, and this appeal followed. Because we conclude that the district court did not abuse its discretion, we affirm.

BACKGROUND

The Buena Vista Rancheria of Me-Wuk Indians is a federally recognized Indian tribe that occupies a 67-acre parcel of land located entirely within Amador County, California. *See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 79 Fed. Reg. 4,748, 4,749 (Jan. 29, 2014). In 1999, the Tribe negotiated a gaming compact with the State of California under the Indian Gaming Regulatory Act ("IGRA"), and submitted the compact to the Secretary of the Interior for approval. Under the IGRA, once the Tribe submits a gaming compact to the Secretary, the Secretary can either approve the compact; disapprove the compact, if it violates certain federal laws; or do nothing. If the Secretary does nothing, the compact is deemed approved after forty-five days. 25 U.S.C. § 2710(d)(8). In 2000, the Secretary approved the compact. *Notice of Approved Tribal-State*

Compacts, 65 Fed. Reg. 31,189, 31,189 (May 16, 2000). In 2004, the Tribe submitted an amended gaming compact to the Secretary. This time, the Secretary took no action on the amended compact for forty-five days, at which point the compact was deemed approved by operation of law. *See* 25 U.S.C. § 2710(d)(8)(C).

In April 2005, Amador County challenged the Secretary's "no-action" approval of the amended compact, arguing that the Tribe's land fails to qualify as "Indian lands"—a statutory requirement for gaming under the IGRA. *See id.* at § 2710(d)(1). On July 22, 2005, Interior filed a motion to dismiss the case, arguing that the County's claims were not subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2). Shortly thereafter, the Tribe sought leave to participate in the case as amicus curiae. The Tribe argued that the suit had to be dismissed under Rule 19 of the Federal Rules of Civil Procedure because the Tribe was an indispensable party to the litigation, and the Tribe is protected by sovereign immunity so that the litigation could not proceed. The Tribe also claimed that Interior did not adequately represent the Tribe's interests. The district court denied the Tribe's motion without explanation.

In 2008, while Interior's motion to dismiss was still pending, Amador County filed an amended complaint, and Interior again moved to dismiss. The district court granted Interior's motion, finding that the Secretary's "no action" approval was "unreviewable," as the decision to approve a gaming compact is committed to agency discretion. *Amador County, Cal. v. Kempthorne*, 592 F. Supp. 2d 101, 106–07 (D.D.C. 2009). Amador County appealed to this court. We reversed. *See Amador County, Cal. v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011).

Upon review, we concluded that judicial review was not precluded under the APA, as the decision to approve a compact is not committed to agency discretion, but guided by principles established in the IGRA. *Amador County*, 640 F.3d at 380–81. We then "turn[ed] to the merits" of the suit, *i.e.*, whether the Tribe's land qualifies as "Indian land" under the IGRA. *Id.* at 383. However, because the answer to this question turned on extrinsic evidence not in the record, we remanded to the district court to "assess the merits in the first instance." *Id.* at 384.

Following this court's remand, the district court ordered the parties to file a Joint Status Report by November 7, 2011. Three days before the parties filed the Joint Status Report, the Tribe filed its motion to intervene. In June 2013, the district court denied as untimely the Tribe's motion to intervene, noting that the parties' Joint Status Report stated that the case is "ready for oral argument and decision on the merits." The Tribe now appeals the district court's denial of its motion for intervention.

ANALYSIS

Intervention of right as sought by appellant is governed by Federal Rule of Civil Procedure 24. That rule provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Under that rule, a district court must grant a motion to intervene if the motion is timely, and the prospective intervenor claims a legally protected interest in the action, and the action threatens to impair that interest, unless that interest is adequately represented by existing parties. *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). At the threshold, however, the motion to intervene must be timely. *U.S. v. British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006). If the motion is untimely, the explicit language of the rule dictates that "intervention must be denied." *NAACP v. New York*, 413 U.S. 345, 365 (1973); *U.S. v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1294 (D.C. Cir. 1980).

Timeliness "is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *British Am. Tobacco*, 437 F.3d at 1238 (internal quotation marks and citation omitted). We review the district court's denial of intervention for untimeliness under the abuse of discretion standard. *Id.* A district court abuses its discretion when it applies the wrong legal standard or relies on clearly erroneous findings of fact. *See In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003).

In this case, after setting forth the timeliness test, the district court found that the Tribe's motion for intervention was untimely. The district court found that the Tribe, from the outset of this litigation, both knew that the suit could adversely affect its rights, and questioned the adequacy of the United States' representation. Mem. Op. & Order at 6–9, No. 05-cv-658 (D.D.C. June 4, 2013). The district court reasoned that regardless of whether it measured the elapsed time from the time when the prospective intervenor "'knew or should have known that any of its rights would be directly affected by the

litigation,'" *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (quoting *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 433–34 (D.C. Cir. 1989)), or when the "'potential inadequacy of representation came into existence,'" *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986)), timeliness weighs against the Tribe. Mem. Op. & Order 6–9. The district court also considered the Tribe's purpose for intervention, namely to file a Rule 19 motion, and noted that the Tribe's need to intervene to maintain its sovereign immunity was a "significant factor" weighing in favor of allowing intervention. *Id.* at 8 n.6. Lastly, the district court found that granting the Tribe's motion will "further delay resolution of the merits to the detriment of the existing parties," since the case was otherwise ready for a decision on the merits. *Id.* at 8. Weighing all these factors, the district court found that the Tribe's motion was untimely. Having considered "all the circumstances," we conclude that the district court did not abuse its discretion.

Nevertheless, the Tribe offers multiple arguments for reversing the judgment. First, the Tribe asserts that the district court "undervalue[d]" the Tribe's purpose for intervention, that is, to seek dismissal of the action on the basis of the Tribe's sovereign immunity. Appellant's Br. 31–37. The Tribe, relying on *Acree v. Republic of Iraq*, 370 F.3d 41, 50–51 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848, 859–60 (2009), argues that because sovereign immunity is jurisdictional, or at least quasi-jurisdictional, the district court had a "heightened duty" to "weigh[] heavily" the Tribe's purpose for intervention. Appellant's Br. 31–33.

The Tribe's argument fails. We have never held that a district court must give extra weight or special consideration to a sovereign's purpose for intervention. We have held that a decision maker abuses its discretion if it fails to consider a

relevant factor. *See Peyton v. DiMario*, 287 F.3d 1121, 1126 (D.C. Cir. 2002). Such is the holding of *Acree*, where this court reversed a district court's finding of untimeliness because it "failed to weigh . . . the purposes for which the Government sought to intervene." *Acree*, 370 F.3d at 50. In this case, the district court considered all the relevant factors, including the Tribe's purpose for intervention, and we will not disturb its judgment.

Next, the Tribe argues that the district court abused its discretion by using the wrong date in computing the elapsed time. Appellant's Br. 22. As the Tribe correctly notes, and as the district court acknowledged, courts measure elapsed time from when the "potential inadequacy of representation [comes] into existence." *See Smoke*, 252 F.3d at 471 (internal quotation marks and citation omitted). The Tribe contends that a conflict of interest did not arise until 2011, when the government, in a separate but related proceeding, acknowledged that a Rule 19 defense was available but refused to assert it because of the United States' interest in seeking a resolution to this case on the merits. Appellant's Br. 27–28. Accordingly, the Tribe argues that the district court should have used 2011, instead of 2005, when weighing the elapsed time factor. We disagree.

Nothing changed in 2011 that warrants using that date in computing the elapsed time. In 2005, the Tribe, in the amicus curiae brief it proffered to the district court, argued that it was an indispensable party to the litigation, that the suit should be dismissed under Rule 19, and the government's representation of the Tribe's interests may be inadequate. Thus, at a minimum, the Tribe and the government knew as early as 2005 that a Rule 19 defense was available. Yet the government never asserted this defense, even though it had the opportunity to do so in its 2008 motion to dismiss. That record belies the notion that the Tribe could have expected inadequate representation from the

government after, but not before, 2011. Indeed, the Tribe all but admits as much by stating it had "earlier concerns about a potential conflict of interest in the United States' representation." Appellant's Br. 22.

The Tribe seeks to avoid this conclusion by arguing that it was not until 2011 that its suspicion of inadequate representation became a reality. Appellant's Br. 28. Yet the Tribe argued in 2005 that "[t]he presence of the United States in this case does not fully protect the Tribe's interests." Proposed Amicus Curiae Br. at 13, No. 05-cv-658 (D.D.C. Aug. 23, 2005). The record demonstrates that the Tribe knew in 2005 as well that the United States might not adequately represent the Tribe's interest. Therefore, the district court did not abuse its discretion in using 2005 as the relevant date in its elapsed time analysis.

Lastly, the Tribe argues that even if the district court used the correct date in the elapsed time analysis, the district court erred because it treated the elapsed time analysis as determinative. According to the Tribe, the district court conflated the elapsed time with the prejudice analysis by focusing exclusively on the delay the motion for intervention will cause, instead of further analyzing how the delay will prejudice the parties.

As we recently stated, the length of time passed "'is not in itself the determinative test.'" *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (quoting *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 129 (D.C. Cir. 1972)). This is because "we do not require timeliness for its own sake." *Id.*; *see also* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1916, at 532 (3d ed. 2007) ("The timeliness requirement is not intended as a punishment for the dilatory . . . ."). Rather, "the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the

unfair detriment of the existing parties." *Roane*, 741 F.3d at 151. Accordingly, in assessing timeliness, a district court must weigh whether the intervention will "'*unfairly* disadvantage[] the original parties.'" *Id.* (quoting *NRDC v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977)) (emphasis added).

In *Roane*, the district court declined to give any weight to the prejudice factor. The district court in this case found that the case was ready for a decision on the merits, and that the Tribe's intervention would delay resolution of the merits. We have previously concluded that the delay caused by a potential intervenor was sufficient to constitute prejudice where a decision on the merits was pending. *See British Am. Tobacco*, 437 F.3d at 1238–39 (upholding finding of prejudice where the intervention would further delay a "massive trial"); *see also NAACP*, 413 U.S. at 367–69 (affirming denial of intervention for untimeliness where intervention would delay the consent judgment from taking effect); *Stewart v. Rubin*, 948 F. Supp. 1077, 1104 (D.D.C. 1996) (finding prejudice where intervention would delay implementation of the settlement), *aff'd* 1997 WL 369455 (D.C. Cir. 1997).

In this case, the County filed the complaint over nine years ago. In November 2011, the County and Interior agreed that the case was "ready for oral argument and decision on the merits." Joint Status Report at 2, No. 05-cv-658 (D.D.C. Nov. 7, 2011). The Tribe's motion for intervention and the subsequent appeal have delayed a decision on the merits for three years. If the Tribe's motion were granted, a resolution of this case would be further delayed as the district court at the very least would need to accept briefing on the Tribe's Rule 19 motion, hear argument, and rule on the motion. On such facts, we cannot say that the district court abused its discretion in finding that the Tribe's intervention would cause prejudicial delay.

Because we conclude that the district court did not abuse its discretion on the threshold question of timeliness, we need not reach the Tribe's argument that the United States does not adequately represent its interest. *See NAACP*, 413 U.S. at 369.

CONCLUSION

The district court set forth the proper test, analyzed the relevant factors, and concluded that the Tribe's motion to intervene did not satisfy Rule 24(a)'s timeliness requirement. On this record, we conclude that the district court did not abuse its discretion. The judgment below is therefore

Affirmed.

RANDOLPH, *Senior Circuit Judge*, concurring: I agree that the Tribe's motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure was untimely. I write separately to mention another basis for denying the motion.

Under Rule 24(a)(2), the motion to intervene must not only be timely, but also the movant must claim

> an interest relating to the property or transaction that is the subject of the action, and [be] so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

The Tribe wanted to intervene in order to assert that it was an indispensable party under Rule 19(a). The idea being that the Tribe could then invoke its sovereign immunity and have the court dismiss Amador County's action against the Department of the Interior. In terms of Rule 24(a)(2), the Tribe claimed that the United States did not "adequately represent" the Tribe's "interest" – which the Tribe defined as its sovereign immunity. Appellant's Brief at 46.

The strategy was clever but it would not have worked. The Tribe's interest in its sovereign immunity was not – in the words of Rule 24(a)(2) – "an interest relating to the property or transaction that is the subject of the action." The very point of the Tribe's motion was to inject sovereign immunity into the case. The Tribe therefore would not have qualified for intervention as of right even if it had timely filed its motion.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1278 **September Term, 2014**

NLRB-21CA39581

Filed On: November 18, 2014

Marquez Brothers Enterprises, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 12-1357

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the motion to vacate and remand and for expedited issuance of the mandate, the opposition thereto, and the reply; and the motion to dismiss case, the opposition thereto, and the reply; and the letter filed pursuant to Rule 28(j) advising of additional authorities, it is

ORDERED that the motion to dismiss case be denied. Petitioner has not shown that the requested relief is warranted. It is

FURTHER ORDERED that the motion to vacate and remand and for expedited issuance of the mandate be granted. The decision of the National Labor Relations Board is vacated and the case remanded to the Board for further proceedings. See NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). It is

FURTHER ORDERED that the cross-application for enforcement be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the respondent a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1469 **September Term, 2014**

NLRB-07CA088519

Filed On: November 18, 2014

Bread of Life, LLC, doing business as Panera Bread,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 12-1484

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the motion to vacate and remand and for expedited issuance of the mandate, the opposition thereto, which contains a request that the Board's March 21, 2012 order be vacated as well as the November 21, 2012 order, and the reply; and the motion for leave to file a surreply, the opposition thereto, the reply, and the lodged surreply, it is

ORDERED that the motion for leave to file a surreply be denied. It is

FURTHER ORDERED that the motion to vacate and remand and for expedited issuance of the mandate be granted. The decision of the National Labor Relations Board is vacated and the case remanded to the Board for further proceedings. See NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). The request that the March 21, 2012 order also be vacated is denied. The court notes the Board's suggestion that, in keeping with past practice, it may choose to vacate that order itself upon remand and revisit the issues raised in the representation proceeding. It is

FURTHER ORDERED that the cross-application for enforcement be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1469 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the respondent a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5175 **September Term, 2014**

1:00-cv-02445-RBW

Filed On: November 18, 2014

Guadalupe L. Garcia, For himself and on behalf of G.A. GARCIA and SONS FARM, et al.,

Appellees

Black Farmers and Agriculturalists Association, Inc.,

Appellant

v.

Thomas J. Vilsack, Secretary, The United States Department of Agriculture,

Appellee

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the responses thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's opposition does not address the district court's reasons for denying intervention or the arguments in the motion for summary affirmance. Appellant has therefore forfeited all arguments regarding the district court order that is on appeal. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5175 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5185 **September Term, 2014**

1:00-cv-02502-RBW

Filed On: November 18, 2014

Rosemary Love, et al.,

Appellees

Black Farmers and Agriculturalists Association, Inc.,

Appellant

v.

Thomas J. Vilsack, Secretary, United States Department of Agriculture,

Appellee

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motions be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's opposition does not address the district court's reasons for denying intervention or the arguments in the motions for summary affirmance. Appellant has therefore forfeited all arguments regarding the district court order that is on appeal. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5185 **September Term, 2014**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5229 **September Term, 2014**

1:08-cv-01207-RWR

Filed On: November 18, 2014

In re: Abd Al-Rahim Hussein Muhammed Al-Nashiri,

Petitioner

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied without prejudice to refiling. Petitioner has not shown that the district court's delay in ruling on the pending motions is so egregious or unreasonable as to warrant the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); cf. Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79-81 (D.C. Cir. 1984). The court anticipates that the district court will act on the motions as expeditiously as possible. See 28 U.S.C. § 1657(a) (requiring expedited consideration of habeas corpus actions and actions for preliminary injunctive relief).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7087 **September Term, 2014**

1:13-cv-00721-CKK

Filed On: November 18, 2014

Thermal Dynamics International Inc.,

Appellee

v.

Safe Haven Enterprises LLC and John Baker,

Appellees

Alta Baker,

Appellant

BEFORE: Rogers, Kavanaugh, and Pillard, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction, the response thereto, and the reply; and the motion for summary reversal, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Appellant seeks immediate review of an interlocutory order under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949). But appellant has not demonstrated that the order fits in the small class of collateral rulings that are conclusive, resolve important questions separate from the merits of the case, and are effectively unreviewable on appeal from the final judgment. See Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009). It is

FURTHER ORDERED that the motion for summary reversal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7087 **September Term, 2014**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1311 **September Term, 2014**

NRC-50-352-LR
NRC-79FR63650
NRC-CLI-13-07

Filed On: November 13, 2014

Natural Resources Defense Council,

Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

Exelon Generation Company, LLC,
Intervenor

No. 14-1225

Natural Resources Defense Council,

Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

BEFORE: Kavanaugh, Circuit Judge, and Edwards and Sentelle, Senior Circuit Judges

O R D E R

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1311 **September Term, 2014**

Upon consideration of petitioner's motion to consolidate, and the opposition thereto, it is

ORDERED that the motion be denied. It is

FURTHER ORDERED that case No. 13-1311 be removed from the November 21, 2014 oral argument calendar and be dismissed as moot in light of petitioner's filing of No. 14-1225.

The Clerk is directed to process case No. 14-1225 in the normal course.

The Clerk is directed to transmit to the U.S. Nuclear Regulatory Commission a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5138 **September Term, 2014**

FILED ON: NOVEMBER 7, 2014

JAMES T. WALKER,
APPELLANT

v.

GINA MCCARTHY, ADMINISTRATOR, US ENVIRONMENTAL PROTECTION AGENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00046)

Before: GRIFFITH, KAVANAUGH, and MILLETT, *Circuit Judges*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(e). It is

ORDERED and **ADJUDGED** that the judgment of the District Court be **AFFIRMED**.

James Walker is an environmental scientist at the Environmental Protection Agency's National Center for Environmental Assessment. He brought a discrimination suit after receiving an officewide e-mail invitation to an event celebrating a colleague's same-sex wedding. Walker argues that the invitation and a series of e-mail exchanges that followed constitute discrimination, a hostile work environment, and failure to accommodate under Title VII of the Civil Rights Act because the expressions of support for same-sex marriage are contrary to his religious faith. He further argues that he suffered retaliation after engaging in protected activity under Title VII. The District Court correctly granted summary judgment to the Administrator.

To maintain Title VII claims for discrimination and retaliation, a plaintiff must show among other things that he or she suffered an "adverse employment action." *Baloch v.*

Kempthorne, 550 F.3d 1191, 1196 (D.C. Cir. 2008) (discrimination claims); *id.* at 1199 (internal quotation marks omitted) (retaliation claims). Under our precedents, Walker has not put forward sufficient evidence of any such adverse employment action. *See Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009).

Hostile work environment claims require plaintiffs to demonstrate that they were subjected to "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (citation and quotation marks omitted). In this case, neither the initial invitation nor the e-mails Walker received after announcing his objection to it rose anywhere close to that level.

To maintain an accommodation claim, many courts require a plaintiff to show that (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; and (3) he or she was disciplined or suffered an adverse employment decision for failure to comply with the conflicting employment requirement. *See, e.g.*, *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2d Cir. 1985). We need not define the precise contours of the test here. For our purposes, it suffices to say that Walker has not put forward sufficient evidence that he was disciplined or otherwise suffered an adverse employment decision.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5037 **September Term, 2013**

1:03-cv-00096-JDB

Filed On: August 18, 2014

United States of America,

Appellee

v.

Project on Government Oversight,

Appellee

Robert A. Berman,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, and the motion for judicial notice, it is

ORDERED that the motion for judicial notice be granted. See Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) ("Courts may take judicial notice of official court records . . . ."). It is

FURTHER ORDERED AND ADJUDGED that the district court's orders filed March 21, 2012, and January 29, 2013, be affirmed. The district court correctly determined that appellant breached his fiduciary duty. See United States v. Carter, 217 U.S. 286, 306 (1910); United States v. Kearns, 595 F.2d 729, 734 (D.C. Cir. 1978). Appellant's agreement with the Project on Government Oversight and his subsequent

acceptance of a payment from the organization, without personally disclosing them to anyone at the agency where he worked, and during the time that he performed work related to the organization's qui tam litigation, at the very least constituted a violation of 5 C.F.R. § 2635.101(b)(14), which requires employees to "avoid any actions creating the appearance that they are violating the law or the ethical standards" set forth in the regulations. See 5 C.F.R. §§ 2635.101(b)(2) ("Employees shall not hold financial interests that conflict with the conscientious performance of duty."); (b)(4) ("An employee shall not . . . solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.").

Appellant has not shown that the district court erred in ordering him to disgorge the entire amount of the payment. He has not explained why he did not renew his argument for a lesser penalty in district court following this court's remand, and in any event he has not presented evidence that payment of the full amount would be punitive, see SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989). Nor has he shown clear and convincing evidence of government misconduct during the trials. See Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1472 (D.C. Cir. 1995). Appellant's arguments concerning the criminal investigation are either irrelevant or forfeit. See Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001) (discussing how the court has "repeatedly held that an argument first made in a reply brief ordinarily comes too late for our consideration."). Finally, the district court did not abuse its discretion in dismissing two remaining counts of the complaint without prejudice in the absence of a showing of clear legal prejudice. Kellmer v. Raines, 674 F.3d 848, 851 (D.C. Cir. 2012).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1035 **September Term, 2013**

PRC-C2013-10

Filed On: August 7, 2014

American Postal Workers Union, AFL-CIO,

Petitioner

v.

Postal Regulatory Commission,

Respondent

United States Postal Service,
Intervenor

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Bellsouth v. FCC, 17 F.3d 1487 (D.C. Cir. 1994); Tennessee Gas Pipeline v. FERC, 9 F.3d 980 (D.C. Cir. 1993). Such a petition for review is "incurably premature," see TeleSTAR, Inc. v. FCC, 888 F.2d 132, 133-34 (D.C. Cir. 1989), and in effect a nullity. The time for filing the petition for review is tolled until all proceedings before the agency have been completed. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5098 **September Term, 2013**

Filed On: August 7, 2014

In re: Zachary Johnson,

Petitioner

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, or in the alternative, petition for writ of prohibition; and the motion for leave to amend record or to supplement record, it is

ORDERED that the petition be denied. Under the All Writs Act, 28 U.S.C. § 1651(a), federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." Because this court may issue the writ only in aid of its current or prospective jurisdiction, the court generally requires a mandamus (or prohibition) petitioner to have instituted a proceeding in a court that might lead to an appeal to this court. See In re Tennant, 359 F.3d 523, 527-28 (D.C. Cir. 2004). In other words, because the D.C. Circuit would not have jurisdiction to review any final order arising from U.S. District Court for the Southern District of Mississippi, this court lacks jurisdiction to grant petitioner the relief he seeks. It is

FURTHER ORDERED that the motion for leave to amend record or to supplement record be granted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5327 **September Term, 2013**

1:13-cv-01479-UNA

Filed On: August 6, 2014

Anthony Leroy Davis,

Appellant

v.

District of Columbia, Dummy Corporation, et al.,

Appellees

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the notice of appeal; the per curiam order filed April 25, 2014 holding the appeal in abeyance; and the motion to govern further proceedings, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B). See Nietzke v. Williams, 490 U.S. 319, 325 (1989) (a frivolous claim "lacks an arguable basis either in law or fact"). Because appellant has failed to provide even a "hint of a suggestion" that he might succeed on the merits of his appeal, see Thomas v. Holder, 750 F.3d 899, 2014 WL 1776000 *2 (D.C. Cir. May 6, 2014) ("his underlying claims are wholly without merit"), the appeal is dismissed without addressing the threshold issue under the Prison Litigation Reform Act.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5208 **September Term, 2013**

1:13-cv-00676-UNA

Filed On: August 5, 2014

Anthony Leroy Davis,

Appellant

v.

Barack Obama, et al.,

Appellees

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the notice of appeal; appellant's brief and appendix; the order to show cause filed January 16, 2014, and the response thereto; the per curiam order filed April 25, 2014 holding the appeal in abeyance; and the motion to govern further proceedings, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B). See Nietzke v. Williams, 490 U.S. 319, 325 (1989) (a frivolous claim "lacks an arguable basis either in law or fact"). Because appellant has failed to provide even a "hint of a suggestion" that he might succeed on the merits of his appeal, see Thomas v. Holder, 750 F.3d 899, 2014 WL 1776000 *2 (D.C. Cir. May 6, 2014) ("his underlying claims are wholly without merit"), the appeal is dismissed without addressing the threshold issue under the Prison Litigation Reform Act.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5238 **September Term, 2013**

1:13-mc-00523-UNA

Filed On: August 5, 2014

Anthony Leroy Davis,

Appellant

v.

Barack Hussein Obama,

Appellee

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the notice of appeal; the order to show cause, filed November 12, 2013, and the response thereto; the per curiam order filed February 7, 2014 holding the appeal in abeyance, and the response thereto; and the motion to govern further proceedings, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B). See Nietzke v. Williams, 490 U.S. 319, 325 (1989) (a frivolous claim "lacks an arguable basis either in law or fact"). Because appellant has failed to provide even a "hint of a suggestion" that he might succeed on the merits of his appeal, see Thomas v. Holder, 750 F.3d 899, 2014 WL 1776000 *2 (D.C. Cir. May 6, 2014) ("his underlying claims are wholly without merit"), the appeal is dismissed without addressing the threshold issue under the Prison Litigation Reform Act.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7144 **September Term, 2013**

1:13-cv-01369-UNA

Filed On: August 5, 2014

Delores O'Brien Heffernan,

Appellee

George E. McDermott,

Appellant

v.

Suzanne Eisner and Jason McCandless,

Appellees

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the court's order filed November 12, 2013, directing appellant to show cause why the district court's order filed September 9, 2013, should not be summarily affirmed, the court's order filed December 30, 2013, granting in part the motion for clarification and verification of the order filed November 12, 2013, and extending the time to respond to the order to show cause, the response to the order filed December 30, 2013, the court's order filed April 23, 2014, denying the motion for reconsideration of the order filed December 30, 2013, directing appellant to file any further response concerning the order to show cause within thirty days, and noting that, absent any further response, the court would consider the matter on the papers already received, the motion in response to the order filed April 23, 2014, and the supplement thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion in response to the order filed April 23, 2014 be denied. Appellant has not shown any grounds for relief in the motion. It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7144 **September Term, 2013**

FURTHER ORDERED, on the court's own motion, that the district court's order filed September 9, 2013, be summarily affirmed. The merits of appellant's position are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not shown any error in the dismissal of the complaint without prejudice for failure to state a cognizable claim upon which relief can be granted, given, among other considerations, the conclusory nature of the complaint and its focus on events occurring in Maryland and Virginia. See, e.g., Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Nor has he shown any error in the denial of the motion for a temporary restraining order as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1067 **September Term, 2013**

FERC-IS12-226-000

Filed On: August 5, 2014

Apache Corporation, et al.,

Petitioners

v.

Federal Energy Regulatory Commission and
United States of America,

Respondents

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of unopposed joint motion to dismiss petition for review, without prejudice, or, in the alternative, hold case in abeyance and suspend filling of initial submissions, it is

ORDERED that motion to dismiss be granted without prejudice to petitioners' ability to seek review of the February 28, 2014 order challenged in this petition, upon final resolution of the issues in FERC Docket No. IS12-226-000, et al.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the agency a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1025 **September Term, 2013**

FCC-BALFT-20120523ABY

Filed On: August 4, 2014

In re: Patrick M. Sullivan and Lake Broadcasting, Inc.,

Petitioners

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the opposition thereto, and the reply, which consents to dismissal of the petition as moot, it is

ORDERED that the petition be dismissed as moot. Petitioners concede that the petition is now moot because the Federal Communications Commission has commenced an administrative proceeding to consider their application.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5345 **September Term, 2013**

FILED ON: AUGUST 1, 2014

LISA V. MULRAIN,
APPELLANT

v.

JULIÁN CASTRO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-01601)

Before: GRIFFITH, KAVANAUGH, and PILLARD, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: August 1, 2014

Opinion for the court filed by Circuit Judge Griffith.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1192 **September Term, 2013**

DOD-Letter dated 4/11/2013

Filed On: July 31, 2014

Robert W. Rodriguez,

Petitioner

v.

Pasquale M. Tamburrino, Chief of Staff for the Office of the Under Secretary of Defense for Personnel and Readiness, United States Department of Defense,

Respondent

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of petitioner's consent motion for voluntary dismissal without prejudice, it is

ORDERED that the consent motion be granted, and that the petition for review be dismissed without prejudice to refiling upon final disposition by the Department of Defense of the issues on remand.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the agency a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3075 **September Term, 2013**

1:07-cr-00153-TFH-1

Filed On: July 29, 2014

United States of America,

Appellee

v.

Lonnell Glover,

Appellant

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the government's unopposed motion to vacate appellant's conviction and remand case to the district court, it is

ORDERED that the motion be granted. See U.S. v. Glover, 736 F.3d 509 (D.C. Cir. 2013).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5091 **September Term, 2013**

1:12-cv-00534-EGS

Filed On: July 29, 2014

Alvin Dorsey,

Appellant

v.

Executive Office for United States Attorneys,

Appellee

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the Clerk's order, filed April 28, 2014, to show cause why the appeal should not be dismissed for lack of jurisdiction, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed. Pursuant to 28 U.S.C. § 1291, this court's jurisdiction requires the existence of a "final decision" of the district court, i.e., one that either "dispose[s] of all claims against all parties," Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 221 (D.C. Cir. 2011), or, pursuant to Fed. R. Civ. P. 54(b), one where the district court has "expressly determine[d] that there is no just reason for delay" of final judgment and has "direct[ed] entry of a final judgment as to one or more, but fewer than all, claims or parties." See Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 159 (D.C. Cir. 2005) ("It is elementary that a grant of summary judgment as to some parties in a multi-party litigation does not constitute a final order unless the requirements of Fed. R. Civ. P. 54(b) are met."). Because the March 26, 2014 order neither disposed of all claims against all parties nor was certified under Rule 54(b), we dismiss the interlocutory appeal for lack of jurisdiction.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5085 **September Term, 2013**

1:13-cv-01438-BAH

Filed On: July 24, 2014

Keith Robert Caldwell, Sr.,

Appellant

v.

Barack Hussein Obama, President of the United States, et al.,

Appellees

BEFORE: Kavanaugh, Millett, and Pillard, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed April 29, 2014, and the response thereto, which contains a motion for refund of the filing fee, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed for lack of jurisdiction. Although appellant contends his notice of appeal was placed in the mail within 60 days of the date on which the district court's order was entered, the notice of appeal was not filed with the district court clerk within the meaning of Fed. R. App. P. 4 during that period. See Fed. R. App. P. 4(a)(1); see also Fed. R. App. P. 3(a). It is

FURTHER ORDERED that the motion for refund of the filing fee be denied. Appellant has not demonstrated the requested relief is warranted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Timothy A. Ralls
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 10, 2014 Decided July 18, 2014

No. 13-7024

INTERSTATE FIRE & CASUALTY COMPANY,
APPELLEE

v.

WASHINGTON HOSPITAL CENTER CORPORATION, DOING BUSINESS AS WASHINGTON HOSPITAL CENTER,
APPELLEE

GREENSPRING FINANCIAL INSURANCE LIMITED,
APPELLANT

MEDSTAR HEALTH, INC.,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-01193)

Linda S. Woolf argued the cause for appellant. With her on the briefs was *Joseph B. Wolf*.

Paulette S. Sarp argued the cause for appellee Interstate Fire and Casualty Company. With her on the brief was *David Hudgins*.

Before: GRIFFITH, KAVANAUGH and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: In 2003, Greenspring Financial Insurance Limited, Inc., issued an insurance policy providing coverage to employees of Washington Hospital Center for claims arising out of medical incidents within the scope of their employment. The central question in this case is whether a nurse hired by a staffing agency and assigned to work at the hospital on a temporary basis was a covered "employee" under the policy. The district court concluded that the nurse qualified as an employee of Washington Hospital for purposes of the Greenspring policy. The court therefore ordered Greenspring to pay the cost of defending and settling medical malpractice claims against the nurse. We agree with the district court's construction of the Greenspring policy, and we see no grounds for excusing Greenspring from its obligations under the insurance contract.

I.

In February 2002, Washington Hospital Center and Progressive Nursing Staffers, Inc., entered into a staffing agreement under which Progressive agreed to provide registered nurses to the hospital for long-term and per-diem assignments. Washington Hospital retained the right to terminate the assignment of any Progressive nurse who failed to meet the hospital's reasonable expectations or failed to follow the hospital's patient care policies. Washington Hospital and Progressive also agreed that each would indemnify the other for "any and all claims and expenses arising out of or resulting from the . . . negligent acts . . . of its employees or agents."

Washington Hospital is a wholly owned subsidiary of MedStar Health, Inc., which owns and operates several other medical facilities in Maryland and the District of Columbia. Greenspring Financial Insurance Limited, Inc., is also a wholly owned subsidiary of MedStar and is MedStar's "captive insurer." *See Clougherty Packing Co. v. Comm'r*, 811 F.2d 1297, 1298 n.1 (9th Cir. 1987) (a captive insurer is "a corporation organized for the purpose of insuring the liabilities of its owner"). In August 2003, Greenspring issued a general liability policy to MedStar under which Greenspring must indemnify the "Insured" for damages of up to $5 million per incident resulting from covered medical incidents. The policy defines "Insured" to include "all past, present, or future full-time or part-time Employees" of MedStar, including employees of MedStar subsidiaries such as Washington Hospital. The Greenspring policy also includes an "other insurance" clause i.e., a clause apportioning liability in the event multiple insurance policies cover the same risk. The clause states that "[t]he insurance afforded by this policy is primary insurance" except when otherwise specified.

Another insurer, Interstate Fire and Casualty Co., issued a professional liability policy covering Progressive and its current and former employees for claims made between November 2006 and November 2007, with a cap of $1 million per incident. The policy includes an "other insurance" clause which states that, "[i]f there is other valid insurance (whether primary, excess, contingent or self-insurance) which may apply against a loss or claim covered by this policy, the insurance provided hereunder shall be deemed excess insurance over and above the applicable limit of all other insurance or self-insurance." Interstate Fire simultaneously issued an excess commercial liability policy to Progressive which covers Progressive and its current and former employees for up to $4 million per incident. The policy also

applies "as excess of and not contributory with" any primary or other insurance.

Chichio Hand, a registered nurse, was hired by Progressive in 1999 and later assigned to work at Washington Hospital. In April 2004, Nurse Hand was one of several medical professionals at Washington Hospital involved in the treatment of Radianne Banks. Ms. Banks, who had been admitted to Washington Hospital while pregnant with her first child, underwent a caesarean section and could not move her legs afterward. In March 2007, she sued Washington Hospital and two of its doctors in D.C. Superior Court for negligence, alleging that she became completely wheelchair-bound as a result of injuries she sustained at the hospital. In June 2008, Washington Hospital filed a third-party complaint in the Banks action seeking indemnification and contribution from Nurse Hand and Progressive. Nurse Hand and Progressive then filed a fourth-party complaint against Washington Hospital and one of its doctors, likewise seeking indemnification and contribution.

In August 2009, Ms. Banks, Washington Hospital, Nurse Hand, Progressive, and Interstate Fire entered into a settlement agreement resolving their respective claims. Washington Hospital agreed to pay Ms. Banks and her attorneys $1.05 million, while Interstate Fire agreed to pay $3.055 million, consisting of a $1.455 million payment to Ms. Banks and her attorneys as well as the purchase of two annuities for Ms. Banks at a combined cost of $1.6 million. Significantly, Interstate Fire "expressly reserv[ed] the right to rely on the 'other insurance' clauses incorporated into its policies to seek reallocation of the settlement as may be warranted."

In July 2010, Interstate Fire followed through on its reservation. It sued Washington Hospital, MedStar, and

Greenspring in federal district court, alleging that the defendants owed a duty under the Greenspring general liability policy to provide primary insurance coverage for Nurse Hand. Interstate Fire asserted that it "stands in the shoes" of Nurse Hand and Progressive for purposes of the litigation, and it sought damages equal to all legal fees and costs it had paid on behalf of Nurse Hand and Progressive. The complaint invoked the district court's diversity jurisdiction. 28 U.S.C. § 1332.

The parties filed cross motions for summary judgment, and the district court issued an initial decision in March 2012. *See Interstate Fire & Cas. Co. v. Wash. Hosp. Ctr. Corp.*, 853 F. Supp. 2d 49 (D.D.C. 2012) (*Interstate Fire I*). The court held that Nurse Hand is an "employee" of Washington Hospital for purposes of the Greenspring policy, and that Nurse Hand thus qualifies as a person insured under that policy. Next, the court rejected the defendants' argument that the staffing agreement between Washington Hospital and Progressive requires Progressive's insurer, Interstate Fire, to indemnify Washington Hospital for any liability arising out of the actions of Progressive's nurses. The court held that Washington Hospital had waived its right to indemnification when it released its claims against Progressive and Interstate Fire in the settlement of the Banks litigation. The court then examined the "other insurance" clauses in the various insurance policies and determined that Greenspring's coverage of Nurse Hand is primary. The court therefore granted partial summary judgment to Interstate Fire with regard to Greenspring's liability. In a subsequent decision, the court ruled that Interstate Fire was entitled to recover $3.055 million from Greenspring for payments under the settlement agreement and $153,248.72 for attorneys' fees and costs, along with pre-judgment and post-judgment interest. *See Interstate Fire & Cas. Co. v. Wash. Hosp. Ctr. Corp.*, 917 F. Supp. 2d 87 (D.D.C. 2013) (*Interstate Fire II*). Greenspring appeals.

II.

We review the district court's grant of summary judgment de novo. *See United States v. Regenerative Scis., LLC*, 741 F.3d 1314, 1318 (D.C. Cir. 2014). The parties agree that the District of Columbia's substantive law applies, and we follow the decisions of the District of Columbia Court of Appeals with respect to local law. *See Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1105, 1107 n.4 (D.C. Cir. 2012). Until February 1, 1971, judgments of the District of Columbia courts were subject to review by this court, and D.C. Circuit decisions from before that date are binding as to local law. *See Hemphill v. Wash. Metro. Area Transit Auth.*, 982 F.2d 572, 574 & n.1 (D.C. Cir. 1993); *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). When local law is "silent," the common law of Maryland is "'especially persuasive authority,'" as Maryland law is historically "'the source of the District's common law.'" *TMG II v. United States*, 1 F.3d 36, 41 (D.C. Cir. 1993) (quoting *Napoleon v. Heard*, 455 A.2d 901, 903 (D.C. 1983)).

A.

The principal issue in this case is whether Nurse Hand, who was hired by a staffing agency (Progressive) and assigned to work at Washington Hospital, qualifies as an "employee" of the hospital. If so, Nurse Hand is an insured under the Greenspring policy, implicating Greenspring's primary coverage. It is undisputed that Nurse Hand is also an employee of Progressive. But "[g]enerally, a person may be the employee of two employers" as long as "'the service to one does not involve abandonment of the service to the other.'" *Zinn v. McKune*, 143 F.3d 1353, 1361 (10th Cir. 1998) (quoting Restatement (2d) of Agency § 226 (1958)); *see Lovelace v. Anderson*, 785 A.2d 726, 741 (Md. 2001). The fact that only Progressive paid a salary to Nurse Hand does not preclude a finding that she is an employee

of both Progressive and the hospital. *See Beegle v. Rest. Mgmt., Inc.*, 679 A.2d 480, 485 (D.C. 1996) (issue of "who paid [the worker]'s salary" is "not an adequate basis upon which to determine the relationships of the parties," and trial court erred in treating payment of salary as "decisive factor" in determining whether employment relationship exists).

Because an insurance policy is a contract, we construe it according to contract law principles. *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002). "'Extrinsic evidence of the parties' subjective intent may be resorted to only if the document is ambiguous.'" *Sears v. Catholic Archdiocese of Wash.*, 5 A.3d 653, 661 n.15 (D.C. 2010) (quoting *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984)). "'In determining whether a contract is ambiguous, we examine the document on its face, giving the language used its plain meaning,' unless, in context, it is evident that the terms used have a technical or specialized meaning." *Beck v. Cont'l Cas. Co. (In re May)*, 936 A.2d 747, 751 (D.C. 2007) (citation omitted) (quoting *Tillery v. Dist. of Columbia Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)). We deal here with an insurance contract, and the "first step" in the construction of an insurance contract is "to determine what a reasonable person in the position of the parties would have thought the disputed language meant." *Travelers Indem. Co. v. United Food & Commercial Workers Int'l Union*, 770 A.2d 978, 986 (D.C. 2001) (internal quotation marks omitted). In conducting that inquiry, District of Columbia courts routinely consult dictionary definitions of disputed terms. *See, e.g.*, *Hartford Fin. Servs. Grp. v. Hand*, 30 A.3d 180, 187 n.13 (D.C. 2011) (consulting *Black's Law Dictionary*); *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1128 n.2 (D.C. 2001) (*Webster's International Dictionary*); *In re Estate of Corriea*, 719 A.2d 1234, 1242-43 (D.C. 1998) (*Webster's Ninth New Collegiate*, *Black's Law*, and *American Heritage Dictionary*).

The disputed term in this case is the word "employee" in the Greenspring policy. The *American Heritage Dictionary* defines "employee" as a "person who works for another in return for financial or other compensation." *The American Heritage Dictionary of the English Language* (5th ed. online 2014). *Webster's* defines "employee" as "one employed by another usually in a position below the executive level and usually for wages." *Webster's Third New International Dictionary, Unabridged* (online ed. 2014). Those definitions do not squarely address whether an individual hired by a staffing agency and assigned to work for another firm is an "employee" of the latter.

The definition of "employee" in *Black's Law Dictionary* speaks to the question more directly. *Black's Law* defines "employee" as a "person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Black's Law Dictionary* 602 (9th ed. 2009). Beneath the definition of "employee" and in indented text, *Black's Law* also includes a definition for "borrowed employee": an "employee whose services are, with the employee's consent, lent to another employer who temporarily assumes control over the employee's work." *Id.* Greenspring acknowledges that the staffing agreement gave Washington Hospital the right to control the details of Nurse Hand's work performance. Greenspring also acknowledges that Nurse Hand was in fact under the hospital's control at the time of the conduct causing Ms. Banks's injuries. According to the *Black's Law* definition, then, Nurse Hand qualifies as an "employee" of Washington Hospital and, more specifically, a "borrowed employee" of the hospital.

We acknowledge that legal dictionaries such as *Black's Law* sometimes supply specialized definitions. But we have found *Black's Law* definitions to be helpful in construing insurance policies under District of Columbia law. *E.g.*, *Essex Ins. Co. v. Doe*, 511 F.3d 198, 200 (D.C. Cir. 2008). And District of Columbia courts routinely rely on *Black's Law* definitions in the insurance context. *See Hand*, 30 A.3d at 187 n.13; *Estate of Corriea*, 719 A.2d at 1242; *Riggs v. Aetna Ins. Co.*, 454 A.2d 818, 821 (D.C. 1983); *McIntosh v. Aetna Life Ins. Co.*, 268 A.2d 518, 520 (D.C. 1970). We follow that course here.

Greenspring, for its part, argues that the definition of "employee" in its policy includes only "full-time" and "part-time" employees rather than "all" employees. Appellant's Br. 18 (emphasis omitted). In Greenspring's view, some workers qualify as "employees" but are neither "full-time" nor "part-time." But the adjective "full-time" is defined as "employed for or working the amount of time considered customary or standard," while "part-time" is defined as "employed for or working less than the amount of time considered customary or standard." *Webster's Third New International Dictionary*, *supra*; *see also American Heritage Dictionary*, *supra* (defining "full-time" as "[e]mployed for or involving a standard number of hours of working time" and "part-time" as "[f]or or during less than the customary or standard time"). It would seem, then, that all employees fall into either the "full-time" or "part-time" category (except perhaps for a category of employees who work *more* than the standard amount of time, and Greenspring does not argue that Nurse Hand falls into such a category). In any event, there is no reason to suppose that the expansive language in the Greenspring policy ("*all* past, present, or future full-time or part-time Employees") was intended to limit the scope of the term "employee." If anything, the policy's definition of "employee" yields the opposite effect.

Greenspring instead urges us to construe the terms "full-time" and "part-time" in light of the definitions used by federal agencies for statistical purposes. *See, e.g.*, U.S. Dep't of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: Labor Force Characteristics*, http://bls.gov/cps/lfcharacteristics.htm (last updated Apr. 25, 2014) ("full time" employment is "35 hours or more per week"; "part time" employment is "1 to 34 hours per week"). It is far from clear how the Bureau of Labor Statistics definitions even if applicable would advance Greenspring's cause. If Nurse Hand worked 35 hours or more per week, she would be a "full-time" employee; if she worked one to 34 hours per week, she would be a "part-time" employee. In either event, she would be an "employee." Greenspring, at any rate, cites no case in which a District of Columbia court has used a Bureau of Labor Statistics website to construe a term in an insurance policy, much less any insurance case in which a court adhered to a Bureau definition to the exclusion of *Black's Law Dictionary*, *Webster's*, and *American Heritage*.

Greenspring also cites decisions from other jurisdictions construing insurance policies with definitions of "employee" that refer to "leased workers" and "temporary workers," terms that do not appear in the Greenspring policy. The policies cited by Greenspring all state that the term "employee" includes a "leased worker" but not a "temporary worker." *See, e.g.*, *Wellington Specialty Ins. Co. v. Kendall Crane Serv.*, 434 F. App'x 794, 795-96 (11th Cir. 2011) (per curiam) (quoting policy language); *Key Constr., Inc. v. Colony Ins. Co.*, No. 3-10-CV-0297-BD, 2011 U.S. Dist. LEXIS 75486, at *2-3 (N.D. Tex. July 13, 2011) (same). A "leased worker" is defined by those policies as "a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the conduct of your business." *Wellington Specialty Ins.*, 434 F. App'x at 796. A "temporary worker" is

defined as "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions." *Key Constr.*, 2011 U.S. Dist. LEXIS 75486, at *3. Greenspring contends that a nurse from a staffing agency would be referred to in the insurance context as a "leased worker" or a "temporary worker," and that the absence of those terms from the Greenspring policy means that the policy does not intend to cover someone like Nurse Hand.

In construing insurance policies, however, District of Columbia courts are primarily concerned with "'the meaning which common speech imports,'" not the meaning that other insurers' would ascribe to the same term. *Travelers Indem.*, 770 A.2d at 986 (quoting *Estate of Corriea*, 719 A.2d at 1239). In any event, the definition of "employee" set forth in those other policies hardly impugns the conclusion that Nurse Hand qualifies as an "employee" under the Greenspring policy. To the contrary, the language of those policies suggests that the term "employee" is generally understood to include "leased workers," and Nurse Hand appears to fit in the category of leased workers according to the description of that term in those policies. *See Wellington Specialty Ins.*, 434 F. App'x at 796. And even if Nurse Hand were a "temporary worker," the language of the other policies could be read to indicate that the term "employee" would ordinarily encompass temporary workers *unless* the policy expressly excludes them. As a result, the fact that the Greenspring policy contains no mention of "leased workers" or "temporary workers" in its definition of "employee" affords no basis for concluding that the policy excludes Nurse Hand from that term.

B.

In understanding the meaning of "employee" in the Greenspring policy, the district court found it "helpful" to

consider the test used by District of Columbia courts when assessing whether a person is an "employee" for vicarious liability purposes. *Interstate Fire I*, 853 F. Supp. 2d at 57. As a "general rule," an entity is vicariously liable for the torts of an employee but not for those of an independent contractor. *See W.M. Schlosser Co. v. Md. Drywall Co.*, 673 A.2d 647, 651 (D.C. 1996). In determining whether a person is an employee or an independent contractor, District of Columbia courts consider multiple specified factors. *See Schecter v. Merchs. Home Delivery, Inc.*, 892 A.2d 415, 422-23 (D.C. 2006); *Moorehead v. District of Columbia*, 747 A.2d 138, 143 (D.C. 2000); *Judah v. Reiner*, 744 A.2d 1037, 1040 (D.C. 2000). "'While no single factor is controlling, the decisive test is whether the employer has the right to control and direct the servant in the performance of his work and the manner in which the work is to be done.'" *Schecter*, 892 A.2d at 423 (alteration and emphasis omitted) (quoting *Beegle*, 679 A.2d at 485). The district court determined that Nurse Hand is an "employee" of Washington Hospital under that framework because the hospital had the right to control her conduct and to terminate her assignment at any time, and because her care for Ms. Banks was "clearly part of the [hospital's] regular business." *Interstate Fire I*, 853 F. Supp. 2d at 57-58. Greenspring does not dispute the district court's application of the common law test, but instead contends that the court erred by invoking that test in the first place.

District of Columbia and Maryland courts, however, have indicated that the "'known principles of the common law'" can inform the interpretation of insurance policies. *Unkelsbee v. Homestead Fire Ins. Co.*, 41 A.2d 168, 170-72 (D.C. 1945) (quoting *Waters v. Merchs.' Louisville Ins. Co.*, 36 U.S. (11 Pet.) 213, 223 (1837)); *see also Stiegler v. Eureka Life Ins. Co.*, 127 A. 397, 402 (Md. 1925) (common law supplies default rule where terms of insurance policy and statutes are silent). Courts

in other jurisdictions likewise look to common law principles when construing the terms of insurance contracts at least when the contracts themselves do not expressly displace common law default rules. *See Crawford v. Lumbermen's Mut. Cas. Co.*, 220 A.2d 480, 483 (Vt. 1966) (in answering the "perplexing question" of whether worker is "employee" under insurance policy, "the common law decisions on the relationship of master and servant afford a safe guide"); *see also Collin v. Am. Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 403 (Cal. Ct. App. 1994); *Quiring v. GEICO Gen. Ins. Co.*, 953 N.E.2d 119, 129 (Ind. Ct. App. 2011); *Detweiler v. J.C. Penney Cas. Ins. Co.*, 751 P.2d 282, 284 (Wash. 1988). Accordingly, we believe that the district court appropriately considered common law principles of vicarious liability in construing the term "employee" in the Greenspring policy. And we agree with the district court that the common law test supports concluding that Nurse Hand qualifies as an "employee" of Washington Hospital.

C.

Greenspring argues that, instead of looking to dictionary definitions and common law principles to understand the meaning of the term "employee" in the Greenspring policy, the court should rely on an affidavit in the record from Larry Smith, the president of Greenspring and the vice president of risk management for Washington Hospital's parent company, MedStar. According to Smith's affidavit, Greenspring and MedStar both understood that the Greenspring policy would "apply to employees who had been hired by MedStar" and its subsidiaries "but not to temporary workers such as agency nurses." Smith Decl. ¶ 3, ECF No. 35-2.

As we have explained, however, District of Columbia courts apply unambiguous provisions of insurance policies without resort to extrinsic evidence of the parties' subjective intent. The

Smith affidavit, coming eight years after the Greenspring policy was written and more than one year after Interstate Fire filed suit, cannot outweigh the various considerations establishing that Nurse Hand qualifies as an "employee" of Washington Hospital under the Greenspring policy. *See Sears*, 5 A.3d at 661 n.15 (statement made in the course of litigation, "not contemporaneous with . . . or reflected in any of the documents" that constitute the parties' agreement, "cannot serve to render ambiguous contract terms that are otherwise unambiguous"). And even assuming that the policy is ambiguous and that the Smith affidavit affords *some* indication of an intent to exclude agency nurses from coverage, any such indication would be offset by the general rule that "'ambiguities in an insurance contract should be construed against the insurer who drafted the contract . . . where other factors are not decisive.'" *Beck*, 936 A.2d at 751 n.4 (quoting *Cameron v. USAA Prop. & Cas. Ins. Co.*, 733 A.2d 965, 968 (D.C. 1999)); *see Estate of Corriea*, 719 A.2d at 1243; *Meade v. Prudential Ins. Co.*, 477 A.2d 726, 728 (D.C. 1984). In the District of Columbia, that canon applies even when as here the insurer who drafted the contract is engaged in litigation against another insurance company. *See Imperial Ins., Inc. v. Emp'rs' Liab. Assurance Corp.*, 442 F.2d 1197, 1199-1200 (D.C. Cir. 1970) (binding with respect to local law). Greenspring argues against invoking the canon on the ground that neither Nurse Hand nor Interstate Fire purchased the policy from Greenspring. But District of Columbia courts construe ambiguities in an insurance policy against the insurer even when the claimant is a third-party beneficiary rather than the purchaser of the policy. *See, e.g.*, *Price v. Doe*, 638 A.2d 1147, 1149, 1152 (D.C. 1994); *Nationwide Mut. Ins. Co. v. Schilansky*, 176 A.2d 786, 786-88 (D.C. 1961). The Smith affidavit is certainly not a "decisive" factor in favor of Greenspring's preferred construction, *cf. Beck*, 936 A.2d at 751 n.4, and thus does not alter our conclusion that Nurse Hand is an

"employee" of Washington Hospital under the Greenspring policy.

III.

While Greenspring's primary position is that Nurse Hand is not an "employee" of Washington Hospital, Greenspring also asks us to reverse the district court's decision even if we hold that Nurse Hand *is* an employee covered under its policy. Greenspring puts forward three arguments in support of its alternative position, which we consider in turn.

A.

Greenspring first asks us to follow the Eighth Circuit's holding in *Wal-Mart Stores, Inc. v. RLI Insurance Co.*, 292 F.3d 583 (8th Cir. 2002), as well as cases from other jurisdictions that adhere to the *Wal-Mart Stores* decision. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272 (4th Cir. 2004); *Am. Indem. Lloyds* v. *Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429, 436 (5th Cir. 2003). In *Wal-Mart Stores*, RLI Insurance Company sought to recover $10 million it had paid to settle a product liability lawsuit related to a halogen lamp supplied by Cheyenne Industries and sold by Wal-Mart at one of its retail stores. The district court concluded that Wal-Mart's insurer, National Union, bore primary liability for the settlement costs and that the RLI insurance policy purchased by Cheyenne provided only excess coverage. The district court therefore held that RLI was entitled to recover the $10 million it had paid to settle the halogen lamp lawsuit. *See Wal-Mart Stores*, 292 F.3d at 585-87.

The Eighth Circuit reversed. It held that the vendor agreement between Cheyenne and Wal-Mart obligated Cheyenne to indemnify Wal-Mart for claims resulting from any

alleged defect in the lamps, and it found that the indemnification provisions in the vendor agreement "squarely applie[d]" to the case. *Id.* at 587-88. If National Union paid the $10 million to settle the product liability claim, then "it would step into Wal-Mart's shoes and bring a subrogation action against Cheyenne asserting Wal-Mart's contractual right to indemnification." *Id.* at 594. RLI, as Cheyenne's insurer, would then be obligated to cover Cheyenne for National Union's $10 million indemnification claim, and "the parties would be back in the situation they were in before th[e] action was brought." *Id.* "To prevent such wasteful litigation and to give effect to the indemnification agreement between the parties," the Eighth Circuit held "that RLI cannot recover against National Union." *Id.*; *accord St. Paul Fire*, 365 F.3d at 276-77; *Am. Indem. Lloyds*, 335 F.3d at 444.

Greenspring argues that this case is closely analogous to *Wal-Mart Stores*. Just as Cheyenne agreed to indemnify Wal-Mart for claims arising from the sale of Cheyenne lamps, Progressive agreed to indemnify Washington Hospital for claims arising out of the negligent acts of Progressive's nurses. Greenspring says that if it reimburses Interstate Fire for the cost of defending and settling the Banks litigation, it will then step into the shoes of Washington Hospital and assert Washington Hospital's contractual right to indemnification from Progressive. And Interstate Fire, as Progressive's insurer, will still bear the ultimate loss.

We need not decide whether District of Columbia courts would follow *Wal-Mart Stores*, because that decision would not alter the outcome of this case in any event. First, there is no suggestion in *Wal-Mart Stores* that Wal-Mart had waived its contractual right to indemnification from Cheyenne. Here, by contrast, Washington Hospital released any contractual right to indemnification as part of the Banks settlement. The language

of the release is unequivocal: it states that Washington Hospital "completely releases and forever discharges" Nurse Hand, Progressive, and Interstate Fire of "all claims, demands, causes of action, obligations, liens, damages, losses, costs, attorneys' fees and expenses of every kind and nature whatsoever" that Washington Hospital "may now have or may hereafter have . . . by reason of any matter, cause or thing arising out of, or in any manner connected with," the Banks litigation. Greenspring never explains how Washington Hospital's contractual indemnification claim could survive such an unambiguous release.

Second, while National Union would have stepped into Wal-Mart's shoes if it paid $10 million on Wal-Mart's behalf to settle the product liability lawsuit, Greenspring would not step into Washington Hospital's shoes if it paid $3.055 million on Nurse Hand's behalf to settle the Banks action. Greenspring instead would step into *Nurse Hand's* shoes with respect to the $3.055 million payment, and Nurse Hand would have no indemnity claim against Progressive: an employer "held vicariously liable for the tort of an employee" generally has "a right of indemnity from the employee," not the other way around. Dobbs' Law of Torts § 425 (2d ed. updated 2014) (West); *see also District of Columbia v. Wash. Hosp. Ctr.*, 722 A.2d 332, 340 n.9 (D.C. 1998). Thus, even if Washington Hospital had not waived its indemnification claim, Greenspring would have no entitlement to assert the hospital's indemnification claim while standing in the shoes of Nurse Hand. Unlike in *Wal-Mart Stores*, then, a ruling in favor of Interstate Fire would not result in a "circuity of action." *Wal-Mart Stores*, 292 F.3d at 594.

B.

Greenspring next argues that contribution is an equitable remedy and that the district court erred by failing to take equitable considerations into account. The district court did not err. While contribution is "governed by equitable principles," a contribution action is still "subject to any express or implied agreements between or among the parties sharing the liability." *Green Leaves Rest., Inc. v. 617 H Street Assocs.*, 974 A.2d 222, 238 (D.C. 2009) (footnote omitted). Consequently, "'[w]here the parties have a contract governing an aspect of the relation between themselves, a court will not displace the terms of that contract and impose some other equitable duties not chosen by the parties.'" *Id.* (alteration omitted) (quoting *Emerine v. Yancey*, 680 A.2d 1380, 1384 (D.C. 1996)). Here, Washington Hospital and Interstate Fire were parties to a settlement agreement broadly governing "any matter . . . connected with" the Banks litigation. They agreed to release each other from all claims, demands, and obligations with one exception: Interstate Fire reserved the right to seek reallocation of the settlement based on the language of the insurance policies. The district court had no discretion to displace the terms of that agreement and impose an equitable duty upon Interstate Fire to pay more than the insurance policies provided.

C.

Finally, Greenspring argues that some portion of the $3.055 million paid by Interstate Fire to settle the Banks litigation went to resolve Washington Hospital's contractual indemnity claim against Progressive. Even if it must reimburse Interstate Fire for Nurse Hand's share of the settlement, Greenspring contends, it has no obligation to reimburse Interstate Fire for Progressive's share. We are unpersuaded.

In its third-party complaint in the Banks litigation, Washington Hospital alleged that Progressive, as Nurse Hand's employer, was vicariously liable for Nurse Hand's negligence under the doctrine of respondeat superior. But Washington Hospital asserted no independent negligence claims against Progressive (such as for negligent hiring or negligent supervision). As noted above, an employer who is vicariously liable for an employee's torts may recover from the employee the amount paid to discharge the liability plus reasonable legal expenses. Thus, even if Progressive were vicariously liable to Washington Hospital for Nurse Hand's negligence, and even if some portion of Interstate Fire's $3.055 million payment went to discharge Progressive's liability, Interstate Fire standing in the shoes of Progressive would be entitled to recover that amount from Nurse Hand. And Greenspring, as Nurse Hand's primary insurer, would be obligated to reimburse Interstate Fire for any amount that Interstate Fire had paid on account of Progressive's vicarious liability.

* * * * *

Because we conclude that Interstate Fire is entitled to reimbursement from Greenspring for the amounts paid to defend and settle the Banks action, we affirm the judgment of the district court.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7186 **September Term, 2013**

1:13-cv-00477-UNA

Filed On: July 15, 2014

Kevin Alston,
Appellant

v.

Wisconsin Court Of Appeals,
Appellee

BEFORE: Brown and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the appeal be dismissed. By order entered on the civil docket on September 6, 2013, the district court denied appellant's motion to reopen the time to appeal. Appellant filed a notice of appeal on November 6, 2013. On November 22, 2013, this court ordered appellant to show cause why the appeal should not be dismissed as untimely, to which appellant has responded. The court lacks jurisdiction to review the September 6, 2013, order, because the notice of appeal was filed more than 30 days after entry of that order on the civil docket. See Fed. R. App. P. 4(a)(1)(A). Appellant has not shown that he is entitled to relief under Fed. R. App. P. 4(a)(5), because he has not shown excusable neglect or good cause for the untimely filing. Nor is he entitled to relief under Fed. R. App. P. 4(a)(6), because he did not move to reopen the time to appeal within 14 days after receiving notice of the September 6, 2013, order.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5041 **September Term, 2013**

Filed On: July 15, 2014

In re: Jaime Luevano,

Petitioner

BEFORE: Brown and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the "habeas" petition, the motion for leave to proceed in forma pauperis, the motions to amend, and the court's order to show cause filed February 20, 2014, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, in light of petitioner's representation that he seeks only habeas relief, that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motions to amend be granted. It is

FURTHER ORDERED that the petition be dismissed. This court lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). Habeas is available to petitioner only in the District Court for the Western District of Texas, which has jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5261 **September Term, 2013**

1:09-cv-01633-EGS

Filed On: July 14, 2014

In re: Gregory T. Howard,

Petitioner

Consolidated with 13-5267, 13-5313

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petitions for writ of mandamus and the supplements thereto; the motion for summary affirmance and the opposition thereto; appellant's dispositive motions (which include motions for summary reversal, vacatur, remand, and declaratory relief), the supplement to the motion for summary reversal, the opposition, and the reply; the motions for leave to proceed in forma pauperis in Nos. 13-5261 and 13-5313; the motion to appoint counsel; the motion to suspend the court's rules; the motion to vacate the October 21, 2013, Clerk's order; the request for sanctions; the "motion for a determination on Bivens relief and 28 U.S.C. § 1343(a) relief"; the motion for judicial notice; and appellant's briefs, it is

ORDERED that the motions for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to vacate the October 21, 2013, Clerk's order be denied. As this court previously held, appellant's in forma pauperis status conferred by the district court does not apply to his mandamus actions. See February 11, 2014, Order in Nos. 13-5261, et al. It is

FURTHER ORDERED the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5261 **September Term, 2013**

FURTHER ORDERED that the motion for summary affirmance be granted and appellant's dispositive motions be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed appellant's complaint for lack of subject matter jurisdiction, as he had not shown a waiver of the government's sovereign immunity. Appellant's negligence claim is not cognizable under the Federal Tort Claims Act because the alleged facts constitute a violation of federal law, and appellant has not shown that District of Columbia law would hold a private person liable in like circumstances. See United States v. Olson, 546 U.S. 43, 44 (2005); Hornbeck Offshore Transp., LLC v. United States, 569 F.3d 506, 508 (D.C. Cir. 2009). Nor has appellant alleged facts satisfying the elements of a claim for intentional infliction of emotional distress. To the extent appellant is attempting to invoke the Administrative Procedure Act ("APA"), that statute waives sovereign immunity only for actions seeking "relief other than money damages." 5 U.S.C. § 702. Any injunctive relief concerning appellant's student loans would be moot, as they have been discharged. To the extent appellant is trying to challenge the alleged offset of his Social Security benefits pursuant to the APA, he did not raise this claim in the complaint, so he cannot raise it for the first time in this court. See, e.g., United States v. Stover, 329 F.3d 859, 872 (D.C. Cir. 2003) (arguments not presented to the district court "cannot be considered for the first time on appeal"). Finally, the district court did not abuse its discretion in denying the motion for reconsideration, which did not cure the jurisdictional defect in the complaint. See see Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). It is

FURTHER ORDERED that the motion for judicial notice be denied. The document submitted by appellant is irrelevant to the disposition of these cases. See Larson v. Dep't of State, 565 F.3d 857, 870 (D.C. Cir. 2009). It is

FURTHER ORDERED that the petitions for writ of mandamus be denied. Appellant has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). It is

FURTHER ORDERED that the request for sanctions and the "motion for a determination on Bivens relief and 28 U.S.C. § 1343(a) relief," which asks this court to impose sanctions on the district judge, be denied. Appellant has not shown any conduct by the government warranting sanctions. The district judge is absolutely immune from liability for damages for actions taken in his judicial capacity, see Mireles

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5261 **September Term, 2013**

v. Waco, 502 U.S. 9, 11-12 (1991) (per curiam); and the request for injunctive relief is moot to the extent it concerns the instant case, and is otherwise baseless. It is

FURTHER ORDERED that the motion to suspend the court's rules be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5161 **September Term, 2013**

1:13-cv-00580-UNA

Filed On: July 11, 2014

Steven Lynn Jackson,

Appellant

v.

United States Parole Commission,

Appellee

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which is construed as including a motion for a certificate of appealability; and the opposition thereto and motion to dismiss for lack of a certificate of appealability, it is

ORDERED that the motion for certificate of appealability be denied and the motion to dismiss granted. Because appellant has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealablity has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7138 **September Term, 2013**

1:13-cv-01232-RJL-DAR

Filed On: July 11, 2014

Angelene Hardaway and Lena Hardaway,

Appellants

v.

District of Columbia Housing Authority,

Appellee

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause issued on September 23, 2013, and the response thereto; and the motion for summary affirmance, and the opposition thereto, it is

ORDERED that the order to show cause why this appeal should not be dismissed be discharged. It is

FURTHER ORDERED that the appeal be dismissed for lack of jurisdiction. The district court's September 5, 2013 order is not a final appealable order under 28 U.S.C. § 1291. Nor does the order meet the requirements of the collateral order doctrine under Cohen v. Benefit Industrial Loan Corporation, 337 U.S. 541, 546 (1949), because the order did not conclusively determine the issue of appellants' privacy concerns. The September 5, 2013 order denying appellants' motion to seal stated that "[i]f medical or other sensitive or confidential documents are introduced, the parties may redact such documents or seek a protective order as appropriate."

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5120 **September Term, 2013**

1:14-cv-00435-CKK

Filed On: July 11, 2014

In re: Charles Strange, On Behalf of Michael Strange, their son and stepson, et al.,

Petitioners

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition be denied. As petitioners' affidavits provide no reasonable basis for questioning the district court's impartiality, petitioners have not shown a clear and indisputable right to the relief requested. See In re Brooks, 383 F.3d 1036, 1041 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128, 1139 (D.C. Cir. 2003); United States v. Haldeman, 559 F.2d 31, 131-34 (D.C. Cir. 1976).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5051 **September Term, 2013**

1:13-cv-01745-UNA

Filed On: June 20, 2014

Hector D Portillo,
Appellant

v.

United States of America, et al.,
Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed March 19, 2014, and the response thereto, which contains a request for appointment of counsel, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the request for appointment of counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that this appeal be dismissed for lack of jurisdiction. The district court's December 16, 2013 order was not final or otherwise appealable. See 28 U.S.C. §§ 1291, 1292. Because the order is "clearly interlocutory," the notice of appeal did not ripen upon entry of a final order. See FirsTier Mortg. Co. v. Investors Mortg. Ins. Co., 498 U.S. 269, 276 (1991). The dismissal is without prejudice to filing in district court a motion for reconsideration of the district court's denial of leave to file a notice of appeal of the February 21, 2014 final order, or seeking other appropriate relief.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7027 **September Term, 2013**

Filed On: June 20, 2014

In re: Charles Alpine,

Petitioner

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "petition for a writ of habeas corpus," which contains a request for appointment of counsel; and the order to show cause filed March 12, 2014, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the request for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7046 **September Term, 2013**

Filed On: June 20, 2014

In re: Charles Alpine,

Petitioner

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "petition for a writ of habeas corpus," which contains a request for appointment of counsel; and the order to show cause filed April 17, 2014, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the request for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7023 **September Term, 2013**

Filed On: June 19, 2014

In re: Charles Alpine,

Petitioner

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "petition for a writ of habeas corpus," which contains a request for appointment of counsel; the order to show cause filed March 4, 2014, and the response and supplement thereto; and the "motion for personal own recognizance bond," it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the "motion for personal own recognizance bond" be denied. It is

FURTHER ORDERED that the request for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7024 **September Term, 2013**

Filed On: June 19, 2014

In re: Charles Alpine,

Petitioner

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "petition for a writ of habeas corpus," and the order to show cause filed March 7, 2014, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the petition be dismissed for lack of jurisdiction. To the extent petitioner seeks monetary relief for constitutional or other federal claims, original jurisdiction is in a district court. See 28 U.S.C. § 1331. This court also lacks jurisdiction over an original habeas petition. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996). To the extent petitioner seeks habeas relief, he can obtain that relief only in the District Court for the Northern District of Texas, which has jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3052 **September Term, 2013**

1:10-cr-00018-JDB-7

Filed On: June 17, 2014

United States of America,

Appellee

v.

Edwin Arnulfo Moreno Ibarra, also known as Georgina,

Appellant

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief; the motion to dismiss, the opposition thereto, and the reply; and the supplements, it is

ORDERED that the motion to dismiss be granted. Appellant's challenges were waived by his guilty plea. See United States v. Delgado-Garcia, 374 F.3d 1337 (D.C. Cir. 2004); United States v. Baucum, 80 F.3d 539 (D.C. Cir. 1996); United States v. Drew, 200 F.3d 871 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3093 **September Term, 2013**

1:09-cr-00243-GK-1

Filed On: June 13, 2014

In re: Amy, Child Pornography Victim,

Petitioner

Consolidated with 12-3100

BEFORE: Rogers and Kavanaugh, Circuit Judges, and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of the motion of Michael Monzel to govern future proceedings; the motion of the United States of America to vacate and remand in appeal No. 12-3100 and to thereafter dismiss as moot Amy's mandamus petition in No. 12-3093; the motion of Amy to intervene or, in the alternative, to participate as amicus in No. 12-3100; and the lodged brief, it is

ORDERED that the motion to govern be denied. It is

FURTHER ORDERED that in No. 12-3100, the motion to intervene be denied and the motion to participate as amicus curiae be granted. The Clerk is directed to file the lodged brief. It is

FURTHER ORDERED that the motion to vacate and remand in No. 12-3100 be granted to the following extent: the amended judgment is hereby vacated insofar as it awards no restitution to Amy or Vicky, and this case is hereby remanded to the district court with instructions to redetermine restitution for Amy consistent with the Supreme Court's opinion in Paroline v. United States, 134 S. Ct. 1710 (2014), and to reinstate Vicky's original $5,000 restitution award. It is

FURTHER ORDERED that the petition for writ of mandamus in No. 12-3093 be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3093 **September Term, 2013**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 12-3100 until 7 days after disposition of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1485 **September Term, 2013**

DOE-76FR67037

Filed On: April 24, 2014

American Public Gas Association,
Petitioner
v.

United States Department of Energy,
Respondent

Air Conditioning Contractors of America, et al.,
Intervenors

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the joint motion to vacate in part and remand for further rulemaking filed on January 11, 2013, the oppositions thereto, and the replies; the motion to substitute as petitioner, the oppositions thereto, and the reply; the unopposed motion to govern future proceedings; and the joint unopposed motion to vacate in part and remand for further rulemaking filed on March 11, 2014, it is

ORDERED that the joint unopposed motion to vacate in part and remand for further rulemaking, filed March 11, 2014, be granted. The direct final rule, 76 Fed. Reg. 37408 (June 27, 2011), and notice of effective date, 76 Fed. Reg. 67037 (Oct. 31, 2011), as they relate to energy conservation standards for non-weatherized gas furnaces, including but not limited to the Department of Energy's determination that such furnaces constitute a single class of products for purposes of 42 U.S.C. §§ 6295(q)(1)(B), 6295(o)(4), are hereby vacated and remanded to the Department of Energy for notice and comment rulemaking in accordance with the Energy Policy and Conservation Act. It is

FURTHER ORDERED that all remaining motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to respondent a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5377 **September Term, 2013**

1:07-cv-01552-RJL

Filed On: April 24, 2014

In re: Ujuchris Okereh,

Petitioner

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for writ of mandamus, it is

ORDERED the mandamus petition be denied. Petitioner has failed to show either a "clear and indisputable" right to relief or that there is "no other adequate means" to obtain the relief requested. Cheney v. U.S. District Court, 542 U.S. 367, 380 (2004) (citations and internal quotation marks omitted). It is

FURTHER ORDERED, on the court's own motion, that the mandamus petition be construed as a notice of appeal, see Smith v. Barry, 502 U.S. 244, 248-49 (1992), from the district court's orders entered September 25, 2013 (dismissing the case for lack of prosecution) and November 20, 2013 (denying petitioner's October 23, 2013 request for reconsideration of the dismissal order, which is in effect a timely motion for reconsideration under Fed. R. Civ. P. 59(e)). The Clerk is directed to transmit a copy of the mandamus petition to the district court for entry as a notice of appeal. It is

FURTHER ORDERED, on the court's own motion, that the motion for leave to proceed in forma pauperis be transmitted to the district court for resolution in the first instance. See Fed. R. App. P. 24(a); Okereh v. Mabus, 625 F.3d 21 (D.C. Cir. 2010) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5145 **September Term, 2013**

1:09-cv-02372-RCL

Filed On: April 23, 2014

Alan Scott,

Appellant

v.

Joyce K. Conley, Individual and Official Capacity, et al.,

Appellees

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the opposition thereto; and the court's order to show cause filed January 10, 2014, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly concluded that appellant failed to meet his burden of establishing personal jurisdiction over defendants Schultz, Jett, Lockett, and Cozza-Rhodes. See Reuber v. United States, 787 F.2d 599, 599 (D.C. Cir. 1986) (per curiam) ("[O]nce a defendant timely asserts the absence of personal jurisdiction, the plaintiff has the burden to prove that jurisdiction is properly exercised."). Furthermore, the Seventh Circuit precedents on which appellant relies do not show any error in the district court's determination that defendants Smith and Conley were shielded by qualified immunity. Those precedents do not show that the defendants' actions in rejecting books appellant sought to purchase and blocking his financial correspondence violated any clearly established right. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011). Finally, appellant has not demonstrated the district court erred in dismissing his claim of unauthorized disclosure under the Privacy Act, see 5 U.S.C. § 552a(b), on the ground that appellant failed to plead facts showing that "the agency acted in a manner which

was intentional or willful," 5 U.S.C. § 552a(g)(4), as required for an award of damages under the Act. See Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1122 (D.C. Cir. 2007) ("An agency acts in an intentional or willful manner either by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act." (internal quotation marks omitted)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3083 **September Term, 2013**

1:00-cr-00252-RCL-3

Filed On: April 22, 2014

United States of America,

Appellee

v.

Reginald Curtis Carter, also known as Reggie,
also known as Black,

Appellant

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability, the opposition thereto, and the motion to dismiss, it is

ORDERED that the motion for certificate of appealability be denied and the motion to dismiss granted. Because appellant has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealablity has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5188 **September Term, 2013**

1:12-cv-01218-EGS

Filed On: April 22, 2014

Lamont Peete,
Appellant

v.

United States of America, et al.,
Appellees

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as containing a request for a certificate of appealability, the motion to dismiss and the opposition thereto, the motion to appoint counsel, and the order to show cause filed January 3, 2014, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to appoint counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to dismiss be granted. Because appellant has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c), no certificate of appealability is warranted. Appellant has not demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7160 **September Term, 2013**

1:07-cv-01866-JDB

Filed On: March 25, 2014

Robert John Hickey,

Appellant

v.

Charlene Scott,

Appellee

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the briefs filed by the parties, the motion to dismiss, and the opposition thereto, it is

ORDERED that this appeal be dismissed. Appellant's notice of appeal filed on December 28, 2011, was timely as to the district court's order entered on November 28, 2011, denying the parties' bills of costs. See Fed. R. Civ. P. 4(a)(1)(A). However, appellant does not challenge that order in his briefs, nor does he show that his notice of appeal was timely as to any other order, judgment, or ruling in this case. See, e.g., Fed. R. Civ. P. 58(e) ("Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3064 **September Term, 2013**

1:06-cr-00248-JDB-4

Filed On: March 25, 2014

United States of America,

Appellee

v.

Juan Daniel Del Cid Morales, also known as
Ovidio Fajardo Aldana,

Appellant

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed December 16, 2013, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that appellant's notice of appeal be construed as a petition for leave to file a successive motion under 28 U.S.C. § 2255, and denied. To the extent appellant is seeking to appeal his sentence, the time to do so has expired. See Fed. R. App. P. 4(b)(1)(A)(i). Appellant has identified no authority showing he is entitled to file a second direct appeal under 18 U.S.C. § 3742 that is untimely under the Federal Rules of Appellate Procedure, or that he can bring a free-standing challenge to the district court's subject matter jurisdiction. Appellant is seeking vacatur of his conviction and sentence based on the district court's alleged lack of subject matter jurisdiction. Because this relief can be obtained by way of a motion under § 2255, see 28 U.S.C. § 2255(a), appellant can only seek relief under that provision. See United States v. Ayala, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990) (holding that the defendant could not challenge his federal conviction through a petition for a writ of audita querela because the defendant could seek the same relief under 28 U.S.C. § 2255). Moreover, appellant has not shown that his motion is based on either newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have

found the movant guilty of the offense; or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h); United States v. Ortiz, 136 F.3d 161, 163-64 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5273 **September Term, 2013**

1:12-cv-01780-JDB

Filed On: March 25, 2014

John A. Champion,

Appellant

v.

Ronnie R. Holt, Warden,

Appellee

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability, which includes a motion for the appointment of counsel; the supplement and record material; the opposition to the motion for certificate of appealability and motion to dismiss; and the reply in support of the motion for certificate of appealability, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(2)(B). It is

FURTHER ORDERED that the motion for certificate of appealability be denied and the motion to dismiss granted. Because appellant's filing is time barred under the applicable statute of limitations, no certificate of appealability is warranted. See 28 U.S.C. § 2244(d)(1).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealablity has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5329 **September Term, 2013**

Filed On: March 25, 2014

In re: Larry E. Belton, Sr.,

Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not shown a clear and indisputable right to the extraordinary relief requested. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 272, 289 (1988); Price v.United States, 228 F.3d 420, 421 (D.C. Cir. 2000) (per curiam) (Veterans' Benefits Act of 1957 "precludes judicial review in Article III courts of VA decisions affecting the provision of veterans' benefits").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7128 **September Term, 2013**

1:13-cv-00319-JDB

Filed On: March 25, 2014

Montgomery Blair Sibley,

Appellant

v.

Judith N. Macaluso, et al.,

Appellees

BEFORE: Griffith, Kavanaugh, and Millett, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed January 9, 2014, the response thereto, which includes a request for oral argument, and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the request for oral argument be denied. It is

FURTHER ORDERED that the appeal of the district court's order filed June 17, 2013, denying appellant's motion for a preliminary and permanent injunction be dismissed as moot. Appellant seeks to enjoin the judges of the District of Columbia Court of Appeals from sitting in judgment in the matter of Sibley v. Oberly, et al., No. 13-cv-400, but the District of Columbia Court of Appeals issued its judgment in that case on August 27, 2013. Because there is no pending decision in Sibley v. Oberly, et al. to be enjoined, appellant's motion for an injunction and the appeal of the denial of the motion are moot. See Lemon v. Geren, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("A case becomes moot when intervening events make it impossible to grant the prevailing party effective relief.") (internal quotation omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5337 **September Term, 2013**

1:12-cv-01510-JDB

Filed On: March 24, 2014

Judicial Watch, Inc.,

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Griffith and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The November 8, 2013 order holding appellant's complaint in abeyance pending resolution of a related case is not a final appealable order under 28 U.S.C. § 1291. See Summers v. Department of Justice, 925 F.2d 450, 453 (D.C. Cir. 1991). Nor is the order appealable under the collateral order doctrine. See Summers, 925 F.3d at 453. It is

FURTHER ORDERED that the alternative request for mandamus relief be denied. Appellant has not shown a clear and indisputable right to the extraordinary relief requested. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 272, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5009 **September Term, 2013**

Filed On: March 24, 2014

In re: Eric Flores,

Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed as moot. The district court filed and resolved petitioner's complaint on February 18, 2014. See Flores v. George Washington University, 14cv00239 (D.D.C. Feb. 18, 2014).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5025 **September Term, 2013**

1:13-cv-01162-UNA

Filed On: March 24, 2014

In re: Tye J. Smith,

Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the notice of appeal, which has been construed as a petition for writ of mandamus, the motion for leave to proceed in forma pauperis, and the motion for emergency injunction, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus and the motion for emergency injunction be dismissed. The transfer of the case file to the United States District Court for the District of Colorado, a "permissible transferee forum," has deprived this court of jurisdiction to review the transfer. Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); see also In re Asemani, 455 F.3d 296, 299-300 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 18, 2014 Decided March 21, 2014

No. 12-1234

NATIONAL TREASURY EMPLOYEES UNION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

On Petition for Review of a Final Decision
of the Federal Labor Relations Authority

Julie M. Wilson argued the cause for petitioner. With her on the briefs were *Gregory O'Duden* and *Jacob Heyman-Kantor*. *Paras N. Shah* entered an appearance.

Zachary R. Henige, Attorney, Federal Labor Relations Authority, argued the cause for respondent. On the brief were *Rosa M. Koppel*, Solicitor, and *David M. Shewchuk*, Deputy Solicitor.

Before: HENDERSON, ROGERS and KAVANAUGH, *Circuit Judges*.

Opinion for the court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The National Treasury Employees Union petitions for review of the decision of the Federal Labor Relations Authority that the Internal Revenue Service ("the IRS") did not commit an unfair labor practice under 5 U.S.C. § 7116 when it failed to provide the Union notice or an opportunity to bargain over an increase in the workloads of IRS Case Advocates. Because Authority precedent established that this bargaining obligation arises only when an agency initiates a change in its policies, practices, or procedures, and the Authority reasonably relied on that precedent, we deny the petition for review.

I.

The Federal Service Labor-Management Relations Statute ("the Statute") requires agencies to bargain in good faith with their employees' recognized representative regarding "conditions of employment," 5 U.S.C. §§ 7102(2), 7103(a)(12), 7114(a)(4), (b), which include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," *id*. § 7103(a)(14). Although an agency is not required to bargain over its management rights, including the right to control its internal organization, the number of employees, and work assignments, it must negotiate about the impact and implementation of its exercise of those rights. *Id.* § 7106; *see NTEU v. FLRA*, 414 F.3d 50, 52 53 (D.C. Cir. 2005). Under 5 U.S.C. § 7116(a)(1) and (5), it is an unfair labor practice for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter" or "to refuse to consult or negotiate in good faith with a labor organization as required by this chapter." As interpreted by the Authority, the requirement of good faith bargaining means that

> prior to implementing a change in conditions of employment, an agency is required to provide the

> exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a *de minimis* effect on conditions of employment.

Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M., 64 F.L.R.A. 166, 173, 175 (2009); *see id.* at 176. Failure to do so constitutes a violation of 5 U.S.C. § 7116(a)(1) and (5). *Id.* at 173, 175; *see also Internal Revenue Serv., Washington, D.C.*, 4 F.L.R.A. 488, 488, 498 99 (1980).

On June 25, 2008, the Union, as exclusive bargaining representative, filed a national grievance on the ground that the IRS had "measurably increased the caseloads of Case Advocates within the Taxpayer Advoca[te] Service (TAS) without giving notice to [the Union] and providing an opportunity to bargain," and violated the parties' collective bargaining agreement (the "National Agreement") and 5 U.S.C. § 7116(a)(1) and (5). *See* Arb. Dec. at 3 4. An arbitrator found that the IRS violated Article 47 of the National Agreement and 5 U.S.C. § 7116(a)(1) and (5) by changing employees' conditions of employment without fulfilling its notice-and-bargaining obligations. Concluding that "[t]he IRS cannot control how many taxpayers use this service established by Congress and cannot choose to ignore taxpayers' inquiries and concerns," the Arbitrator found that "[w]orkload is not determined solely by the number of cases coming into TAS," and that the IRS "has control over other factors that affect workload," including case processing procedures, deadlines for completing individual actions, and the number of staff available. Arb. Dec. at 36. Because the "[s]ubstantial increases in the number of cases . . . are not sufficiently mitigated by other factors," the Arbitrator concluded that the IRS was responsible for the change in conditions of employment, triggering its

notice-and-bargaining obligations. *Id.* at 39 40. The Arbitrator awarded various remedies, including ordering the IRS to bargain and to post a notice that it had committed an unfair labor practice and violated the National Agreement, but denied the Union's requests for a *status quo ante* remedy and attorney's fees. Both the Union and the IRS filed exceptions.

The Authority reversed in part, affirmed in part, and remanded in part. First, it set aside the unfair labor practice violation under § 7116(a)(1) and (5), explaining that a finding that an agency has failed to provide a union with notice and an opportunity to bargain over changes to conditions of employment requires a "threshold determination that the agency made a change in a policy, practice, or procedure affecting unit employees' conditions of employment." *NTEU*, 66 F.L.R.A. 577, 579 (2012). The Arbitrator found only that there had been an increase in the number of incoming cases, not that the IRS made any "unilateral change" that violated its notice-and-bargaining obligations under the Statute. *Id.* at 580. Second, it left standing, in the absence of an exception, the Arbitrator's finding that the IRS had violated the National Agreement and therefore set aside only the posting requirement regarding the unfair labor practice. *See id.* at 581. Third, it rejected the Union's exception that the Arbitrator's denial of a *status quo ante* remedy was contrary to law but agreed with the Union on attorney's fees and remanded that portion of the award to the Arbitrator for additional factual findings, in the absence of agreement by the parties. *See id.* at 582.

The Union petitions for review of the Authority's determination that the IRS did not commit an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5). We first address our jurisdiction.

II.

The court has jurisdiction to review a final order of the Authority when an unfair labor practice under 5 U.S.C. § 7116[1] is "either an explicit ground for, or [] necessarily implicated by, the Authority's decision." *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 67 68 (D.C. Cir. 1987) (adopting analysis in *United States Marshals Service v. FLRA*, 708 F.2d 1417, 1420 (9th Cir. 1983)); *see* 5 U.S.C. § 7123(a)(1). Here, the Authority's reversal of the Arbitrator's unfair labor practice finding clearly involves an unfair labor practice. Further, the Statute, 5 U.S.C. § 7123(c), contemplates review of a part of an Authority order by referencing 5 U.S.C. § 706, which refers to review of an "agency action" defined to include "the whole or a part of an agency . . . order." *Id.* § 551(13); *see id.* § 701(b)(2). An "order" is "the whole or a part of a final disposition . . . of an agency." *Id.* § 551(6). The Union's petition for review of only part of the Authority's Decision therefore does not deprive the court of jurisdiction, provided that Decision is "final" under § 7123(a).

Although a remand can defeat the finality of an order, *see Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1047 (D.C. Cir. 1999), for purposes of judicial review a final agency action "need not be the last administrative action contemplated by the statutory scheme." *Role Models Am., Inc. v. White*, 317 F.3d 327, 331 (D.C. Cir. 2003) (internal quotation marks and brackets omitted). Rather it "must mark the 'consummation' of the agency's decisionmaking process it must not be of a merely tentative or interlocutory nature . . .

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[1] Although the Statute refers to "an unfair labor practice under section 7118," the correct reference is to § 7116. *See Am. Fed'n of Gov't Emps., Local 2510 v. FLRA*, 453 F.3d 500, 502 n.* (D.C. Cir. 2006).

[and] the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177 78 (1997) (internal citation omitted); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005); *see also John Doe, Inc. v. Drug Enforcement Admin.*, 484 F.3d 561, 566 & n.4 (D.C. Cir. 2007). In adopting "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final" under 28 U.S.C. § 1291, the Supreme Court in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988), explained that resolution of an attorney's fees claim "will not alter the order or moot or revise decisions embodied in the order," *id.* at 199, and generally "is not part of the merits of the action to which the fees pertain," *id.* at 200. The Court recently reaffirmed this rule in *Ray Haluch Gravel Co. v. Central Pension Fund of International Union of Operating Engineers & Participating Employers*, 134 S. Ct. 773 (2014).

Given the collateral nature of the determination of the Union's attorney's fee request, we "discern no reason that the Supreme Court's holding would not apply to an appeal from the decision of an administrative agency." *Fluor Constructors, Inc. v. Reich*, 111 F.3d 94, 95 (11th Cir. 1997); *see Wagner v. Shinseki*, 733 F.3d 1343, 1349 (Fed. Cir. 2013). The finality requirement is applied "in a 'flexible' and 'pragmatic' way," *John Doe, Inc.*, 484 F.3d at 566 (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 50 (1967))), to ensure that courts "neither improperly intrude into the agency's decisionmaking process nor squander judicial resources through piecemeal review," *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 358 F.3d 31, 34 (D.C. Cir. 2004) (quoting *Ciba-Geigy Corp.*, 801 F.2d at 436) (internal quotation marks and brackets omitted). Neither concern is implicated here. The Authority has made a final determination that the Arbitrator erred in finding the IRS

committed an unfair labor practice under 5 U.S.C. § 7116 (a)(1) and (5). This determination satisfies each *Bennett* factor because the Authority's decisionmaking process with respect to the statutory violation is complete and it has made a final determination of the parties' rights and obligations. *See John Doe, Inc.*, 484 F.3d at 566; *see also Bennett*, 520 U.S. at 177 78. The Authority determined that the unchallenged finding that the IRS had violated the National Agreement could support the Union's request for attorney's fees. *See NTEU*, 66 F.L.R.A. at 581. That the Authority remanded the attorney's fees issue therefore does not suggest that its decisionmaking process with respect to the independent unfair labor practice question is incomplete. Furthermore, there is little realistic possibility of piecemeal review because it is unlikely this court would have jurisdiction to review the attorney's fee determination. Orders involving only an arbitrator's award of attorney's fees generally have no bearing upon the law of unfair labor practices and are therefore not judicially reviewable. *See Am. Fed'n of Gov't Emps., Local 2510*, 453 F.3d at 504 05; 5 U.S.C. § 7123(a)(1).

For these reasons, we hold that the court has jurisdiction to consider the Union's petition and turn to the merits.

III.

The court will set aside an order of the Authority only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A), 7123(c). Further, deference is due to the Authority's interpretation of the Statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See NASA v. FLRA*, 527 U.S. 229, 234 (1999); *Dep't of Justice v. FLRA*, 266 F.3d 1228, 1230 (D.C. Cir. 2001); 5 U.S.C. § 7105. The Authority must "provide a rational explanation for its decision" but in reviewing unfair labor practice determinations, the court

"recogniz[es] that such determinations are best left to the expert judgment of the [Authority]." *FDIC v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotation marks omitted).

Although the Statute imposes a duty to bargain over employees' conditions of employment, *see* 5 U.S.C. §§ 7102(2), 7103(a)(12), 7114(a)(4), (b)(2), it does not refer to an employer's obligation to provide advance notice to an employee representative of changes to employees' working conditions. Rather, the "notice-and-bargaining" obligations derive from the Authority's interpretation of the Statute's mandate in 5 U.S.C. § 7116(a)(1) and (5) that agencies must bargain in good faith over working conditions. *See, e.g.*, *Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 F.L.R.A. 166, 173, 175 (2009); *Dep't of Veterans Affairs, Med. Ctr., Sheridan, Wyo.*, 59 F.L.R.A. 93, 94 95 (2003); *Dep't of Labor, OSHA, Region 1, Bos., Mass.*, 58 F.L.R.A. 213, 215 16 (2002); *Internal Revenue Serv., Washington, D.C.*, 4 F.L.R.A. 488, 488, 498 99 (1980). Under that precedent, these obligations arise only if the agency has "made a change in a policy, practice, or procedure affecting unit employees' conditions of employment." *NTEU*, 66 F.L.R.A. at 579. More particularly, "where employees' 'volume' of work or 'number' of assignments increases, but those increases are not attributable to any change in the agency's policies, practices, or procedures affecting working conditions, . . . [the] increases '[s]tanding alone' do not trigger notice-and-bargaining obligations under § 7116(a)(5)." *Id.* at 579 80 (quoting *Dep't of Veterans Affairs*, 59 F.L.R.A. at 94 95).

The Union does not suggest that the Authority's interpretation requiring a unilateral change by an agency to trigger notice-and-midterm bargaining is contrary to the Statute, and we agree that the Authority's interpretation "is certainly consistent with the [Statute] and, to the extent the statute and

congressional intent are unclear, we may rely on the Authority's reasonable judgment." *NASA*, 527 U.S. at 234. Instead, the Union contends, as it had argued to the Authority in opposing the IRS's exceptions, that the Arbitrator, in emphasizing factors within the IRS's control, applied the correct legal standard for changes to working conditions in finding an unfair labor practice by the IRS. Responding, the Authority reasonably rejected, in light of its precedent, both the Arbitrator's approach and the Union's proposal for a "'bright-line rule' that significantly increased workloads trigger an agency's notice-and-bargaining obligations under § 7116 regardless of whether the increase is 'precipitated by the agency.'" *NTEU*, 66 F.L.R.A. at 580 (quoting Union's Opposition to the Agency's Exceptions at 30). The Authority explained that "[t]he Union has not explained how an agency could *unilaterally change* conditions of employment and thereby violate § 7116 if it has not *made any change* to a policy, practice, or procedure affecting conditions of employment." *Id.*

The Union no longer presses its bright-line rule, which the Authority viewed as seeking a change in its precedent. Instead the Union contends first that the Authority impermissibly ignored the Arbitrator's factual findings that there was a change in conditions of employment. The Union relies on the principle that in reviewing questions of law, the Authority is to defer to the Arbitrator's findings of fact. *See Dep't of Commerce, Patent & Trademark Office*, 52 F.L.R.A. 358, 367 (1996); *accord Nat'l Fed'n of Fed. Emps., Local 1437*, 53 F.L.R.A. 1703, 1710 & n.6 (1998). It points to the Arbitrator's findings that the IRS "has control" over factors that affect Case Advocates' workloads, including staffing and case processing procedures. Arb. Dec. at 36. In the Union's view, even under the Authority's narrow "policy, practice, and procedure" standard the Authority's application of it was erroneous because the IRS was an actor in creating a different and difficult work environment. But the Authority's determination that the IRS

did not make any unilateral change was consistent with the Arbitrator's factual finding that the IRS "divide[d] up an ever-growing pool of cases among virtually the same number of existing Case Advocates without making other reasonable adjustments." Arb. Dec. at 40. Under Authority precedent, this was the critical finding: The IRS responded to outside factors, but initiated no change of its own to its policies, practices, or procedures.

Similarly, the Union's second contention, that the Authority's narrow standard is inconsistent with the statutory definition of "conditions of employment," which includes "personnel policies, practices, and matters . . . affecting working conditions," 5 U.S.C. § 7103(a)(14), is unconvincing. Although the Case Advocates may have experienced a change in "practices" and "matters" affecting their working conditions between 2006 and 2009, the Arbitrator did not find that these changes had been initiated by the IRS. The reasonableness of the Authority's judgment in adopting a clear threshold principle for triggering an agency's "notice-and-bargaining" obligations is highlighted by the Arbitrator's implicit recognition that any other rule would leave an agency guessing about when its obligations are triggered by the gradual influence of external factors; in rejecting the Union's request for a *status quo ante* remedy, the Arbitrator observed that "it would be difficult if not impossible to determine exactly to what point in time the [IRS] must return." Arb. Dec. at 46. The Authority's determination, relying on its precedent, that the Arbitrator erred in finding an unfair labor practice was adequately explained and is neither arbitrary nor capricious. *See* 5 U.S.C. §§ 706(2)(A), 7123(c). And to the Union's assertion that under the Authority's narrow standard unions would be denied the ability to negotiate over changes in working conditions solely because the changes were not initiated by an agency, the Authority responds that its interpretation does not relieve an agency of its duty to respond to union-initiated proposals within the duty to bargain; it only

limits an agency's obligation to provide advance notice and an opportunity to bargain to situations where the agency itself has initiated a unilateral change. *See* Resp't's Br. at 26; *see also Library of Congress v. FLRA*, 699 F.2d 1280, 1289 90 (D.C. Cir. 1983).

Accordingly, we deny the petition for review.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5195 **September Term, 2013**

1:13-cv-00163-BAH

Filed On: January 22, 2014

Robert Hudnall,

Appellant

v.

Eric K. Shinseki, Secretary, Department of Veterans Affairs,

Appellee

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, previously construed in part as a petition for a writ of mandamus; the court's order filed October 24, 2013, denying the mandamus petition and ordering appellant/petitioner to show cause why any remaining aspects of this appeal should not be dismissed; and the "request for reconsideration and response to order to show cause," it is

ORDERED that the request for reconsideration be denied. Appellant/petitioner has not shown any grounds for reconsidering the denial of his mandamus petition. It is

FURTHER ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that any remaining aspects of this appeal be dismissed. Appellant/petitioner has not shown that dismissal of any remaining aspects of the appeal is unwarranted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 11, 2013 Decided December 13, 2013
Reissued January 15, 2014

No. 12-5287

DIANNE D. SLEDGE, CO-PERSONAL REPRESENTATIVE OF THE ESTATE OF RICO WOODLAND, ET AL.,
APPELLANTS

v.

FEDERAL BUREAU OF PRISONS,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cv-00742)

Stephen V. Carey argued the cause for appellants. With him on the briefs were *David P. Donovan* and *Philip R. Seybold*.

Heather Graham-Oliver, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Ronald C. Machen, Jr.*, U.S. Attorney, and *R. Craig Lawrence* and *Michelle Lo*, Assistant U.S. Attorneys.

Before: KAVANAUGH, *Circuit Judge*, and SENTELLE and RANDOLPH, *Senior Circuit Judges*.

Opinion for the court filed by *Senior Circuit Judge* RANDOLPH.

I

RANDOLPH, *Senior Circuit Judge*: This case arises from an altercation between Rico Woodland, an inmate at the Federal Correctional Institution in Allenwood, Pennsylvania, and a fellow inmate, Jesse Sparks. At 12:37 p.m. on October 15, 2002, Woodland and Sparks entered their cell. The two began to fight and were initially evenly matched, but Woodland became unable to defend himself (possibly because of an asthma attack).[1] Woodland was discovered at 1:05 p.m. with severe injuries, and was taken to a nearby hospital. He remained in a coma for several months, suffered brain damage, lost the use of his limbs, and eventually passed away on January 29, 2006.

Officer Richard Sweithelm was the corrections officer assigned to Woodland's housing unit on the afternoon of the assault. Officer Sweithelm assumed his post at about noon. At 12:37 p.m., just before Woodland and Sparks began their fight, Officer Sweithelm left the housing unit, and the prison began a "controlled movement." Controlled movements are regular ten-minute periods during which inmates can move from one part of the institution to another (for example, from housing units to a recreation facility or the dining hall). Officer Sweithelm remained outside the housing unit throughout this controlled movement. He smoked a cigarette, chatted with a fellow corrections officer, and watched inmate traffic entering and

[1] Sparks was charged with and pled guilty to the assault.

leaving the housing unit. He did not go back inside until 12:48 p.m., after the controlled movement was complete.

Woodland, and later his family and estate, claimed that the government was liable for Woodland's injuries because Officer Sweithelm acted negligently by standing outside and failing to monitor the interior of the housing unit during the assault. After exhausting administrative remedies, Teresa Sledge, the personal representative of Woodland's estate, sued the government in the district court.[2] Invoking the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, Sledge argued that the government was liable for personal injury and wrongful death under Pennsylvania law.[3]

The government moved to dismiss the complaint. It argued that Officer Sweithelm's conduct was protected by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), and that Sledge's claims were therefore outside the district court's subject-matter jurisdiction. The district court granted Sledge limited jurisdictional discovery and, after a hearing, dismissed the complaint. The opinion of the district court is reported at *Sledge v. United States*, 883 F. Supp. 2d 71 (D.D.C. 2012). Sledge timely appealed.

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[2] The suit was originally filed by Steven Sledge as personal representative of Woodland's estate. Steven Sledge passed away after the case was filed, and the district court granted a motion to substitute party.

[3] The complaint also challenged Woodland's medical treatment after the assault. Those claims are not the subject of this appeal. Liability under the Federal Tort Claims Act is determined "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1); *see id.* § 2674, here, Pennsylvania.

II

The Federal Tort Claims Act grants district courts exclusive jurisdiction to hear certain tort claims against the United States, including claims for "personal injury or death" based on the "negligent or wrongful act[s] or omission[s]" of government employees on the job. 28 U.S.C. § 1346(b)(1); *see id.* § 2674. The Act's broad jurisdictional grant is subject to exceptions. *See id.* § 2680. Among those, the discretionary function exception bars courts from hearing claims "based upon the exercise . . . or the failure to exercise . . . a discretionary function or duty on the part of . . . an employee of the Government, whether or not the discretion involved [was] abused." *Id.* § 2680(a).

We have treated the exception as jurisdictional: if it applies to the conduct of which a plaintiff complains, then "the district court lacks subject matter jurisdiction over the case." *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 759 (D.C. Cir. 2001); *see Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995). We review *de novo* a district court's decision whether the exception applies. *Loughlin v. United States*, 393 F.3d 155, 162-63 (D.C. Cir. 2004).

Courts apply the exception using the two-part *Gaubert*/*Berkovitz* test. *See United States v. Gaubert*, 499 U.S. 315 (1991); *Berkovitz v. United States*, 486 U.S. 531 (1988); *Sloan*, 236 F.3d at 759-60; *Cope*, 45 F.3d at 448-49. First, a court must ask whether a "statute, regulation, or policy" directs a government employee to conduct himself in a particular way. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). If so, then the employee's conduct is not discretionary and the exception does not protect him. *Id.* at 322, 324. In that case, the court proceeds under the first clause of 28 U.S.C. § 2680(a), and the government is immune from suit if and only if the employee followed the directive. *Cope*, 45 F.3d at 448. If a written directive is unambiguous then oral testimony cannot contradict

it. *See Shansky v. United States*, 164 F.3d 688, 691-92 (1st Cir. 1999). The testimony of government officials may be used to clarify or establish a directive. *See, e.g.*, *Macharia v. United States*, 334 F.3d 61, 65-66 (D.C. Cir. 2003).

If there is no "statute, regulation, or policy" on point, then the employee's conduct is discretionary and the inquiry moves to step two. At step two the court must decide whether that discretion is the type "that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23 (quoting *Berkovitz*, 486 U.S. at 536). The precise contours of this test are difficult to pin down. *Cope*, 45 F.3d at 448-49. The paradigmatic example of step two in action is negligent driving by a government employee on the job. *Gaubert*, 499 U.S. at 325 n.7. Although "driving requires the constant exercise of discretion," negligent driving is unprotected because it "can hardly be said to be grounded in regulatory policy." *Id.* Otherwise, we are left with the Supreme Court's statement that conduct is protected only if it is "based on considerations of public policy" such as "social, economic, [or] political" concerns. *Id.* at 323 (internal quotation marks omitted). In that calculus, the nature of the conduct, rather than the subjective intent of the actor, is what matters. The court must ask whether the challenged actions are amenable to public policy analysis, even if the actor was not acting out of public-policy motives. *Id.* at 325.

III

Sledge argues that Officer Sweithelm violated a mandatory directive by failing to monitor the inside of the housing unit. That directive is contained in what prison officials refer to as a post order. Post orders are adopted by individual correctional institutions,[4] and govern the conduct of corrections officers while they serve at a particular post within the institution. Post orders constitute government policy within a prison. *See, e.g.*, *Garza v. United States*, 161 F. App'x 341, 345 (5th Cir. 2005). The post order Sledge identifies requires all housing unit officers to "continuously monitor inmate traffic within and outside of the units" during controlled movements. Sledge asserts that this post order is unambiguous in at least one respect: whatever discretion Officer Sweithelm had, he *was required* to visually inspect the *interior* of the housing unit during the movement, which he altogether failed to do. Therefore, Sledge concludes, Officer Sweithelm's conduct is unprotected at *Gaubert*/*Berkovitz* step one.

Sledge's position finds some support in the case law. Courts have held that corrections-officer conduct is not protected when it contravenes specific and unambiguous directives, such as "account[] for and dispose[] of" "all razors" "at the end of the shower," *Gray v. United States*, 486 F. App'x 975, 978 (3d Cir. 2012), or "patrol the recreation yard" "[d]uring closed movement[s]," *Garza*, 161 F. App'x at 344-45. But courts reach a different conclusion when directives are phrased in more general terms or when the terms themselves are ambiguous, such as directives to "take disciplinary action at such times and to the

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[4] Corrections officers are also subject to directives contained in program statements, which are adopted by the Bureau of Prisons, and institutional supplements, which apply program statements to particular institutions.

degree necessary to regulate an inmate's behavior," *Calderon v. United States*, 123 F.3d 947, 949 (7th Cir. 1997) (emphasis omitted) (citing 28 C.F.R. § 541.10(b)(2)), or "[do] not . . . allow[inmates] to gather in large groups," *Garza*, 161 F. App'x at 345. Those directives provide discretion about how and when a corrections officer should act, even if they have a readily discernable objective. *See Garza*, 161 F. App'x at 345-46; *Calderon*, 123 F.3d at 949-50.

Although the question is close, we think the post order to "continuously monitor inmate traffic within . . . the unit[]" falls into the discretionary category. Sledge argues that the order obligated Officer Sweithelm to look inside the housing unit. That interpretation is plausible, though not required, when the particular phrase is read in isolation. But read in context, the order confers discretion on Officer Sweithelm to act as he did. It directs him to monitor the flow of inmates into and out of the housing unit without telling him precisely how to do so or where to stand.

First, the order requires "continuous[]" monitoring of inmate traffic both "within *and outside* of the units" (emphasis added). Sledge's interpretation, that "within" designates inmates already inside the housing unit, appears to require the impossible. A unit officer cannot continuously observe two different locations, separated by a wall, at the same time. *See Sledge*, 883 F. Supp. 2d at 85. We are not inclined to accept Sledge's "tortured reading" of the order. *Id.*

Second, the order refers to "inmate traffic." In the context of controlled movements, during which inmates can move from one area of the institution to another, "inmate traffic" likely refers to ingress, egress, and travel between buildings, rather than inmates moving about the interior of housing units. If the post order required Officer Sweithelm to monitor the inside of the housing unit, it is difficult to see why it would be confined

to monitoring "traffic." Inmates inside a housing unit could pose a security risk whether or not they were moving around. If the prison wanted to adopt Sledge's interpretation, it would make more sense to speak of "*inmates* within and outside of the units" rather than "inmate *traffic*."

Third, the remainder of the order undermines Sledge's interpretation. The penultimate sentence of the disputed paragraph directs unit offers to "[m]aintain[] high visibility" in order to "disrupt inmate chances of bringing contraband into the unit." That directive is not easily reconciled with Sledge's suggestion that Officer Sweithelm stand in the sallyport, an approximately seven-foot-by-nine-foot room between the inner and outer doors to the housing unit. Standing there would minimize his visibility, according to the deposition testimony of several prison officials.

That same testimony generally approved of Officer Sweithelm's conduct and rejected Sledge's interpretation of the post order. Robert Womeldorf, the Operations Lieutenant, explained that during a controlled movement "there's no need to monitor your inmates . . . inside your housing unit because they're not moving anywhere. You're watching the inmates go from point A to point B." Other officials were more emphatic. Stanley Yates, the Allenwood Warden at the time of the assault, stated that housing offers were "directed" to "stand[] in the front of the housing unit, . . . controlling th[e] compound," and that to do otherwise would have been irresponsible. "[I]f [a unit officer] went back in and stayed in" there would be no "officer paying attention to the flow of traffic." To Warden Yates this would constitute a dereliction of the officer's duty.

We also reject Sledge's interpretation of the post order because it is contrary to sound public policy and prison security. At the very least, these considerations lead us to conclude that the order and the discretion it conferred were grounded in public

policy. The policy problem is one of resource allocation. In a prison with 1,300-1,400 inmates it is impossible to keep each inmate in view at all times. During a controlled movement, 60 to 70 percent of inmates are outside, and prison officials therefore want more eyes watching inmate movement between buildings. By standing outside during controlled movements, unit officers can observe any events on the compound and respond quickly by closing the doors and securing the housing units. Monitoring inmate flow from the outside also helps prevent inmates from moving contraband into the housing units, which is a stated objective of the post order. Without housing unit officers observing inmate traffic, the large group of inmates moving between buildings would lack substantial supervision. We are thus persuaded that the order provided Officer Sweithelm with discretion to act as he did.

Sledge also argues that Officer Sweithelm violated orders that he remain at his post when he left the housing unit and stood several yards beyond the door. Sledge is correct that corrections officers may not leave their posts. But the orders do not identify the boundaries of the housing unit post, and the record does not support Sledge's claim that the boundaries are the walls of the housing unit. When asked directly about the issue, prison officials stated Officer Sweithelm's post included the area closely surrounding the housing unit. Relying on this testimony, and the absence of any order directing Officer Sweithelm to stand in a certain location, the district court correctly found that Officer Sweithelm did not leave his post. *Sledge*, 883 F. Supp. 2d at 84-85.

As to *Gaubert*/*Berkovitz* step two, Sledge argues that the exception does not protect Officer Sweithelm because he was not actually exercising discretion. Instead, Sledge alleges, Officer Sweithelm utterly neglected his duties. He stepped outside to smoke, pace, and talk, but not to monitor inmates. Sledge relies on other negligent guard cases. In those cases,

courts have held (or recognized the possibility in dicta) that the discretionary function exception does not protect corrections officers who are totally derelict of duty, for example, by packing up personal belongings and leaving early, *Chess v. United States*, 836 F. Supp. 2d 742, 751 (N.D. Ill. 2011), or by completely failing to perform required inspections, *Coulthurst v. United States*, 214 F.3d 106, 110-11 (2d Cir. 2000).

The validity of the negligent guard theory is an open question in this court. Even if that theory could ever allow a plaintiff's claim to survive the discretionary function exception, it would not do so here. The Supreme Court stated in *Gaubert* that the "focus of the inquiry [at step two] is not on the agent's subjective intent in exercising the discretion . . ., but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. We read the negligent guard cases in light of that statement. The problem with packing up personal belongings while still on the clock, for example, is not that a particular corrections officer does so for purely personal non-policy reasons. The problem is that there can never be a public-policy reason for doing so. Thus the decision to pack up early is unprotected.

Aside from subjective intent, the "nature of the actions" that might give rise to liability in this case is that Officer Sweithelm stood outside without looking into the housing unit. Even if Sledge is correct that Officer Sweithelm so acted merely to satisfy a nicotine craving, that motivation is irrelevant. The decision to stand outside, as explained above, is "susceptible to policy analysis." *Id.* Prison officials testified to several reasons why they would permit, or even advise, a housing unit officer to stand outside and monitor the compound during controlled movements. Officer Sweithelm's conduct is therefore protected at step two, as well as step one. *See Sledge*, 883 F. Supp. 2d at 86-87.

Because the discretionary function exception denies the district court subject-matter jurisdiction over Sledge's complaint, the decision of the district court is

Affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5211 **September Term, 2013**

FILED ON: DECEMBER 11, 2013

NATIONAL PARKS CONSERVATION ASSOCIATION, ET AL.,
APPELLEES

v.

ENVIRONMENTAL PROTECTION AGENCY AND GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR,
APPELLEES

STATE OF ARIZONA,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-01548)

Before: TATEL and KAVANAUGH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

J U D G M E N T

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the Court and briefed and argued by counsel. The Court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed.

The District Court entered a consent decree that resolved a suit in which environmental groups had complained that EPA did not meet statutory deadlines for implementing EPA's Regional Haze Rule, 64 Fed. Reg. 35,714 (July 1, 1999). The consent decree established a timeline for EPA to promulgate a Federal Implementation Plan (FIP), or approve a State Implementation Plan (SIP), that would meet the requirements of the Regional Haze Rule. Arizona objected to the consent decree on various grounds. The District Court concluded that it lacked jurisdiction to consider Arizona's objections to the consent decree.

We conclude that the District Court lacked jurisdiction because Arizona's objections are not

ripe. Arizona claims that it will be harmed when EPA promulgates a FIP to fully implement the requirements of the Regional Haze Rule. But as counsel for EPA told us, the consent decree neither requires EPA to promulgate a FIP for all elements of the Regional Haze Rule, nor bars EPA from considering and accepting Arizona's SIP submission, in whole or in part. *See* Tr. Oral Arg. at 24, Nov. 7, 2013 ("[A]ll the consent decree does is establish a deadline by which EPA must have an approved SIP in place for Arizona, or must promulgate a FIP for Arizona."). Under the consent decree, EPA retains the discretion to choose either course of action. Also, contrary to the suggestion advanced by Arizona, the consent decree does not impair Arizona's ability to contest any future adverse decisions made by EPA in implementing the Regional Haze Rule. As counsel for EPA explained at oral argument, "if Arizona submits a new SIP and EPA refuses to act on it then once an appropriate clock has run Arizona can seek to compel EPA to act, and if EPA acts and Arizona thinks that EPA has acted contrary to the [Clean Air] Act then Arizona can challenge that" decision. Tr. Oral Arg. at 26-27. Under the circumstances, it is evident that Arizona's objections are not ripe.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1276 **September Term, 2013**

LOC-74FR52418

Filed On: October 28, 2013

College Broadcasters, Inc.,

Petitioner

v.

Copyright Royalty Board,

Respondent

Intercollegiate Broadcasting System, Inc., a Non-Profit Rhode Island Corporation,
Intervenor

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the responses thereto, and the reply; the motion to hold in abeyance, the response thereto, and the reply; and intervenor's motion to govern future proceedings and the response thereto, it is

ORDERED that this case be transferred to the United States District Court for the District of Columbia. See 28 U.S.C. § 1631; 17 U.S.C. § 803(b)(6)(A) ("All regulations issued by the Copyright Royalty Judges . . . are subject to judicial review pursuant to chapter 7 of title 5, except as set forth in [§ 803(d)]."). "[O]nly when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action" may a party seek initial review in an appellate court. Watts v. SEC, 482 F.3d 501, 505 (D.C. Cir. 2007). Petitioner has not identified any such direct-review statute applicable to a Copyright Royalty Board rule issued outside the context of a proceeding under 17 U.S.C. § 803.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1276 **September Term, 2013**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit the original file of this case and a certified copy of this order to the United States District Court for the District of Columbia.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3042 **September Term, 2013**

1:07-cr-00007-GK-1

Filed On: October 24, 2013

United States of America,

Appellee

v.

Andre Drew,

Appellant

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability, the response thereto, and the reply; and the motion to dismiss for lack of a certificate of appealability and the response thereto, it is

ORDERED that the motion to dismiss be granted and the motion for a certificate of appealability be denied. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Appellant cannot prevail on his ineffective assistance of counsel claims, because he has not demonstrated that it is "debatable" among "jurists of reason," id. at 484, that counsel's purportedly "deficient performance prejudiced the defense," Strickland v. Washington, 466 U.S. 668, 687 (1984). Nor has appellant made "a substantial showing of the denial of a constitutional right" with respect to his allegations of a violation of Federal Rule of Criminal Procedure 48(a) and "prosecutorial harassment."

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1243 **September Term, 2013**

DEA-February 11, 2013 Letter

Filed On: October 22, 2013

In re: Eisai Inc.,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the opposition thereto, and the reply; the motion to expedite; and the notices, it is

ORDERED that the petition be denied. Petitioner has not shown that the agency's delay warrants the extraordinary remedy of mandamus. See Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984). Petitioner may once again seek relief in this court should the Drug Enforcement Administration fail to adhere to its envisioned schedule. It is

FURTHER ORDERED that the motion to expedite be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Timothy A. Ralls
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1173 **September Term, 2013**

NLRB-26CA024057

Filed On: October 17, 2013

In re: Ozburn-Hessey Logistics, LLC,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed June 24, 2013, and the response thereto; and the amended petition for writ of mandamus, it is

ORDERED that the order to show cause be discharged. In light of the filing of the amended mandamus petition, the petition is not moot. It is

FURTHER ORDERED that the amended petition for writ of mandamus be denied. "Mandamus is an extraordinary remedy unavailable where the right to relief is not clear or where another adequate remedy is available." Nat'l Mining Ass'n v. Mine Safety & Health Admin., 599 F.3d 662, 673 (D.C. Cir. 2010). Petitioner has an adequate alternative to the mandamus relief it seeks; it may refuse to bargain with the union certified by the Board and raise its challenge to the validity of the certification in a petition for review of any ensuing unfair labor practice finding. See Terrace Gardens Plaza, Inc. v. NLRB, 91 F.3d 222, 225 (D.C. Cir. 1996) ("The employer may . . . petition the court of appeals for review and argue the invalidity of the union's certification as an affirmative defense to the unfair labor practice charge."); see also Boire v. Greyhound Corp., 376 U.S. 473, 479 n.6 (1964) ("'An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees.'" (quoting S. Rep. No. 573, 74th Cong., 1st Sess., 14)). Moreover, the certification does not interfere with this court's authority to consider the related petitions for review concerning the terminations underlying the ballot disputes.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5255 **September Term, 2013**

Filed On: October 17, 2013

In re: Dennis M. Gallipeau,

Petitioner

BEFORE: Henderson and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, and the motion for leave to proceed in forma pauperis (IFP), it is

ORDERED that the motion for leave to proceed IFP be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. On July 23, 2012, the motion for leave to proceed IFP and the complaint described (but not submitted to this court) by petitioner were filed in the district court in case no. 12cv1209. By order entered July 25, 2012, the district court gave petitioner 30 days in which to submit his trust fund information, or risk having his complaint dismissed for lack of prosecution. By order entered November 19, 2012, the district court denied the IFP motion and dismissed the complaint without prejudice, because no trust account information was received. While it is unclear why the petitioner failed to receive the July or November 2012 orders, now that his complaint has been disposed of, there is no cause for the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

The Clerk is directed to send petitioner a copy of the district court docket in 12cv1209 and the orders and memorandum opinion referenced therein.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7094 **September Term, 2013**

1:11-cv-00080-DAR

Filed On: October 17, 2013

Raymond E. Jones,

Appellant

v.

Werner Enterprises, Inc., et al.,

Appellees

BEFORE: Griffith, Kavanaugh, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Because there has been no entry of final judgment by the district court on all claims and because there has been no Fed. R. Civ. P. 54(b) certification, we have no jurisdiction over this appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7122 **September Term, 2013**

1:13-cv-01154-UNA

Filed On: October 17, 2013

In re: Derek N. Jarvis,

Petitioner

BEFORE: Henderson and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus and the memorandum in support thereof, and the motion for leave to proceed in forma pauperis (IFP), it is

ORDERED that the motion for leave to proceed IFP be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court did not abuse its discretion in transferring the action to the U.S. Court for the District of Maryland, because Maryland is where petitioner resides, where ten of the eleven defendants conduct business, and where the real property at issue is located. See In re: Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1161 **September Term, 2013**

EDUC-4/22/13 Letter

Filed On: October 15, 2013

Eric Flores,

Petitioner

v.

United States Department of Education and
United States Department of Justice,

Respondents

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed on appeal in forma pauperis; the motion to dismiss and the response thereto; and the order to show cause, filed July 19, 2013, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for leave to proceed on appeal in forma pauperis be granted. It is

FURTHER ORDERED that the motion to dismiss be granted. Petitioner has not met his burden of demonstrating that this court has subject matter jurisdiction over his petition for review. See Georgiades v. Martin-Trigona, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984); see also Nat'l Auto. Dealers Assn v. FTC, 670 F.3d 268, 305 (D.C. Cir. 2012) (citations omitted) ("normal default rule" in this circuit is that a challenge to agency action proceeds first to district court, unless the governing statute specifically confers jurisdiction to review directly agency action).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1195 **September Term, 2013**

FTC-1223196

Filed On: October 15, 2013

Caribbean Cruise Line,

Petitioner

v.

Federal Trade Commission,

Respondent

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the opposition thereto, it is

ORDERED that the motion to dismiss be granted. Petitioner has not identified any statutory provision authorizing this court to exercise jurisdiction over the petition for review, which sought review of the Federal Trade Commission's order denying petitioner's motion to quash or limit a Civil Investigative Demand. The Administrative Procedure Act "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." Califano v. Sanders, 430 U.S. 99, 107 (1977).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5231 **September Term, 2013**

1:04-cr-00543-1

Filed On: October 15, 2013

In re: Charles E. Hall,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, and the motion to proceed in forma pauperis and supplement thereto, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court's delay is not so egregious or unreasonable as to warrant the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); cf. Telecomm. Research and Action Ctr. v. FCC, 750 F.2d 70, 78-80 (D.C. Cir. 1984) (factors considered regarding mandamus petitions involving agency delay). We are confident that the district court will act as promptly as its docket permits.

Pursuant to D.C. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1314 **September Term, 2013**

LOC-75FR56873

Filed On: September 30, 2013

Intercollegiate Broadcasting System, Inc., a Rhode Island Non-Profit Corporation,
Petitioner

v.

Copyright Royalty Board, Library of Congress,
Respondent

SoundExchange, Inc.,
Intervenor

BEFORE: Garland, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the joint motion for vacatur and remand, it is

ORDERED that the motion be granted. The final determination of the Copyright Royalty Judges, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 75 Fed. Reg. 56,873 (Sept. 17, 2010), is hereby vacated. It is

FURTHER ORDERED that this case be remanded to the Copyright Royalty Board for further proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the Copyright Royalty Board a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3091 **September Term, 2013**

1:03-cr-00331-MMM-1
1:08-cv-01779-MMM

Filed On: September 30, 2013

United States of America,

Appellee

v.

William Eliu Martinez,

Appellant

BEFORE: Garland, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the opposition thereto, it is

ORDERED that the motion to dismiss be granted, because appellant did not file a timely notice of appeal. The district court order under review was entered on February 22, 2010, and appellant failed to file a notice of appeal within 60 days. Fed. Rule App. P. 4(a)(1)(B). Even construing Appellant's late-filed notice of appeal as a motion to reopen the time to file, appellant does not satisfy the requirements of Federal Rule of Appellate Procedure 4(a)(6) because he did not file the notice within 180 days of entry of the order. The timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Bowles v. Russell, 551 U.S. 205, 213 (2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5131 **September Term, 2013**

1:13-cv-00547-UNA

Filed On: September 30, 2013

Christopher Mark Headen,

Appellant

v.

United States of America and Thomas D. Schroeder,

Appellees

BEFORE: Garland, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which the court construes as containing a request for a certificate of appealability, it is

ORDERED that the request for a certificate of appealability be denied and the appeal dismissed. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5172 **September Term, 2013**

1:12-cv-01106-RLW

Filed On: September 30, 2013

In re: Jerome Julius Brown,

Petitioner

BEFORE: Garland, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and the motion to proceed in forma pauperis, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5189 **September Term, 2013**

1:13-cv-00901-UNA

Filed On: September 30, 2013

Juan Carlos Olivo Ramirez,

Appellant

v.

United States of America,

Appellee

BEFORE: Garland, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which the court construes as containing a request for a certificate of appealability, it is

ORDERED that the request for a certificate of appealability be denied and the appeal dismissed. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7078 **September Term, 2013**

1:13-cv-00584-UNA

Filed On: September 30, 2013

Gene Allen,

Appellant

v.

State of Nevada,

Appellee

Consolidated with 13-7108

BEFORE: Garland, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which the court construes as containing a request for a certificate of appealability, it is

ORDERED that the request for a certificate of appealability be denied and these cases dismissed. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5152 **September Term, 2013**

1:07-cv-02330-PLF

Filed On: September 27, 2013

Michael Fenwick,

Appellant

v.

United States of America, et al.,

Appellees

Consolidated with 13-5130

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration the motion to dismiss, the response thereto and notice of errata, and the reply, it is

ORDERED that the motion to dismiss be granted. Appellant filed his notice of appeal on May 20, 2013, more than 60 days after the March 1, 2013, entry of the district court's order, see Federal Rule of Appellate Procedure 4(a)(1)(B), and more than 14 days after the appellees filed their notice of appeal on April 30, 2013, see Federal Rule of Appellate Procedure 4(a)(3). Appellant has not shown that he meets the criteria for reopening the time to file a notice of appeal, as he has not claimed he did not receive notice of the order within 21 days of its entry. See Fed. R. App. P. 4(a)(6).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5159 **September Term, 2013**

Filed On: September 27, 2013

In re: Clarence J. McCallum,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of habeas corpus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5194 **September Term, 2013**

Filed On: September 27, 2013

In re: Kamal K. Roy,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, the motion for leave to proceed in forma pauperis, and the supplement to the petition and motion, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5216 **September Term, 2013**

Filed On: September 27, 2013

In re: David Wattleton,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the motion to "cease and desist" collecting fees pursuant to the Prison Litigation Reform Act and for a refund of fees already collected, the petition for a writ of mandamus, and the motion for injunctive relief pending disposition of the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to cease and desist and for a refund be denied. Because petitioner was found not guilty by reason of insanity and committed pursuant to 18 U.S.C. § 4243, see United States v. Wattleton, 110 F. Supp. 2d 1380 (N.D. Ga. 2000), aff'd, 296 F.3d 1184 (11th Cir. 2002), he is not a "prisoner" pursuant to the Prison Litigation Reform Act. See 28 U.S.C. § 1915(h); Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001). But petitioner did not request reconsideration when the court previously assessed PLRA fees, see Wattleton v. Lappin, No. 03-5018 (D.C. Cir. Sept. 24, 2003), and he cannot obtain relief in this unrelated case. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Mandamus is available only if: "'(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.'" N. States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997) (quoting Council of and for the Blind of Del. Cnty. Valley, Inc. v. Regan, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (en banc)). The petition does not meet this standard. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5216 **September Term, 2013**

FURTHER ORDERED that the motion for injunctive relief pending disposition of the petition for writ of mandamus be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7073 **September Term, 2013**

1:13-cv-00334-UNA

Filed On: September 27, 2013

Frankie L. McCoy,

Appellant

v.

Corizen Health Incorporated, et al.,

Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as a petition for writ of mandamus, the memorandum of law and fact, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court did not abuse its discretion in transferring this case to the District of Maryland pursuant to 28 U.S.C. § 1406(a). See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam); 42 U.S.C. § 2000e-5(f)(3) (Title VII venue provision); 42 U.S.C. § 12117(a) (applying Title VII venue provision to ADA claims); 29 U.S.C. § 794a(a)(1) (applying Title VII venue provision to Rehabilitation Act claims).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-8005 **September Term, 2013**

1:09-cv-00648-RWR

Filed On: September 11, 2013

In re: Han Kim and Yong Seok Kim,

Petitioners

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for permission to appeal under 28 U.S.C. § 1292(b), it is

ORDERED that the petition be denied without prejudice. In holding that it lacked subject matter jurisdiction over the action, the district court's order is essentially a final decision, not an interlocutory order that is amenable to review under § 1292(b). The questions presented by petitioners may be raised on appeal under 28 U.S.C. § 1291, upon the district court's entry of final judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5107 **September Term, 2013**

1:10-cv-01223-RLW

Filed On: September 10, 2013

DeLarse Montgomery, Jr.,

Appellant

v.

Joshua Gotbaum, Director of the Pension Benefit Guaranty Corporation,

Appellee

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly granted summary judgment in favor of appellee. Appellant has not demonstrated a genuine issue of material fact that appellee's proffered explanations for appellant's non-selection to an accountant position were pretextual or that a reasonable trier of fact could infer discrimination or retaliation based on the evidence. See Kersey v. Wash. Metro. Area Transit Auth., 586 F.3d 13, 16-17 (D.C. Cir. 2009); Brady v. Office of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008). Nor has appellant shown that the district court erred in rejecting his attempt to raise for the first time in his post-judgment "motion for a new trial" a claim that he is entitled to a veterans preference. And to the extent appellant seeks to raise that unpreserved claim in this court, he is not permitted to do so. See Kattan by Thomas v. District of Columbia, 995 F.2d 274, 276-77 (D.C. Cir. 1993); District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1084 (D.C. Cir. 1984).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5107 **September Term, 2013**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5091 **September Term, 2013**

1:12-cv-00815-ABJ

Filed On: September 6, 2013

Roman Catholic Archbishop of Washington, et al.,

Appellants

v.

Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, et al.,

Appellees

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellants' motion for preliminary injunction, the response thereto, and the reply, it is

ORDERED that the appeal with respect to the challenge to the old regulations be dismissed as moot. It is

FURTHER ORDERED that the motion for preliminary injunction challenging the new regulations be denied, as such relief should be sought in the first instance in the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1038 **September Term, 2012**

USTC-10691-09

Filed On: July 31, 2013

Isidoro Rodriguez and Irene Rodriguez,

Appellants

v.

Commissioner of Internal Revenue Service,

Respondent

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to transfer the appeal to the Fourth Circuit, and the response thereto; the motion to disqualify judges, the response thereto, and the reply; and the motion to vacate the order of the United States Tax Court, the response thereto, and the reply, it is

ORDERED that the motion to disqualify be denied in part. To the extent appellants move to disqualify the above-named judges, they have provided no reasonable basis for questioning the panel's impartiality. See 28 U.S.C. § 455(a); SEC v. Loving Spirit Found. Inc., 392 F.3d 486, 493-94 (D.C. Cir. 2004). Judicial rulings alone almost never establish a valid basis for a bias or partiality motion. See Liteky v. United States, 510 U.S. 540, 555 (1994). And appellants provide no evidence to substantiate their claim of bias on the part of any member of the panel. See In re Kaminski, 960 F.2d 1062, 1065 n.3 (D.C. Cir. 1992) (per curiam) ("A judge should not recuse himself based upon conclusory, unsupported or tenuous allegations."). It is

FURTHER ORDERED that the motion to transfer be granted. The proper venue for appellate review of the United States Tax Court's dismissal of appellants' petition seeking redetermination of tax liability is the United States Court of Appeals for the circuit encompassing appellants' legal residence at the time their Tax Court petition was filed. See I.R.C. § 7482(b)(1)(A); Estate of Israel v. Comm'r of IRS, 159 F.3d 593, 595 (D.C. Cir. 1998). Appellants do not dispute that when they filed the petition at issue,

their legal residence was in Virginia, making venue proper in the Fourth Circuit. This appeal, therefore, will be transferred to the Fourth Circuit.

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Fourth Circuit.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3081 **September Term, 2012**

1:11-cr-00008-ESH-1

Filed On: July 30, 2013

United States of America,

Appellee

v.

Johanna Folake Fapohunda, also known as Johanna F. Thompson,

Appellant

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss case for lack of a certificate of appealability and the opposition thereto; the order to show cause filed February 13, 2013; and the motion for a certificate of appealability and the opposition thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for a certificate of appealability be denied and the motion to dismiss be granted. To prevail on her claim of ineffective assistance of counsel, appellant was required to show "a reasonable probability that, but for counsel's errors, [she] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). Notwithstanding the immigration consequences of appellant's guilty plea, it would only have been rational for appellant to reject the plea offer if there were at least some possibility she could have prevailed at trial, and appellant's "'vague'" and "'conclusory'" claims of innocence were insufficient to entitle her to an evidentiary hearing on this question. United States v. Pollard, 959 F.2d 1011, 1031 (D.C. Cir. 1992) (quoting Machibroda v. United States, 368 U.S. 487, 495 (1962)). Therefore, no certificate of appealability will issue because appellant has failed to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3089 **September Term, 2012**

1:06-cr-00227-RBW-2

Filed On: July 30, 2013

United States of America,

Appellee

v.

Troy Antoine Hopkins, also known as Fat Troy, also known as Dialo Fatah,

Appellant

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability; the motion to appoint counsel; the motion to dismiss case for lack of certificate of appealability and the opposition thereto; and the court's order to show cause filed May 2, 2013, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to appoint counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion for a certificate of appealability be denied and the motion to dismiss be granted. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. Appellant has not demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5302 **September Term, 2012**

1:97-cv-01978-PLF

Filed On: July 30, 2013

Timothy C. Pigford, et al.,

Appellees

Muhammad Robbalaa,

Appellant

v.

Thomas J. Vilsack, Secretary of Agriculture,

Appellee

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; the motion for summary affirmance, the response thereto, the reply, and the sur-reply; the motion to vacate order of the court; and the motion to stay order, it is

ORDERED that the motion for appointment of counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Under the terms of the Pigford v. Glickman consent decree at ¶ 12(b)(iii), appellant had 120 days from the date of the arbitrator's October 28, 2002 decision to petition for review by the court-ordered Monitor. Once the Monitor dismissed the petition, the arbitrator's decision became final and not subject to further review. See consent decree ¶ 10(l); see also Pigford v. Veneman, 292 F.3d 918, 924-25 (D.C. Cir. 2002). It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5302 **September Term, 2012**

FURTHER ORDERED that the motions to vacate and to stay be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7098 **September Term, 2012**

1:10-cv-01155-JEB

Filed On: July 30, 2013

Jia Di Feng,

Appellee

v.

See-Lee Lim,

Appellant

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed September 27, 2012, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed for lack of jurisdiction. The district court's order denying appellant's motion for summary judgment is not final or otherwise immediately appealable. See, e.g., Fed. R. Civ. P. 54(b); Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7112 **September Term, 2012**

1:10-cv-01155-JEB

Filed On: July 30, 2013

In re: See-Lee Lim,

Petitioner

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the supporting memorandum of law and fact, it is

ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown a clear and indisputable right to the relief requested. See generally In re: Brooks, 383 F.3d 1036, 1041 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128, 1139 (D.C. Cir. 2003).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1145 **September Term, 2012**

NLRB-08CA39029
NLRB-08CA39133

Filed On: July 30, 2013

JAG Healthcare, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for mandatory transfer, the opposition thereto, and the reply, it is

ORDERED that the motion be granted and this case be transferred to the United States Court of Appeals for the Sixth Circuit, where the National Labor Relations Board filed an application for enforcement, No. 13-1448, on April 11, 2013 – eleven days before the petition for review was filed in this court. See 28 U.S.C. § 2112(a)(1), (5). This disposition is without prejudice to petitioner's ability to present to the Sixth Circuit Court of Appeals the arguments it has raised in opposition to the transfer motion.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit the original files and a certified copy of this order to the United States Court of Appeals for the Sixth Circuit.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5050 **September Term, 2012**

1:12-cv-02061-UNA

Filed On: July 30, 2013

Douglas Wardrick,

Appellant

v.

Eric Wilson and Attorney General for the District of Columbia,

Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability, the response thereto, and the reply, it is

ORDERED that the request for a certificate of appealability be denied. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant may not challenge his District of Columbia conviction in federal court unless his remedy under D.C. Code § 23-110(a) is inadequate or ineffective to test the legality of his detention. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998); see also D.C. Code § 23-110(g). Appellant has not demonstrated that his remedy under D.C. Code § 23-110 is inadequate or ineffective with regard to his claim because "[as] with any [28 U.S.C.] § 2254 petition, the petitioner must satisfy the procedural prerequisites for relief including, for example, exhaustion of remedies." Lackawanna County District Attorney v. Coss, 532 U.S. 394, 404 (2001).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 14, 2013 Decided June 18, 2013

No. 12-5294

DELTA AIR LINES, INC.,
APPELLANT

v.

EXPORT-IMPORT BANK OF THE UNITED STATES, ET AL.,
APPELLEES

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
INTERVENOR-APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-02024)

Michael K. Kellogg argued the cause for appellants. With him on the briefs were *Wan J. Kim*, *Gregory G. Rapawy*, *W. Joss Nichols*, *Jonathan A. Cohen*, *R. Russell Bailey*, and *Stephen B. Moldof*.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, *Beth S. Brinkmann*, Deputy Assistant Attorney General, *Helen L. Gilbert*, Attorney, and *Sparkle L. Sooknanan*, Attorney.

Steven G. Bradbury, *C.B. Buente*, and *Quentin Riegel* were on the brief for *amicus curiae* National Association of Manufacturers in support of appellees.

Before: HENDERSON, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: The Export-Import Bank of the United States is a federal agency that issues loans and loan guarantees to foreign corporations so that they can purchase American goods and services. In 2011, the Export-Import Bank approved $3.4 billion in loan guarantees to Air India so that Air India could purchase Boeing airplanes. Air India plans to use the planes to provide air service on transoceanic routes. Before issuing the loan guarantees, the Bank was required under the Export-Import Bank Act to consider the effects that the loan guarantees would have on U.S. industries and U.S. jobs. *See* 12 U.S.C. §§ 635(b)(1)(B), 635a-2. Delta Air Lines argues that the Bank failed to consider those effects, in violation of the Bank Act. At this stage, we conclude simply that the Bank failed to reasonably explain its application of the Bank Act in this case, as required by the Administrative Procedure Act. We therefore reverse the judgment of the District Court. The District Court is directed to remand the case to the Bank without vacating any of the Bank's actions in this matter to date.

I

The Export-Import Bank Act establishes the Export-Import Bank of the United States and authorizes the Bank to provide loans and loan guarantees that allow foreign

companies to purchase American goods and services. The Bank Act also contains numerous provisions that limit the Bank's authority to extend loans and loan guarantees to foreign corporations. Two such provisions are directly relevant in this case. Section 635(b)(1)(B) of Title 12 provides that the Bank "shall take into account any serious adverse effect" of a loan or loan guarantee on certain U.S. industries and U.S. jobs. 12 U.S.C. § 635(b)(1)(B). Similarly, Section 635a-2 provides that the Bank "shall implement such regulations and procedures as may be appropriate to insure that full consideration is given to the extent to which any loan or financial guarantee is likely to have an adverse effect" on U.S. industries and U.S. jobs. 12 U.S.C. § 635a-2.[1]

To comply with the Bank Act, the Bank has developed a set of Economic Impact Procedures. Those procedures are designed to identify categories of loans and loan guarantees that do not have an adverse effect on the relevant portions of

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[1] In relevant part, Section 635(b)(1)(B) provides that the Bank:

> shall take into account any serious adverse effect of such loan or guarantee on the competitive position of United States industry, the availability of materials which are in short supply in the United States, and employment in the United States, and shall give particular emphasis to the objective of strengthening the competitive position of United States exporters and thereby of expanding total United States exports.

In relevant part, Section 635a-2 provides that the Bank:

> shall implement such regulations and procedures as may be appropriate to insure that full consideration is given to the extent to which any loan or financial guarantee is likely to have an adverse effect on industries, including agriculture, and employment in the United States, either by reducing demand for goods produced in the United States or by increasing imports to the United States.

the U.S. economy. Such loans and loan guarantees are thus effectively screened out from more detailed economic analysis during the consideration of particular loans or loan guarantees. As relevant here, the Economic Impact Procedures screen out transactions that do not "result in the foreign production of an exportable good." J.A. 1129. In other words, loans and loan guarantees that help foreign *service* providers (such as Air India's airline service) have been categorically determined not to affect U.S. industries and U.S. jobs.

Here, the Bank applied those procedures to Air India's loan guarantees. Because Air India planned to use the loan guarantees to increase the number of transoceanic flights it offered – a service, not an exportable good – the Bank did not specifically consider the impact of the loan guarantees on U.S. industries and U.S. jobs. Delta argues that this approach is inconsistent with the Bank Act, which according to Delta requires consideration of the impact of individual loans and loan guarantees – including to foreign *service* providers – on U.S. industries and U.S jobs. The District Court agreed with the Bank, and Delta now appeals.

II

The Bank's initial defense to Delta's challenge is that its implementation of these provisions of the Bank Act is committed to its discretion by law and is therefore judicially unreviewable under the Administrative Procedure Act. *See* 5 U.S.C. § 701(a)(2). The District Court concluded otherwise. We agree with the District Court.

Agency action, the Supreme Court has said, is presumptively subject to judicial review. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (APA

"embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute'") (citation omitted). The APA contains two exceptions: Review is unavailable when (i) it is precluded by statute or (ii) when agency action is committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(1)-(2).

The Bank primarily argues that the second exception applies here. Under that exception, agency action is committed to agency discretion by law and thus judicially unreviewable when there is "no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (exception "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply") (internal quotation marks omitted).

Section 635(b)(1)(B) mandates that the Bank "*shall* take into account any serious adverse effect" a guarantee might have on certain U.S. industries or U.S. jobs. *See* 12 U.S.C. § 635(b)(1)(B) (emphasis added). Similarly, Section 635a-2 mandates that the Bank "*shall* implement such regulations and procedures as may be appropriate to insure that full consideration is given to the extent to which any loan or financial guarantee is likely to have an adverse effect" on U.S. industries and U.S. jobs. *Id.* § 635a-2 (emphasis added). The language in both provisions identifies factors that the Bank must consider – namely, the adverse effects on U.S. industries and U.S. jobs. Ensuring that agencies follow commands of this sort is of course standard judicial fare. These statutes provide enough law to qualify as "law to apply" under the relevant APA precedents. *See Amador County v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011) (review available because statute imposes mandatory obligations on agency); *Armstrong v. Bush*, 924 F.2d 282, 293 (D.C. Cir. 1991) (same); *Robbins*

v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985) (per curiam) ("The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised."); *see also* 3 RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE § 17.6 (4th ed. 2002) ("statute can confer on an agency a high degree of discretion, and yet a court might still have an obligation to review the agency's exercise of its discretion to avoid abuse," especially on procedural grounds).

The Bank also suggests, in passing, that the Bank Act implicitly precludes judicial review, the first Section 701(a) exception to judicial review. In support, the Bank says that it is designed to function like a commercial bank, not a federal agency. But the Bank is indisputably a federal agency. 12 U.S.C. § 635(a)(1) ("There is created a corporation with the name Export-Import Bank of the United States, which shall be an agency of the United States of America."). The Bank further contends that judicial review would undermine its ability to operate effectively. No doubt many agencies feel that way at times, but an agency that wants a carve-out from the APA should direct its arguments to Congress. The Bank Act does not preclude judicial review for purposes of Section 701(a)(1).

In sum, the Bank's actions in this case are subject to judicial review to determine whether the Bank complied with the Bank Act or otherwise acted in an arbitrary and capricious manner. *See* 5 U.S.C. § 706.

III

Delta argues that the Bank, by not performing a detailed economic analysis of the loan guarantees, failed to "take into account any serious adverse effect" of its loan guarantees and failed to give "full consideration" to whether the loan guarantees were likely to have the relevant adverse economic harm. *See* 12 U.S.C. §§ 635(b)(1)(B), 635a-2.[2] The Bank actually shares Delta's view that the statute requires consideration of those factors for *all* loans and loan guarantees. But the Bank says that its Economic Impact Procedures do just that because they expressly state that they are designed to "ensure that all transactions are screened for economic impact implications." J.A. 1129.

The dispute here arises because the procedures *categorically* determine that loans and loan guarantees to foreign *service* providers will not affect U.S. industries and U.S. jobs. Delta acknowledges that categorical assessments are permissible under the Act in appropriate circumstances. Tr. of Oral Arg. at 5. The real disagreement between the parties, then, is whether the Bank's categorical assessment of the impact of loans and loan guarantees to foreign service providers is a reasonable application of the Bank Act and has been reasonably explained for purposes of the Administrative Procedure Act. *See Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 57 (1983); 5 U.S.C. § 706(2)(A). We agree with Delta that the

[2] Delta also argues that the Bank violated a provision of the Bank Act that prohibits the Bank from making a loan or loan guarantee that helps a foreign country expand production capacity of a competing "commodity" by one percent or more. *See* 12 U.S.C. § 635(e). But the ordinary meaning of the word "commodity" encompasses goods, not services, and so that provision does not apply here.

Bank, at a minimum, has not reasonably explained its justification for the categorical conclusion at issue here. In particular, the Bank has not reasonably explained its apparent conclusion that loans and loan guarantees to help a foreign company provide a service (as opposed to a good) can *never* cause adverse effects to U.S. industries and U.S. jobs.

We need not prolong the matter. Applying this Court's precedents regarding remand without vacatur, we direct the District Court to remand the case to the Bank without vacating any of the Bank's actions in this matter to date. *See Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (vacatur not required if "it is conceivable" that agency may correct error and vacatur would be too disruptive). On remand to the Bank, the Bank should (i) attempt to provide a reasonable explanation for how the Economic Impact Procedures, which screen out loans and loan guarantees to service providers, square with the statute's requirements, or (ii) adequately consider and explain any adverse effects that these particular Air India loan guarantees have on U.S. industries and U.S. jobs, or (iii) take whatever other action the Bank deems appropriate to comply with the Bank Act and the APA. The Bank's actions on remand of course will be subject to later judicial review if an aggrieved party wishes to challenge the Bank's actions as unlawful.

* * *

We reverse the judgment of the District Court. The District Court is directed to remand the case to the Bank for further proceedings consistent with this opinion, but the District Court should not vacate any of the Bank's actions in this matter to date.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5154 **September Term, 2012**

1:11-cv-01213-CKK

Filed On: June 14, 2013

Ronald J. Jackson,

Appellant

v.

Adrianne Todman and Brenda Redding,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing and the remainder of the motion for appointment of counsel, it is

ORDERED that the remainder of the motion for appointment of counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED AND ADJUDGED that the district court's order filed February 23, 2012, granting the motion to dismiss filed by District of Columbia Housing officials Todman and Redding, be affirmed. Because appellant failed, despite appropriate warning, to file a timely response or a timely motion to extend the time to file a response to the Housing officials' motion to dismiss, and offered no explanation for that failure, the district court did not abuse its discretion in granting the motion to dismiss as conceded. See Federal Deposit Insurance Corporation v. Bender, 127 F.3d 58, 68 (D.C. Cir. 1997) (discretion lies wholly with the district court to grant motion to dismiss as conceded).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

No. 12-1473

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

MATTHEW J. COLLINS,
Respondent.

CONSENT JUDGMENT SUMMARILY ENFORCING THE COMMISSION'S ORDER AGAINST MATTHEW J. COLLINS EXCEPT AS TO THE CIVIL MONETARY PENALTY

WHEREAS the U.S. Securities and Exchange Commission brought administrative proceedings against Matthew J. Collins alleging, among other things, that Collins, while associated with a registered broker-dealer, failed reasonably to supervise Eric J. Brown, his sole subordinate, in association with the sale and offer of securities;

WHEREAS the Commission found that Collins failed reasonably to supervise Brown, and accordingly ordered that Collins cease-and-desist from future violations of the federal securities laws, imposed an associational bar against Collins, and ordered that Collins pay, $310,000 in civil penalties, $2,915

in disgorgement, plus prejudgment interest of $1,324.74;

WHEREAS Collins filed a petition for review of the Commission's order in which he challenged the amount of civil penalties imposed on him by the Commission, but did not challenge the Commission's findings that he failed reasonably to supervise Brown, or the disgorgement and prejudgment interest amounts imposed on him by the Commission;

WHEREAS the Commission's order has become final and may be enforced against Collins as to the disgorgement and prejudgment interest amounts;

WHEREAS the parties have agreed to resolve this matter without the need for substantive briefing or oral argument;

WHEREAS Collins has consented to the entry of this Consent Judgment summarily enforcing against him the portions of the Commission's order imposing disgorgement and prejudgment interest, without trial or adjudication of any issue of fact or law, and to waive any appeal of the Consent Judgment if it is entered as submitted by the parties;

WHEREAS, pursuant to Rule 600 of the Commission's Rules of Practice, 17 C.F.R. 201.600, the amount of additional accrued interest on the disgorgement amount to the date of the entry of this Consent Judgment is $73.78;

WHEREAS Collins acknowledges that no promise or representation has

been made by the Commission or any member, officer, employee, agent, or representative of the Commission with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability, and accordingly waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy herein;

AND WHEREAS Collins enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Collins to enter into this Consent;

IT IS HEREBY ORDERED that:

1. This Court has jurisdiction over the subject matter of this action and over Collins.

2. The portions of the February 12, 2012 order by the Commission requiring that Collins pay $2,915 in disgorgement and $1,324.74 in prejudgment interest are final and may be enforced against Collins, and this Court's judgment summarily enforcing those portions of the Commission's order may be registered in any judicial district pursuant to 28 U.S.C. 1963.

3. Collins therefore must pay $2,915 in disgorgement and $1324.74 in

prejudgment interest to the Commission.

4. Pursuant to 17 C.F.R. 201.600, Collins must pay the Commission $73.78 in additional prejudgment interest to the date of the entry of this Consent Judgment.

5. Payments of the disgorgement and prejudgment interest amounts shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, 100 F Street, NE, Mail Stop 6042, Washington, DC 20549; and (iv) submitted under cover letter that references Collins's full name and the file number of the administrative proceeding below (Admin. Proc. File No. 3-13532). A copy of the cover letter and check shall be sent to Alix Biel, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, 4th Floor, New York, NY 10281-1022.

6. This Court shall retain jurisdiction over this matter and the Consent Judgment to enforce its terms.

IT IS SO ORDERED.

Dated: June 4, 2013

KLH
CIRCUIT JUDGE

RBG
CIRCUIT JUDGE

BK
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1041 **September Term, 2012**

Filed On: May 31, 2013

In re: David Alan Schum,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the motion for leave to seal the in forma pauperis motion and supporting affidavit, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for leave to seal the in forma pauperis motion and affidavit be denied. Petitioner has shown no basis to warrant sealing these judicial records, which are standard forms that he submitted to the court because he wished to obtain the privilege of commencing his action without prepayment of the filing fee, pursuant to 28 U.S.C. § 1915(a)(1). See Johnson v. Greater Southeast Comty. Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991) (emphasizing the "strong presumption in favor of public access to judicial proceedings"); see also Sturdza v. United Arab Emirates, No. 07-7034 (D.C. Cir. Oct. 23, 2007) (denying motion for leave to file ex parte a motion for leave to proceed in forma pauperis); Wolfe v. Graham, No. 95-7137 (D.C. Cir. Dec. 22, 1995) (denying motion to seal motion for leave to proceed in forma pauperis). It is

FURTHER ORDERED that the petition be denied. Petitioner has not shown that he has a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5035 **September Term, 2012**

1:12-cv-1385-UNA

Filed On: May 31, 2013

In re: Billy Ray McKoy,

Petitioner

BEFORE: Garland, Chief Judge; and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for a writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition be denied. Petitioner has not shown a clear and indisputable right to the relief requested. See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5073 **September Term, 2012**

Filed On: May 29, 2013

In re: Eric Flores,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, which includes a request to compel the United States Attorney General "to take preventive measures," and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner fails to show a "clear and indisputable right" to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5074 **September Term, 2012**

Filed On: May 29, 2013

In re: Eric Flores,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner fails to show a "clear and indisputable right" to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Petitioner's "federal tort complaint against torture" was filed in the district court on March 18, 2013. The district court did not abuse its discretion in transferring the complaint to the Western District of Texas. See 28 U.S.C. §§ 1391(b), 1402(b), 1406(a); In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). The civil action was electronically transferred to the Western District of Texas on April 8, 2013. To the extent petitioner wants his "petition for emergency preliminary injunction" and a related in forma pauperis motion to be filed and considered with his tort complaint, he should address his concerns to the transferee court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5062 **September Term, 2012**

1:13-cv-00156-UNA

Filed On: May 24, 2013

In re: Theodore J. Williams,

Petitioner

BEFORE: Garland, Chief Judge; and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the petition for a writ of mandamus, and the memorandum of law and fact in support thereof, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be dismissed. The transfer of the district court file deprives this court of jurisdiction to review the transfer unless there is a substantial question whether the district court had the power to transfer. See In re Asemani, 455 F.3d 296, 300 (D.C. Cir. 2006). The district court's transfer of the case to the Eastern District of North Carolina presents no such substantial question.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1044 **September Term, 2012**

Filed On: May 8, 2013

In re: Percy Squire,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Petitioner improperly seeks to use the mandamus petition as a substitute for appeal. See In re GTE Serv. Corp., 762 F.2d 1024, 1026-27 (D.C. Cir. 1985). In this case, mandamus relief is not available because petitioner has an adequate, ordinary remedy by virtue of the review provisions in the Communications Act, 47 U.S.C. §§ 155(c)(4) & (7), 402(b). See In re GTE Serv. Corp., 762 F.2d at 1026-27.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1020 **September Term, 2012**

NLRB-21CA039546

Filed On: May 1, 2013

DIRECTV Holdings, LLC,

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for transfer, the opposition thereto, and the reply; and the motion to intervene, it is

ORDERED that the motion to transfer be granted and this case, including the motion to intervene, be transferred to the United States Court of Appeals for the Ninth Circuit. See 28 U.S.C. § 2112(a). If, within 10 days after issuance of its order, the Board receives from a petitioner only one court-stamped copy of a petition for review of the order, the Board must file the record in the court of appeals where that petition was filed. See 28 U.S.C. § 2112(a)(1) and (2). Movant-intervenor, but not petitioner, served on the Board a court-stamped copy of its petition within 10 days after the Board's order issued. Thus, the case must be transferred to the Ninth Circuit, where movant-intervenor filed its petition.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit the original files and a certified copy of this order to the United States Court of Appeals for the Ninth Circuit.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5388 **September Term, 2012**

1:12-cv-00967-JDB

Filed On: April 30, 2013

James F. Johnson,

Appellant

v.

Nancy M. Ware, Honorable, Director Court Services and Offenders Supervision Agency (CSOSA),

Appellee

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the response thereto, and the motion to appoint counsel, it is

ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly concluded that appellant is not entitled to the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Appellant has not shown a clear and indisputable right to relief, Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002), because the requirement that he register as a sex offender does not violate the Ex Post Facto Clause of the Constitution, see Anderson v. Holder, 647 F.3d 1165 (D.C. Cir. 2011) (holding that District of Columbia's Sex Offender Registration Act does not violate the Ex Post Facto Clause because its registration requirement is "civil and nonpunitive"). Nor has appellant shown that he lacks an adequate remedy in the D.C. Superior Court to challenge the requirement that he register as a sex offender. See Power, 292 F.3d at 784.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5388 **September Term, 2012**

is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5116 **September Term, 2012**

Filed On: April 26, 2013

In re: Samuel T. Jones,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the emergency petition for writ of mandamus and the motion to proceed in forma pauperis, it is

ORDERED that this case be transferred to the U.S. District Court for the Southern District of Indiana. See 28 U.S.C. § 1361. Petitioner's action must be brought in district court in the first instance. See 28 U.S.C. § 1331; 28 U.S.C. § 1361. Because the acts or omissions complained of occurred at the Federal Correctional Institute in Terre Haute, Indiana, venue is proper in the Southern District of Indiana. See 28 U.S.C. § 1391(e).

The Clerk is directed to transmit the original case file and a certified copy of this order to the U.S. District Court for the Southern District of Indiana.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5358 **September Term, 2012**

1:09-cv-01270-RCL

Filed On: April 24, 2013

Darrell James Parks,

Appellant

v.

Cranston J. Mitchell, Chairman of United States Parole Commission, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed December 5, 2011, be affirmed. Appellant has not shown that the district court abused its discretion in denying him relief from judgment under Federal Rule of Civil Procedure 60(b). See Marino v. DEA, 685 F.3d 1076, 1080 (D.C. Cir. 2012) (district court's denial of a Rule 60(b) motion is reviewed for abuse of discretion).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1007 **September Term, 2012**

9:12-cv-81174-KAM

Filed On: April 18, 2013

Securities and Exchange Commission,

Petitioner

v.

Eric J. Brown,

Respondent

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to transfer, it is

ORDERED that the motions be granted and this case be transferred to the United States District Court for the Southern District of Florida, for the convenience of the parties in the interest of justice. See 15 U.S.C. § 78y(c)(3).

The Clerk is directed to transmit the original file and a certified copy of this order to the United States District Court for the Southern District of Florida.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3016 **September Term, 2012**

1:11-cr-00355-RBW

Filed On: April 16, 2013

In re: LaFrances Dudley O'Neal,

Petitioner

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not shown that she has a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5059 **September Term, 2012**

1:12-cv-01538-ESH

Filed On: April 16, 2013

In re: Harold W. Van Allen,

Petitioner

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and the supplements thereto, it is

ORDERED that the petition be denied. Petitioner has not shown that he has a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5033 **September Term, 2012**

Filed On: April 12, 2013

In re: Eric Flores,

Petitioner

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the supplement thereto, and the motion for leave to proceed in forma pauperis and the supplement thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The district court did not abuse its discretion in transferring the "federal tort complaint against torture" to the Western District of Texas. See 28 U.S.C. §§ 1391(b), 1402(b), 1406(a); In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). Petitioner has otherwise failed to show a "clear and indisputable right" to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1361 **September Term, 2012**

BOP-TRT-NER-2012-03625

Filed On: April 10, 2013

Donald G. Jackman, Jr.,

Petitioner

v.

Federal Bureau of Prisons,

Respondent

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; and the motion to dismiss, the opposition thereto, and the supplement to the opposition, it is

ORDERED that the motion for appointment of counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion to dismiss be granted. None of the statutes relied on by Petitioner authorizes direct review of the Bureau of Prisons' ("BOP") decision in this court. The Hobbs Act, 28 U.S.C. §§ 2341-2349, gives courts of appeals exclusive jurisdiction to review certain agency actions, but BOP orders are not among those enumerated in the statute. And, 28 U.S.C. § 2112, entitled "Record on review and enforcement of agency orders," does not confer jurisdiction; rather, it sets forth procedures for filing, handling, and determining the contents of the administrative record in proceedings in the court of appeals. Similarly, the Administrative Procedure Act ("APA") prescribes the standards of direct judicial review of agency actions, see 5 U.SC. §§ 701-706, but the APA itself "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action," Oryszak v. Sullivan, 576 F.3d 522, 524 (D.C. Cir. 2009) (citing Califano v. Sanders, 430 U.S. 99 107 (1977)). Finally, to the extent Petitioner relies on the Federal Tort Claims Act, that statute does not provide for direct review in this court; any action under the Act must be brought in district court in the first instance. See 28 U.S.C. §§ 1346(b)(1), 2671-2880, 1402(b).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1361 **September Term, 2012**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1361 **September Term, 2012**

BOP-TRT-NER-2012-03625

Filed On: June 6, 2013

Donald G. Jackman, Jr.,

Petitioner

v.

Federal Bureau of Prisons,

Respondent

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

This case was appealed from
District of Columbia: 1:12-mc-00414-EGS

U.S. Circuit Court of Appeals

US Circuit Court of Appeals - D.C. Circuit

12-5403

In re: Subpoena

This case was retrieved from the court on Thursday, July 19, 2018

Header

Case Number:	12-5403
Date Filed:	12/18/2012
Date Full Case Retrieved:	07/19/2018
Status:	Terminated 03/27/2013
NOS Description:	(890) 2890: Other Statutory Actions; Appeal

[Summary][Associated Cases][Participants][Proceedings][Pending Motion][Brief][Rehearings][History][Additional Case]

Summary

No Information is Available for this case

Associated Cases

No Information is Available for this case

Participants

Litigant	Attorney
In re: Subpoena	
In re	

Proceedings

Date	Details
12/18/2012	US CIVIL CASE docketed. [12-5403]
12/18/2012	NOTICE OF APPEAL filed [1410811] by Party 1 seeking review of a decision by the U.S. District Court in 1:12-mc-00414-EGS. Assigned USCA Case Number [12-5403]
12/18/2012	CLERK'S ORDER filed [1410830] directing party to file initial submissions: APPELLANT docketing statement due 01/17/2013. APPELLANT certificate as to parties, etc. due 01/17/2013. APPELLANT statement of issues due 01/17/2013. APPELLANT underlying decision due 01/17/2013. APPELLANT deferred appendix statement due 01/17/2013. APPELLANT notice of appearance due 01/17/2013. APPELLANT transcript status report due 01/17/2013. APPELLANT procedural motions due 01/17/2013.

	APPELLANT dispositive motions due 02/01/2013; directing party to file initial submissions: APPELLEE certificate as to parties, etc. due 01/17/2013. APPELLEE entry of appearance due 01/17/2013. APPELLEE procedural motions due 01/17/2013. APPELLEE dispositive motions due 02/01/2013 [12-5403]
01/15/2013	[UNDER SEAL] MOTION filed [STYLED AS "MOTION TO HOLD DEADLINES IN ABEYANCE"] [1415337] by Party 1 to hold case in abeyance (Response to Motion served by mail due on 01/28/2013) [Service Date: 01/15/2013 by US Mail] Pages: 1-10. [12-5403]
01/17/2013	[UNDER SEAL] ENTRY OF APPEARANCE filed [1416115] by Party 8 (Appellee). [12-5403]
01/17/2013	[UNDER SEAL] CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1416116] by Party 8 (Appellee). [Service Date: 01/17/2013] [12-5403]
01/25/2013	RESPONSE IN OPPOSITION FILED [1417204] by Party 8 to motion to hold case in abeyance [1415337-2] [Service Date: 01/25/2013 by US Mail, Email] Pages: 1-10. [12-5403]
01/31/2013	[UNDER SEAL] MOTION filed [1418266] by Party 8 to dismiss case (Response to Motion served by mail due on 02/14/2013) [Service Date: 01/31/2013 by US Mail] Pages: 1-10. [12-5403]
01/31/2013	[UNDER SEAL] STATEMENT FILED [1418267] by Party 8 with Disclosure Listing [Service Date: 01/31/2013] [12-5403]
02/04/2013	SEALED REPLY FILED [1419998] by Party 1 to Response and RESPONSE IN OPPOSITION FILED to Party 8 Motion to dismiss appeal [1418266-2](Reply to Response by Mail to Cross Motion due on 02/14/2013) [Service Date: 02/04/2013 by US Mail] Pages: 1-10. [12-5403]
03/27/2013	PER CURIAM ORDER filed [1427605] denying motion to hold case in abeyance [1415337-2]; granting motion to dismiss the appeal as moot [1418266-2]; vacating the district court's order filed November 19, 2012; remanding case to the district court (see order for details). Withholding issuance of the mandate. Before Judges: Rogers, Brown and Kavanaugh. [12-5403]
06/04/2013	MANDATE ISSUED to Clerk, District Court [12-5403]

Pending Motion

No Information is Available for this case

Brief

No Information is Available for this case

Rehearings

No Information is Available for this case

History

No Information is Available for this case

Additional Case

Additional Case Information

Civil US - United States

Appeal from: United States District Court for the District of Columbia

District: 0090 Division: 1 CaseNumber: 1:12-mc-00414-EGS LeadCaseNumber: 1:12-mc-00414-EGS DateFiled: 08/06/2012

Trial Judge: Emmet G. Sullivan , U.S. District Judge

Judgement Date: 11/19/2012

Judgement EOD: 11/19/2012

Date NOA Filed: 12/13/2012

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3066 **September Term, 2012**

1:02-cr-00475-RWR-1

Filed On: March 13, 2013

United States of America,

Appellee

v.

Ramendra Basu,

Appellant

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss the appeal for lack of a certificate of appealability and the response thereto, it is

ORDERED that the motion to dismiss be granted. Because appellant has not made "a substantial showing of the denial of a constitutional right," no certificate of appealability is warranted. 28 U.S.C. § 2253(c)(2). Appellant has not "demonstrate[d] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see United States v. Basu, 881 F. Supp. 2d 1 (D.D.C. 2012).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7126 **September Term, 2012**

Filed On: March 13, 2013

In re: Robert Cotner,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the motion for appointment of counsel, the petition for writ of habeas corpus, petitioner's brief, the supplements, and the notices to the court, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition for writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1423 **September Term, 2012**

EPA-77FR50686

Filed On: March 12, 2013

Peabody Western Coal Company,

Petitioner

v.

Environmental Protection Agency,

Respondent

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and reply, it is

ORDERED that the petition for review be dismissed. Under the Clean Air Act, venue over petitions seeking review of actions by the Environmental Protection Agency that are locally or regionally applicable lies in the appropriate regional circuit. 42 U.S.C. § 7607(b)(1). The action which petitioner challenges is a determination regarding a specific facility operated by the Peabody Western Coal Company in Black Mesa Complex, Arizona. Thus, venue is appropriate only in the Ninth Circuit.

This court expresses no opinion on the standing issues raised in the motion to dismiss.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5251 **September Term, 2012**

1:12-cv-00221-UNA

Filed On: March 12, 2013

In re: Anthony Askew,

Petitioner

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's orders filed August 14, 2012, September 26, 2012, and December 17, 2012, ordering petitioner to submit either the docketing fee or a motion for leave to proceed in forma pauperis, along with a completed Consent to Collection of Fees and Prisoner Trust Account Report, and warning petitioner that failure to comply would result in dismissal of the petition for writ of mandamus for lack of prosecution; and petitioner's submissions filed December 19, 2012 and January 7, 2013, it is

ORDERED that this case be dismissed for lack of prosecution. See D.C. Cir. Rule 38. Petitioner has failed to comply with this court's orders.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5304 **September Term, 2012**

1:11-mc-00678-RLW

Filed On: March 12, 2013

Securities and Exchange Commission,

Appellee

Richard Cheatham,

Appellant

v.

Securities Investor Protection Corporation,

Appellee

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not shown that the district court erred in denying his untimely motion to intervene. See Associated Builders and Contractors, Inc. v. Herman, 166 F.3d 1248, 1257 (D.C. Cir. 1999) ("A motion for intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken.") (internal quotation omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7065 **September Term, 2012**

1:11-cv-01452-JEB

Filed On: March 12, 2013

In the Matter of: Ludwig & Robinson PLLC,

Yelverton Law Firm, PLLC,

Appellant

v.

Ludwig & Robinson PLLC,

Appellee

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal; the motion for leave to file a supplement to the motion for summary reversal; the order to show cause filed December 7, 2012, the response thereto, and the reply; and the petition for permission to allow certification for immediate direct appeal, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for leave to file a supplement be granted. The Clerk is directed to file the lodged supplement. It is

FURTHER ORDERED that the motion for summary reversal be denied and, on the court's own motion, that the district court's orders filed May 3, 2012 and June 22, 2012 be summarily affirmed. Appellant's filing of a motion for summary reversal placed the merits of this appeal before the court. Because the appropriate disposition is so clear, summary action is warranted. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has failed to demonstrate any error in the district court's memorandum opinion and order dismissing without prejudice appellant's "request for de novo review of rulings of the United States Bankruptcy Court pursuant to 28 U.S.C. § 157(c)(1)." Furthermore, appellant has presented no argument in support of his challenge to the district court's order denying without prejudice his motion to alter or amend the judgment entered May 3, 2012. To the

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7065 **September Term, 2012**

extent appellant seeks summary reversal as to claims against the Yelverton Law Firm, PLLC, by Ludwig & Robinson, PLLC, those challenges to orders of the United States Bankruptcy Court, and arguments contesting the merits of those rulings, are not properly before this court. It is

FURTHER ORDERED that the petition for permission to appeal be denied. Appellant did not obtain a certification for direct appeal from either the bankruptcy court or the district court as required by 28 U.S.C. § 158(d)(2) and Federal Rule of Bankruptcy Procedure 8001(f). In fact, the district court docket in Civil Action No. 12-1996, In re Yelverton (D.D.C), indicates that appellant did not make a timely request for certification in accordance with the representation made in the petition ¶ 2. See § 158(d)(2)(E) (any request for certification must be made not later than 60 days after entry of the order sought to be appealed); see also Fed. R. Bankr. P. 8001(f)(3) (request for certification must be filed within the time specified by § 158(d)(2)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7113 **September Term, 2012**

1:12-cv-00055-CKK

Filed On: March 12, 2013

In the Matter of: Green Miller, Jr.,

Green Miller, Jr.,

Appellant

v.

District of Columbia,

Appellee

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal, the opposition thereto, the motion for summary affirmance, the opposition thereto, and the "motion to find defendants'/appellees' in contempt or alternatively appoint a special attorney to investigate," it is

ORDERED that the motion to find defendants/appellees in contempt or to appoint a special attorney to investigate be denied. It is

FURTHER ORDERED that the motion for summary reversal be denied and that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary affirmance. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not err in dismissing appellant's bankruptcy appeal as untimely as to all but the order denying his motion for an extension of time, affirming that order, and denying appellant's miscellaneous motions. See, e.g., Fed. R. Bankr. P. 8002.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7113 **September Term, 2012**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5391 **September Term, 2012**

1:12-cv-01859-UNA

Filed On: March 5, 2013

Adam Troy Kittrell,

Appellant

v.

United States of America and Terrence W. Boyle, USA,

Appellees

BEFORE: Garland, Chief Judge; and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which the court construes as containing a request for a certificate of appealability, it is

ORDERED that the request for a certificate of appealability be denied and the appeal dismissed. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5402 **September Term, 2012**

1:12-cv-01060-RJL

Filed On: March 5, 2013

Nina Shahin, CPA,

Appellant

v.

Timothy F. Geithner, Secretary of Treasury,

Appellee

BEFORE: Garland, Chief Judge; and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed December 18, 2012, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed. This court lacks jurisdiction to review on an interlocutory basis the district court's denial of appellant's motion for appointment of counsel. See Ficken v. Alvarez, 146 F.3d 978, 983 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5389 **September Term, 2012**

1:12-cv-01926-UNA

Filed On: March 1, 2013

In re: Frederick Allen Noble,

Petitioner

BEFORE: Garland, Chief Judge; and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the petition for writ of mandamus and the memorandum of law and fact in support thereof, and the motion for remand, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus and the motion for remand be dismissed. The physical or electronic transfer of the case file to another permissible forum deprives this court of jurisdiction to review the transfer. See In re Asemani, 455 F.3d 296, 299-300 (D.C. Cir. 2006); Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7017 **September Term, 2012**

1:11-cv-01527-RLW

Filed On: January 4, 2013

3M Company,

Appellee

v.

Harvey Boulter, et al.,

Appellees

District of Columbia,

Appellant

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the consent motion of the District of Columbia to dismiss its appeal and to vacate the portions of the district court's opinion and order addressing the District of Columbia Anti-SLAPP Act, it is

ORDERED that the District of Columbia's motion to dismiss its appeal be granted. The court takes no position on the District's arguments regarding vacatur of the district court's opinion and order. It is

FURTHER ORDERED that the case be remanded to the district court with instructions to consider the motion for vacatur as a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5078 **September Term, 2012**

1:11-cv-00997-ABJ

Filed On: January 3, 2013

Richard Allen Smith, Jr.,

Appellant

v.

United States Department of Justice, et al.,

Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed October 22, 2012, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the judgment of the district court be vacated and the case remanded so that the district court can consider the effect of the 2010 amendments to Federal Rule of Civil Procedure 56 and "state on the record the reasons for granting or denying the [summary judgment] motion." Fed. R. Civ. P. 56(a). As in Grimes v. District of Columbia, No. 11-7053 (D.C. Cir. March 2, 2012) (per curiam) (unpublished judgment):

> [w]e express no opinion as to the consequences for this case of the interaction of amended Federal Rule of Civil Procedure 56(e) and the accompanying 2010 Advisory Committee note, Federal Rule of Civil Procedure 55, and Local Rule 7(b). We leave these matters to be addressed by the district court in the first instance.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5192 **September Term, 2012**

1:11-cv-01310-RCL

Filed On: January 3, 2013

Lester Chew,

Appellant

v.

R. Ives, Warden,

Appellee

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as containing a request for a certificate of appealability; the motions to appoint counsel; and the motion to dismiss for lack of a certificate of appealability and the response thereto, it is

ORDERED that the motions to appoint counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to dismiss be granted and the request for a certificate of appealability be denied. See 28 U.S.C. § 2253(c). Appellant has not shown that "'jurists of reason would find it debatable whether the district court was correct' in dismissing his petition for lack of jurisdiction...." Williams v. Martinez, 586 F.3d 995, 997 (D.C. Cir. 2009) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1282 **September Term, 2012**

FERC-ER07-956-001
FERC-ER07-956-002

Filed On: December 7, 2012

Louisiana Public Service Commission,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Arkansas Public Service Commission, et al.,
Intervenors

Consolidated with 12-1283

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss No. 12-1283 and the opposition thereto; the motion to hold No. 12-1282 in abeyance pending further agency proceedings and the opposition thereto; and the request to rescind consolidation, it is

ORDERED that the motion to dismiss No. 12-1283 be granted. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002) (and cases cited therein). The petition for review is incurably premature even if the rehearing petition raises issues different from those raised by the petition for review. See Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489 (D.C. Cir. 1994). It is

FURTHER ORDERED that the motion to hold No. 12-1282 in abeyance be granted, pending further order of the court. Petitioner is directed to file a status report within 90 days of the date of this order and every 90 days thereafter. The parties are directed to file motions to govern further proceedings within 30 days of FERC's completion of the ongoing "Entergy bandwidth proceedings." It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1282 **September Term, 2012**

FURTHER ORDERED that the request to rescind consolidation be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 12-1283 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8011 **September Term, 2012**

1:12-cv-00048-BAH

Filed On: December 7, 2012

In re: Cox Communications, Inc., et al.,

Petitioners

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for permission to appeal pursuant to 28 U.S.C. §1292(b), the response thereto, and the reply, it is

ORDERED that the petition for permission to appeal be granted. See 28 U.S.C. § 1292(b). Approval of the petition is without prejudice to reconsideration by the merits panel.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Fed. R. App. P. 5 and collect the mandatory fee from the appellants. Upon payment of the fees, the district court is to certify and transmit the preliminary record to this court, after which the case will be assigned a general docket number and proceed in the normal course.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1258 **September Term, 2012**

FCC-12-52

Filed On: December 6, 2012

Accipiter Communications, Inc.,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and to defer filing of the administrative record, the response thereto, and the reply; and the motion to strike, or in the alternative for leave to file a surreply, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. An intent to challenge the underlying Transformation Order cannot be fairly inferred from the petition for review and the contemporaneous filings. Entravision Holdings, LLC v. FCC, 202 F.3d 311, 313 (D.C. Cir. 2000). To the extent the petitioner seeks review of the order denying in part reconsideration, it is well-established that denials of petitions for reconsideration are unreviewable except insofar as the request for reconsideration is based upon new evidence or changed circumstances. See id. Petitioner has not shown that the portion of its petition for reconsideration that was denied was based on new evidence or changed circumstances. It is

FURTHER ORDERED that the motion to strike and the motion to defer filing of the administrative record be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5259 **September Term, 2012**

1:12-cv-00330-RJL

Filed On: November 30, 2012

Lloyd J. Fleming,

Appellant

v.

Richard A. Coward, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for injunction; the motions for subpoena; the motion for indictment; and the motion to dismiss for lack of jurisdiction or, alternatively, to transfer case, and the opposition thereto, it is

ORDERED that the motion to transfer be granted and this appeal, including appellant's motions, be transferred to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction to review a district court's decision "in any civil action arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1).

The Clerk is directed to transmit a certified copy of this order, along with the original case file, to the United States Court of Appeals for the Federal Circuit.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1433 **September Term, 2012**

FILED: NOVEMBER 9, 2012

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1164,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

On Petition for Review of a Final Decision
of the Federal Labor Relations Authority

Before: GARLAND, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This cause was considered on a petition for review of an order of the Federal Labor Relations Authority (FLRA) and was briefed and argued by the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review is denied.

The Social Security Administration (the Agency) plans to move its Newport, Rhode Island, field office to a new location. The Agency's floor plan for the new space provides for wall-mounted workstations along an "Interview Barrier Privacy Wall." This privacy wall would separate Agency employees from the public areas of the office. Employees seated at the workstations would conduct interviews through windows in the privacy wall (like teller windows at banks) and complete other tasks at the same workstation. In order to alleviate perceived ergonomic and other deficiencies in the floor plan, the American Federation of Government Employees, Local 1164 (the Union) proposed a "hybrid front-end interviewing floor plan" that would allow each employee to use a cubicle in the back of the office for work that does not require interviewing as well as the workstation mounted to the privacy wall for work that does.

After the Agency refused to negotiate over the proposal, the Union petitioned the FLRA for review. The FLRA dismissed the petition, holding that the Agency need not negotiate over a proposal that was not an "appropriate arrangement[] for employees adversely affected by" management's exercise of its authority to determine the "methods, and means of performing work." *See* 5 U.S.C. §§ 7106(b)(1)-(3) (2006). The FLRA reached this decision after concluding

that the Union's proposal would interfere with management rights by "totally eliminat[ing] the single-workstation setup chosen by the Agency" and by "lessen[ing] the Newport office's ability to fulfill its mission to serve the public efficiently . . . ." *Am. Fed'n of Gov't Emps., Local 1164 and Soc. Sec. Admin.*, 66 F.L.R.A. No. 24, 117 (2011) (*Local 1164*). The Union now petitions this Court for review, arguing that the FLRA applied the incorrect test to determine whether or not the proposal is "appropriate."

We have held that "a proposal that infringes on a management right is negotiable as an 'appropriate arrangement' under section 7106(b)(3) . . . if it does not excessively interfere with management's rights." *Patent Office Prof'l Ass'n v. FLRA*, 873 F.2d 1485, 1491 (D.C. Cir. 1989) (citing *Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983)). In *National Association of Government Employees, Local R14-87 and Kansas Army National Guard* (*KANG*), the FLRA made that determination by "weighing the competing practical needs of employees and managers." 21 F.L.R.A. No. 4, 31-32 (1986). The FLRA identified five illustrative but not exhaustive factors that could be used in that balancing depending on the facts and circumstances of the case at hand. *Id.* at 32-33. Here, the FLRA looked at two of those factors, one of which is relevant to this petition for review. Considering "the effect of the proposal on effective and efficient government operations," *id.* at 33, the FLRA determined that the Agency need not negotiate over the Union's proposal because it would "lessen the Newport office's ability to fulfill its mission to serve the public efficiently." *Local 1164*, *supra*, at 117.

The Union argues that the balancing test in *KANG* has been revised by the formulation in *Am. Fed. of Gov't Emps., AFL-CIO, Local 1923 v. FLRA* (*Local 1923*), which, the Union contends, makes the primary factor "the extent to which the interference hampers the ability of an agency to perform its core functions—*to get its work done in an efficient and effective way*." 819 F.2d 306, 308-09 (D.C. Cir. 1987) (emphasis added). We need not decide whether the Union has correctly interpreted the relationship between *KANG* and *Local 1923* because in this case the FLRA conducted the very inquiry the Union says *Local 1923* requires, concluding that the proposal would "lessen the Newport office's ability to fulfill its mission to serve the public *efficiently*." *Local 1164*, *supra*, at 117 (emphasis added).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold the issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7104 **September Term, 2012**

Filed On: November 8, 2012

In re: Robert Hollander,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the supplement thereto, and the motion for leave to exceed the page limit, it is

ORDERED that the motion for leave to exceed the page limit be granted. The Clerk is directed to file the lodged petition. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. The petition asks this court to enjoin the enforcement of, correct, or rescind various orders entered by the Superior Court of the District of Columbia in an ongoing child custody action; to compel the recusal of the presiding judge; and to compel the Superior Court to replace the guardian ad litem appointed for the minor child. This court has no appellate jurisdiction over actions in the District of Columbia courts. See D.C. Code § 11-721(a) (vesting jurisdiction in the District of Columbia Court of Appeals over orders of the Superior Court); 28 U.S.C. § 1257(a) & (b) (vesting jurisdiction in the Supreme Court to review final judgments of the D.C. Court of Appeals). The Rooker-Feldman doctrine makes clear that the Supreme Court's jurisdiction under § 1257 is exclusive. Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923). The All Writs Act gives federal courts the power to issue writs, including mandamus, "in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). This court, however, has no appellate jurisdiction over the Superior Court case – now or in the future – which mandamus could "aid." Therefore, the court lacks jurisdiction to issue the writ. See In Re Stone, 569 F.2d 156, 157 (D.C. Cir. 1978) (per curiam); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5104 **September Term, 2012**

1:11-cv-00149-GK

Filed On: July 5, 2013

Jerry T. Graham,

Appellant

v.

B. A. Bledsoe, Warden, and Office of the United States Attorney General,

Appellees

No. 12-5131

Jerry T. Graham,

Appellant

v.

B. A. Bledsoe, Warden, and Office of the United States Attorney General,

Appellees

BEFORE: Henderson, Rogers, and Tatel, Circuit Judges

O R D E R

Upon consideration of the motion to recall the mandate in the above-referenced cases, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. Because the motion seeks to relitigate a claim presented in appellant's prior habeas petition, it must be analyzed under the standards applicable to a second or successive application under 28 U.S.C. § 2254. See 28 U.S.C. § 2244(b)(2); Calderon v. Thompson, 523 U.S. 538, 553 (1998). Appellant cannot rely on Martinez v. Ryan, 132 S. Ct. 1309 (2012), to support his challenge, because Martinez does not announce a new rule of constitutional law that

the Supreme Court has held will apply retroactively to cases on collateral review. See § 2244(b)(2)(A); Tyler v. Cain, 533 U.S. 656, 663 (2001) ("[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive.").

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5235 **September Term, 2012**

Filed On: October 15, 2012

In re: Vivian Diane Eiber,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "motion to dismiss for lack of subject matter jurisdiction," which the court construes as a petition for writ of habeas corpus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). The petition in essence seeks to invalidate petitioner's conviction based on the asserted unconstitutionality of the statute conferring district court jurisdiction over violations of federal criminal statutes, a challenge that should be brought by way of a motion pursuant to 28 U.S.C. § 2255 in the sentencing court, or, if the § 2255 remedy is inadequate or ineffective, by a habeas petition under 28 U.S.C. § 2241 in the judicial district where petitioner's custodian is located. See 28 U.S.C. § 2255(a), (e).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5236 **September Term, 2012**

Filed On: October 15, 2012

In re: Vickie Diane Becker,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "motion to dismiss for lack of subject matter jurisdiction," which the court construes as a petition for writ of habeas corpus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). The petition in essence seeks to invalidate petitioner's conviction based on the asserted unconstitutionality of the statute conferring district court jurisdiction over violations of federal criminal statutes, a challenge that should be brought by way of a motion pursuant to 28 U.S.C. § 2255 in the sentencing court, or, if the § 2255 remedy is inadequate or ineffective, by a habeas petition under 28 U.S.C. § 2241 in the judicial district where petitioner's custodian is located. See 28 U.S.C. § 2255(a), (e).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5237 **September Term, 2012**

Filed On: October 15, 2012

In re: Susan Ellen O'Brien,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "motion to dismiss for lack of subject matter jurisdiction," which the court construes as a petition for writ of habeas corpus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). The petition in essence seeks to invalidate petitioner's conviction based on the asserted unconstitutionality of the statute conferring district court jurisdiction over violations of federal criminal statutes, a challenge that should be brought by way of a motion pursuant to 28 U.S.C. § 2255 in the sentencing court, or, if the § 2255 remedy is inadequate or ineffective, by a habeas petition under 28 U.S.C. § 2241 in the judicial district where petitioner's custodian is located. See 28 U.S.C. § 2255(a), (e).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5238 **September Term, 2012**

Filed On: October 15, 2012

In re: Catherine Senninger,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "motion to dismiss for lack of subject matter jurisdiction," which the court construes as a petition for writ of habeas corpus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). The petition in essence seeks to invalidate petitioner's conviction based on the asserted unconstitutionality of the statute conferring district court jurisdiction over violations of federal criminal statutes, a challenge that should be brought by way of a motion pursuant to 28 U.S.C. § 2255 in the sentencing court, or, if the § 2255 remedy is inadequate or ineffective, by a habeas petition under 28 U.S.C. § 2241 in the judicial district where petitioner's custodian is located. See 28 U.S.C. § 2255(a), (e).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5239 **September Term, 2012**

Filed On: October 15, 2012

In re: Mary Perkins,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "motion to dismiss for lack of subject matter jurisdiction," which the court construes as a petition for writ of habeas corpus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). The petition in essence seeks to invalidate petitioner's conviction based on the asserted unconstitutionality of the statute conferring district court jurisdiction over violations of federal criminal statutes, a challenge that should be brought by way of a motion pursuant to 28 U.S.C. § 2255 in the sentencing court, or, if the § 2255 remedy is inadequate or ineffective, by a habeas petition under 28 U.S.C. § 2241 in the judicial district where petitioner's custodian is located. See 28 U.S.C. § 2255(a), (e).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5240 **September Term, 2012**

Filed On: October 15, 2012

In re: Jerryca P. Chavez,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "motion to dismiss for lack of subject matter jurisdiction," which the court construes as a petition for writ of habeas corpus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). The petition in essence seeks to invalidate petitioner's conviction based on the asserted unconstitutionality of the statute conferring district court jurisdiction over violations of federal criminal statutes, a challenge that should be brought by way of a motion pursuant to 28 U.S.C. § 2255 in the sentencing court, or, if the § 2255 remedy is inadequate or ineffective, by a habeas petition under 28 U.S.C. § 2241 in the judicial district where petitioner's custodian is located. See 28 U.S.C. § 2255(a), (e).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5241 **September Term, 2012**

Filed On: October 15, 2012

In re: Brandy Hale Rakes,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "motion to dismiss for lack of subject matter jurisdiction," which the court construes as a petition for writ of habeas corpus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). The petition in essence seeks to invalidate petitioner's conviction based on the asserted unconstitutionality of the statute conferring district court jurisdiction over violations of federal criminal statutes, a challenge that should be brought by way of a motion pursuant to 28 U.S.C. § 2255 in the sentencing court, or, if the § 2255 remedy is inadequate or ineffective, by a habeas petition under 28 U.S.C. § 2241 in the judicial district where petitioner's custodian is located. See 28 U.S.C. § 2255(a), (e).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3055 **September Term, 2012**

1:01-cr-00140-RCL-1

Filed On: October 12, 2012

United States of America,

Appellee

v.

Willie C. Hankerson,

Appellant

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which the court construes as including a request for a certificate of appealability (COA); and the motion to proceed in forma pauperis and the supplement thereto, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the request for COA be denied. Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" dismissing as untimely his motion filed pursuant to 28 U.S.C. § 2255. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5046 **September Term, 2012**

1:09-cv-00591-RBW

Filed On: November 5, 2012

Frank Peterson,

Appellant

v.

Stephen T. Ayers, Acting Architect of the Capitol,

Appellee

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5262 **September Term, 2012**

1:08-cv-02127-UNA

Filed On: October 12, 2012

In re: David Lee Smith,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5272 **September Term, 2012**

1:11-cv-01940-UNA

Filed On: October 12, 2012

In re: Thomas Franklin Cross, Jr.,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5277 **September Term, 2012**

1:12-cv-1385

Filed On: October 12, 2012

In re: Billy Ray McKoy,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Because petitioner was convicted in state court, the proper vehicle for challenging his conviction in federal court is an application for a writ of habeas corpus filed under 28 U.S.C. § 2254, not § 2255, in the district in which petitioner's custodian is located. See 28 U.S.C. §§ 2254, 2255. Accordingly, the district court did not abuse its discretion in transferring this action to the United States District Court for the Eastern District of North Carolina, see In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam), which has jurisdiction over petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426 (2004); Stokes v. United States Parole Commission, 374 F.3d 1235 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8016 **September Term, 2012**

1:09-cv-01099-UNA

Filed On: October 12, 2012

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a notice of appeal, it is

ORDERED that the petition be denied because Sindram has not shown a tenable basis for each of his claims. See Sindram v. Johnson, No. 91-7110 (D.C. Cir. Apr. 20, 1993).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8014 **September Term, 2012**

1:09-cv-01099-UNA

Filed On: October 3, 2012

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a notice of appeal, it is

ORDERED that the petition be denied because Sindram has not shown a tenable basis for each of his claims. See Sindram v. Johnson, No. 91-7110 (D.C. Cir. Apr. 20, 1993).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8015 **September Term, 2012**

1:12-mc-00428-UNA

Filed On: October 3, 2012

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a notice of appeal, it is

ORDERED that the petition be denied because Sindram has not shown a tenable basis for each of his claims. See Sindram v. Johnson, No. 91-7110 (D.C. Cir. Apr. 20, 1993).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1255 **September Term, 2012**

LABR-2006-SOX-00108

Filed On: September 28, 2012

Hunter R. Levi,

Petitioner

v.

United States Department of Labor and Hilda L. Solis,

Respondents

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss (styled as a motion for summary affirmance seeking dismissal) and the opposition thereto, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to dismiss be granted. The Administrative Law Judge's March 9, 2012, order is not a final, reviewable order. See 18 U.S.C. § 1514A(b); 49 U.S.C. § 42121(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5166 **September Term, 2012**

1:12-cv-00545-UNA

Filed On: September 28, 2012

Everton A. Berry,

Appellant

v.

United States of America and Louise W. Flanagan,

Appellees

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which the court construes as containing a request for a certificate of appealability; and the motion for remand, it is

ORDERED that the request for a certificate of appealability be denied and the appeal dismissed. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDonnell, 529 U.S. 473, 484 (2000). It is

FURTHER ORDERED that the motion for remand be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5230 **September Term, 2012**

Filed On: September 28, 2012

In re: Bennie L. Gamble, Jr.,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of habeas corpus and the supplement thereto, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5191 **September Term, 2012**

1:07-cv-01027-RJL

Filed On: September 21, 2012

In re: Antoine Jones,

Petitioner

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the supplements thereto, the response to the petition, and the reply; the motions for appointment of counsel and the supplement thereto; and the motions for discovery, it is

ORDERED that the motions for appointment of counsel be denied. It is

FURTHER ORDERED that the motions for discovery be denied. It is

FURTHER ORDERED that the petition be granted and the district court be directed to file petitioner's motion. See In re Williams, No. 10-5122, unpublished order (D.C. Cir. Jan. 4, 2012) (Griffith and Kavanaugh, JJ.; and Ginsburg, S.J.). At this time, the court takes no position on the merits of petitioner's motion or its timeliness under Fed. R. Civ. P. 60(b)(3) and (d), and Baltia Air Lines, Inc. v. Transaction Management, Inc., 98 F.3d 640, 642-43 (D.C. Cir. 1996). See also Standard Oil Co. v. U.S., 429 U.S. 17, 17-19 (1976) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3099 **September Term, 2012**

1:02-cr-00376-CKK-1
1:08-cv-00250-CKK

Filed On: September 20, 2012

United States of America,

Appellee

v.

Dorothy Maju Henry, also known as Dorothy Maju, also known as Dorothy Kzioki Manju, also known as Dorothy Nzioki,

Appellant

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, construed as including a request for a certificate of appealability, appellee's brief, appellant's reply brief, and the appendices, it is

ORDERED that the request for a certificate of appealability be denied and that the appeal be dismissed. Appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), as she has not "demonstrate[d] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). See, e.g., Strickland v. Washington, 466 U.S. 668 (1984) (ineffective assistance of counsel); United States v. Kearney, 682 F.2d 214 (D.C. Cir. 1982) (recanting witnesses); United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996) (hearings).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1256 **September Term 2012**

EPA-74FR40074

Filed On: September 19, 2012

Natural Resources Defense Council,

Petitioner

v.

Environmental Protection Agency,

Respondent

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the unopposed motion for voluntary vacatur and remand, it is

ORDERED that the motion for voluntary vacatur and remand be granted. Respondent's Implementation of the 1997 8-Hour Ozone National Ambient Air Quality Standard: Addressing a Portion of the Phase 2 Ozone Implementation Rule Concerning Reasonable Further Progress Emissions Reductions Credits Outside Ozone Nonattainment Areas, 74 Fed. Reg. 40,074 (Aug. 11, 2009), is hereby vacated and the case is remanded for further proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to respondent a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8009 **September Term 2012**

1:12-mc-00408-UNA

Filed On: September 19, 2012

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the application for leave to file a notice of appeal pursuant to this court's injunction entered April 20, 1993, it is

ORDERED that the application for leave to file a notice of appeal be denied because appellant has not shown a tenable basis for the appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8012 **September Term 2012**

1:09-cv-01099-UNA

Filed On: September 19, 2012

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the application for leave to file a notice of appeal pursuant to this court's injunction entered April 20, 1993, it is

ORDERED that the application for leave to file a notice of appeal be denied because appellant has not shown a tenable basis for the appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8013 **September Term 2012**

1:12-mc-00428-UNA

Filed On: September 19, 2012

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the application for leave to file a notice of appeal pursuant to this court's injunction entered April 20, 1993, it is

ORDERED that the application for leave to file a notice of appeal be denied because appellant has not shown a tenable basis for the appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3041 **September Term 2012**

1:98-cr-00071-RCL

Filed On: September 14, 2012

In re: Thomas Fields,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to file a second or successive motion under 28 U.S.C. § 2255 and the response thereto; the motion for leave to proceed in forma pauperis; and the motion to appoint counsel, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to appoint counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2). It is

FURTHER ORDERED that the motion for leave to file a second or successive motion under 28 U.S.C. § 2255 be denied. Petitioner has not shown that his motion is based on either newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h); United States v. Ortiz, 136 F.3d 161, 163-64 (D.C. Cir. 1998). The transcripts and affidavits petitioner relies on are more than a year old, and petitioner has not demonstrated that this evidence "could have been discovered through the exercise of due diligence" only within the past year. 28 U.S.C. § 2255(f); see also Walker v. Martin, 131 S. Ct. 1120, 1129 (2011) ("The clock runs from 'the date on which the [supporting] facts could have been discovered through ... due diligence.'") (quoting 28 U.S.C. § 2255(f)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5232 **September Term 2012**

1:10-cv-01086-PLF

Filed On: September 14, 2012

In re: David Earl Jones,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion to proceed in forma pauperis, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The district court's delay in ruling on the pending petition for a writ of habeas corpus is not so egregious or unreasonable as to warrant the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); cf. Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5242 **September Term 2012**

Filed On: September 14, 2012

In re: Eric Flores,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has failed to show a "clear and indisputable right" to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5252 **September Term 2012**

04:11-cv-04503

Filed On: September 14, 2012

In re: Shirley LaBlanche, (Mother of Decedent)
In The Estate of Kent R. LaBlanche,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be dismissed without prejudice to refiling in the United States Court of Appeals for the Ninth Circuit, which is the appropriate court. See 28 U.S.C. § 1407(e) ("Petitions for an extraordinary writ to review an order to transfer ... shall be filed only in the court of appeals having jurisdiction over the transferee district.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5263 **September Term 2012**

1:11-cv-2215

Filed On: September 14, 2012

In re: Rory M. Walsh, and as Natural Guardian of S.J.W.; a minor,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-7046 **September Term 2012**

1:10-cv-00604-BJR

Filed On: September 4, 2012

Leslie T. Jackson, In her own right, and as next friend of her son, A.J.P.,

Appellant

v.

Kaya Henderson, In her official capacity as Chancellor and District of Columbia,

Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition to the motion to dismiss, the motion for stay, the motion for an extension of time to file a response to the motion for stay, and the opposition thereto, it is

ORDERED that the motion to dismiss be granted. "It is black letter law that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291," North Carolina Fisheries Ass'n, Inc. v. Gutierrez, 550 F.3d 16, 19 (D.C. Cir. 2008), and appellant has not shown that the challenged order is appealable under a pendent jurisdiction theory or the collateral order doctrine. See Swint v. Chambers County Commission, 514 U.S. 35 (1995); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). It is

FURTHER ORDERED that the motion for stay and the motion for an extension of time to file a response to the motion for stay be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5163 **September Term 2011**

1:11-cv-00937-JEB

Filed On: August 10, 2012

Morris J. Peavey,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed May 22, 2012, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed as untimely. Appellant filed his notice of appeal on May 9, 2012, more than 60 days after the March 2, 2012, entry of the district court order dismissing his case. See Fed. R. App. P. 4(a)(1)(A). Appellant has not shown he meets the criteria for extending or reopening the time to file a notice of appeal. See Fed. R. App. P. 4(a)(5) and (6).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5177 **September Term 2011**

07-cr-00048

Filed On: August 10, 2012

In re: William D. Poynter,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The district court's delay in ruling on petitioner's pending motions is not so egregious or unreasonable as to warrant the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); cf. Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984). We are confident that the district court will act upon the motions as promptly as its docket permits.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1156 **September Term 2011**

USTC-18920-09

Filed On: August 9, 2012

Ronald S. Adams,

Appellant

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for improper venue, or, in the alternative, to transfer the appeal to the Eleventh Circuit; and the opposition thereto, it is

ORDERED that the motion to transfer be granted. The proper venue for appellate review of the United States Tax Court's dismissal of appellant's petition seeking redetermination of tax liability is the United States Court of Appeals for the circuit encompassing appellant's legal residence at the time his Tax Court petition was filed. See 26 U.S.C. § 7482(b)(1)(A); Estate of Israel v. Comm'r of IRS, 159 F.3d 593, 595 (D.C. Cir. 1998). Appellant does not dispute that when he filed the petition at issue, his legal residence was in Florida, making venue proper in the Eleventh Circuit. This appeal, therefore, will be transferred to the Eleventh Circuit. The transfer is without prejudice to the parties' rights to raise all available issues on appeal before the Eleventh Circuit. See Alexander v. Comm'r, 825 F.2d 499 (D.C. Cir. 1987) (per curiam).

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Eleventh Circuit.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5162 **September Term 2011**

Filed On: August 9, 2012

In re: Gary Anthony Cole, Sr.,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, and the supplement thereto, which includes a request for appointment of counsel, it is

ORDERED that the request for appointment of counsel be denied. In civil cases, petitioners are not entitled to appointment of counsel when they have not demonstrated any likelihood of success on the merits. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5187 **September Term 2011**

1:00-cr-00159-RCL

Filed On: August 9, 2012

In re: Derrek E. Arrington,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Because the district court is conducting proceedings on petitioner's request for a reduction in his sentence, he has failed to demonstrate that his right to relief is clear and indisputable. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1169 **September Term 2011**

FCC-12-26

Filed On: August 8, 2012

Warren C. Havens,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to hold in abeyance, the response thereto, and the reply; and the motion to dismiss, the response thereto, and the reply, it is

ORDERED that the motion to hold in abeyance be denied. It is

FURTHER ORDERED that the motion to dismiss be granted. Because of the pendency of petitioner's request for administrative reconsideration, the agency order petitioner challenges is not a final reviewable order with respect to petitioner, and his petition for review is incurably premature. See Wade v. FCC, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (per curiam); TeleSTAR, Inc. v. FCC, 888 F.2d 132, 134 (D.C. Cir. 1989); United Transp. Union v. ICC, 871 F.2d 1114, 1116-18 (D.C. Cir. 1989). Once the agency rules on petitioner's request for administrative reconsideration, whether by granting or denying it on the merits or by denying petitioner permission to file the administrative reconsideration, the agency order(s) become "final" and petitioner may seek review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1169 **September Term 2011**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5011 **September Term 2011**

1:07-cv-01167-RBW

Filed On: August 8, 2012

Donnell Hurt,

Appellant

v.

District Of Columbia Court Services And Offender Supervision Agency, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to appoint of counsel; the motion to remand, appellant's brief in support thereof, and the response thereto; and the motion for summary affirmance, and the response thereto, it is

ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion to remand be denied, and the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly concluded there was no violation of the Privacy Act arising from the alleged disclosure of appellant's conviction, and appellant failed to show the alleged disclosure caused his homelessness. In addition, the district court did not abuse its discretion in denying appellant's Rule 59(e) motion to vacate judgment. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5011 **September Term 2011**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5152 **September Term 2011**

Filed On: August 8, 2012

In re: Clifford Jackson,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of habeas corpus, and petitioner's letters informing the court that he wants to file his petition in district court, it is

ORDERED, on the court's own motion, that the petition be transferred to the district court.

The Clerk is directed to transmit the original file and a certified copy of this order to the United States District Court for the District of Columbia.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5159 **September Term 2011**

USDC-TXND-4:98-cv-00838

Filed On: August 8, 2012

In re: Gary Anthony Cole, Sr.,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, and the supplement thereto, which includes a request for appointment of counsel, it is

ORDERED that the request for appointment of counsel be denied. In civil cases, petitioners are not entitled to appointment of counsel when they have not demonstrated any likelihood of success on the merits. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5305 **September Term, 2014**

1:09-cv-00587-RLW

Filed On: August 20, 2015 [1568900]

Stephen Dearth and Second Amendment Foundation, Inc.,

Appellants

v.

Loretta E. Lynch,

Appellee

O R D E R

Upon consideration of appellants' bill of costs and the objection thereto, it is

ORDERED that the request for costs be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5082 **September Term 2011**

1:12-cv-00299-UNA

Filed On: June 15, 2012

James Leak, Jr.,

Appellant

v.

United States of America,

Appellee

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

The court concludes, on its own motion, that oral argument will not assist the court in this case. Accordingly, the court will dispose of the appeal without oral argument on the basis of the record and the presentations in appellant's brief. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j).

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5082 **September Term 2011**

1:12-cv-00299-UNA

Filed On: June 29, 2012

James Leak, Jr.,

Appellant

v.

United States of America,

Appellee

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed February 24, 2012 be affirmed. The district court properly dismissed appellant's pleading without prejudice. To the extent appellant is challenging his conviction and sentence, his remedy is by way of a motion filed pursuant to 28 U.S.C. § 2255 in his criminal case. See 28 U.S.C. 2255. To the extent he is challenging the execution of that sentence, his remedy is by way of a habeas petition pursuant to 28 U.S.C. 2241 in the district that has jurisdiction over his custodian. See 28 U.S.C. § 2241; Rumsfeld v. Padilla, 52 U.S. 26 (2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1015 **September Term 2011**

USTC-22570-09L

Filed On: June 21, 2012

Genevieve Marie Walker,

Appellant

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance or in the alternative for dismissal for improper venue, and the opposition thereto; and the court's order to show cause filed March 21, 2012, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be transferred to the United States Court of Appeals for the Fourth Circuit. Appellant does not dispute that at the time her petition was filed in the Tax Court, she resided in Maryland. Accordingly, venue lies in the Fourth Circuit. See 26 U.S.C. § 7482(b)(1). Because the venue provision applies only to review of Tax Court decisions in the courts of appeals, contrary to appellant's argument, the Commissioner did not waive his objection to venue by failing to raise it before the Tax Court. Although the Commissioner requests that the court dismiss this appeal for improper venue, the court determines that transfer of the case to the Fourth Circuit "would be in the interest of justice." Alexander v. Comm'r of Internal Revenue, 825 F.2d 499, 502 (D.C. Cir. 1987).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit the original file, including a copy of this order, to the United States Court of Appeals for the Fourth Circuit.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3027 **September Term 2011**

1:04-cr-00353-ESH-1

Filed On: June 18, 2012

In re: Ralph J. Prepetit,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the motion for appointment of counsel; and the petition for leave to file a second or successive motion under 28 U.S.C. § 2255, the response thereto, and the reply, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion for leave to file a second or successive motion under 28 U.S.C. § 2255 be denied. Petitioner has not shown that his motion is based on either newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h); United States v. Ortiz, 136 F.3d 161, 163-64 (D.C. Cir. 1998). Petitioner cannot rely on Lafler v. Cooper, 132 S. Ct. 1376 (2012), or Missouri v. Frye, 132 S. Ct. 1399 (2012), to challenge his conviction and sentence, because the Supreme Court has not held that either case applies retroactively to cases on collateral review. See Tyler v. Cain, 533 U.S. 656, 663 (2001) ("[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive.").

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5091 **September Term 2011**

1:09-cv-02107-RWR

Filed On: June 18, 2012

In re: J. Todd Chapman,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. The physical or electronic transfer of the case file to another permissible forum deprives this court of jurisdiction to review the transfer. See In re Asemani, 455 F.3d 296, 299-300 (D.C. Cir. 2006); Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5108 **September Term 2011**

1:07-cr-00081-CKK

Filed On: June 18, 2012

In re: Darryl Knight,

Petitioner

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for a writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be dismissed as moot insofar as petitioner seeks an order directing the district court to proceed expeditiously on his motion filed pursuant to 28 U.S.C. § 2255. The district court has now appointed counsel to represent petitioner, held one status hearing, and scheduled another. It is

FURTHER ORDERED that the petition be denied insofar as petition seeks an order directing the district court to issue a ruling on his § 2255 motion. The district court is proceeding with the case and will issue a ruling in due course. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7080 **September Term 2011**

1:10-cv-00108-ABJ

Filed On: June 15, 2012

Bridges Public Charter School,

Appellee

v.

Fatmata Barrie, et al.,

Appellants

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to late file and for enlargement of time to file appellants' brief and appendix, and the opposition thereto; the motion to dismiss for lack of prosecution, the Clerk's order to show cause, filed March 2, 2012, the response thereto, and the reply; and the lodged brief and appendix, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for leave to late file and for enlargement of time to file appellants' brief and appendix be denied. Motions to extend the briefing schedule are disfavored and will be granted only for extraordinarily compelling reasons. D.C. Cir. Rule 28(e)(1). Appellants' excuse, that counsel miscalendared the briefing schedule, does not amount to an extraordinarily compelling reason for altering the briefing schedule. Moreover, motions to extend the briefing schedule must be filed at least 7 days before the brief is due, D.C. Cir. Rule 28(e)(2), and appellants filed their motion one day *after* the brief was due. Finally, motions to extend the briefing schedule do not toll the time for filing a brief by the court-ordered deadline if the court has not acted on the extension motion. D.C. Cir. Rule 28(e)(4). Appellants did not submit a brief until two months after the February 2, 2012 court-imposed deadline. It is

FURTHER ORDERED that the motion to dismiss for lack of prosecution be granted. See English-Speaking Union v. Johnson, 353 F.3d 1013, 1022 (D.C. Cir. 2004) (citation omitted) (appeal may be dismissed after appellant fails to provide sufficient justification for failure to timely file brief); Barber v. American Security Bank,

841 F.2d 1159 (D.C. Cir. 1988) (appeal dismissed where counsel repeatedly failed to follow court's rules and offered inadequate grounds for doing so).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7091 **September Term 2011**

1:09-cv-01592-RMC
1:10-cv-01087-RMC
1:10-cv-01394-RMC
1:11-cv-00361-RMC

Filed On: August 2, 2012

In the Matter of: Elliotte Patrick Coleman,

Elliotte Patrick Coleman,

Appellant

v.

Countrywide Home Loans,

Appellee

Consolidated with 11-7020, 11-7090, 11-7091

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition and amended petition for panel rehearing, it is

ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7091 **September Term 2011**

1:09-cv-01592-RMC
1:10-cv-01087-RMC
1:10-cv-01394-RMC
1:11-cv-00361-RMC

Filed On: August 2, 2012

In the Matter of: Elliotte Patrick Coleman,

Elliotte Patrick Coleman,

Appellant

v.

Countrywide Home Loans,

Appellee

Consolidated with 11-7020, 11-7090, 11-7091

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition and amended petition for panel rehearing, it is

ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7091 **September Term 2011**

1:09-cv-01592-RMC
1:10-cv-01087-RMC
1:10-cv-01394-RMC
1:11-cv-00361-RMC

Filed On: August 2, 2012

In the Matter of: Elliotte Patrick Coleman,

Elliotte Patrick Coleman,

Appellant

v.

Countrywide Home Loans,

Appellee

Consolidated with 11-7020, 11-7090, 11-7091

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition and amended petition for panel rehearing, it is

ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7091 **September Term 2011**

1:09-cv-01592-RMC
1:10-cv-01087-RMC
1:10-cv-01394-RMC
1:11-cv-00361-RMC

Filed On: August 2, 2012

In the Matter of: Elliotte Patrick Coleman,

Elliotte Patrick Coleman,

Appellant

v.

Countrywide Home Loans,

Appellee

Consolidated with 11-7020, 11-7090, 11-7091

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition and amended petition for panel rehearing, it is

ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1315 **September Term 2011**

NLRB-21CA37649

Filed On: May 25, 2012

Southwest Regional Council of Carpenters
and Carpenters Local Union No. 1506,

Petitioners

v.

National Labor Relations Board,

Respondent

Southern California Painters and Allied Trades
District Council No. 36, International Union of
Painters and Allied Trades, AFL-CIO,

Intervenor

Consolidated with 10-1316, 12-1013

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed January 30, 2012, and the responses thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that Nos. 10-1315 and 10-1316 be dismissed as incurably premature. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002); Sunrise Mountainview Hospital v. NLRB, No. 11-1472 (D.C. Cir. May 11, 2012) (per curiam).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1315 **September Term 2011**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in Nos. 10-1315 and 10-1316 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1315 **September Term 2011**

NLRB-21CA37649

Filed On: May 25, 2012

Southwest Regional Council of Carpenters
and Carpenters Local Union No. 1506,

Petitioners

v.

National Labor Relations Board,

Respondent

Southern California Painters and Allied Trades
District Council No. 36, International Union of
Painters and Allied Trades, AFL-CIO,

Intervenor

Consolidated with 10-1316, 12-1013

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed January 30, 2012, and the responses thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that Nos. 10-1315 and 10-1316 be dismissed as incurably premature. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002); Sunrise Mountainview Hospital v. NLRB, No. 11-1472 (D.C. Cir. May 11, 2012) (per curiam).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1315 **September Term 2011**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in Nos. 10-1315 and 10-1316 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1062 **September Term 2011**

NLRB-28CA20898
NLRB-28CA20906
NLRB-28CA20973
NLRB-28CA21050
NLRB-28CA21203

Filed On: May 25, 2012

Milum Textile Services Co.,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 12-1159

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed March 28, 2012, and the responses thereto; and the motion for an extension of time to file the certified index to the record, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that No. 12-1062 be dismissed as incurably premature. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002); Sunrise Mountainview Hospital v. NLRB, No. 11-1472 (D.C. Cir. May 11, 2012) (per curiam). It is

FURTHER ORDERED that the motion for an extension of time to file the certified index to the record be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 12-1062 until seven days after

resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1007 **September Term 2011**

USTC-24968-09

Filed On: July 6, 2012

David Bosch,

Appellant

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7148 **September Term 2011**

1:10-cv-01543-RLW

Filed On: April 20, 2012

Jerome Grant, II,

Appellant

v.

Mark Johnson, as Chief Executive Officer for Florida Capital Bank, N.A., doing business as Florida Capital Bank Mortgage, et al.,

Appellees

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief; the motion by Mark Johnson to dismiss case; the motion by Howard N. Bierman to dismiss case and for summary affirmance, and the opposition thereto; and the motion to strike, it is

ORDERED that the motion to strike be denied. See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981) ("[M]otions to strike, as a general rule, are disfavored."). It is

FURTHER ORDERED that the appeal be dismissed to the extent appellant seeks review of the district court's September 30, 2011 order disposing of his case. "[T]he taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" Bowles v. Russell, 551 U.S. 205, 209 (2007) (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (per curiam)). Although appellant claims he did not receive timely notice of the September 30, 2011 order, he failed to file a motion to reopen the time to appeal within 14 days of receiving notice of the order, as required under Federal Rule of Appellate Procedure 4(a)(6). See Fed. R. App. P. 4(a)(6)(B); Kidd v. District of Columbia, 206 F.3d 35, 38 (D.C. Cir. 2000). It is

FURTHER ORDERED that the district court's order filed November 28, 2011 be summarily affirmed. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly determined that the two outstanding motions filed by appellant had become moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7148 **September Term 2011**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8003 **September Term 2011**

1:08-cv-01832-JEB

Filed On: April 20, 2012

In re: Ekaterini Kottaras, Individually on behalf of herself and on behalf of all others similiarly situated,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for permission to appeal pursuant to Fed. R. Civ. P. 23(f), the opposition thereto, and the reply, it is

ORDERED that the petition be denied. Petitioner has not shown that exercise of this court's discretion to permit an appeal under Fed. R. Civ. P. 23(f) is warranted. See In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002).

Because no appeal has been allowed, no mandate will issue. The Clerk is directed to transmit a certified copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3057 **September Term 2011**

1:00-cr-00254-RWR-1

Filed On: April 13, 2012

United States of America,

Appellee

v.

Wayne C. Felder,

Appellant

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction; the motion to dismiss for lack of certificate of appealability; the court's order to show cause filed August 30, 2011; the court's order to show cause filed January 9, 2012; counsel's response to the court's order filed January 9, 2012 and the supplement to the response; and the lack of any response by appellant to the court's orders to show cause, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED that the portion of the appeal seeking review of the disposition of appellant's motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(2) be dismissed as moot. Appellant has been released from prison and cannot obtain any reduction in his statutorily mandated term of supervised release. See United States v. Bundy, 391 Fed. Appx. 886 (D.C. Cir. 2010); United States v. Lafayette, 585 F.3d 435, 440 (D.C. Cir. 2009). Moreover, appellant's offense and sentencing occurred prior to enactment of the Fair Sentencing Act of 2010. See United States v. Goncalves, 642 F.3d 245, 254 n.8 (1st Cir. 2011) (collecting cases holding that the Fair Sentencing Act of 2010 does not apply retroactively to sentences imposed prior to the legislation's enactment). It is

FURTHER ORDERED that the portion of the appeal seeking review of the disposition of appellant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 be dismissed for lack of prosecution. See D.C. Cir. Rule 38.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3057 **September Term 2011**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5250 **September Term 2011**

1:10-cv-00797-PLF

Filed On: April 13, 2012

Vernon Norman Earle,

Appellant

v.

United States of America,

Appellee

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as containing a request for certificate of appealability; the motion to appoint counsel; and the motion to dismiss and the opposition thereto; it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to dismiss be granted and the request for a certificate of appealability be denied. The district court properly dismissed for lack of jurisdiction appellant's ineffective assistance of trial counsel claims. See D.C. Code § 23-110(g). Appellant has not demonstrated that his remedy under D.C. Code § 23-110 is inadequate or ineffective with regard to this claim. See e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998). The § 23-110 remedy is not considered inadequate or ineffective simply because the requested relief has been denied, see Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir. 1986), or because appellant now claims "actual innocence." Ibrahim v United States, 661 F.3d 1141, 1146 (D.C. Cir. 2011). Accordingly a certificate of appealability is not warranted with respect to these claims. With respect to appellant's ineffective assistance of appellate counsel claims, although appellant has now filed in the District of Columbia Court of Appeals a motion to recall the mandate, appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in dismissing the petition for lack of jurisdiction,"

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5250 **September Term 2011**

Williams v. Martinez, 586 F.3d 995, 997 (D.C. Cir. 2009) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), because, at the time of its decision, the district court lacked jurisdiction due to appellant's failure to exhaust local remedies. See Williams, 586 F.3d at 999. The denial of a certificate of appealability with respect to the ineffective assistance of appellate counsel claims is without prejudice to appellant seeking appropriate relief in the district court now that his motion to recall the mandate has been resolved by the District of Columbia Court of Appeals.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8001 **September Term 2011**

1:09-cv-01750-BJR

Filed On: April 13, 2012

In re: Lataunya Howard,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), and the response thereto, which the court construes as a cross-petition to appeal, it is

ORDERED that the petitions for permission to appeal be granted. See 28 U.S.C. § 1292(b). Approval of the petitions is without prejudice to reconsideration by the merits panel.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal for the plaintiff and as a notice of appeal for the defendant pursuant to Fed. R. App. P. 5 and collect the mandatory docketing fee from plaintiff. Upon payment of the fee, the district court is to certify and transmit the preliminary record to this court, after which the cases will proceed in the normal course.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3093 **September Term 2011**

1:04-cr-00353-ESH

Filed On: April 12, 2012

In re: Ralph J. Prepetit,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a second or successive motion under 28 U.S.C. § 2255, the response thereto, and the reply; the motion to dismiss for lack of a certificate of appealability; and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the petition for leave to file a second or successive motion under 28 U.S.C. § 2255 be denied. Petitioner has not shown that his motion is based either on newly discovered evidence pertaining to his lack of guilt or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable. See 28 U.S.C. § 2255(h). It is

FURTHER ORDERED that the motion to dismiss for lack of a certificate of appealability be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5225 **September Term 2011**

1:11-cv-01134

Filed On: May 4, 2012

In re: Tonita Hall, also known as Louise Redditt,

Petitioner

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the "notice of appeal and motion for stay or injunction pending appeal to be held in abeyance," it is

ORDERED that the motion be denied. This court lacks authority to grant the relief requested. The court's order, dismissing the petition for writ of mandamus for lack of jurisdiction, became effective automatically twenty-one days after it was issued on March 26, 2012, and no mandate will issue. See D.C. Circuit Rule 41(a)(3). Under the Rules of the Supreme Court, the ninety-day period for filing a petition for writ of certiorari runs from the date this court's order was issued. See Sup. Ct. R. 13(1), (3). For good cause, a Justice may extend the time to file a petition for a period not exceeding sixty days; the requirements for such an application are set out in Supreme Court Rule 13(5).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7152 **September Term 2011**

1:11-cv-01978-JDB

Filed On: March 23, 2012

Kwasi Seitu,

Appellant

v.

Lucinda Baber, Director, DCDMV, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss the appeal for lack of jurisdiction, the response thereto, and the reply, it is

ORDERED that the motion be granted. The notice of appeal, filed December 20, 2011, is timely only as to the district court's order filed December 12, 2011, denying appellant's motion for recusal. See Fed. R. App. P. 4(a)(1)(A). The motion for recusal did not seek reconsideration of the November 15, 2011 order denying appellant's motion for a preliminary injunction and, therefore, did not suspend the time to appeal that order under Rule 4(a)(4)(A). To the extent appellant's challenge is construed as a petition for writ of mandamus, as he so requests, the petition is denied. Appellant has not shown a clear and indisputable right to the extraordinary remedy of mandamus compelling recusal of the judge from the pending district court proceedings. See In re: Brooks, 383 F.3d 1036, 1041-43 (D.C. Cir. 2004); Liteky v. United States, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1033 **September Term 2011**

NLRB-7CA52614
NLRB-7CA52939

Filed On: March 23, 2012

Comau, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of petitioner's motion to dismiss, it is

ORDERED that the motion to dismiss the petition be granted. The request to waive the filing fee for a future petition for review or to order reimbursement by respondent is denied. Should petitioner wish to seek reimbursement of costs, counsel may do so by submitting the appropriate form to the Clerk. See Fed. R. App. P. 39; D.C. Cir. Rule 39.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the agency a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5039 **September Term, 2015**

1:15-cv-00074-UNA
1:15-cv-00080-UNA

Filed On: August 3, 2016

Seavon Pierce,

Appellant

v.

Barack Hussein Obama, et al.,

Appellees

Consolidated with 15-5040

BEFORE: Tatel and Brown, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for an injunction; and the response to the order to show cause filed May 11, 2016, and the request for reconsideration thereof; and the petition for rehearing of this court's dismissal of appellant's habeas claims for lack of a certificate of appealability; and the motion to disqualify the panel; and the petition to compel, which is construed as a supplement to the motion for an injunction and the request for reconsideration, it is

ORDERED that the motion to disqualify the panel be denied. Appellant has provided no basis for granting such relief. It is

FURTHER ORDERED that the petition for panel rehearing be denied. This court properly dismissed appellant's habeas claims for lack of a certificate of appealability because appellant has not made "a substantial showing of the denial of a constitutional right," Slack v. McDaniel, 529 U.S. 473, 484 (2000), with respect to the district court's holding that it lacked jurisdiction. It is

FURTHER ORDERED that the motion for an injunction, and appellant's request for reconsideration of the order to show cause filed May 11, 2016, be denied. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5039 **September Term, 2015**

FURTHER ORDERED that, to the extent this action raises non-habeas claims, the in forma pauperis (IFP) status granted by the district court on January 15, 2015, be revoked, the order to show cause be discharged, and appellant pay the $505 appellate fee within thirty (30) days of the date of this order. Because appellant was incarcerated when he filed his notice of appeal, the Prison Litigation Reform Act applies to the non-habeas aspects of the appeal. See 28 U.S.C. § 1915(b) ("if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee"); id. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section...."). Appellant has, while incarcerated, brought at least three civil actions or appeals that were dismissed on the ground that they were frivolous, malicious, or failed to state a claim. See Pierce v. Obama, No. 14-CV-00691, 2014 WL 4959062, at *2 (S.D. Cal. Aug. 20, 2014) (listing four "prior civil actions or appeals dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted"), aff'd, Pierce v. Obama, No. 14-56470 at 1-2 (9th Cir. Dec. 2, 2014) (noting the district court "correctly concluded" plaintiff had three strikes, and holding that appeal was itself frivolous). And appellant does not claim do be in imminent danger. See Asemani v. U.S. Citizenship and Immigration Services, 797 F.3d 1069, 1076 (D.C. Cir. 2015).

Further, while the district court granted the appellant IFP status in the underlying action, that status does not carry over to the instant appeal, because appellant was a prisoner when he filed his notice of appeal. See 28 U.S.C. § 1915(a); Fed. R. App. P. 24(a)(3). Failure to prepay the fees in this appeal will result in dismissal of the appeal for lack of prosecution. See D.C. Cir. Rule 38.

The Clerk is directed to send a copy of this order to appellant by whatever means necessary to ensure receipt.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7016 **September Term 2011**

1:09-cv-00851-UNA

Filed On: February 23, 2012

Darryl R. Gregg,

Appellant

v.

B. A. Bledsoe,

Appellee

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as a request for a certificate of appealability; appellant's brief; the motion to appoint counsel; and the court's order to show cause filed October 17, 2011, and the response thereto; it is

ORDERED that the order to show cause be discharged. The district court abused its discretion in denying appellant's Rule 4(a)(6) motion as untimely. The motion was filed 180 days after entry of the district court's dismissal order, and contrary to the district court's conclusion, a Rule 4(a)(6) motion filed exactly 180 days after entry of the order sought to be appealed is timely. See Fed. R. App. P. 26(a)(1)(C) (providing that in computing time, the last day of the time period should be included); see also Benavides v. Bureau of Prisons, 79 F.3d 1211, 1214 (D.C. Cir. 1996) (stating that in no case may the window for filing a motion under Rule 4(a)(6) "be opened more than 180 days after the entry of the judgment" (emphasis added)). It is

FURTHER ORDERED that the motion to appoint counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the request for a certificate of appealability be denied. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDonnell, 529 U.S. 473, 484 (2000). Appellant may not challenge his District of Columbia conviction in federal court unless his remedy under D.C. Code § 23-110(a) is inadequate or ineffective to test the legality

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7016 **September Term 2011**

of his detention. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998); see also D.C. Code § 23-110(g). The § 23-110 remedy, however, is not considered inadequate or ineffective simply because the requested relief has been denied. See Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986). In addition, appellant has not made a substantial showing of a denial of his constitutional right to effective assistance of appellate counsel. See Williams v. Martinez, 586 F.3d 995 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

EPA-75FR14670
EPA-75FR76790
EPA-76FR15855

Filed On: February 10, 2012

National Chicken Council, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Growth Energy, et al.,
Intervenors

Consolidated with 10-1108, 11-1030, 11-1089, 11-1110

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of Environmental Petitioners' unopposed motion for voluntary dismissal, it is

ORDERED that the motion be granted, and case Nos. 10-1108, 11-1030, 11-1089, and 11-1110 are hereby dismissed. The Clerk is directed to transmit forthwith to the Environmental Protection Agency a certified copy of this order in lieu of formal mandate. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

FURTHER ORDERED, on the court's own motion, that the court's January 31, 2012 order allocating oral argument time be amended as follows:

Food Petitioners	--	15 minutes
Respondent	--	15 minutes (may divide time with the intervenors as they see fit)

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

EPA-75FR14670
EPA-75FR76790
EPA-76FR15855

Filed On: February 10, 2012

National Chicken Council, et al.,

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v.

Environmental Protection Agency,

Respondent

Growth Energy, et al.,
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Consolidated with 10-1108, 11-1030, 11-1089, 11-1110

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of Environmental Petitioners' unopposed motion for voluntary dismissal, it is

ORDERED that the motion be granted, and case Nos. 10-1108, 11-1030, 11-1089, and 11-1110 are hereby dismissed. The Clerk is directed to transmit forthwith to the Environmental Protection Agency a certified copy of this order in lieu of formal mandate. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

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Food Petitioners	--	15 minutes
Respondent	--	15 minutes (may divide time with the intervenors as they see fit)

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

EPA-75FR14670
EPA-75FR76790
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Filed On: February 10, 2012

National Chicken Council, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Growth Energy, et al.,
Intervenors

Consolidated with 10-1108, 11-1030, 11-1089, 11-1110

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of Environmental Petitioners' unopposed motion for voluntary dismissal, it is

ORDERED that the motion be granted, and case Nos. 10-1108, 11-1030, 11-1089, and 11-1110 are hereby dismissed. The Clerk is directed to transmit forthwith to the Environmental Protection Agency a certified copy of this order in lieu of formal mandate. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

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Food Petitioners	--	15 minutes
Respondent	--	15 minutes (may divide time with the intervenors as they see fit)

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

EPA-75FR14670
EPA-75FR76790
EPA-76FR15855

Filed On: February 10, 2012

National Chicken Council, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Growth Energy, et al.,
Intervenors

Consolidated with 10-1108, 11-1030, 11-1089, 11-1110

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of Environmental Petitioners' unopposed motion for voluntary dismissal, it is

ORDERED that the motion be granted, and case Nos. 10-1108, 11-1030, 11-1089, and 11-1110 are hereby dismissed. The Clerk is directed to transmit forthwith to the Environmental Protection Agency a certified copy of this order in lieu of formal mandate. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1107 **September Term 2011**

FURTHER ORDERED, on the court's own motion, that the court's January 31, 2012 order allocating oral argument time be amended as follows:

Food Petitioners	--	15 minutes
Respondent	--	15 minutes (may divide time with the intervenors as they see fit)

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5122 **September Term 2011**

1:10-mc-00240

Filed On: January 4, 2012

In re: Lacy L. Williams,
Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, the supplement thereto, the memorandum of law and fact, the response to the petition, and the reply; the motion for deposition, which the court has construed as a motion for disposition of this case; the motions for default judgment and sanctions and the oppositions thereto; and the motion to appoint counsel, it is

ORDERED that the motions for default judgment and sanctions be denied. The government's response was filed prior to the deadline established by the Clerk's order filed on September 12, 2011. It is

FURTHER ORDERED that the motion to appoint counsel be denied. It is

FURTHER ORDERED that the petition for writ of mandamus be granted and the district court be directed to file petitioner's complaint. By following this orderly procedure, the district court will ensure that its disposition of petitioner's complaint, including the underlying motion for leave to proceed in forma pauperis, is embodied in a final, appealable order and will not be subjected to the more stringent standard of review applicable in mandamus actions. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) (mandamus petitioner must show "clear and indisputable" right to relief). At this time, the court takes no position on the merits of petitioner's complaint or whether he should be permitted to proceed without prepayment of fees. It is

FURTHER ORDERED that the motion for disposition be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1399 **September Term 2011**

EPA-76FR48208

Filed On: January 3, 2012

Michael T. Pfeiff,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson, Administrator, U.S. Environmental Protection Agency,

Respondents

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the court's order to show cause filed October 20, 2011, and the response thereto; the motion for modification of petitioner's filing date, the opposition thereto, and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for modification be denied and the petition be dismissed as untimely. Petitions for review under the Clean Air Act, 42 U.S.C. § 7607(b)(1), must be filed within 60 days after notice is published in the Federal Register. The petition for review was received and filed in this court on October 13, 2011, beyond the 60-day period provided by 42 U.S.C. § 7607(b)(1). Federal Rule of Appellate Procedure 4(d) does not apply to petitions for review, and petitioner has not demonstrated any other basis for this court to modify the filing date of his petition. See Med. Waste Inst. & Energy Recovery Council v. EPA, 645 F.3d 420, 427 (D.C. Cir. 2011) (court is powerless to address challenges filed outside § 7607(b)(1)'s filing period); Motor & Equip. Mfrs. Ass'n v. Nichols, 142 F.3d 449, 459-60 (D.C. Cir. 1998) (Section 7607(b)(1) filing period is "jurisdictional in nature, and may not be enlarged or altered by the courts") (internal quotation marks omitted).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1399 **September Term 2011**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5277 **September Term 2011**

1:09-cv-01452-USA

Filed On: March 2, 2012

In re: David Kissi,

Petitioner

BEFORE: Sentelle, Chief Judge, and Henderson, Rogers, Tatel, Garland,* Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

* Circuit Judge Garland did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7067 **September Term 2011**

1:08-cv-02031

Filed On: December 30, 2011

In re: David Kissi,
Petitioner

BEFORE: Tatel, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order issued November 8, 2011, dismissing this case for lack of prosecution and the motion for reconsideration; the petition for writ of mandamus, the supplements thereto, and the memorandum of law and fact; the motion for stay of the underlying order and the supplement thereto; the motions to appoint counsel and the supplements thereto; the motion for hearing; the motion for recusal; and the motion to consolidate; and it appearing that petitioner has now paid the docketing fee in full, it is

ORDERED that the motion for reconsideration be granted, and this case be returned to the court's active docket. It is

FURTHER ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for hearing be denied. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner did not show that the district court abused its discretion in transferring the action to the District of Maryland in light of the nexus between petitioner's claims and that district. See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). It is

FURTHER ORDERED that the motions for stay of the underlying order, recusal, and to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5275 **September Term 2011**

1:07-cv-01167-RBW

Filed On: December 29, 2011

In re: Donnell Hurt,

Petitioner

BEFORE: Sentelle, Chief Judge; Kavanaugh, Circuit Judge; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the petition for writ of mandamus, and the motion for clarification, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court's delay in ruling on the pending motion for summary judgment does not warrant the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). We anticipate that the district court will act upon the pending motion as promptly as its docket permits. It is

FURTHER ORDERED that the motion for clarification be granted. Mandamus petitions filed in connection with civil cases in district court are subject to the filing fee requirements of the Prison Litigation Reform Act, 28 U.S.C. § 1915(b). See In re Grant, 635 F.3d 1227 (D.C. Cir. 2011). Thus, petitioner, who has filed a mandamus petition asking this court to order the district court to rule in his civil action, must pay the full filing fee.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5275 **September Term 2011**

1:07-cv-01167-RBW

Filed On: December 29, 2011

In re: Donnell Hurt,

Petitioner

BEFORE: Sentelle, Chief Judge; Kavanaugh, Circuit Judge; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the trust account report and the consent to collection of fees, it is

ORDERED that pursuant to petitioner's consent to collection of fees, petitioner's custodian is directed to pay on petitioner's behalf the initial partial filing fee of $9.61, to be withheld from petitioner's trust fund account. See 28 U.S.C. § 1915(b)(1). The payment must be by check or money order made payable to Clerk, U.S. Court of Appeals for the District of Columbia Circuit.

The custodian also is directed to collect and pay from petitioner's trust account monthly installments of 20 per cent of the previous month's income credited to the account, until the full $450 docketing fee has been paid. See 28 U.S.C. § 1915(b)(2). Such payments must be made each month the amount in the account exceeds $10 and must be designated as made in payment of the filing fee for Case No. 11-5275. A copy of this order must accompany each remittance. In the event petitioner is transferred to another institution, the balance due must be collected and paid in installments to the Clerk by the custodian at petitioner's next institution. The custodian must notify the Clerk, U.S. Court of Appeals for the District of Columbia Circuit, in the event petitioner is released from custody.

The Clerk is directed to send a copy of this order to petitioner by whatever means necessary to ensure receipt. The Clerk is further directed to send to petitioner's custodian a copy of this order and appellant's consent to collection of fees.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5278 **September Term 2011**

1:07-cv-01719-RWR

Filed On: December 29, 2011

Cornell D.M. Judge Cornish,

Appellant

v.

Jon Dudas, in his Official Capacity as Under-Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, et al.,

Appellees

BEFORE: Sentelle, Chief Judge; Kavanaugh, Circuit Judge; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the court's order to show cause filed October 24, 2011, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be transferred to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over interlocutory appeals arising under federal patent law. See 28 U.S.C. §§ 1292(c)(1), 1295(a)(1), 1338(a). As discussed in this court's orders transferring appellant's previous appeals to the Federal Circuit, the Federal Circuit has exclusive jurisdiction over appeals relating to an attorney's practice before the Patent and Trademark Office. See Cornish v. Dudas, No. 10-5096 (D.C. Cir. Jul. 27, 2010) (citing, inter alia, Athridge v. Quigg, 852 F.2d 621, 623 (D.C. Cir. 1988); Jaskiewicz v. Mossinghoff, 802 F.2d 532, 534-37 (D.C. Cir. 1986)); Cornish v. Dudas, No. 08-5089 (D.C. Cir. Nov. 24, 2008); Cornish v. Dudas, No. 10-5223 (D.C. Cir. Oct. 25, 2010). When this court lacks jurisdiction, it may, in the interest of justice, choose to transfer the case to a court that does have jurisdiction rather than dismiss the appeal. See 28 U.S.C. § 1631. Appellant is warned that this court may dismiss any subsequent appeals concerning his ability to practice before the Patent and Trademark Office.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5278 **September Term 2011**

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Federal Circuit. Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-8028 **September Term 2011**

1:11-cv-00862-JDB

Filed On: December 29, 2011

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge; Kavanaugh, Circuit Judge; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for leave to file a notice of appeal and the opposition thereto, it is

ORDERED that the petition be denied because Sindram has not shown a tenable basis for each of his claims. See Sindram v. Johnson, No. 91-7110 (D.C. Cir. Apr. 20, 1993).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1272 **September Term 2011**

Filed On: December 22, 2011

In re: inContact, Inc.,

Petitioner

BEFORE: Griffith and Kavanaugh, Circuit Judges; Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for writ of mandamus, the opposition thereto, and the reply, it is

ORDERED that the petition for writ of mandamus be denied. Petitioner has not met its burden of showing that the Federal Communications Commission's delay is so egregious or unreasonable as to warrant the extraordinary remedy of mandamus. See In re Monroe Commc'ns Corp., 840 F.2d 942, 945 (D.C. Cir. 1988); Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5248 **September Term 2011**

1:11-cv-01272-UNA

Filed On: December 15, 2011

In re: Michael Idrogo, Public Servant, State of Texas,

Petitioner

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, the supporting memorandum of law and fact, the supplement thereto, the amended petition for a writ of mandamus or, in the alternative, petition for a writ of habeas corpus, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be dismissed. The transfer of the district court case file to a permissible forum deprives this court of jurisdiction to review the transfer. See In re Asemani, 455 F.3d 296 (D.C. Cir. 2006). It is

FURTHER ORDERED that the amended petition for a writ of mandamus or, in the alternative, petition for a writ of habeas corpus be denied in part and dismissed in part. Petitioner has not shown a clear and indisputable right to the extraordinary remedy of mandamus, see generally Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), and this court lacks jurisdiction over his habeas claims. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7075 **September Term 2011**

1:11-cv-01053-CKK

Filed On: December 15, 2011

Cathryn Jeanne Bonnette,

Appellee

v.

District of Columbia Court of Appeals,

Appellee

National Conference of Bar Examiners,

Appellant

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's motion for voluntary dismissal, the response thereto, and the reply, it is

ORDERED that the motion for voluntary dismissal be granted. Appellees do not oppose dismissal. Moreover, although appellee Cathryn Bonnette cites Fed. R. App. P. 39(a)(1) and asserts that all costs and fees should be taxed against appellant, that rule concerns costs and Bonnette has not shown that she has incurred any taxable costs.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5236 **September Term 2011**

1:10-cv-01843-RJL

Filed On: December 14, 2011

Swanson Group Mfg. LLC, et al.,

Appellees

Klamath-Siskiyou Wildlands Center, et al.,

Appellants

v.

Kenneth Lee Salazar, Secretary of Interior and
Tom Vilsack, Secretary of Agriculture,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Griffith and Kavanaugh, Circuit Judges, and Ginsburg, Senior Circuit Judge

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief of appellants. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, it is

ORDERED AND ADJUDGED that the district court's July 19, 2011 order be reversed and the case be remanded with directions to grant appellants' motion to intervene as of right with respect to the first claim for relief in the amended complaint. "[W]here (as here) the district court has not accompanied its decision with either factual findings or explanation," we review de novo the denial of a motion to intervene as of right. Fund for Animals, Inc. v. Norton, 322 F.3d 728, 732 (D.C. Cir. 2003). Appellants have demonstrated that they meet the requirements of Fed. R. Civ. P. 24(a). See Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008); Fund for Animals, 322 F.3d at 731. Upon remand, the district court may consider in the first instance the government's request that the intervenors "be subject to the same constraints

applicable to parties in any Administrative Procedure Act . . . case," and that intervenors "be allocated their own page limits and argument time limits," if applicable. Federal Defendants' Response to Motion to Intervene at 2.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5104 **September Term 2011**

1:11-cv-00149-GK

Filed On: December 9, 2011

Jerry T. Graham,
Appellant

v.

B. A. Bledsoe, Warden and Office of the United States Attorney General,
Appellees

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal and appellant's brief, which the court construes as containing a request for a certificate of appealability, the response thereto, which contains a motion to dismiss for lack of a certificate of appealability, and the reply; and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to dismiss be denied in part, and, on the court's own motion, that the district court's April 18, 2011 order be reversed in part and the case remanded in part. The district court's memorandum opinion and order did not address appellant's second petition for habeas relief, docketed on March 25, 2011, as a "supplemental memorandum" to his first petition. While appellant's first petition raises claims related to his drug conviction, the second petition raises claims related to his separate, first-degree murder and firearm convictions. Additionally, the district court did not address the claim made in the addendum and memorandum in support of appellant's first habeas petition that counsel in Graham's direct appeal of his drug conviction was ineffective for, inter alia, failing to raise the ineffectiveness of Graham's trial counsel. See Williams v. Martinez, 586 F.3d 995, 998 (D.C. Cir. 2009) (concluding that D.C. Code offender could bring habeas claim pursuant to 28 U.S.C. § 2254 for the denial of effective assistance of counsel in direct appeal). The case is remanded to permit the district court to address these claims in the first instance. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5104 **September Term 2011**

FURTHER ORDERED that the request for a certificate of appealability be denied in part and the motion to dismiss be granted in part. The district court properly dismissed for lack of jurisdiction appellant's remaining claims in his first petition. See D.C. Code § 23-110(g). Appellant has not demonstrated that his remedy under D.C. Code § 23-110 is inadequate or ineffective with regard to these remaining claims. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998). The § 23-110 remedy is not considered inadequate or ineffective simply because the requested relief has been denied or not raised. See Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986). Appellant's claim that his appellate counsel was ineffective for failing to file a motion pursuant to D.C. Code § 23-110 was properly dismissed because the "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under [28 U.S.C. §] 2254." 28 U.S.C. § 2254(i).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue. The Clerk is directed to send a certified copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7083 **September Term 2011**

1:10-cv-00224-ABJ

Filed On: December 8, 2011

Santos F. Bonilla,

Appellant

v.

Simon Wainwright, Warden, D.C. Central Detention Facility,

Appellee

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability, the response thereto, and the reply; and the motion to dismiss, it is

ORDERED that the motion for a certificate of appealability be denied and the motion to dismiss be granted. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). The district court properly construed appellant's habeas petition as a § 2254 motion, because he is challenging his conviction and the imposition of his sentence, not the execution of his sentence. See, e.g., McIntosh v. United States Parole Commission, 115 F.3d 809, 811 (10th Cir. 1997) ("Petitions under § 2241 are used to attack the execution of a sentence, ... in contrast to § 2254 habeas and § 2255 proceedings, which are used to collaterally attack the validity of a conviction and sentence ....") (internal citations omitted); cf. In re Crawford, 2003 WL 22305103 (D.C. Cir. Oct. 6, 2003) ("Because appellant is attempting to attack his parole revocation and not his conviction or sentence, the proper vehicle for his suit is 28 U.S.C. § 2241."). Appellant may not challenge his District of Columbia conviction in federal court unless his remedy under D.C. Code § 23-110(g) is inadequate or ineffective to test the legality of his detention. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998). The § 23-110 remedy, however, is not considered inadequate or ineffective simply because the requested relief has been denied. See Garris v. Lindsay, 794 F.2d 722, 727 (D.C.

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Cir. 1986). To the extent appellant challenges D.C. Code § 23-110(g) on equal protection grounds, the Supreme Court rejected a similar challenge in Swain v. Pressley, 430 U.S. 372, 379 n.12 (1977), and appellant has not demonstrated that Swain is no longer good law. Nor has appellant shown that D.C. Code § 23-110(g) violates the separation of powers doctrine. In addition, appellant has forfeited any challenge to the district court's conclusion that his actual innocence claims are unavailing by not addressing this issue on appeal. See United States ex rel. Totten v. Bombadier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5178 **September Term 2011**

1:05-cr-0386-ESH

Filed On: December 2, 2011

In re: Antoine Jones,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for the writ of mandamus and the motion to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition be dismissed as moot. Petitioner received the relief he requests when the district court ruled on his motion for release. See United States v. Antoine Jones, No. 05-cr-386, Mem. Op. and Order (D.D.C. August 1, 2011).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5212 **September Term 2011**

Filed On: December 2, 2011

In re: Joshua Barrett Shapiro,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed on appeal in forma pauperis and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed on appeal in forma pauperis be granted. It is

FURTHER ORDERED, on the court's own motion, that the petition be dismissed for lack of jurisdiction. This court lacks jurisdiction to issue a writ of mandamus to compel agency action where the final agency action would not be reviewable in this court. See Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 77 n.33 (D.C. Cir. 1984) (noting that "we lack jurisdiction to issue the writ" where "we have no appellate jurisdiction over the . . . case, past, present, or future, which mandamus could 'aid'"); see also Moms Against Mercury v. FDA, 483 F.3d 824, 827 (D.C. Cir. 2007) (dismissing petition for writ of mandamus where petitioners failed to demonstrate this court's jurisdiction over agency action). Here, petitioner has failed to demonstrate any basis upon which this court could review directly final agency action on petitioner's complaints. Therefore, the court is "compelled to dismiss [the] petition without considering the merits of petitioners' claim." Moms Against Mercury, 483 F.3d at 828. Finally, to the extent petitioner seeks preliminary injunctive relief separate from mandamus relief, this court lacks jurisdiction to consider such a claim in the first instance. See In re Tennant, 359 F.3d 523, 531 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5214 **September Term 2011**

IRS 19079-10W

Filed On: December 2, 2011

In re: Kwame Gyamfi,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion to seal, it is

ORDERED that the motion to seal be denied. Petitioner has not overcome the strong presumption in favor of public access to judicial records. See generally United States v. Hubbard, 650 F.2d 293, 317-24 (D.C. Cir. 1980). It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown that he has a clear right to relief, that the United States Tax Court has a clear duty to act, and that there is no other adequate remedy available to him. See Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002); see also Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5220 **September Term 2011**

1:05-cr-00386-ESH-1

Filed On: December 2, 2011

In re: Antoine Jones,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for the writ of mandamus, and the motion to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be dismissed as moot in part and dismissed as duplicative in part. Petitioner received the relief he requests when the district court ruled on his motion for release. See United States v. Antoine Jones, No. 05-cr-386, Mem. Op. and Order (D.D.C. August 1, 2011). To the extent the petition also includes a motion for release, the petition is duplicative of the notice of appeal filed and docketed in this court as No. 11-3095, United States v. Antoine Jones, and the motion to release filed in No. 08-3034, United States v. Antoine Jones.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7047 **September Term 2011**

1:06-cv-00315-RCL

Filed On: December 2, 2011

Carl A. Barnes, et al.,

Appellees

Simon Banks,

Appellant

v.

District of Columbia, Government of,

Appellee

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed August 19, 2011, and the response thereto; and the motion to recuse and the supplement thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the district court's May 6, 2011 order denying appellant's motion for intervention as of right be summarily affirmed. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not shown the district court abused its discretion in determining that the existing parties adequately represent his interest. See Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997). It is

FURTHER ORDERED that the appeal be dismissed for lack of jurisdiction as to the district court's May 6, 2011 order denying appellant permission to intervene. A denial of permissive intervention is not normally appealable in itself. In re Vitamins Antitrust Class Actions, 215 F.3d 26, 31 (D.C. Cir. 2000). The court declines to exercise any pendent appellate jurisdiction it may have to review the denial of

permissive intervention in this case. See Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1136 (D.C. Cir. 2004) ("[W]hether or not we have authority to exercise pendent appellate jurisdiction in this case, there is no question that we have discretion to decline to do so."). It is

FURTHER ORDERED that the motion to recuse be dismissed as moot. Appellant seeks the recusal of Judge Rogers, who takes no part in this disposition.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3005 **September Term 2011**

1:89-cr-00162-RCL-4

Filed On: December 1, 2011

United States of America,

Appellee

v.

James Antonio Jones, also known as Tonio,

Appellant

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's motion to govern future proceedings, which includes a motion to remand, and appellee's motion to remand, it is

ORDERED that the motions be granted. The district court's order filed December 15, 2010, is vacated, and the case is remanded for further proceedings. As the government concedes, under Freeman v. United States, 131 S. Ct. 2685 (2011), appellant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). He is therefore eligible to request a reduced sentence from the district court under § 3582(c)(2).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1322 **September Term 2011**

FCC-10-179
FCC-75FR67227

Filed On: November 16, 2011

ICO Global Communications (Holdings) Limited,

Petitioner

v.

Federal Communications Commission and United States of America,

Respondents

Consolidated with 10-1401

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of petitioners' consent motion to dismiss, it is

ORDERED that the motion be granted, and these cases are hereby dismissed.

The Clerk is directed to transmit forthwith to the Federal Communications Commission a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-8026 **September Term 2011**

1:11-cv-01451-ESH

Filed On: November 10, 2011

In re: Michael Sindram,

Petitioner

BEFORE: Sentelle, Chief Judge; and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a notice of appeal pursuant to this court's injunction entered April 20, 1993, it is

ORDERED that the petition for leave to file a notice of appeal be denied because petitioner has not shown a tenable basis for the appeal. See Sindram v. Johnson, No. 91-7110 (D.C. Cir. Apr. 20, 1993).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5259 **September Term 2011**

Filed On: November 9, 2011

In re: Milton Joseph Taylor,

Petitioner

BEFORE: Sentelle, Chief Judge; and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5277 **September Term 2011**

1:09-cv-01452-USA

Filed On: November 8, 2011

In re: David Kissi,

Petitioner

BEFORE: Tatel, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and the supplements thereto, the motion for stay, the motion to appoint counsel, and the motion for recusal, it is

ORDERED that the petition be dismissed for lack of prosecution. See D.C. Cir. Rule 38. By order filed August 12, 2011, petitioner was directed to pay the $450 appellate docketing fee within thirty days and was warned that failure to comply with the court's order would result in the dismissal of his petition for writ of mandamus. To date, no payment has been received. It is

FURTHER ORDERED that all pending motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7067 **September Term 2011**

1:08-cv-02031-RBW

Filed On: November 8, 2011

In re: David Kissi,

Petitioner

BEFORE: Tatel, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and the supplements thereto, the motion for stay and the supplement thereto, the motions to appoint counsel and the supplement thereto, the motion for recusal, and the motion for hearing, it is

ORDERED that the petition be dismissed for lack of prosecution. See D.C. Cir. Rule 38. By order filed August 12, 2011, petitioner was directed to pay the $450 appellate docketing fee within thirty days and was warned that failure to comply with the court's order would result in the dismissal of his petition for writ of mandamus. To date, no payment has been received. It is

FURTHER ORDERED that all pending motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5329 **September Term 2011**

1:07-cv-00525-UNA

Filed On: November 8, 2011

In re: Vincent Faustino Rivera,

Petitioner

BEFORE: Sentelle, Chief Judge; and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order filed September 1, 2011, directing petitioner to pay the $450 docketing fee within 30 days and warning petitioner that failure to do so would result in dismissal of the case for lack of prosecution, and petitioner's renewed motion for leave to proceed in forma pauperis, it is

ORDERED that this petition be dismissed for lack of prosecution. See D.C. Cir. Rule 38. To date, petitioner has not paid the filing fee as directed, but has instead filed a new motion for leave to proceed in forma pauperis.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7079 **September Term 2011**

1:10-cv-01667-UNA

Filed On: November 8, 2011

In re: Chukwuma E. Azubuko,

Petitioner

BEFORE: Sentelle, Chief Judge; and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the memorandum in support thereof, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court did not abuse its discretion in transferring this case to the District of Massachusetts pursuant to 28 U.S.C. § 1406(a). See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). Venue is proper in that judicial district, where a substantial part of the events or omissions giving rise to the claims occurred. See 28 U.S.C. § 1391(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5169 **September Term 2011**

1:11-cv-01135-UNA

Filed On: October 19, 2011

In re: Cecil L. Muhammad,

Petitioner

BEFORE: Sentelle, Chief Judge, Kavanaugh, Circuit Judge, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the notice of appeal, which has been construed as a petition for a writ of mandamus, and the memorandum of law and fact, it is

ORDERED that the petition for a writ of mandamus be denied. Petitioner has not shown that the district court abused its discretion in transferring the case to the U.S. District Court for the Eastern District of North Carolina, where petitioner is incarcerated and a substantial part of the events or omissions giving rise to the claims occurred. See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam); 28 U.S.C. § 1391(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5170 **September Term 2011**

1:11-cv-00368-UNA

Filed On: October 19, 2011

Chukwuma E. Azubuko,

Appellant

v.

Delilah Carmona, Deputy Clerk-Individual and Official capacities and Catherine O'Hagan Wolfe, Court Clerk-Individual and Official capacities,

Appellees

BEFORE: Sentelle, Chief Judge, Kavanaugh, Circuit Judge, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed August 1, 2011, and the response thereto, it is

ORDERED that order to show cause be discharged. It is

FURTHER ORDERED that the appeal be dismissed as untimely. Appellant filed his notice of appeal on July 7, 2011, more than 60 days after the March 30, 2011, entry of the order denying his motion for reconsideration. See Fed. R. App. P. 4(a)(1)(B). Appellant has not shown that he meets the criteria for extending or reopening the time to file a notice of appeal. See Fed. R. App. P. 4(a)(5) and (6).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Amy Yacisin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5171 **September Term 2011**

Filed On: October 19, 2011

In re: Raymond Valero,

Petitioner

BEFORE: Sentelle, Chief Judge, Kavanaugh, Circuit Judge, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the petition for a writ of habeas corpus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Amy Yacisin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5183 **September Term 2011**

1:06-cv-01008-RBW

Filed On: October 19, 2011

Marvin E. Green,

Appellant

v.

DOD Dependents Schools-Europe,

Appellee

BEFORE: Sentelle, Chief Judge, Kavanaugh, Circuit Judge, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed August 1, 2011, and the response thereto, and the supplement to the response, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed as untimely. Appellant filed his notice of appeal on July 26, 2011, more than 60 days after the October 1, 2007 entry of the challenged order. See Fed. R. App. P. 4(a)(1)(B).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5184 **September Term 2011**

1:06-cv-01009-RBW

Filed On: October 19, 2011

Marvin E. Green,

Appellant

v.

DOD Dependents Schools-Europe,

Appellee

BEFORE: Sentelle, Chief Judge, Kavanaugh, Circuit Judge, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed August 1, 2011, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed as untimely. Appellant filed his notice of appeal on July 26, 2011, more than 60 days after the April 11, 2007 entry of the challenged order. See Fed. R. App. P. 4(a)(1)(B).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5187 **September Term 2011**

1:06-cv-01434-RBW

Filed On: October 19, 2011

Marvin E. Green, for minor son SG,

Appellant

v.

Joseph Stuyvesant, Base Capt.,

Appellee

BEFORE: Sentelle, Chief Judge, Kavanaugh, Circuit Judge, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of the order to show cause filed August 1, 2011, and the response thereto, and the supplement to the response, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed as untimely. Appellant filed his notice of appeal on July 26, 2011, more than 60 days after the September 11, 2007 entry of the challenged order. See Fed. R. App. P. 4(a)(1)(B).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5026 **September Term 2011**

1:10-cv-00869-PLF

Filed On: September 19, 2011

Lester Jon Ruston,

Appellant

v.

United States Secret Service,

Appellee

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

O R D E R

By orders filed May 11, 2011, and June 22, 2011, appellant was directed to pay the $455 appellate docketing and filing fees within thirty days and to show cause why the court should not bar him from filing any future appeal in a civil case in forma pauperis. Appellant was warned that failure to comply with the court's order would result in the dismissal of his appeal. To date, neither payment nor a response has been received. Upon consideration of the foregoing, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the appeal be dismissed for lack of prosecution. See D.C. Cir. Rule 38. It is

FURTHER ORDERED that appellant be barred from filing any civil appeal in forma pauperis, unless he is in imminent danger of serious physical injury. See Mitchell v. Fed. Bureau of Prisons, 587 F.3d 415, 419 (D.C. Cir. 2009); Hurt v. Soc. Sec. Admin., 544 F.3d 308, 311 (D.C. Cir. 2008) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

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of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5126 **September Term 2011**

1:11-cv-00756-UNA

Filed On: September 19, 2011

In re: Eric Griffin,
Petitioner

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as a petition for a writ of mandamus; the motion for injunctive relief; and the motion to proceed in forma pauperis, it is

ORDERED that petitioner's motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. A writ of mandamus will issue to block a transfer only upon a showing that the district court grossly abused its discretion. See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). Petitioner's habeas petition must be brought in the judicial district that has jurisdiction over his custodian. See Rumsfeld v. Padilla, 542 U.S. 426, 434-35 (2004); Stokes v. U.S. Parole Comm'n, 374 F.3d 1235, 1237-38 (D.C. Cir. 2004). Accordingly, the district court did not abuse its discretion in transferring petitioner's habeas action to the District Court for the District of Nevada, which has jurisdiction over petitioner's custodian. It is

FURTHER ORDERED that petitioner's motion for injunctive relief be denied without prejudice to renewal in the District of Nevada. Petitioner seeks to enjoin alleged actions taken by his custodian(s), located within that District.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5172 **September Term 2011**

1:09-cr-00250-RMU

Filed On: September 19, 2011

In re: Ernest Bernard Moore,

Petitioner

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to proceed in forma pauperis; and the petition for writ of mandamus, the amended petition for writ of mandamus, and the supplement thereto, which includes a request for reassignment to a different district court judge, it is

ORDERED that the motion to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court's delay in ruling on the motion for release pending appeal is not so excessive as to permit a conclusion that the district court has "persistently and without reason refuse[d] to adjudicate" the matter before it. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978). Nor is reassignment to a different district court judge warranted. We are confident that the district court will act upon the pending motion as promptly as its docket permits.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7035 **September Term 2011**

1:10-cv-01025-RMU

Filed On: September 19, 2011

Wanda Busby,
Appellant

v.

Capital One, N.A. and David Nathaniel Prensky,
Appellees

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss; the opposition thereto; and the replies, it is

ORDERED that the motions to dismiss be granted and that this appeal be dismissed. The district court's order filed March 28, 2011, is not a final appealable decision under 28 U.S.C. § 1291, because it resolves fewer than all of the claims of all of the parties. See Fed. R. Civ. P. 54(b); Robinson-Reeder v. American Council on Education, 571 F.3d 1333, 1337 (D.C. Cir. 2009). Appellant asserts she has moved in the district court to dismiss voluntarily the remaining claim, but that claim remains pending, and therefore the district court has not entered final judgment as to all claims and parties. See Fed. R. Civ. P. 54(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1248 **September Term 2011**

BIA-A-071-995-767

Filed On: September 16, 2011

Becir Hakanjin,

Petitioner

v.

Eric H. Holder, Jr., United States Attorney General,

Respondent

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the supplement to the motion, the trust account report, and the consent to collection of fees, it is

ORDERED that motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that, because petitioner has insufficient funds in his trust account, petitioner will not be assessed an initial filing fee. See 28 U.S.C. § 1915(b)(1). Pursuant to petitioner's consent to collection of fees, petitioner's custodian is directed to collect and pay from petitioner's trust account monthly installments of 20 per cent of the previous month's income credited to petitioner's account, until the full $450 docketing fee has been paid. See 28 U.S.C. § 1915(b)(2). Such payments must be made each month the amount in the account exceeds $10. The payments must be by check or money order made payable to Clerk, U.S. Court of Appeals for the District of Columbia Circuit, and must be designated as made in payment of the filing fee for Case No. 11-1248. A copy of this order must accompany each remittance. In the event petitioner is transferred to another institution, the balance due must be collected and paid in installments to the Clerk by the custodian at petitioner's next institution. The custodian must notify the Clerk, U.S. Court of Appeals for the District of Columbia Circuit, in the event petitioner is released from custody.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5129 **September Term 2011**

1:09-cv-02362-RJL

Filed On: September 16, 2011

Select Specialty Hospital - Augusta, Inc., et al.,

Appellants

v.

Kathleen Sebelius,

Appellee

No. 11-5131 **1:09-cv-02008-RJL**

Select Specialty Hospital - Bloomington, Inc., et al.,

Appellants

v.

Kathleen Sebelius,

Appellee

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, the joint response thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. This court applies "no hard and fast rule" for determining whether "consolidated cases retain their separate identity or become one case for purposes of appellate jurisdiction." United States ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 216 (D.C. Cir. 2003). Although the district court did not consolidate the cases expressly "for all purposes," id.

several factors weigh against the exercise of jurisdiction here: both cases were in the same district court before the same district judge prior to consolidation; the defendant was the same in each case; each case involved the same dispute brought by affiliated plaintiffs concerning interpretation of the defendant's regulations; and the court treated the consolidated cases as a single case in its dismissal order. See Tri-State Hotels v. FDIC, 79 F.3d 707, 712 (8th Cir. 1996); Eggers v. Clinchfield Coal Co., 11 F.3d 35, 39 (4th Cir. 1993); Brown v. United States, 976 F.2d 1104, 1107 (7th Cir. 1992); Hall v. Wilkerson, 926 F.2d 311, 314 (3d Cir. 1991).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5129 **September Term 2011**

1:09-cv-02362-RJL

Filed On: September 16, 2011

Select Specialty Hospital - Augusta, Inc., et al.,

Appellants

v.

Kathleen Sebelius,

Appellee

No. 11-5131 **1:09-cv-02008-RJL**

Select Specialty Hospital - Bloomington, Inc., et al.,

Appellants

v.

Kathleen Sebelius,

Appellee

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, the joint response thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. This court applies "no hard and fast rule" for determining whether "consolidated cases retain their separate identity or become one case for purposes of appellate jurisdiction." United States ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 216 (D.C. Cir. 2003). Although the district court did not consolidate the cases expressly "for all purposes," id.

several factors weigh against the exercise of jurisdiction here: both cases were in the same district court before the same district judge prior to consolidation; the defendant was the same in each case; each case involved the same dispute brought by affiliated plaintiffs concerning interpretation of the defendant's regulations; and the court treated the consolidated cases as a single case in its dismissal order. See Tri-State Hotels v. FDIC, 79 F.3d 707, 712 (8th Cir. 1996); Eggers v. Clinchfield Coal Co., 11 F.3d 35, 39 (4th Cir. 1993); Brown v. United States, 976 F.2d 1104, 1107 (7th Cir. 1992); Hall v. Wilkerson, 926 F.2d 311, 314 (3d Cir. 1991).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7059 **September Term 2011**

1:09-cv-02428-RJL

Filed On: September 16, 2011

Administrators of the Tulane Educational Fund, also known as Tulane University and David H. Coy,

Appellants

v.

Ipsen Pharma, S.A.S., formerly known as Societe de Conseils, de Recherches et d'Applications Scientifiques SAS and Ipsen, S.A.,

Appellees

BEFORE: Ginsburg, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the response thereto, and the reply; the alternative motion to transfer to the Federal Circuit, the response thereto, the reply, and the lodged sur-reply; and the motion for leave to file sur-reply and the opposition thereto, it is

ORDERED that the motion for leave to file sur-reply be granted. The Clerk is directed to file the lodged sur-reply. It is

FURTHER ORDERED that the motion to transfer be granted. The Clerk is directed to send a certified copy of this order and the original files to the United States Court of Appeals for the Federal Circuit.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7062 **September Term 2010**

F9176-86CDE

Filed On: July 28, 2011

In re: Willie G. Munn Bey,

Petitioner

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied because this court does not have authority to review or otherwise interfere with matters of the Superior Court for the District of Columbia. See D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5249 **September Term 2010**

1:04-cv-01404-HHK

Filed On: July 27, 2011

American Postal Workers Union, AFL-CIO,

Appellant

v.

United States Postal Service,

Appellee

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the joint motion to dismiss the appeal as moot and to remand the case to the district court, it is

ORDERED that the motion be granted and that the case be remanded to the district court so that the parties may file a joint motion to vacate the judgment.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5148 **September Term 2010**

1:11-cv-00579-UNA

Filed On: July 27, 2011

In re: Thomas Franklin Cross, Jr.,

Petitioner

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; the notice of appeal, which is construed as a petition for writ of mandamus, and the memorandum of law and fact in support thereof, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. The transfer of the district court file deprives this court of jurisdiction to review the transfer unless there is a substantial question whether the district court had the power to transfer. See In re Asemani, 455 F.3d 296, 300 (D.C. Cir. 2006). Petitioner has raised no such substantial question. See Rumsfeld v. Padilla, 542 U.S. 426 (2004) (habeas claims must be brought in the jurisdiction in which petitioner's warden is located).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3132 **September Term 2010**

1:08-cr-00118-JR-6

Filed On: June 28, 2011 [1315517]

United States of America,

Appellee

v.

Dannie Jones, also known as Smiley,

Appellant

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1142 **September Term 2010**

HHS-Food Act

Filed On: June 17, 2011

In re: Natural Resources Defense Council,

Petitioner

BEFORE: Henderson, Rogers and Kavanaugh Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the response thereto, the reply, and the parties' post-argument submissions, it is

ORDERED that the petition for writ of mandamus be dismissed for lack of jurisdiction, in accordance with the opinion for the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1420 **September Term 2010**

SEC-75FR57092
SEC-75FR57314
SEC-75FR57321
SEC-75FR70311

Filed On: June 3, 2011

NetCoalition and Securities Industry and Financial Markets Association,

Petitioners

v.

Securities and Exchange Commission,

Respondent

Nasdaq Stock Market, LLC, et al.,
Intervenors

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to consolidate, the oppositions thereto, and the reply; the motions to dismiss, the opposition thereto, and the replies; and the Rule 28(j) letters and the response, it is

ORDERED that the motion to dismiss the petition in No. 10-1420 be granted. Petitioners completely fail to respond to the argument that because the rule challenged in No. 10-1420 is no longer in effect their challenge is moot. It is

FURTHER ORDERED that the motion to consolidate No. 10-1420 with Nos. 10-1421, 10-1422, and 11-1001 be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1420 **September Term 2010**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1104 **September Term, 2010**

FILED ON: APRIL 26, 2011

GEORGE C. JEPSEN, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT AND CONNECTICUT OFFICE OF CONSUMER COUNSEL,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ISO NEW ENGLAND INC.,
INTERVENOR

On Petition for Review of Orders
of the Federal Energy Regulatory Commission

Before: ROGERS, TATEL, and KAVANAUGH, *Circuit Judges*

JUDGMENT

This petition for review of orders of the Federal Energy Regulatory Commission was presented to the court and briefed and argued by the parties. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is hereby

ORDERED and ADJUDGED that the petition for review is denied.

ISO New England Inc. is a non-profit utility company that operates New England's electric transmission grid and administers the region's wholesale electricity market. Petitioners are concerned that ISO New England may be paying its executives too much, thus leading to higher rates for consumers. They challenge the Federal Energy Regulatory Commission's determination that ISO New England's 2010 budget, including its executive-compensation plan, was "just and reasonable." 16 U.S.C. § 824d(a); *see also id.* § 825*l*(b) (judicial review provision); *ISO New England Inc.*, 129 FERC ¶ 61,299 (2009) (order approving 2010 budget); *ISO New England Inc.*, 130 FERC ¶ 61,236 (2010) (order denying petitioners' petition for rehearing). Specifically, they contend that before approving the 2010 budget, FERC should have required ISO New England to

submit the report of an independent consultant that found the company's 2009 executive compensation to be reasonable. Given the "highly deferential" standard of review that applies to FERC decisions involving "matters of rate design," *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 287 (D.C. Cir. 2006); *see also Blumenthal v. FERC*, 613 F.3d 1142, 1143, 1146 47 (D.C. Cir. 2010), we conclude that FERC did not act arbitrarily or capriciously in approving ISO New England's 2010 budget without requiring submission of the 2009 report, especially in light of (1) the extensive vetting the company's budget had received from various stakeholders and the company's independent Board of Directors, and (2) the fact that FERC had previously reviewed and approved the consultant's methodology, *see ISO New England Inc.*, 127 FERC ¶ 61,254, at 62,106 (2009). We also reject petitioners' due-process argument. Although petitioners lacked an opportunity to review and comment on the consultant's 2009 report, they did have an opportunity to argue in their petition for rehearing that FERC should have required ISO New England to submit the report before approving the company's 2010 budget. In the context of this case, the Due Process Clause required nothing more. *Cf. Blumenthal*, 613 F.3d at 1145 46 (rejecting petitioners' due-process challenges to FERC's approval of ISO New England's 2009 executive-compensation plan).

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5224 **September Term 2010**

04cv01194, 04cv01254, 04cv02035, 04cv02215, 05cv00023, 05cv00280, 05cv00329, 05cv00359, 05cv00392, 05cv00520, 05cv00526, 05cv00634, 05cv00881, 05cv00998, 05cv01048, 05cv01236, 05cv01429, 05cv01645, 05cv01649, 05cv01983, 05cv02186

Filed On: April 25, 2011

Mahmoad Abdah, Detainee, Camp Delta, et al.,

Appellees

v.

Barack Obama, President of the United States, et al.,

Appellants

Consolidated with 05-5225, 05-5227, 05-5229, 05-5230, 05-5235, 05-5236, 05-5237, 05-5238, 05-5243, 05-5244, 05-5248, 05-5337, 05-5338, 05-5374, 05-5390, 05-5398, 05-5479, 05-5484, 06-5041, 06-5065

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed July 23, 2010, appellees' response thereto, and the reply; and appellees' motion to hold the cases in abeyance pending disposition of the petition for initial hearing en banc and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot in light of the court's order denying the petition for initial hearing en banc. It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5224 **September Term 2010**

FURTHER ORDERED that the district court's orders requiring advance notice of transfer are hereby vacated. See Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5148 **September Term 2007**

06cv01767

Filed On: August 25, 2008

Mohamed Al-Zarnouqi, Detainee, et al.,

Appellees

v.

George W. Bush, President of the United States, et al.,

Appellants

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellants' motion to govern further proceedings, which includes a motion to hold this case in abeyance, and appellees' motion in response thereto, in which appellees consent to abeyance, it is

ORDERED that the motion to hold in abeyance be granted. This case is hereby held in abeyance pending further order of the court. The parties are directed to file motions to govern future proceedings within 14 days of this court's disposition of Kiyemba v. Bush, No. 05-5487, scheduled for oral argument September 25, 2008.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5149 **September Term 2010**

1:05-cv-02386

Filed On: April 21, 2011

Sharaf Al Sanani, Detainee, Guantanamo Bay Naval Station, et al.,

Appellees

v.

Donnie Thomas, Army Col, Commander, Joint Detention Operations Group, JTF-GTMO, et al.,

Appellants

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed July 23, 2010; the response thereto by Appellee Umar Hamzayevich Abdulayev, containing a request to hold the case in abeyance pending disposition of the petition for initial hearing en banc in Abdah v. Obama, No. 05-5224; and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the request to hold in abeyance be dismissed as moot in light of the court's order denying the petition for initial hearing en banc in Abdah v. Obama, No. 05-5224 (D.C. Cir. Jan. 11, 2011). It is

FURTHER ORDERED that the district court's order requiring advance notice of transfer is hereby vacated. See Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5028 **September Term 2010**

1:08-cv-01923-GK

Filed On: April 20, 2011

Muhammad Ahmad Abdallah Al Ansi and
Sami Al Hajj, as Next Friend Of Muhammad
Ahmad Abdallah Al Ansi,

Appellees

v.

Barack Obama, in his official capacity as
President of the United States, et al.,

Appellants

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed July 23, 2010; the response thereto by Appellee Muhammad Ahmad Abdallah Al Ansi, containing a request to hold the case in abeyance pending disposition of the petition for initial hearing en banc in Abdah v. Obama, No. 05-5224; and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the request to hold in abeyance be dismissed as moot in light of the court's order denying the petition for initial hearing en banc in Abdah v. Obama, No. 05-5224 (D.C. Cir. Jan. 11, 2011). It is

FURTHER ORDERED that the case be remanded to the district court with instructions to consider the government's request for vacatur of the order filed December 29, 2008, directing the government to provide the court and petitioner's counsel 30 days' notice prior to transporting or removing petitioner from Guantanamo Bay. The parties should be afforded an opportunity to submit further briefing or evidence for the district court to consider in a manner consistent with Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009). As the government has acknowledged (Reply at 4), the district court record "does not include Government declarations similar to those this Court credited in Kiyemba II." Specifically, the government has not filed in this case any declaration to document the policy of the United States not to transfer a

detainee to a country where he is likely to be tortured, or other sufficient representation that this petitioner will not be transferred to any country if it is determined that he is more likely than not to face torture there. See Kiyemba, 561 F.3d at 514.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5001 **September Term 2010**

1:09-cv-02381

Filed On: April 20, 2011

In re: Rudy Stanko,

Petitioner

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, the memorandum of law and fact in support thereof, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. The filing-fee requirements of the Prison Litigation Reform Act, 28 U.S.C. § 1915(b), will apply to this petition challenging the district court's order transferring petitioner's civil action. See In re: Rogel Grant, — F.3d —, 2011 WL 590107 (D.C. Cir. Feb. 22, 2011). It is

FURTHER ORDERED that the petition be dismissed as moot. See McBryde v. Comm. to Review Circuit Council Conduct, 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot."). On March 11, 2010, Civil Action No. 09-2381 was electronically transferred to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1406(a). Thereafter, because petitioner no longer resided in that district but had relocated in Terre Haute, Indiana, the civil action was transferred to the Southern District of Indiana. Stanko v. Lappin, No. 10cv0547 (M.D. Pa. Apr. 20, 2010). Ultimately, the action was dismissed without prejudice. Stanko v. Lappin, No. 10cv112 (S.D. Ind. Sept. 14, 2010), appeal dismissed, No. 10-2868 (7th Cir. Jan. 12, 2011).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5336 **September Term 2010**

1:08-cv-00140-EGS

Filed On: April 20, 2011

Montgomery Carl Akers,

Appellant

v.

Harrell Watts, Nation Appeals Coordinator,
Federal Bureau of Prisons, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed October 25, 2010, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed for lack of jurisdiction. Appellant has not shown that the challenged orders are final or appealable under the collateral order doctrine. See Fed. R. Civ. P. 54(b); 28 U.S.C. § 1291; Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5027 **September Term 2010**

1:08-cv-01207-RWR

Filed On: April 19, 2011

Abd Al-Rahim Hussein Al-Nashiri,

Appellee

v.

Hillary Rodham Clinton, Secretary of State of the United States, et al.,

Appellants

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed July 23, 2010, appellee's response thereto, and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the district court's order requiring advance notice of transfer is hereby vacated. See Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3089 **September Term 2010**

1:01-cr-00140-RCL-1

Filed On: April 19, 2011

In re: Willie C. Hankerson,

Petitioner

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the documents filed by petitioner on September 16, 2010, which have been docketed as a petition for writ of mandamus seeking an order directing the district court to file appellant's notice of appeal dated July 28, 2010; petitioner's addenda thereto; respondent's response to the mandamus petition and motion to dismiss appeal; and petitioner's opposition to the motion to dismiss, it is

ORDERED that the petition for writ of mandamus be denied. The writ of mandamus "is an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Petitioner has failed to demonstrate that he has a "clear and indisputable right" to mandamus relief. In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (citations omitted). It is

FURTHER ORDERED that the motion to dismiss be dismissed as moot. Because the district court declined to file petitioner's notice of appeal, there is no appeal to dismiss.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5396 **September Term 2010**

1:09-cv-01423-GK

Filed On: April 19, 2011

Securities and Exchange Commission,

Appellee

v.

Elaine M. Brown and Gary A. Prince,

Appellees

Bonnie Wachtel,

Appellant

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Appellant has not demonstrated that the challenged order meets the stringent requirements of the collateral order doctrine. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3122 **September Term 2010**

1:91-cr-00560-TFH-3

Filed On: April 15, 2011

United States of America,

Appellee

v.

Artur Tchibassa,

Appellant

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as a request for a certificate of appealability ("COA"); and the motion to dismiss for lack of a COA and the response thereto, it is

ORDERED that the motion to dismiss for lack of a COA be granted and the appeal dismissed. Appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by demonstrating "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Appellant argues he should be resentenced because an intervening change in law has invalidated United States v. Coles, 403 F.3d 764 (D.C. Cir. 2005), yet he cites no cases that overrule Coles or have been made retroactively applicable. Appellant cannot prevail on his ineffective assistance of counsel claims because he has not shown that his "counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that this error caused prejudice." United States v. Hurt, 527 F.3d 1347, 1356 (D.C. Cir. 2008). As for the evidentiary claims, it is well-established that a federal prisoner cannot raise collaterally any issue litigated and adjudicated on direct appeal, absent exceptional circumstances such as an intervening change in law, Davis v. United States, 417 U.S. 333, 342 (1974); United States v. Greene, 834 F.2d 1067, 1070 (D. C. Cir. 1987), and there are no such circumstances here. Finally, to the extent appellant relies on Castro v. United States, 540 U.S. 375 (2003), for the

proposition that the district court must warn a pro se litigant before recharacterizing a motion as a first motion pursuant to 28 U.S.C. § 2255, appellant's situation is distinguishable, because appellant clearly intended to file a § 2255 motion.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no COA has been allowed, no mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3015 **September Term 2010**

1:91-cr-00560-TFH
1:91-cr-00560-TFH-3

Filed On: April 15, 2011

In re: Artur Tchibassa,

Petitioner

Consolidated with 11-3028

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a successive motion under 28 U.S.C. § 2255, and the response thereto; the motion for leave to proceed in forma pauperis; and the notice of appeal in No. 11-3028, which is construed as a petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The transfer of petitioner's successive § 2255 motion to this court as a petition for leave to file a successive § 2255 motion was appropriate. See 28 U.S.C. § 2244(b)(3)(A); 28 U.S.C. § 2255(h). It is

FURTHER ORDERED that the petition for leave to file a successive 28 U.S.C. § 2255 motion be denied. Petitioner has not demonstrated that the district court erred in construing his Rule 60(b) motion as a successive 28 U.S.C. § 2255 motion and transferring the motion to this court to determine whether it should be allowed. Nor has petitioner shown that his successive § 2255 motion is based either on newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3015 **September Term 2010**

review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h); United States v. Ortiz, 136 F.3d 161, 163-64 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3015 **September Term 2010**

1:91-cr-00560-TFH
1:91-cr-00560-TFH-3

Filed On: April 15, 2011

In re: Artur Tchibassa,

Petitioner

Consolidated with 11-3028

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for leave to file a successive motion under 28 U.S.C. § 2255, and the response thereto; the motion for leave to proceed in forma pauperis; and the notice of appeal in No. 11-3028, which is construed as a petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The transfer of petitioner's successive § 2255 motion to this court as a petition for leave to file a successive § 2255 motion was appropriate. See 28 U.S.C. § 2244(b)(3)(A); 28 U.S.C. § 2255(h). It is

FURTHER ORDERED that the petition for leave to file a successive 28 U.S.C. § 2255 motion be denied. Petitioner has not demonstrated that the district court erred in construing his Rule 60(b) motion as a successive 28 U.S.C. § 2255 motion and transferring the motion to this court to determine whether it should be allowed. Nor has petitioner shown that his successive § 2255 motion is based either on newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3015 **September Term 2010**

review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h); United States v. Ortiz, 136 F.3d 161, 163-64 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5034 **September Term 2010**

1:05-cv-01347-GK

Filed On: March 28, 2011

Farhi Saeed Bin Mohammed, Detainee, Guantanamo Bay Naval Statio, and Moazzam Begg, as next friend of Farhi Saeed bin Mohammed,

Appellees

v.

Barack Obama, et al.,

Appellants

Consolidated with 10-5045

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to withdraw the December 29, 2010 motion regarding ex parte consideration, a public copy of which is attached to the current motion, to which no response has been filed; and the final status report and motion to dismiss the appeals as moot, to which no response has been filed, it is

ORDERED that the motion to withdraw be granted. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the motion to dismiss be granted, and the appeals are hereby dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5365 **September Term 2010**

1:10-cv-01574-UNA

Filed On: April 1, 2011

Lavonne Davis,

Appellant

v.

House of Representatives, Elenor Holmes Office,

Appellee

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7083 **September Term 2010**

1:10-cv-00827-UNA

Filed On: March 24, 2011

Joseph Slovinec,

Appellant

v.

American University,

Appellee

BEFORE: Henderson, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the brief and appendix filed by appellant and the supplements; appellee's motion to extend time and the opposition thereto combined with a motion to strike; appellee's lodged motion for summary affirmance and the opposition thereto; and the motion for appointment of counsel, it is

ORDERED that the motion to extend time be granted. The Clerk is directed to file the lodged motion for summary affirmance. It is

FURTHER ORDERED that the motion to strike be denied. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated a sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in dismissing appellant's complaint without prejudice on the ground that it did not meet the requirements of Federal Rule of Civil Procedure 8(a). See Ciralsky v. CIA, 355 F.3d 661, 668-71 (D.C. Cir. 2004).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7083 **September Term 2010**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1396 **September Term 2010**

FCC-10-2038

Filed On: March 18, 2011

Warren C. Havens, et al.,

Petitioners

v.

Federal Communications Commission,

Respondent

BEFORE: Henderson, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the response thereto; and the motion to intervene, it is

ORDERED that the motion to dismiss be granted. The challenged order is not a final, reviewable order of the Commission. See 47 U.S.C. § 155(c)(7); Int'l Telecard Ass'n v. FCC, 166 F.3d 387, 388 (D.C. Cir. 1999) (per curiam); Richman Bros. Records, Inc. v. FCC, 124 F.3d 1302,1303-04 (D.C. Cir. 1997). It is

FURTHER ORDERED that the motion to intervene be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1354 **September Term 2010**

NLRB-34CA12735

Filed On: March 16, 2011

FedEx Ground Package System, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Henderson, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary disposition; and the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted in light of the National Labor Relations Board's withdrawal of its order issued on October 29, 2010. See 29 U.S.C. § 160(d). It is

FURTHER ORDERED that the motion for summary disposition be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7126 **September Term 2010**

1:09-cv-02314-EGS

Filed On: March 15, 2011

Larry Coleman,

Appellant

v.

Washington Hospital Center Corporation and
Pamela Randolph, MD,

Appellees

BEFORE: Henderson, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss the case and the supplement thereto; the court's order issued December 3, 2010, dismissing the case for lack of prosecution; and the motion for reconsideration of the December 3, 2010 order, combined with a response to the court's October 29, 2010 order to show cause, and the opposition thereto, it is

ORDERED that the motion for reconsideration be granted. It is

FURTHER ORDERED that the motion to dismiss be granted. The notice of appeal was untimely. See Fed. R. App. P. 4(a)(1)(A). Courts lack authority to create equitable exceptions to the jurisdictional requirement of a timely filed notice of appeal. Bowles v. Russell, 551 U.S. 205, 214 (2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3045 **September Term 2010**

1:07-cr-00207-RJL-1

Filed On: March 11, 2011

United States of America,

Appellee

v.

Russell Carlton Palmer,

Appellant

BEFORE: Henderson, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed November 18, 2010, appellee's response thereto, which consists of a motion for summary affirmance, and appellant's reply to that response; and the order to show cause filed January 7, 2011, and appellant's response thereto and to the motion for summary affirmance, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly determined that 18 U.S.C. § 3582(c)(2), which allows for sentence modification only with respect to Guidelines ranges that have *subsequently* been lowered, is not available to appellant because Amendment 706 took effect before appellant was sentenced. The district court also correctly determined that § 3582(c)(2) does not apply because appellant was sentenced to a mandatory minimum term of imprisonment. See United States v. Cook, 594 F.3d 883 (D.C. Cir. 2010), cert. denied, 130 S. Ct. 3375 (2010). Appellant's remaining arguments do not undercut the correctness of these conclusions. Finally, appellant must present to the district court in the first instance the argument stemming from the Fair Sentencing Act of 2010 that he seeks to raise in his response to the motion for summary affirmance.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3045 **September Term 2010**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3060 **September Term 2010**

1:05-cr-00223-RJL-1

Filed On: February 25, 2011

United States of America,

Appellee

v.

Isidro Hinojosa Benavides,

Appellant

BEFORE: Sentelle, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the unopposed motion to vacate sentence and remand for resentencing, it is

ORDERED that the motion be granted, and that appellant's sentence be vacated and the case remanded for resentencing.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith a certified copy of this order to the district court in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5376 **September Term 2010**

1:10-cv-00916-UNA

Filed On: February 24, 2011

In re: Charles Anthony Woods,

Petitioner

BEFORE: Sentelle, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of this court's order issued November 23, 2010, the motion to proceed in forma pauperis, the Prisoner Trust Account Report, and Consent to Collection of Fees filed by petitioner, it is

ORDERED, on the court's own motion, that this case be dismissed. Petitioner was ordered to file a motion to proceed in forma pauperis and a completed Prisoner Trust Account Report and Consent to Collection of Fees. The court's November 23, 2010 order warned that failure to comply with its terms would result in dismissal of the case for lack of prosecution. See D.C. Cir. Rule 38. Petitioner, however, filed on January 24, 2011, a motion to proceed in forma pauperis, a Prisoner Trust Account Report, and Consent to Collection of Fees, each page covered with handwritten conditions. Because petitioner has failed to comply with the order, the petition is dismissed for lack of prosecution.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1225 **September Term 2010**

STB-FD35239

Filed On: January 26, 2011

The Buncher Company,

Petitioner

v.

Surface Transportation Board and United States of America,

Respondents

Allegheny Valley Railroad Company,
Intervenor

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to adduce additional evidence, which includes a request to remand, and the joint response thereto; and the joint motion to remand and the response thereto, it is

ORDERED that the case be remanded to the Surface Transportation Board. The Board has agreed to reopen the declaratory order proceeding and consider petitioner's new evidence and jurisdictional argument.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5363 **September Term, 2010**

FILED ON: JANUARY 11, 2011

UNITED STATES OF AMERICA,
APPELLANT

v.

OLD DOMINION BOAT CLUB,
APPELLEE

Consolidated with 09-5369

Appeals from the United States District Court
for the District of Columbia
(No. 1:73-cv-01903)

Before: TATEL, GARLAND and KAVANAUGH, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: January 11, 2011

Opinion for the court filed by Circuit Judge Tatel.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5293 **September Term, 2010**

IN THE MATTER OF: ALPINE PCS, INC., FILED ON: DECEMBER 21, 2010

ALPINE PCS, INC.,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-02055)

Before: GINSBURG and KAVANAUGH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*

JUDGMENT

This appeal was considered on the record and on the briefs and the oral arguments of the parties. Although the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. See Fed. R. App. P. 36; D.C. Cir. Rule 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

To the extent issues raised here were raised before the district and bankruptcy courts, we affirm the judgment of the district court for the reasons stated in the opinion of the bankruptcy court. Insofar as the appellant argues its request for debt restructuring suspended the automatic cancellation rule, 47 C.F.R. § 1.2110(g)(4)(iv), that argument is not properly before us because the appellant did not argue it until the reply brief. *See MBI Group, Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010). Insofar as the appellant claims a right to offset its debt owed to the Commission from proceeds obtained in the auction for new licenses to use the same spectrum, we have no occasion to resolve that issue because there are as of yet no such proceeds.

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5055 **September Term 2010**

1:08-cv-02140-JR

Filed On: November 16, 2010

Mississippi State Conference NAACP, et al.,

Appellants

v.

United States Department of Housing & Urban Development and Shaun Donovan, in his official capacity as Secretary of the United States Department of Housing and Urban Development,

Appellees

BEFORE: Ginsburg, Henderson and Kavanaugh, *Circuit Judges*

O R D E R

Upon consideration of the agreement and joint motion to dismiss with prejudice, it is

ORDERED that the motion be granted and this case is hereby dismissed. No mandate shall issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5260 **September Term 2010**

1:09-cr-00359-RBW-3

Filed On: November 5, 2010

In re: Joe O. Bondo,

Petitioner

BEFORE: Sentelle, Chief Judge; and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; and the petition for writ of habeas corpus, the brief in support thereof, and the motion for release, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of habeas corpus and the motion for release be transferred to the United States District Court for the District of Columbia. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

The Clerk is directed to transmit the original file and a certified copy of this order to the United States District Court for the District of Columbia. Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5165 **September Term 2010**

Filed On: October 28, 2010

In re: Karen McBrien,

Petitioner

BEFORE: Sentelle, Chief Judge; and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of habeas corpus, which includes a motion for appointment of counsel, the court's order filed July 19, 2010, dismissing this case for lack of prosecution, the motion for reconsideration of the July 19 order, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for reconsideration be granted and that this case be returned to the court's active docket. It is

FURTHER ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the petition for writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5104 **September Term 2010**

1:08-cv-00971-ESH

Filed On: October 25, 2010

Craig Allan Williams,

Appellant

v.

R. Martinez, Warden and Ronald C. Machen, Jr., Esquire, United States Attorney for the District of Columbia,

Appellees

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; and the request for a certificate of appealability (styled "application for issuance of certificate of appealability"), the response thereto, and the reply, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the request for a certificate of appealability be denied and the appeal be dismissed. Appellant has not made "a substantial showing of the denial of a constitutional right," see 28 U.S.C. § 2253(c)(2), as he has not demonstrated "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5223 **September Term 2010**

1:07-cv-01719-RWR

Filed On: October 25, 2010

Cornell D.M. Judge Cornish,

Appellant

v.

David J. Kappos, in his Official Capacity as Under-Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, et al.,

Appellees

Consolidated with 10-5236

BEFORE: Sentelle, Chief Judge; and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed August 13, 2010, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be transferred to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over interlocutory appeals arising under federal patent law. See 28 U.S.C. §§ 1292(c)(1), 1295(a)(1), 1338(a). As discussed in this court's orders transferring appellant's previous appeals to the Federal Circuit, the Federal Circuit has exclusive jurisdiction over appeals relating to an attorney's practice before the Patent and Trademark Office. See Cornish v. Dudas, No. 10-5096, unpublished order (D.C. Cir. Jul. 27, 2010) (citing, inter alia, Athridge v. Quigg, 852 F.2d 621, 623 (D.C. Cir. 1988); Jaskiewicz v. Mossinghoff, 802 F.2d 532, 534-37 (D.C. Cir. 1986)); Cornish v. Dudas, No. 08-5089, unpublished order (D.C. Cir. Nov. 24, 2008). When this court lacks jurisdiction, it may choose to transfer the case to a court that does have jurisdiction rather than dismiss the appeal. See 28 U.S.C. § 1631.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5223 **September Term 2010**

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Federal Circuit. Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5223 **September Term 2010**

1:07-cv-01719-RWR

Filed On: October 25, 2010

Cornell D.M. Judge Cornish,

Appellant

v.

David J. Kappos, in his Official Capacity as Under-Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, et al.,

Appellees

Consolidated with 10-5236

BEFORE: Sentelle, Chief Judge; and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed August 13, 2010, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be transferred to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over interlocutory appeals arising under federal patent law. See 28 U.S.C. §§ 1292(c)(1), 1295(a)(1), 1338(a). As discussed in this court's orders transferring appellant's previous appeals to the Federal Circuit, the Federal Circuit has exclusive jurisdiction over appeals relating to an attorney's practice before the Patent and Trademark Office. See Cornish v. Dudas, No. 10-5096, unpublished order (D.C. Cir. Jul. 27, 2010) (citing, inter alia, Athridge v. Quigg, 852 F.2d 621, 623 (D.C. Cir. 1988); Jaskiewicz v. Mossinghoff, 802 F.2d 532, 534-37 (D.C. Cir. 1986)); Cornish v. Dudas, No. 08-5089, unpublished order (D.C. Cir. Nov. 24, 2008). When this court lacks jurisdiction, it may choose to transfer the case to a court that does have jurisdiction rather than dismiss the appeal. See 28 U.S.C. § 1631.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5223 **September Term 2010**

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Federal Circuit. Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7092 **September Term 2010**

1:08-cv-00485-RBW

Filed On: October 22, 2010

Republic of Argentina,

Appellant

v.

BG Group, PLC,

Appellee

BEFORE: Sentelle, Chief Judge; and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted and that this appeal be dismissed. The district court's order filed June 7, 2010, is not a final appealable decision under 28 U.S.C. § 1291, because it resolves fewer than all of the claims of all of the parties. See Fed. R. Civ. P. 54(b); Robinson-Reeder v. American Council on Education, 571 F.3d 1333, 1337 (D.C. Cir. 2009). Nor is the order appealable under the collateral order exception to the finality requirement. See Coopers & Lybrand v. Livesay 437 U.S. 463, 468 (1978) (to qualify, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appal from a final judgment").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5252 **September Term 2010**

Tort 91-120

Filed On: October 21, 2010

In re: Julia V. Smith,

Petitioner

BEFORE: Sentelle, Chief Judge; and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and supplements thereto, the motion for leave to proceed in forma pauperis, the order to show cause filed July 28, 2010, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed for lack of jurisdiction. Petitioner's claims may be reviewed only by the district court in the appropriate jurisdiction. See 28 U.S.C. § 1346(b)(1).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1070 **September Term 2010**

FCC-07-256

Filed On: October 21, 2010

Feature Group IP Petition West LLC, et al.,
Petitioners

v.

Federal Communications Commission and
United States of America,
Respondents

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the response thereto, and the reply; the respondents' motion to govern future proceedings, which includes a motion to dismiss; and the petitioners' motion to govern future proceedings, it is

ORDERED that the motions to dismiss be granted. Petitioners' request for agency reconsideration rendered this petition for review incurably premature. It is well-settled that "[a] request for administrative reconsideration renders an agency's otherwise final action non-final with respect to the requesting party," Clifton Power v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002) (citing United Transp. Union v. ICC, 871 F.2d 1114, 1116 (D.C. Cir. 1989)), and "'subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction,'" Clifton Power, 294 F.3d at 110 (quoting TeleSTAR, Inc. v. FCC, 888 F.2d 132, 134 (D.C. Cir. 1989)). This rule applies whether the petition for judicial review is filed before or after the request for agency reconsideration, because "[t]he danger of wasted judicial effort . . . arises whether a party seeks agency reconsideration before, simultaneous with, or after filing an appeal or petition for judicial review." Wade v. FCC, 986 F.2d 1433, 1434 (D.C. Cir. 1993). It is

FURTHER ORDERED that petitioners' motion to govern be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5111 **September Term 2010**

1:09-cv-00242-CKK

Filed On: October 21, 2010

David Hall Crum,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Sentelle, Chief Judge; and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to vacate, which is construed as including a request for a certificate of appealability ("COA"), the opposition thereto, the reply, the motion to dismiss or for summary affirmance, the order to show cause filed July 26, 2010, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to vacate be denied. Appellant has not demonstrated the requested relief is warranted. It is

FURTHER ORDERED that the request for a COA be denied, the motion to dismiss for lack of a COA be granted, and this case be dismissed. Appellant has not made a substantial showing of the denial of a constitutional right, see 28 U.S.C. § 2253(c)(2), in the district court's denial of his motion for reconsideration of the denial of his habeas petition.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no COA has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5266 **September Term 2010**

Filed On: October 21, 2010

In re: Jermaine Brown,

Petitioner

BEFORE: Sentelle, Chief Judge; and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for writ of habeas corpus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of habeas corpus be dismissed. This court lacks jurisdiction to entertain an original petition for a writ of habeas corpus. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1017 **September Term 2010**

EPA-73FR76948
EPA-73FR76948-60

Filed On: October 19, 2010

Waterkeeper Alliance, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

National Chicken Council, et al.,
Intervenors

Consolidated with 09-1104

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to govern future proceedings, the oppositions thereto, and the reply; and the motion for voluntary remand, the opposition thereto, and the reply, it is

ORDERED that the motion for voluntary remand be granted. The court remands to the Environmental Protection Agency for further consideration the rule entitled "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms," 73 Fed. Reg. 76,948 (Dec. 18, 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1017 **September Term 2010**

EPA-73FR76948
EPA-73FR76948-60

Filed On: October 19, 2010

Waterkeeper Alliance, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

National Chicken Council, et al.,
Intervenors

Consolidated with 09-1104

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to govern future proceedings, the oppositions thereto, and the reply; and the motion for voluntary remand, the opposition thereto, and the reply, it is

ORDERED that the motion for voluntary remand be granted. The court remands to the Environmental Protection Agency for further consideration the rule entitled "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms," 73 Fed. Reg. 76,948 (Dec. 18, 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3125 **September Term 2010**

1:03-cr-00560-RBW-1

Filed On: October 18, 2010

United States of America,

Appellee

v.

Vincent E. Reed,

Appellant

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability and the opposition thereto, it is

ORDERED that the motion be denied and the appeal be dismissed. Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" dismissing as untimely his motion filed pursuant to 28 U.S.C. § 2255. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Pursuant to the one-year period of limitation in 28 U.S.C. § 2255(f), appellant was required to deposit his motion "in the institution's internal mailing system on or before the last day for filing." See Rules Governing Section 2255 Proceedings for the United States District Courts, R. 3(d). To be timely, therefore, appellant was required to deposit his motion with prison officials on or before July 7, 2009, which he concedes he failed to do. Moreover, even if equitable tolling is applicable to a motion filed pursuant to 28 U.S.C. § 2255, appellant has failed to present extraordinary circumstances that would warrant the application of equitable tolling in this case. See United States v. Pollard, 416 F.3d 48, 56 (D.C. Cir. 2005).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1322 **September Term 2010**

NLRB-10CA28856

Filed On: October 6, 2010

International Brotherhood of Electrical Workers, AFL-CIO, Local Union Nos. 347 and 443,
Petitioner

v.

National Labor Relations Board,
Respondent

Contractor Services, Inc.,
Intervenor

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss filed on December 31, 2008, the opposition thereto, and the reply; the motion for remand; and the motion to dismiss filed on August 18, 2010, it is

ORDERED that the motion to dismiss filed on August 18, 2010, be granted in light of the National Labor Relations Board's withdrawal of its order issued on August 27, 2008. See 29 U.S.C. § 160(d). It is

FURTHER ORDERED that the remaining motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5105 **September Term 2010**

1:05-cv-02315-RBW

Filed On: October 1, 2010

James F. Johnson,

Appellant

v.

Adrian Fenty, Mayor, et al.,

Appellees

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance, the responses thereto, and the reply; and the court's order to show cause filed July 15, 2010; it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's claims under 42 U.S.C. § 1983 against the Mayor of the District of Columbia in his official capacity are treated as claims against the District of Columbia itself. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Atchinson v. District of Columbia, 73 F.3d 418, 424 (D.C. Cir. 1996). Appellant, however, has not alleged any custom or practice of the District of Columbia that caused his injuries. See Baker v. District of Columbia, 326 F.3d 1302, 1306 (D.C. Cir. 2003). Similarly, appellant's claims against Paul Quander, Paul Brennan, John Taberski, and Anthony Hinton in their official capacities are treated as claims against the Court Services and Offender Supervision Agency ("CSOSA") itself, which is a federal agency. See D.C. Code § 24-133. These claims must fail, because § 1983 "does not apply to federal officials acting under color of federal law." Settles v. United States Parole Comm'n, 429 F.3d 1098, 1104 (D.C. Cir. 2005). Furthermore, the only possible basis for subject matter jurisdiction over appellant's claims for monetary damages against the CSOSA would be the Federal Tort Claims Act ("FTCA"), see GAF Corp. v. United States, 818 F.2d 901, 904-05 (D.C. Cir.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5105 **September Term 2010**

1987), but the United States "has not rendered itself liable under [the FTCA] for constitutional tort claims." FDIC v. Meyer, 510 U.S. 471, 478 (1994).

Appellant's claims against former Mayor Anthony Williams and Paul Quander in their individual capacities based on the doctrine of respondent superior fail as a matter of law. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior."). Appellant does not challenge on appeal the district court's conclusion that Brennan, Taberski, and Hinton are entitled to qualified immunity for the claims against them in their individual capacities.

Appellant also fails to state a claim under 42 U.S.C. § 1985(3). In order for there to be a conspiracy, there must be "an agreement to take part in an unlawful action," Hall v. Clinton, 285 F.3d 74, 82-83 (D.C. Cir. 2002), yet the complaint is devoid of any allegation regarding the existence of an agreement among the appellees. Appellant attempts to assert a conspiracy claim under 18 U.S.C. §§ 241-242, but he has not shown that these criminal statutes provide a private cause of action. See Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 190 (1994). Finally, to the extent appellant seeks monetary damages in connection with the time he was in custody pending his parole revocation hearing in 2005, these claims are barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). See Taylor v. United States Probation Office, 409 F.3d 426, 427 (D.C. Cir. 2005) (stating that Heck applies to actions "challenging the fact or duration of confinement").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5106 **September Term 2010**

1:09-cv-00531-CKK

Filed On: October 1, 2010

Gregory T. Howard,

Appellant

v.

United States District Court for the Southern District of Ohio, et al.,

Appellees

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to vacate this court's June 7, 2010 order, motion for appointment of counsel, motion to dispense with appendix, motion for summary reversal, motion to vacate and remand and the supplement thereto, and the notice requesting separate findings of fact and conclusions of law, it is

ORDERED that the motion to vacate this court's June 7, 2010 order be denied. Because the district court correctly certified that the appeal was not taken in good faith, this court denied leave to proceed in forma pauperis and directed appellant to pay the full filing and docketing fee or the appeal would be dismissed. See 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3)(A); Wooten v. District of Columbia Metro. Police Dep't, 129 F.3d 206, 208 (D.C. Cir. 1997). On July 8, 2010, appellant moved to vacate that order; then on August 13, 2010, he paid the full $455 fee. To the extent appellant wishes to pursue his motion to vacate as a means of securing a refund of the money he has paid, such a request is denied as appellant has offered no grounds for reconsidering the determination that he is not entitled to proceed in forma pauperis in this appeal. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated any likelihood of success on the merits. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5106 **September Term 2010**

FURTHER ORDERED that the motion for summary reversal and motion to vacate and remand be denied, and, on the court's own motion, that the district court's order filed April 6, 2010, be summarily affirmed. Appellant's motions for summary reversal, vacatur, and remand placed the merits of this appeal before the court. Because the appropriate disposition is so clear, summary action is warranted. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in denying appellant's motion for relief under Federal Rule of Civil Procedure 60(b). See Smalls v. United States, 471 F.3d 186, 191-92 (D.C. Cir. 2006). The Rule 60(b) motion requested that the district court reverse its prior determination that it lacked subject matter jurisdiction, reinstate the complaint, and transfer it to another court because that was the disposition of a subsequent civil complaint filed by appellant. Because the jurisdictional question had already been decided in the current case, the district court correctly determined it lacked authority to grant such relief, which would be contrary to the mandate issued by this court. See Role Models America, Inc. v. Geren, 514 F.3d 1308, 1311 (D.C. Cir. 2008); Indep. Petroleum Ass'n of Am. v. Babbitt, 235 F.3d 588, 597 (D.C. Cir. 2001) (The mandate rule is a "more powerful version of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case.") (internal quotation marks omitted). It is

FURTHER ORDERED that the motion to dispense with the appendix be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3005 **September Term 2010**

1:03-cr-00550-JDB-1

Filed On: October 1, 2010

United States of America,

Appellee

v.

Robert Nicholas Spadaro,

Appellant

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the response, which includes a request that this court overrule the district court's ruling denying appellant's application for a certificate of appealability ("COA") and remand this case to the district court for an evidentiary hearing, it is

ORDERED that the motion to dismiss be granted. When the district court denies a habeas motion on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue only when the petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). A COA is not warranted for the claims that appellant was not competent to assist in preparing his defense and that he received an incomplete competency evaluation, because the district court correctly concluded that appellant had procedurally defaulted these claims by failing to raise them on direct review. See Bousley v. United States, 523 U.S. 614, 622 (1998). Furthermore, appellant cannot raise these procedurally defaulted claims in habeas because he has not demonstrated either "cause and actual prejudice," or that he is "actually innocent." See id. Additionally, because appellant did not seek in the district court a COA on the issue whether his counsel was ineffective, and because the district court did not grant a COA on that issue, it is not properly before this court. See United States v. Goodwin, 594 F.3d 1, 7 (D.C. Cir. 2010).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3005 **September Term 2010**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1200 **September Term 2010**

NLRB-2CA38512

Filed On: September 29, 2010

The New York and Presbyterian Hospital,
Petitioner

v.

National Labor Relations Board,
Respondent

Consolidated with 09-1210

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for remand, the opposition thereto, and the reply; the motion to dismiss filed on July 26, 2010, and the opposition thereto; and the motion to dismiss filed on August 18, 2010, it is

ORDERED that the motion to dismiss filed on August 18, 2010, be granted in light of the National Labor Relations Board's withdrawal of its order issued on April 29, 2009. See 29 U.S.C. § 160(d). It is

FURTHER ORDERED that the remaining motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1235 **September Term 2010**

NLRB-12CA26377

Filed On: September 29, 2010

Contemporary Cars, Inc., doing business as Mercedes-Benz of Orlando,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 09-1248

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal and the opposition thereto, the motion for remand, and the motion to dismiss, it is

ORDERED that the motion to dismiss be granted in light of the National Labor Relations Board's withdrawal of its order issued on August 28, 2009. See 29 U.S.C. § 160(d). It is

FURTHER ORDERED that the remaining motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5127 **September Term 2010**

06cv00217

Filed On: September 27, 2010

Free Enterprise Fund and Beckstead and Watts, LLP,

Appellants

v.

Public Company Accounting Oversight Board, et al.,

Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

It is, on the court's own motion,

ORDERED that the judgment filed August 28, 2008, be vacated. It is

FURTHER ORDERED that in light of the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 130 S. Ct. 3138 (2010), affirming in part, reversing in part, and remanding the case for further proceedings consistent with its opinion, that this case be remanded to the district court for further proceedings consistent with the Supreme Court's opinion.

The Clerk is directed to transmit forthwith to the United States District Court for the District of Columbia a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5013 **September Term 2010**

1:07-cv-01599-RBW

Filed On: September 23, 2010

Martin Wiesner,

Appellant

v.

Federal Bureau of Investigation and Central Intelligence Agency,

Appellees

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant responded to the joint motion for summary affirmance by addressing only one issue, the adequacy of the CIA's search. Appellant's doubts about a second, more expansive search do not rebut the presumption of good faith to be accorded the CIA's declaration. See Chambers v. U.S. Dep't of the Interior, 568 F.3d 998, 1003 (D.C. Cir. 2009) (citation omitted) (substantial weight traditionally accorded agency affidavits in FOIA "adequacy of search" cases). Furthermore, because appellant failed to address the other issues raised by appellees, the court will treat those issues as conceded. See U.S. v. Reeves, 586 F.3d 20, 25 (D.C. Cir. 2009), citing Doe v. District of Columbia, 93 F.3d 861, 875 n.14 (D.C. Cir. 1996) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5013 **September Term 2010**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1021 **September Term 2009**

FCC-10-5
FCC-10-54

Filed On: August 30, 2010

Paging Systems, Inc.,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss case for lack of standing, the opposition thereto, and the reply; and the motion to consolidate cases, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. In the decision on appeal, the Commission confirmed that, even without the express condition appellant seeks, the parties to the license assignment agreement at issue bear the risk that the Commission may revoke its consent to the assignment in the future. Moreover, the Commission has represented on appeal that the Commission's decision has the same practical effect as including appellant's proposed condition. See March 31, 2010 Motion to Dismiss at 14. Appellant's concern that the lack of an express condition would limit the Commission's ability to award relief if appellant prevails in its auction challenges is therefore too speculative to support standing. See In re Navy Chaplaincy, 534 F.3d 756, 760 (D.C. Cir. 2008) (To have standing, a litigant must suffer an injury that is "'actual and imminent' rather than remote, speculative, conjectural or hypothetical." (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5044 **September Term 2009**

1:06-cv-01002-EGS

Filed On: August 10, 2010

Arthur L. Davis,

Appellant

Jimmie Gilbert,

Appellee

James D. Moses, for themselves and all others similarly situated,

Appellant

v.

Gene Dodaro, Comptroller General of the United States Government Accountability Office (GAO) and Mary E. Leary, Chair, The Personnel Appeals Board of the GAO,

Appellees

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; and the motion for summary reversal and for remand, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal and remand be denied. The merits of the parties' positions are so clear as to warrant summary affirmance. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellants failed to address any of the arguments made by appellees in their motion for summary affirmance. See U.S. v. Reeves, 586 F.3d 20, 25 (D.C. Cir. 2009), citing Doe v. District of Columbia, 93 F.3d

861, 875 n.14 (D.C. Cir. 1996) (per curiam) (argument not raised on appeal is waived). Appellants also forfeited the arguments upon which they rely to summarily reverse and remand, because they did not first present those arguments to the district court. See Baptist Memorial Hospital v. Sebelius, 603 F.3d 57, 53 (D.C. Cir. 2010), citing Adams v. Rice, 531 F.3d 936, 945 (D.C. Cir. 2008) (refusing to consider argument never made in district court).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5389 **September Term 2009**

1:05-cv-00819-RWR

Filed On: August 9, 2010

Morris J. Peavey,

Appellant

v.

Eric H. Holder, Jr., U.S. Attorney General, et al.,

Appellees

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal, styled as a "petition for writ of mandamus," the motion for leave to file an abbreviated appendix to the motion for summary reversal, and the lodged appendix; the motion for leave to file a corrected affidavit in support of the motion for leave to file an abbreviated appendix and the lodged corrected affidavit; the motion to extend time to file a motion for summary affirmance, the opposition thereto, the lodged motion for summary affirmance, and the lodged opposition thereto; and the motion to enjoin the Secretary of the Army, it is

ORDERED that the motions for leave to file be granted. The Clerk is directed to file the lodged appendix and corrected affidavit. It is

FURTHER ORDERED that the motion to extend time be granted. The Clerk is directed to file the lodged motion for summary affirmance and the lodged opposition. It is

FURTHER ORDERED that the motion to enjoin the Secretary of the Army be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5389 **September Term 2009**

F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not demonstrated that any agency "improperly withheld" a record within its possession at the time appellant made a request under the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552(a)(4)(B); see SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991). FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980). The district court correctly concluded that the agencies conducted searches reasonably calculated to uncover all relevant documents. See Steinberg v. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994). The district court also correctly held that 38 U.S.C. § 511 precluded it from reviewing any decision by the Secretary of Veterans Affairs on a claim for veterans' benefits, see Price v. United States, 228 F.3d 420, 421 (D.C. Cir. 2000), and properly rejected appellant's challenge to the constitutionality of that provision. Finally, because the defendants timely filed a motion to dismiss appellant's complaint, the district court properly denied appellant's motion for default judgment. See also Fed. R. Civ. P. 55(d).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5176 **September Term, 2009**

FILED ON: AUGUST 6, 2010

MICHAEL BOARDLEY,
APPELLANT

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cv-01986)

Before: SENTELLE, *Chief Judge*, BROWN and KAVANAUGH, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby reversed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: August 6, 2010

Opinion for the court filed by Circuit Judge Brown.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5111 **September Term 2009**

1:09-cv-00116-RJL

Filed On: August 6, 2010

Donald Jeffries Hatch,

Appellant

v.

Brian R. Jett,

Appellee

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the appellant's brief, filed June 1, 2010, construed as including a request for a certificate of appealability; and the motion for an extension of time to file additional pleadings, it is

ORDERED, on the court's own motion, that the district court's order, issued March 4, 2009, denying the petition for a writ of habeas corpus, be reversed and the case remanded to the district court for further proceedings consistent with this court's opinion in Williams v. Martinez, 586 F.3d 995 (D.C. Cir. 2009). It is

FURTHER ORDERED that the motion for an extension of time be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3055 **September Term 2009**

1:04-cr-00353-ESH-1

Filed On: August 6, 2010

In re: Ralph J. Prepetit,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to file a second or successive motion under 28 U.S.C. § 2255, the supplement thereto, the opposition to the motion for leave to file a second or successive motion under 28 U.S.C. § 2255, the reply, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for leave to file a second or successive motion under 28 U.S.C. § 2255 be denied. Petitioner's § 2255 motion is not based on newly discovered evidence or on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, as required under § 2255.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1067 **September Term 2009**

ISN-766

Filed On: August 4, 2010

In re: Omar Khadr,

Petitioner

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and writ of prohibition, the motion for a stay of the military commission proceedings pending consideration of the petition, the combined opposition to the petition and motion for a stay, and the reply, consideration of which had been deferred by a prior panel in light of the uncertainty of a trial date; the motion to amend the petition for a writ of mandamus and writ of prohibition, and the lodged amended petition for a writ of mandamus and writ of prohibition, it is

ORDERED that the motion to amend the petition be granted. The Clerk is directed to file the lodged amended petition. It is

FURTHER ORDERED that the amended petition for a writ of mandamus and writ of prohibition be denied. Petitioner has an adequate alternative to seeking a writ of mandamus, because he may challenge the constitutionality of the Military Commissions Act on appeal after a final judgment. In addition, he has failed to demonstrate that his right to the relief requested is "clear and indisputable." See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); In re: GTE Service Corp., 762 F.2d 1024, 1026-27 (D.C. Cir. 1985). It is

FURTHER ORDERED that the motion for a stay of the military commission proceedings pending consideration of the petition be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5350 **September Term 2009**

1:05-cv-02349-RMC

Filed On: July 29, 2010

Ahmed Ben Bacha, Detainee, ISN 290, and Salah Belbacha, as next friend of Ahmed Ben Bacha,

Appellees

v.

Tom Copeman, Army Brig. Gen. - Commander, Joint Task Force - GTMO, et al.,

Appellants

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellants' motion to vacate and remand; appellees' motions to hold in abeyance, the supplement thereto, the oppositions, and the reply; and appellants' motion to dismiss the appeal as moot, the opposition thereto, and the reply, it is

ORDERED that the motions to hold in abeyance be dismissed as moot in light of the Supreme Court's order denying the petition for writ of certiorari in Kiyemba v. Obama, No. 09-581 (U.S. Mar. 22, 2010), and this court's order dissolving the preliminary injunction in Mohammed v. Obama, No. 10-5218 (D.C. Cir. July 8, 2010). It is

FURTHER ORDERED that the appeal be dismissed as moot in light of the district court's order entered February 4, 2010, vacating the injunction barring appellee Ahmed Ben Bacha's transfer to Algeria, and the district court's order entered April 19, 2010, denying the motion for reconsideration of the February 4 order. It is

FURTHER ORDERED that the motion to vacate and remand be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1061 **September Term 2009**

FERC-RM08-7-000

Filed On: July 28, 2010

NRG Power Marketing, LLC and Louisiana Generating LLC,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

North American Electric Reliability Corporation,
Intervenor

BEFORE: Rogers, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, or in the alternative, to hold in abeyance, the opposition thereto, and the reply; and the motion to suspend the requirement to file the certified index to the record, it is

ORDERED that the motion to dismiss be granted. The Federal Energy Regulatory Commission's orders challenged in this case are not ripe for judicial review. See Toca Producers v. FERC, 411 F.3d 262, 265–66 (D.C. Cir. 2005); Friends of Keeseville, Inc. v. FERC, 859 F.2d 230, 235–37 (D.C. Cir. 1988). It is

FURTHER ORDERED that the motion to suspend the requirement to file the certified index to the record be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

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No. 10-1061 **September Term 2009**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
MaryAnne Lister
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3138 **September Term, 2009**

FILED ON: JULY 27, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

KHALED MOHAMED SHABBAN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 06cr00290-01)

Before: GARLAND and KAVANAUGH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the case is hereby remanded for an evidentiary hearing to determine whether appellant was denied effective assistance of counsel, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: July 27, 2010

Opinion for the court filed by Circuit Judge Garland.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5073 **September Term 2009**

1:03-cv-02422
1:03-cv-02422-RMC

Filed On: July 27, 2010

In re: Mar-Jac Poultry, Inc.,

Petitioner

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus; the motion for expedited consideration, and the opposition thereto; the petitioner's motion for leave to supplement the public appendix, and the response thereto; and the respondents' motion for leave to supplement the appendix, it is

ORDERED that the motions for leave to supplement the appendix be granted. The Clerk is directed to file the lodged supplements. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. In light of the recent developments in district court, petitioner has failed to demonstrate that its right to the relief requested is "clear and indisputable." See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). It is

FURTHER ORDERED that the motion for expedited consideration be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7035 **September Term 2009**

1:03-cv-02422-RMC

Filed On: July 27, 2010

Mar-Jac Poultry, Inc.,

Appellant

v.

Rita Katz, also known as Sarah, also known as Terrorist Hunter, et al.,

Appellees

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction, the opposition thereto, and the reply; the motion for expedited consideration, and the opposition thereto; the appellant's motion for leave to supplement the public appendix, and the response thereto; and the appellees' motion for leave to supplement the appendix, it is

ORDERED that the motions for leave to supplement the appendix be granted. The Clerk is directed to file the lodged supplements. It is

FURTHER ORDERED that the motion to dismiss be granted. In light of the recent developments in district court, the stay at issue is not so indefinite as to be the practical equivalent of a final order. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Group, 460 U.S. 1, 10 (1983); Dellinger v. Mitchell, 442 F.2d 782, 789-90 (D.C. Cir. 1971). Appellant has also failed to identify an important issue warranting immediate review under the collateral order doctrine, because the disputed question – whether the case can proceed without the testimony of a witness invoking his Fifth Amendment privilege – has become moot. See Will v. Hallock, 546 U.S. 345, 349 (2006). It is

FURTHER ORDERED that the motion for expedited consideration be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7035 **September Term 2009**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1208 **September Term, 2009**

FILED ON: JULY 23, 2010

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION, ET AL.,
INTERVENORS

Consolidated with 07-1216, 07-1217, 07-1513, 08-1298, 08-1311

On Petitions for Review of Orders
of the Federal Energy Regulatory Commission

Before: BROWN, GRIFFITH and KAVANAUGH, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the petitions for review of orders f the Federal Energy Regulatory Commission and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petitions for review are denied, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: July 23, 2010

Opinion Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1208 **September Term, 2009**

FILED ON: JULY 23, 2010

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION, ET AL.,
INTERVENORS

Consolidated with 07-1216, 07-1217, 07-1513, 08-1298, 08-1311

On Petitions for Review of Orders
of the Federal Energy Regulatory Commission

Before: BROWN, GRIFFITH and KAVANAUGH, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the petitions for review of orders f the Federal Energy Regulatory Commission and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petitions for review are denied, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: July 23, 2010

Opinion Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1294 **September Term 2009**

ISN-1045

Filed On: July 23, 2010

In re: Mohammed Kamin,

Petitioner

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petitioner's unopposed motion to dismiss the case without prejudice, it is

ORDERED that the motion be granted, and this case is hereby dismissed without prejudice.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7042 **September Term, 2009**

FILED ON: JULY 9, 2010

PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION,
APPELLEE

v.

DISTRICT OF COLUMBIA AND ADRIAN FENTY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE DISTRICT OF COLUMBIA,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:04-cv-01082-RMU)

Before: GINSBURG, BROWN, and KAVANAUGH, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part, and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: July 9, 2010

Opinion for the court filed by Circuit Judge Ginsburg.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5218 **September Term 2009**

1:05-cv-01347-GK

Filed On: July 8, 2010

Farhi Saeed Bin Mohammed, Detainee, Guantanamo Bay Naval Station and Moazzam Begg, as next friend of Farhi Saeed bin Mohammed,

Appellees

UNDER SEAL

v.

Barack Obama, et al.,

Appellants

BEFORE: Tatel,* Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the emergency motion for expedited summary reversal, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The preliminary injunction entered June 29, 2010, in Civil Action No. 05-1347 (D.D.C.), is hereby dissolved. The district court had enjoined the government from transferring Farhi Saeed Bin Mohammed to Algeria in light of his allegations that he would be tortured there by the Algerian government and by non-state actors. Under Kiyemba v. Obama ("Kiyemba II"), however, the district court may not prevent the transfer of a Guantanamo detainee when the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country. 561 F.3d 509, 516 (D.C. Cir. 2009); see Munaf v. Geren, 128 S. Ct. 2207, 2226 (2008).

The government's representations in this case satisfy that standard. The government avers that it evaluated "all information that is in any way relevant to whether a detainee is more likely than not to be tortured in the receiving country," Emergency Mot. at 14, "including submissions [the government had] received to date from counsel representing the detainee," Fried Decl. ¶ 3, July 9, 2009 [hereinafter July Fried Decl.]; see also id. ¶ 6; Fried Decl. ¶¶ 4, 7–8, Nov. 25, 2009, and has determined that, in the face of the allegations made by Mohammed, his transfer complies with "the policy that the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured." July Fried Decl. ¶ 2. It is

FURTHER ORDERED, on the court's own motion, that the preliminary injunction entered June 29, 2010, in Civil Action No. 05-1347 (D.D.C.), remain in effect until issuance of the mandate herein.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5218 **September Term 2009**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate at 4:00 p.m., Wednesday, July 14, 2010.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk

* Circuit Judge Tatel would deny in part the motion for summary reversal for the reasons set forth in the attached statement, entered under seal.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5218 **September Term 2009**

UNDER SEAL

TATEL, *Circuit Judge*, concurring in part and dissenting in part:

The United States captured Fahri Saeed bin Mohammed in Pakistan in 2002 and has detained him at Guantanamo Bay ever since. In November 2009, the U.S. District Court for the District of Columbia found Mohammed's detention unlawful and granted his petition for a writ of habeas corpus. Although pursuant to its inherent remedial powers the district court possesses authority to ensure Mohammed's safe release, *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 ("[W]hen the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority . . . to formulate and issue appropriate orders for relief . . . ."), the government argues that *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009), precludes the district court or this court from second-guessing the Executive's determination that Mohammed faces no harm in Algeria, where the government intends to release him.

In *Kiyemba II* we held that "the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee." *Id.* at 514 (citing *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008)). The district court's injunction therefore cannot stand to the extent that it rests on Mohammed's fear of torture from the Algerian government or on the court's desire to question Ambassador Fried about his declarations.

In an allegation that the district court credited, however, Mohammed also claims that he will be targeted by non-governmental actors—armed Islamic militants unaffiliated with the Algerian government—if the United States sends him to Algeria. Even if the logic of *Kiyemba II* requires deference to the government's evaluation of threats from non-governmental entities, that decision still requires evidence of a governmental policy not to transfer a detainee where such harm is likely. Notwithstanding several rounds of briefing by Mohammed raising the issue, however, the government has never said in its declarations whether, as a matter of policy, it even considers threats from non-governmental entities—or whether it receives assurances from the recipient government regarding its ability to protect the detainee from such threats—when making transfer decisions. Pointing out that Ambassador Fried's declarations refer to United States policy against transferring "individuals to countries where it has determined that they are more likely than not to be tortured," Fried Decl. ¶ 3, Nov. 25, 2009**,** and stating that it has evaluated "all information that is in any way relevant" to that policy, Emergency Mot. at 14, the government suggests that this policy necessarily considers the likelihood of torture by non-governmental entities. But the declarations focus exclusively on "whether the *foreign government* concerned will treat the detainee humanely," and on whether "the *Government of Algeria* has treated any of these individuals in a manner inconsistent with its obligations under the Convention Against Torture." Fried Decl. ¶ 4, Nov. 25, 2009 (emphasis added); Fried Decl. ¶ 3, July 9, 2009 (emphasis added). In my view, then, the declarations fail to show that the

government has specifically considered the likelihood of torture at the hands of non-governmental actors. If the government has in fact done so, all it needs to do is clearly say so in its declaration. To be sure, *Kiyemba II* prohibits courts from second-guessing government declarations regarding the risk of torture in the recipient country, but nothing in *Kiyemba II* requires courts to guess as to what the government's policy is.

Thus, while I agree with my colleagues that *Kiyemba II* compels us to reverse the district court with respect to Mohammed's allegations of torture by the Algerian government and the court's intention to interrogate Ambassador Fried, I would remand to allow the government an opportunity to submit supplemental declarations as to whether, in deciding it was safe to send Mohammed to Algeria, it considered potential threats posed by non-governmental entities.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7003 **September Term 2009**

1:01-cv-00853-GK-DAR

Filed On: July 7, 2010

Reuven Gilmore, individually, as the Administrator of the estate of Esh Kodesh Gilmore and as natural guardian of plaintiffs Eliana Gilmore and Dror Gilmore, et al.,

Appellants

v.

Palestinian Interim Self-Government Authority, also known as The Palestinian National Authority, also known as Palestinian Authority and The Palestine Liberation Organization,

Appellees

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction, the lodged opposition thereto, and the reply; the motion for an extension of time to file the opposition; the motion for leave to file the opposition late, styled as a motion for leave to file a memorandum of law, the response thereto, and the reply; the motion to treat the motion to dismiss as conceded and the response thereto; the motion for leave to file a surreply and the opposition thereto; the motion for leave to file a new exhibit, the opposition thereto, and the reply; and the motion to consolidate and the response thereto, it is

ORDERED the motion for an extension of time to file the opposition to the motion to dismiss and the motion for leave to file it late be granted. See Fed. R. App. P. 26(b); Fed. R. Civ. P. 6(b). The Clerk is directed to file the lodged opposition. It is

FURTHER ORDERED that the motion to treat the motion to dismiss as conceded be dismissed as moot. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-7003 **September Term 2009**

FURTHER ORDERED that the motion for leave to file a surreply be denied. It is

FURTHER ORDERED that the motion for leave to file a new exhibit be granted. It is

FURTHER ORDERED that the motion to dismiss for lack of jurisdiction be granted. The appellants have not demonstrated that the order is likely to be effectively unreviewable on appeal from a final judgment. See Will v. Hallock, 546 U.S. 345, 349 (2006) (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)); Pigford v. Veneman, 369 F.3d 545, 547-48 (D.C. Cir. 2004) (holding that the appellant must demonstrate he will likely be unable to recover the relief sought if successful on appeal after a final judgment). It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7155 **September Term 2009**

1:09-cv-01751-ESH

Filed On: July 6, 2010

In the Matter of: Darryl Rose,

Andre Pianski Barber,

Appellant

v.

Cynthia A. Niklas and Darryl Rose,

Appellees

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the suggestion of substitution of parties; and the motion for summary reversal (styled as a motion for summary disposition), the response thereto, and the reply, it is

ORDERED that the suggestion of substitution of parties be granted. The Clerk is directed to substitute counsel Andre P. Barber as appellant, in place of Darryl Rose. It is

FURTHER ORDERED that the motion for summary reversal be denied and, on the court's own motion, that the district court's orders filed October 20, 2009, and November 17, 2009, be summarily affirmed. Appellant's filing of a motion for summary reversal placed the merits of this appeal before the court. Because the appropriate disposition is so clear, summary action is warranted. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court did not abuse its discretion in affirming the bankruptcy court's imposition of a $750 sanction against appellant for violating Fed. R. Bankr. P. 9011(b). See Burns v. George Basilikas Trust, 599 F.3d 673, 677 (D.C. Cir. 2010) (sanctions for

violations of Rule 9011(b), like sanctions for violations of Fed. R. Civ. P. 11(b), are reviewable for abuse of discretion). Nor did the district court abuse its discretion in denying reconsideration of that affirmance order. See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (Rule 59(e) denial reviewed for abuse of discretion). Appellant was given sufficient notice of the basis for the bankruptcy court's sanctions and was adequately apprised, in advance of the award, of the specific conduct warranting sanctions. Appellant's client was undeniably ineligible for chapter 13 debtor status, and Rule 9011(c) sanctions were appropriate.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5088 **September Term 2009**

1:01-cv-00853-GK-DAR

Filed On: July 6, 2010

In re: Reuven Gilmore, et al.,

Petitioners

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus; the motion for leave to file a new exhibit; and the motion to consolidate and the response thereto, it is

ORDERED that the motion for leave to file a new exhibit be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioners have not demonstrated that they have no other adequate means to obtain the relief requested. See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5094 **September Term 2009**

1:10-cv-00517-RMC
1:10-cv-00521-RMC

Filed On: July 6, 2010

Apotex, Inc.,

Appellant

Roxane Laboratories, Inc., Civil Action No. 10-521,

Appellee

v.

Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services, et al.,

Appellees

No. 10-5108

Roxane Laboratories, Inc.,

Appellant

v.

United States Food and Drug Administration, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

These consolidated appeals were considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5094 **September Term 2009**

ORDERED AND ADJUDGED that the district court's order filed April 2, 2010, denying motions for a preliminary injunction, be affirmed. For a preliminary injunction to issue "a litigant must show '(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.'" Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (quoting CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)).

The district court correctly concluded that appellants failed to show a substantial likelihood of success on the merits. When the Hatch-Waxman Act's forfeiture provisions are viewed in the context of the statute's incentive structure, it becomes clear that Congress could not have intended a brand manufacturer's unilateral decision to cause the premature expiration of a patent (in the face of a generic applicant's challenge to the patent in a paragraph IV certification) to strip the first generic applicant of the 180-day period of marketing exclusivity granted by the statute. See Teva Pharms. USA, Inc. v. Sebelius, 595 F.3d 1303, 1317–18 (D.C. Cir. 2010). We will thus affirm the district court's decision to deny appellants' motions for a preliminary injunction. See Apotex, Inc. v. FDA, 449 F.3d 1249, 1253–54 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5094 **September Term 2009**

1:10-cv-00517-RMC
1:10-cv-00521-RMC

Filed On: July 6, 2010

Apotex, Inc.,

Appellant

Roxane Laboratories, Inc., Civil Action No. 10-521,

Appellee

v.

Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services, et al.,

Appellees

No. 10-5108

Roxane Laboratories, Inc.,

Appellant

v.

United States Food and Drug Administration, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

These consolidated appeals were considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5094 **September Term 2009**

ORDERED AND ADJUDGED that the district court's order filed April 2, 2010, denying motions for a preliminary injunction, be affirmed. For a preliminary injunction to issue "a litigant must show '(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.'" Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (quoting CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)).

The district court correctly concluded that appellants failed to show a substantial likelihood of success on the merits. When the Hatch-Waxman Act's forfeiture provisions are viewed in the context of the statute's incentive structure, it becomes clear that Congress could not have intended a brand manufacturer's unilateral decision to cause the premature expiration of a patent (in the face of a generic applicant's challenge to the patent in a paragraph IV certification) to strip the first generic applicant of the 180-day period of marketing exclusivity granted by the statute. See Teva Pharms. USA, Inc. v. Sebelius, 595 F.3d 1303, 1317–18 (D.C. Cir. 2010). We will thus affirm the district court's decision to deny appellants' motions for a preliminary injunction. See Apotex, Inc. v. FDA, 449 F.3d 1249, 1253–54 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3074 **September Term 2009**

1:06-cr-00182-JR-1

Filed On: July 1, 2010

United States of America,

Appellee

v.

Darryl M. Woodfork, also known as D,

Appellant

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to withdraw as counsel pursuant to Anders v. California, the confidential brief in support thereof, and the supplemental brief; and appellant's response to the motion, which contained a request for the appointment of new counsel, it is

ORDERED that the motion to withdraw be granted. See Anders v. California, 386 U.S. 738 (1967). It is

FURTHER ORDERED that the motion for appointment of new counsel be denied. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed. An independent review of the record indicates there are no meritorious issues for appeal. See Anders, 386 U.S. at 744.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3031 **September Term 2009**

Filed On: June 30, 2010

In re: James Burney,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of habeas corpus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the petition for writ of habeas corpus and motion for leave to proceed in forma pauperis be transferred to the United States District Court for the District of Columbia, which has jurisdiction over petitioner's custodian. See Fed. R. App. P. 22(a); Rumsfeld v. Padilla, 542 U.S. 426 (2004). The transfer is without prejudice to the district court determining whether it has jurisdiction to consider the case.

The Clerk is directed to transmit the original file and a certified copy of this order to the United States District Court for the District of Columbia.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3062 **September Term, 2009**
FILED ON: JUNE 29, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

CHARLES E. COUGHLIN,
APPELLANT

Consolidated with 09-3063

Appeals from the United States District Court
for the District of Columbia
(No. 1:08-cr-00334-HHK-1)

Before: TATEL, GARLAND and KAVANAUGH, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes be reversed as to the denial of Coughlin's double jeopardy motion with respect to Counts One and Four, and the district court is hereby directed to dismiss those counts; and the judgment of the district court be affirmed as to Counts Six and Seven and the case be remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: June 29, 2010

Opinion for the court filed by Circuit Judge Garland.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3041 **September Term 2009**

1:00-cr-00204-01

Filed On: June 25, 2010

In re: Jairo Mota-Vargas,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis; it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be dismissed as moot to the extent appellant seeks to compel the district court to rule on the claims raised in his 28 U.S.C. § 2255 motion that his guilty plea was involuntary and that his counsel was ineffective for failing to file a motion to dismiss the indictment on double jeopardy grounds. On April 30, 2010, the district court ruled on the motion and denied these two claims. No. 00-cr-204 (D.D.C. Order, filed April 30, 2010). It is

FURTHER ORDERED that the petition for a writ of mandamus be denied to the extent appellant seeks to compel the district court to rule on his remaining ineffective assistance of counsel claim. The district court has scheduled an evidentiary hearing on this claim, see id., and any delay is not so egregious or unreasonable as to warrant the extraordinary remedy of mandamus, see Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); cf. Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5200 **September Term 2009**

1:05-cv-01347-GK

Filed On: June 25, 2010

Farhi Saeed Bin Mohammed, Detainee, Guantanamo Bay Naval Station and Moazzam Begg, as next friend of Farhi Saeed bin Mohammed,

Appellees

v.

Barack Obama, et al.,

Appellants

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the emergency motion for expedited summary reversal, the oppositions thereto, and the replies, it is

ORDERED, pursuant to this court's authority under the All Writs Act, 28 U.S.C. § 1651, that the district court resolve all outstanding motions in this case by Tuesday, June 29, at 4:00 p.m., in a manner consistent with Munaf v. Geren, 553 U.S. 674 (2008), and Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009) (Kiyemba II). The district court is ordered to do so without requiring further testimony from Special Envoy Fried or any other United States government official. This order does not preclude the parties from voluntarily submitting further briefing or evidence to the district court regarding petitioner's claimed fear of private individuals or private groups in Algeria, which petitioner contends (but the government disputes) distinguishes this case from the binding precedents of Munaf and Kiyemba II. This court states no view at this time on how Munaf and Kiyemba II apply to petitioner's allegation.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Tara Glover
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5033 **September Term 2009**

1:05-cv-00329-PLF

Filed On: June 23, 2010

Younous Chekkouri, also known as Ahmed Abdullah Al-Wazan,

Appellee

v.

Barack Obama, et al.,

Appellants

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of respondent-appellants' motion to vacate the district court's order, the opposition thereto, and the reply; and petitioner-appellee's cross-motion to dismiss the appeal and remand, the response thereto, and the reply, it is

ORDERED that the appeal be dismissed. It is

FURTHER ORDERED that the case be remanded to the district court with instructions to consider the government's request for vacatur of the memorandum opinion and order filed December 3, 2009. See U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) ("a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1292 **September Term 2009**

USTC-6492-06

Filed On: June 21, 2010

LKF X Investments, LLC and LKF X Capital Corporation, Tax Matters Partner,

Appellants

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the parties' motions to govern further proceedings, it is

ORDERED that the Tax Court's August 25, 2009, decision be affirmed in part, reversed in part, and vacated and remanded in part for further proceedings. See Petaluma FX Partners, LLC v. Commissioner, 591 F.3d 649 (D.C. Cir. 2010) (per curiam). The Tax Court's decision that it had jurisdiction to determine whether the partnership at issue in this case should be disregarded for federal tax purposes is affirmed. The decision is reversed insofar as the Tax Court asserted jurisdiction over the outside-basis issues. The decision with respect to penalties is vacated and remanded for further proceedings on that issue.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5064 **September Term 2009**

1:05-cv-01108

Filed On: June 21, 2010

William Avery, Dr.,

Appellant

v.

United States of America,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed February 7, 2008 be affirmed. Appellant does not challenge the court's disposition of his negligence and defamation claims and, even liberally construed, the passages from the complaint cited in his brief do not assert claims for a declaratory judgment or an accounting. See, e.g., Greenhill v. Spellings, 482 F.3d 569, 572-73 (D.C. Cir. 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5152 **September Term 2009**

1:05-cv-0356-EGS

Filed On: June 18, 2010

In re: Akube Wuromoni Ndoromo,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The district court's delay in ruling on petitioner's pending motion is not so egregious or unreasonable as to warrant the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); cf. Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984). We are confident that the district court will act upon the pending motion as promptly as its docket permits.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3050 **September Term 2009**

1:08-cr-00162-HHK-1

Filed On: June 18, 2010

United States of America,

Appellee

v.

Nicholas Proctor,

Appellant

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the unopposed motion to vacate judgment and remand for dismissal of the indictment, it is

ORDERED that the motion be granted, and that the judgment of conviction be vacated and the case remanded for dismissal of the indictment against appellant.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith a certified copy of this order to the district court in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3021 **September Term 2009**

1:04-cr-00273-RBW-1

Filed On: June 17, 2010

United States of America,

Appellee

v.

William L. Lawson,

Appellant

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which requests recusal of the district judge; and the government's motion to remand, the opposition thereto, which includes a motion to strike, and the reply and opposition to the motion to strike, it is

ORDERED that the motion to strike be denied. It is

FURTHER ORDERED that the motion to remand for resentencing be granted, and the request for recusal be denied. The government concedes the district court erred when it declined to allow appellant to allocute at the proceedings that occurred after the prior remand. The government also concedes that, due to a retroactive amendment to Section 2D1.1 of the Sentencing Guidelines, see U.S.S.G. app. C, amend. 706 and 711 (Nov. 1, 2007), appellant is entitled to a remand in order to request a two-point reduction in his Sentencing Guidelines range calculation. Recusal of the district judge is not warranted because adverse judicial rulings by themselves rarely establish a valid basis for claiming bias, and appellant provides no other basis for questioning the impartiality of the district judge. See 28 U.S.C. § 455; Liteky v. United States, 510 U.S. 540, 555 (1994). The remaining issues in appellant's brief may be raised on remand.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3021 **September Term 2009**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3021 **September Term 2010**

1:04-cr-00273-RBW-1

Filed On: October 19, 2010

United States of America,

Appellee

v.

William L. Lawson,

Appellant

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED that the petition for rehearing be denied. It is

FURTHER ORDERED that the court's order filed June 17, 2010, denying the motion to strike and granting the motion to remand for resentencing, be amended to reflect that the court was denying a request for reassignment to a different judge rather than a request for recusal. The Clerk is directed to issue an amended order setting out the court's rationale for denying reassignment.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7160 **September Term 2009**

1:08-cv-02210-RBW

Filed On: June 16, 2010

Conchita McDowell Bonner, et al.,

Appellants

v.

District of Columbia, et al.,

Appellees

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance and the opposition thereto; the motion to strike the district court's order, which the court construes as a motion for summary reversal, and the opposition thereto; and the motion to strike the motions for summary affirmance and the opposition thereto, it is

ORDERED that the motion to strike the motions for summary affirmance be denied. The motions for summary affirmance were filed on February 25, 2010, the deadline established in the January 11, 2010, initial submissions order issued by the Clerk's Office. It is

FURTHER ORDERED that the motions for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Because appellants failed to show excusable neglect, the district court did not abuse its discretion in denying appellant's motion for reconsideration. See Fox v. American Airlines, Inc., 389 F.3d 1291, 1294-96 (D.C. Cir. 2004). Moreover, appellants did not show that the district court judge manifested a deep-seated favoritism or antagonism that would have rendered a fair judgment impossible. See Liteky v. United States, 510 U.S. 540, 555 (1994).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-3051 **September Term 2009**

1:04-cr-00114-RBW

Filed On: June 11, 2010

In re: Zulma Natazha Chacin de Henriquez, et al.,

Petitioners

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and appendix of exhibits, the opposition thereto, and the reply; and respondent's motion for leave to file a supplemental opposition to the petition under seal and ex parte, the lodged ex parte supplemental opposition, and the opposition to the motion, it is

ORDERED that the motion for leave to file be granted. The Clerk is directed to file under seal the lodged ex parte supplemental opposition. It is

FURTHER ORDERED that the petition for writ of mandamus be denied without prejudice to renewal. Petitioners seek a writ of mandamus directing the district court to "take up and decide forthwith" their motion to enforce rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771. The court declines to so order in light of ongoing proceedings before the district court with respect to petitioners' motion to enforce rights. The appendix of exhibits contains the district court's order filed April 26, 2010, Crim. No. 04-114 (D.D.C. Doc. 188), attaching a copy of petitioners' motion to enforce rights (which the district court received on April 19, 2010), and directing the United States to show cause why the court should not recognize the movants' status as victims under the Crime Victims' Rights Act and order the government to comply with the Act's provisions. The government has informed this court that its response to the district court's order "is pending" (Public Opp'n at 7-9). Accordingly, based on the public filings in this case, the court has determined that mandamus relief is not warranted at this time. The district court is directed to promptly notify the petitioners of its disposition of their motion.

The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5035 **September Term 2009**

1:05-cv-01220-RMU

Filed On: June 8, 2010

Abu Abdul Rauf Zalita, Detainee and Omar Deghayes, As Next Friend of Abu Abdul Rauf Zalita,

Appellees

v.

Barack Obama, President of the United States, et al.,

Appellants

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the government's unopposed motion to dismiss the appeal as moot, it is

ORDERED that the motion be granted and this appeal be dismissed as moot based on the government's representation that appellee Abu Zalita has been transferred from Guantanamo Bay and is no longer in the custody and control of the United States government.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3085 **September Term, 2009**

FILED ON: JUNE 4, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

CARL I. COLEMAN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cr-00213-JDB-5)

Before: GINSBURG, BROWN, and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the District Court be affirmed.

Appellant Carl Coleman pled guilty to conspiracy to engage in a fraudulent check-cashing scheme. The financial losses caused by the conspiracy totaled more than $1.6 million. At sentencing, the District Court held Coleman jointly and severally liable for restitution not in the full amount of $1.6 million, but instead in the amount of $146,022. The $146,022 amount reflected fraudulent checks cashed by Coleman personally, as well as certain checks deposited in accounts opened in Coleman's name or in the name of his co-conspirator Matthews. In considering the conduct of his co-conspirators for which Coleman could be held responsible, the District Court explicitly acknowledged it needed to identify "the reasonably foreseeable acts in furtherance of jointly undertaken criminal activity." Sentencing Tr. at 31.

In this Court, Coleman argues that the District Court committed reversible error because

it failed to make a finding about the scope of the conspiracy. The Government responds that the law of restitution does not require the Court to make a finding about scope. The Government argues in the alternative that the District Court appropriately made such a finding. We agree with the Government's alternative argument and affirm on that basis.

"[T]here are two substantive limitations on a defendant's responsibility for acts undertaken by co-conspirators: Those acts must be 'in furtherance of' the same conspiracy to which the defendant has agreed, and they must be reasonably foreseeable to the defendant." *United States v. Childress*, 58 F.3d 693, 722 (D.C. Cir. 1995). Both elements are necessary: "The extent of a defendant's vicarious liability under conspiracy law is always determined by the scope of his agreement with his co-conspirators. Mere foreseeability is not enough." *United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994).

After considering the arguments of counsel, the District Court ordered restitution in the amount of $146,022 – "the full amount of the loss that . . . Coleman [was] responsible for." Sentencing Tr. at 41. In so doing, the District Court expressly incorporated the pre-sentencing report's findings about the scope of the conspiracy – that is, about the acts that were in furtherance of the conspiracy.

In sum, the District Court expressly incorporated the pre-sentencing report's findings and ordered an appropriate amount of restitution. We find no reversible error. *See Saro*, 24 F.3d at 288.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7142 **September Term, 2009**

FILED ON: MAY 28, 2010

BRITT A. SHAW, ET AL.,
APPELLANTS

v.

MARRIOTT INTERNATIONAL, INC.,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:05-cv-01138-GK)

Before: SENTELLE, *Chief Judge*, and GRIFFITH and KAVANAUGH, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause that plaintiffs Shaw and Mendelson lack standing to sue in federal court be reversed and remanded to the district court for further proceedings; and the judgment in favor of Marriot be affirmed with respect to the remaining plaintiffs, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: May 28, 2010

Opinion for the court filed by Circuit Judge Griffith.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 2009 Decided May 25, 2010

No. 06-3128

UNITED STATES OF AMERICA,
APPELLEE

v.

GEORGE WILSON, ALSO KNOWN AS SHUG, ALSO KNOWN AS HERMAN WALKER, ALSO KNOWN AS DONNELL MACK,
APPELLANT

Consolidated with 06-3131, 06-3133, 06-3136, 06-3140

Appeals from the United States District Court
for the District of Columbia
(No. 04cr00128-18)

Richard K. Gilbert, *David B. Smith*, *Steven R. Kiersh*, and *Sicilia C. Englert*, appointed by the court, argued the cause for appellants. With them on the briefs were *Michael E. Lawlor* and *Thomas J. Saunders*, appointed by the court. *Kristen G. Hughes*, appointed by the court, entered an appearance.

Stratton C. Strand, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Roy W. McLeese*

III, *Elizabeth Trosman*, *John Dominguez*, and *Darlene Soltys*, Assistant U.S. Attorneys.

Before: SENTELLE, *Chief Judge*, and ROGERS and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: A group known as the M Street Crew operated a massive drug ring in Northeast Washington, D.C. The Crew sold PCP, as well as ecstasy and some crack cocaine. From late 2002 through March 2004, the government conducted an extensive investigation of the M Street Crew's activities. As a result of the investigation, 19 defendants were charged with a variety of federal crimes. In this appeal, five of those defendants challenge their convictions and sentences. They raise numerous claims, some common to all defendants and others specific to one or more defendants. Except for one issue related to defendant Blackson's judgment as to which the government concedes error, we affirm the district court's judgments in their entirety.

I

A

We describe the facts in the light most favorable to the government, as we must in reviewing a jury verdict of guilt. *United States v. Clayborne*, 509 F.2d 473, 475 (D.C. Cir. 1974); *United States v. Alexander*, 331 F.3d 116, 127 (D.C. Cir. 2003). The five appellants in this case are John Franklin, William Robinson, George Wilson, Joseph Blackson, and William Simmons.

In 2002, the FBI and the Metropolitan Police Department of Washington, D.C., initiated an intensive investigation of criminal activity in a four-block area around 18th Street and M Street in Northeast Washington. Officers viewed the neighborhood at the time as "an open air drug market." Mar. 28, 2006 AM Trial Tr. at 95 (Officer Carlton Herndon). The air smelled of PCP, and the area was filled with broken vials. *Id.* at 100; *id.* at 40 (Officer Michael Morawski). Detectives patrolling the area could easily find bottles of PCP hidden along the edges of buildings and walkways. *Id.* at 100 (Officer Carlton Herndon).

During its investigation, the government uncovered a large-scale drug ring. John Franklin had a supplier outside the M Street Crew from whom he bought at least 15 to 20 gallons of PCP between 2002 and 2004. Mar. 14, 2006 AM Trial Tr. at 65 (Herbert Martin). Franklin, in turn, supplied the M Street Crew primarily with liquid PCP and ecstasy pills. Mar. 22, 2006 AM Trial Tr. at 73–74 (Elizabeth Lee); Apr. 19, 2006 PM Trial Tr. at 29–30 (Roberta Moore).

Franklin's routine was generally consistent. He would obtain PCP from his supplier. Then, Franklin's common-law wife, Elizabeth Lee, would rebottle the drug into ounce and half-ounce bottles for Franklin to sell on the street or to lower-level dealers. Mar. 22, 2006 PM Trial Tr. at 7 (Elizabeth Lee). Before selling his now-bottled product, Franklin employed a neighborhood woman, Monica Bell, to "test it out." *Id.* at 40, 43. Bell sampled Franklin's PCP about "three times a week" in exchange for occasional "free dippers," cigarettes soaked in PCP. Apr. 18, 2006 PM Trial Tr. at 82, 86 (Monica Bell).

After testing, Franklin would supply the drugs to the Crew. Often, these drug transactions would occur in person. *See, e.g.*, Apr. 27, 2006 AM Trial Tr. at 85 (Omari Minnis) ("Normally I

might go to him once, twice a week. Get about a ounce, two ounces."). When Franklin was not available, however, he delegated to his lieutenants. *See, e.g.*, Apr. 24, 2006 PM Trial Tr. at 32, 38 (Ronnie Tucker); Aug. 11, 2003 Wiretap Tr. at 2–3; May 2, 2006 AM Trial Tr. at 15 (Michael Abney). Franklin sold PCP to those he supplied in half-ounce bottles for $250 and ecstasy pills in ten-packs for $100. Mar. 22, 2006 AM Trial Tr. at 73–74 (Elizabeth Lee); Apr. 20, 2006 PM Trial Tr. at 28–29 (April Jackson).

Franklin's role was not limited to that of a supplier. At trial, other members of the Crew described Franklin as their "organizer" and "leader." Apr. 24, 2006 AM Trial Tr. at 107 (Ronnie Tucker); May 2, 2006 AM Trial Tr. at 10–12 (Michael Abney). Indeed, members of the Crew brought Franklin in to mediate disputes and to "keep[] M Street in order." May 2, 2006 AM Trial Tr. at 12 (Michael Abney). Even when uninvited, Franklin often played a mediating role between Crew members. *See id.* at 39. When absent from 18th and M, Franklin would check in on the Crew, sometimes giving advice about their selling methods. *See, e.g.*, Sept. 30, 2003 Wiretap Tr. at 2.

Below Franklin in the Crew's hierarchy were his three lieutenants: William Robinson, George Wilson, and Joseph Blackson. May 2, 2006 AM Trial Tr. at 13–15 (Michael Abney). Those men supplied the Crew with PCP in Franklin's absence. *Id.* at 29; Apr. 24, 2006 PM Trial Tr. at 14–15 (Ronnie Tucker). The lieutenants would "take on the situations when John [was] not around as far as money, or drugs or problems that's going on that's involved in the area, keep things intact" so as not to mess up the Crew's "money spot." May 2, 2006 AM Trial Tr. at 15 (Michael Abney). Their job was "to oversee everything for the top man. To make sure everything on the block going the way that he . . . would want it to be and see to it

that its foot soldiers everybody taken care of, everybody straight." May 3, 2006 AM Trial Tr. at 22 (Michael Abney).

William "Dee" Robinson was one of Franklin's closest friends. Mar. 23, 2006 AM Trial Tr. at 22 (Elizabeth Lee). Robinson "would hold bottles" of PCP for Franklin when he was away from 18th and M, Apr. 27, 2006 AM Trial Tr. at 91 (Omari Minnis), and communicated regularly with Franklin about the Crew's drug sales and supply, *see, e.g.*, Apr. 24, 2006 PM Trial Tr. at 66–67 (Ronnie Tucker); Aug. 21, 2003 Wiretap Tr. at 1. On Sundays, which Franklin spent with his family, Robinson was sometimes in charge of the Crew. *See* May 2, 2006 AM Trial Tr. at 28–29 (Michael Abney).

George "Shug" Wilson was like a sibling to Franklin. *Id.* at 35. When Franklin was unavailable, he regularly referred buyers to Wilson, who sold some of the PCP supplied by Franklin. *Id.* at 29; Apr. 24, 2006 PM Trial Tr. at 15 (Ronnie Tucker). Wilson played an enforcement role in the Crew; he defended its preeminence in the 18th and M area from outsiders, sometimes by force. *See* Sept. 27, 2003 Wiretap Tr. at 1–2; Oct. 3, 2003 Wiretap Tr. at 1, 4–6; May 3, 2006 PM Trial Tr. at 34–35 (Robin Tamika Hazel) ("Shug pulled his gun out on him and made him leave. . . . Told him to leave from off his block. This is his block."). Moreover, like Robinson, Wilson was sometimes in charge of the Crew in Franklin's absence. May 2, 2006 AM Trial Tr. at 28–29 (Michael Abney). This authority position was apparent to onlookers; a police officer who regularly patrolled 18th and M initially took Wilson to be "in charge" of the Crew. Mar. 28, 2006 PM Trial Tr. at 11, 13–14 (Officer Carlton Herndon).

Joseph "Joe Black" Blackson, Franklin's younger brother, also distributed PCP in Franklin's absence. In addition, Blackson held drugs for his brother. Apr. 24, 2006 PM Trial Tr.

at 17–18 (Ronnie Tucker). In his dealings with an undercover officer, Blackson equated himself with Franklin, stating that "dealing with John is just as dealing with him." Apr. 4, 2006 PM Trial Tr. at 97 (Officer Donna Leftridge). Blackson was the only one of the lieutenants to be absent from the 18th and M Street area for any length of time during the investigation; he was arrested on July 29, 2003, when police found drugs in the glove compartment of his car. Apr. 12, 2006 PM Trial Tr. at 60–74 (Officer Max Luis Salazar). Blackson was then incarcerated for an indeterminate period of time before returning to 18th and M. *See* Reply Br. at 69; Aug. 31, 2006 Sent. Hg. at 67.

Beneath Franklin's three lieutenants was a class of "foot soldiers" who made individual sales in the 18th and M area. May 2, 2006 AM Trial Tr. at 18–19 (Michael Abney). Although the foot soldiers were numerous, only one foot soldier was tried with Franklin and is party to this appeal. William "Mike" Simmons was Franklin's "loyalest foot soldier." *Id.* at 42. Witnesses variously testified that Simmons was Franklin's "[s]idekick," "runner," "helper," "little man," and "flunky." Apr. 19, 2006 PM Trial Tr. at 44 (Roberta Moore); Apr. 27, 2006 AM Trial Tr. at 88 (Omari Minnis). According to one witness, Simmons would do "[w]hatever [Franklin] told him. Sell bottles to people. If [Franklin] . . . needed anything done, he'd do it." May 2, 2006 AM Trial Tr. at 43 (Michael Abney). One of Simmons' most frequent tasks was to deliver drugs to Franklin or from Franklin to his customers. *See, e.g.*, *id.* at 51–52; Apr. 19, 2006 PM Trial Tr. at 44 (Roberta Moore); Apr. 24, 2006 PM Trial Tr. at 17 (Ronnie Tucker).

B

The M Street Crew displayed cohesion both as a business and as a social unit. As a business, the Crew guarded its

territory, permitting only Crew members to sell within the 18th and M area. Apr. 27, 2006 AM Trial Tr. at 81–82 (Omari Minnis); Apr. 24, 2006 PM Trial Tr. at 22 (Ronnie Tucker) ("We ain't allow nobody to sell drugs around there that wasn't from around there."). The Crew used graffiti to mark its territory. *See, e.g.*, Record Materials for Appellee at 95–105. Moreover, the Crew's monopoly on drug sales within its turf was strictly enforced; if someone from outside the Crew attempted to sell drugs in the Crew's territory, he would "either get hurt real bad or he wouldn't make it home." Apr. 27, 2006 AM Trial Tr. at 82 (Omari Minnis).

Economic order was maintained within the Crew as well. Franklin and the lieutenants imposed a rotational system of drug sales whereby the Crew members would "take turns" selling so that "everybody get[s] a fair share." Apr. 24, 2006 PM Trial Tr. at 5 (Ronnie Tucker). Under this system, each Crew member would be permitted to make a single sale — regardless of the magnitude of the sale — before relinquishing the turf to another Crew member. Apr. 27, 2006 AM Trial Tr. at 80 (Omari Minnis) ("say it was five of us outside, you know, whoever was outside first goes first, come up second, go second. Don't matter how much they wanted or, you know, they wanted eight dippers it's your turn.").

The Crew members also protected their turf and each other from potential threats in the form of police officers and outsiders. When police were in the area, Crew members would alert one another to the potential threat. Mar. 28, 2006 AM Trial Tr. at 41 (Officer Carlton Herndon) ("When I came into the area, either on a bike or a car, they would always give a heads up that I was in the area."); Apr. 24, 2006 PM Trial Tr. at 7 (Ronnie Tucker) ("We warn each other."). Similarly, when outsiders attacked Crew members, the Crew fought back, sometimes exchanging gunfire. *See, e.g.*, Apr. 27, 2006 PM

Trial Tr. at 6–8 (Omari Minnis); May 2, 2006 AM Trial Tr. at 73–80 (Michael Abney).

Finally, the Crew was a cohesive social unit. Crew members socialized together, frequenting local dance clubs. Apr. 6, 2006 AM Trial Tr. at 18–20 (Ricardo Love). Crew members would flash an M-shaped hand signal to one another, signaling their membership in the M Street Crew. *See* Record Materials for Appellee at 122–23, 125. Musicians at the local clubs recognized the group as a defined unit, giving a "shout out" that the M Street Crew was "[i]n the house." Apr. 6, 2006 AM Trial Tr. at 20–21 (Ricardo Love).

C

The massive investigation of the M Street Crew culminated in 39 arrests on March 16, 2004. Mar. 10, 2006 AM Trial Tr. at 45 (Agent Joseph Sopata). Among those arrested and later indicted were Franklin, Robinson, Wilson, Blackson, and Simmons, appellants here. Those five were tried together. After a lengthy trial, the jury convicted each defendant of the bulk of the drug charges leveled against him. The defendants were acquitted of various weapons and violent crime charges.

The jury convicted Franklin of one count of conspiracy to distribute and possess with intent to distribute a controlled substance (Count 1, Judgment of Franklin at 1; Verdict at 1–3); one count of RICO conspiracy (Count 2, Judgment of Franklin at 2; Verdict at 12–13); one count of continuing criminal enterprise (Count 3, Judgment of Franklin at 2; Verdict at 4–11); 16 counts of distribution of and possession with the intent to distribute PCP, half of which occurred within 1,000 feet of a school (Counts 8, 10, 17, 21, 30, 36–37, 41–42, 44, 51, 53, 58, 63, 69, and 77, Judgment of Franklin at 2–3; Verdict at 16–20); three counts of distribution of cocaine base, one of which

occurred within 1,000 feet of a school (Counts 45, 52, and 67, Judgment of Franklin at 2; Verdict at 17–18); five counts of distribution of ecstasy and possession with the intent to distribute ecstasy, two of which occurred within 1,000 feet of a school (Counts 50, 57, 68, and 77–78, Judgment of Franklin at 2–3; Verdict at 17–20); 27 counts of unlawful use of a communication facility (Counts 83–109, Judgment of Franklin at 3; Verdict at 20–23); two counts of use or possession of a firearm during a drug-trafficking offense (Counts 135 and 137, Judgment of Franklin at 3; Verdict at 14–15); and two counts of being a felon in possession of a firearm (Counts 136 and 138, Judgment of Franklin at 3; Verdict at 14–15). Franklin was also acquitted of several of the charges against him, most notably of all murder, assault, and related charges (Counts 2, 129–32, 148–49, and 158–59, Verdict at 12, 14–15). In acquitting Franklin of those charges, the jury found that the RICO conspiracy did not involve murder (Count 2, Verdict at 12).

Franklin's lieutenants were also convicted of both narcotics and RICO conspiracies, as well as of various distribution charges, but acquitted of violent crime charges. Unlike Franklin, none of the lieutenants was charged with leading a continuing criminal enterprise.

Blackson was convicted of one count of conspiracy to distribute and possess with intent to distribute a controlled substance (Count 1, Judgment of Blackson at 1; Verdict at 24–26); one count of RICO conspiracy (Count 2, Judgment of Blackson at 2; Verdict at 26–27); eleven counts of distribution of PCP, most occurring within 1,000 feet of a school (Counts 6, 9–10, 13, 16, 19, 23–24, 27, 33, and 42, Judgment of Blackson at 2; Verdict at 27–29); two counts of possession with intent to distribute ecstasy (Counts 7 and 43, Judgment of Blackson at 2; Verdict at 27, 29); one count of using, carrying, or possessing a firearm during a drug trafficking crime (Count 133, Judgment of

Blackson at 2; Verdict at 27); and one count of possession of a firearm by a convicted felon (Count 134, Judgment of Blackson at 2; Verdict at 27). The jury found that the RICO conspiracy did not involve murder (Count 2, Verdict at 26).

Robinson, similarly, was convicted of one count of conspiracy to distribute and possess with intent to distribute a controlled substance (Count 1, Judgment of Robinson at 1; Verdict at 30–31); one count of RICO conspiracy (Count 2, Judgment of Robinson at 2; Verdict at 32); two counts of PCP distribution, one within 1,000 feet of a school (Counts 36 and 58, Judgment of Robinson at 2; Verdict at 33); one count of possession with the intent to distribute PCP (Count 73, Judgment of Robinson at 2; Verdict at 33); and three counts of unlawful use of a communication facility (Counts 96, 101, and 103, Judgment of Robinson at 2; Verdict at 34). The jury found that the RICO conspiracy did not involve murder (Count 2, Verdict at 32).

Wilson, the third lieutenant, was convicted of one count of conspiracy to distribute and possess with an intent to distribute a controlled substance (Count 1, Judgment of Wilson at 1; Verdict at 41–42); one count of RICO conspiracy (Count 2, Judgment of Wilson at 2; Verdict at 43); and three counts of unlawful use of a communication facility (Counts 104–06, Judgment of Wilson at 2; Verdict at 44). The jury found that the RICO conspiracy did not involve murder (Count 2, Verdict at 43).

Finally, Simmons, the only foot soldier to be tried with Franklin and the lieutenants, was convicted of one count of conspiracy to distribute and possess with intent to distribute a controlled substance (Count 1, Judgment of Simmons at 1; Verdict at 35–36); one count of RICO conspiracy (Count 2, Judgment of Simmons at 2; Verdict at 37); and three counts of

distribution of PCP within 1,000 feet of a school (Counts 8, 10, and 30, Judgment of Simmons at 2; Verdict at 39–40). The jury acquitted Simmons of all murder, assault, and weapons charges (Counts 2, 129–32, 148–49, and 158–59, Verdict at 37–39). In doing so, it found that the RICO conspiracy did not involve murder (Count 2, Verdict at 37).

At sentencing, Franklin, Robinson, and Wilson were all sentenced to life in prison. Judgment of Franklin at 4; Judgment of Robinson at 3; Judgment of Wilson at 3. Blackson was sentenced to a total of 35 years of imprisonment, followed by 10 years of supervised release. Judgment of Blackson at 3–4. Simmons was sentenced to 22 years of imprisonment, followed by five years of supervised release. Judgment of Simmons at 3–4.

D

On appeal, appellants raise eleven discrete challenges to their convictions and sentences.

First, all appellants argue that their cross-examination of the government's key witness, Officer Donna Leftridge, was improperly limited in violation of the Confrontation Clause.

Second, Blackson, Robinson, Simmons, and Wilson contend that they were prejudiced by the district court's improper denial of their motion for severance. They argue that statements made by Franklin's counsel during his opening and closing statements destroyed their ability to receive a fair and impartial trial.

Third, all five appellants assert that the district court erred in its jury instructions concerning the RICO conspiracy charge. Specifically, they argue that the district court erred (1) in not

instructing the jury that a conviction for RICO conspiracy requires a finding that a defendant participated in the operation or management of the enterprise; (2) in not instructing the jury that an "enterprise" must include an element of structure; and (3) in not instructing the jury that continuity is a necessary element of a "pattern of racketeering activity."

Fourth, Simmons contends that the prosecution improperly vouched for witness Roberta Moore. In doing so, Simmons claims, the government improperly invoked the authority of both the government and the court to support Moore's veracity.

Fifth, Simmons argues that the district court abused its discretion in denying his motion to strike testimony about his lifestyle that he deems "extraordinarily prejudicial." Appellants' Br. at 16.

Sixth, Robinson contends that the district court erred in denying him permission to call two lay witnesses who were familiar with drug dealing and with the 18th and M Street area respectively. The district court ruled that the two witnesses' testimony would amount to expert testimony under Rule of Evidence 702. Robinson contends, however, that the two witnesses were qualified to testify as lay witnesses based on their firsthand experience of drug sales and of the 18th and M area.

Seventh, Wilson argues that the district court erred in denying his motion to suppress evidence obtained from a warrantless search of his fiancée's house. Wilson contends that the consent furnished to police by his fiancée was involuntarily procured. He argues that all evidence from the search was obtained unlawfully and should have been suppressed.

Eighth, Franklin claims that the evidence presented at trial was insufficient to support the jury's finding that he engaged in a continuing criminal enterprise. Specifically, he contends that insufficient evidence was presented at trial to prove that he organized, supervised, or managed five or more people.

Ninth, Blackson claims that the district court erred in entering judgment against him for a count of which he was not convicted.

Tenth, Simmons argues that the district court erred both procedurally and substantively in imposing an above-Guidelines sentence on him. Procedurally, he contends first that the district court impermissibly relied on his history of drug abuse in increasing his sentence and, second, that the district court failed to provide him with a written statement of the reasons for the variance. Substantively, he alleges that the district court failed to take into account aspects of his personal history that would have counseled in favor of a lower sentence.

Finally, Robinson, Wilson, and Blackson contend that the district court based their sentences on erroneous factual findings. First, all three appellants claim the district court incorrectly attributed 30 or more kilograms of PCP to each of them. Second, Wilson and Blackson contend that the district court incorrectly imposed a three-level Guideline enhancement for their role in the conspiracy.

II

Appellants contend their rights under the Confrontation Clause of the Sixth Amendment to the Constitution were violated in two respects: (A) when the district court limited cross-examination of undercover police officer Donna Leftridge by failing to order the government to disclose during trial

information it had failed to turn over as required by *Brady v. Maryland*, 373 U.S. 83 (1963), regarding an ongoing investigation of Officer Leftridge; and (B) when the district court prohibited all questioning regarding Officer Leftridge's alleged inappropriate social relationship with appellant John Franklin. Appellants maintain that they were consequently deprived of "all opportunities to impeach Leftridge's credibility." Appellants' Br. at 23.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The Amendment guarantees a defendant the right to cross-examine the witnesses against him or her, and it is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974). The district court must "give a defendant a 'realistic opportunity to ferret out a potential source of bias.'" *United States v. Davis*, 127 F.3d 68, 70 (D.C. Cir. 1997) (quoting *United States v. Derr*, 990 F.2d 1330, 1334 (D.C. Cir. 1993)). "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis v. Alaska*, 415 U.S. at 318). Our review of the district court's legal conclusions regarding the Confrontation Clause is *de novo*. *United States v. Carson*, 455 F.3d 336, 362 (D.C. Cir. 2006).

A

Appellants and their counsel did not learn until March 28, 2006, in the middle of the trial, that Leftridge had been suspended by the Internal Affairs Division ("IAD") of the Metropolitan Police Department ("MPD") due to an ongoing investigation. The day before, on March 27, prosecutors *ex parte* informed the district court that Leftridge had been suspended with pay by IAD due to [REDACTED] Leftridge had confirmed to the prosecutors that she did not know the basis of the investigation. The prosecutors advised the district court that Leftridge was under investigation [REDACTED]

Leftridge was placed on the "*Lewis* List" of MPD officers who are under investigation.[1]

The district court concluded that the nature of the ongoing investigation of Leftridge was of limited relevance to her credibility or any potential bias but directed the prosecutors to disclose her status to defense counsel. The following day, March 28, 2006, the government disclosed to defense counsel, in writing, that: (1) IAD had suspended Leftridge with pay in early December 2005; (2) Leftridge was on the *Lewis* list; (3) Leftridge knew she was under investigation but not why or by whom; and (4) Leftridge was not under investigation by the U.S. Attorney's Office for the District of Columbia. The

[1] *See United States v. (Walter) Bowie*, 198 F.3d 905, 907–08 (D.C. Cir. 1999); *Lewis v. United States*, 408 A.2d 303 (D.C. 1979).

government's disclosure did not mention [REDACTED]

Defense counsel sought additional disclosure pursuant to *Brady*, 373 U.S. 83, and *Giglio v. United States*, 405 U.S. 150 (1972), or, failing that, an *in camera* review by the district court of the evidence supporting the government's limited disclosure. The district court denied the request for additional disclosure, stating it had already conducted an *in camera* review. However, on March 30, 2006, the district court requested confirmation of the *ex parte* information [REDACTED]

In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court held that the withholding of potentially relevant impeachment evidence does not implicate the Confrontation Clause in the sense of "any direct restriction on the scope of cross-examination." *Id.* at 678. Instead, "the constitutional error, if any," involves "the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination." *Id.* This latter duty arises under the Due Process Clause of the Fifth Amendment. *See id.* at 675; *see also Brady*, 373 U.S. at 86. As a plurality explained in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Confrontation Clause did not create "a constitutionally compelled rule of pretrial discovery" of information that might be useful to the defense in preparing for trial. *Id.* at 52. Instead, "the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense

counsel may ask during cross-examination." *Id.* (emphasis in original). This court has adopted the plurality's holding. *United States v. Tarantino*, 846 F.2d 1384, 1415–16 (D.C. Cir. 1988). Based on their access to the *ex parte* information of March 27, 2006 for the first time after filing their opening brief, appellants have added to their Confrontation Clause contention a *Brady* claim regarding the investigation of Leftridge.

The Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Thereafter the Court held that such disclosure is mandatory regardless of whether a defendant requests it, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that impeachment evidence must also be disclosed, *see Bagley*, 473 U.S. at 676; *Giglio*, 405 U.S. at 154. To determine whether there has been a *Brady* violation, courts apply a three-part test. "The evidence at issue must [1] be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must [2] have been suppressed by the [government], either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). For prejudice to have ensued, there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *id.* at 280 (internal quotation marks omitted), i.e., "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see Bagley*, 473 U.S. at 682.

Appellants contend that the district court erred by failing to order the government to make two required disclosures: (1) the subject matter of the investigation of Leftridge and (2)

[REDACTED] This court has held that "to be 'material' under *Brady*, undisclosed information or evidence acquired through that information must be admissible." *Derr*, 990 F.2d at 1336; *see United States v. Johnson*, 592 F.3d 164, 171 (D.C. Cir. 2010); *see also Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam). Our review of the district court's evidentiary rulings is for abuse of discretion. *United States v. Lin*, 101 F.3d 760, 768 (D.C. Cir. 1996).

With regard to non-disclosure of the subject matter of the investigation, the government persuasively maintains that there was no *Brady* violation because the undisclosed information would not have been admissible at trial, and appellants do not maintain that their knowledge of it could have led to admissible evidence. Although the defense might have sought to use the undisclosed information about the subject matter of the investigation to impeach Leftridge pursuant to Federal Rule of Evidence 608(b),[2] the district court would properly have ruled such cross-examination improper because the subject matter of the internal investigation [REDACTED] would not have been probative of Leftridge's truthfulness. Without additional evidence of wrongdoing beyond bald assertions [REDACTED], impeachment would have been

[2] Rule 608(b) provides in relevant part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

based on unproven allegations. As this court stated in *United States v. Morrison*, 98 F.3d 619, 628 (D.C. Cir. 1996), "the mere *filing* of a complaint [against a witness] is not probative of truthfulness or untruthfulness." (emphasis in original) (internal quotation marks omitted).

Additionally, had the defense sought admission of the subject matter of the investigation pursuant to Federal Rule of Evidence 404(b)[3] to show Leftridge's motive or bias, *see generally United States v. Crowder*, 141 F.3d 1202, 1206, 1209–10 (D.C. Cir. 1998) (en banc), it is difficult to understand how the subject matter, rather than the fact of the existence of the investigation, would have assisted in portraying Leftridge as biased. Appellant William Simmons' counsel cross-examined Leftridge about her suspension without pay and the suspension of her police powers as a result of the ongoing investigation, eliciting her admission to the suspension but also her denial of knowledge of the basis for the investigation. Presumably, based upon her suspension, Leftridge could have been motivated to testify falsely against appellants in order to curry favor with the government. But the fact that she was being investigated at all provided that potential motive. Even assuming information about the subject matter of the investigation was probative of bias, the district court would properly have excluded cross-examination pursuant to Rule 403 because "its probative value [wa]s substantially outweighed by the danger of unfair

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[3] Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

prejudice." FED. R. EVID. 403. As the district court concluded, the "prejudice to this officer given the uncertainty of the [allegations] is quite high, the prejudice to her career and her credibility is quite high." Mar. 27, 2006 *Ex Parte* Tr. at 10. That risk of prejudice would have substantially outweighed the minimal probative value of the evidence.

By contrast, the undisclosed information [REDACTED]

would have been admissible pursuant to Rule 404(b) to show motive and bias. *See United States v. (Juan) Bowie*, 232 F.3d 923, 930 (D.C. Cir. 2000). [REDACTED]

On direct examination Leftridge denied she had been told why she was under investigation and why her police powers had been suspended; on cross-examination she acknowledged that she believed she was under investigation by IAD. These statements do not rule out Leftridge's knowledge [REDACTED]

Despite Leftridge's apparent knowledge [REDACTED] , the government disclosed to the defense only that she was suspended by IAD and was "under investigation." Defense counsel understood the disclosure to mean that the investigation was being conducted by IAD only, as evidenced, for example, by defense counsel's cross-examination of Leftridge: "You are being investigated by the internal affairs division of the Metropolitan Police

Department?" Apr. 5, 2006 AM Trial Tr. at 77. Upon obtaining access to sealed materials after filing their opening brief, appellants contended in their reply brief that requiring Leftridge to admit [REDACTED]

would have strengthened their argument to the jury that Leftridge's testimony was biased due to an "incentive to curry favor with the government." Reply Br. at 13–14, 16. This argument is compelling. [REDACTED]

It is true that the government disclosed to the defense that the U.S. Attorney's Office for the District of Columbia was not investigating Leftridge, thus lessening the potential desire for Leftridge to curry favor with the prosecutors who were conducting appellants' prosecution. But this disclosure also implied, as defense counsel reasonably understood, [REDACTED]

In any event, this aspect of the disclosure cannot excuse the government's non-disclosure [REDACTED]

The defense was entitled to

information that would strengthen its impeachment of Leftridge, whom the defense viewed as a key government witness because she interpreted video and audio tapes of the defendants and also engaged in repeated undercover drug purchases with several defendants, including appellants (except Wilson). *See United States v. (Walter) Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999). Given its relevance as impeachment evidence, the government had a duty under *Brady* to make a timely pretrial disclosure to the defense [REDACTED] *See United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976). The district court, in turn, erred in limiting cross-examination of Leftridge by failing to order the government to disclose this admissible evidence to the defense during trial.

The question remains whether the undisclosed evidence [REDACTED] was "material," i.e., was there "a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler*, 527 U.S. at 289 (internal quotation marks omitted). The "materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." *Id.* at 290. Instead, a court must ask whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 527 U.S. at 435.

As an initial matter, it is worth noting that a reasonable jury could easily have concluded that Leftridge [REDACTED] "would be careful not to worsen [her] predicament" by perjuring herself, *see (Walter) Bowie*, 198 F.3d at 909. Secondly, as appellants must concede, and as the district court found, much of Leftridge's testimony was

corroborated by physical evidence including video and audio tapes, and to the extent Leftridge testified to what was also demonstrated by physical evidence, her credibility would be unimpaired. *See id.* at 911. Thirdly, given the physical evidence corroborating much of Leftridge's testimony, appellants cannot show materiality under *Brady* by claiming that any bias would have affected the entirety of her testimony. Instead, appellants must contend that Leftridge was careful to mislead the jury only where her testimony would not go beyond what the physical evidence demonstrated — a degree of tailoring that would appear implausible.

In any event, we conclude, upon review of the likely effect of informing the jury of the undisclosed evidence [REDACTED] , that there is not a reasonable probability that the result of the trial would have been different for any appellant. Leftridge testified regarding the drug and RICO conspiracies (Counts 1 and 2), of which each appellant was convicted; the continuing criminal enterprise (Count 3) of which Franklin was convicted; and the drug distribution counts of which Franklin, Blackson, Robinson, and Simmons were convicted. As regards the drug distribution counts, Franklin conceded his guilt, Wilson faced no charges, and Robinson did not contest the single count against him, where he is plainly visible on videotape. Therefore, only the drug distribution convictions of Blackson and Simmons could even theoretically be called into question through the impeachment of Leftridge with the undisclosed evidence.

1

As to the convictions of all appellants for drug conspiracy (Count 1) and RICO conspiracy (Count 2), and the conviction of Franklin for continuing criminal enterprise (Count 3), the non-disclosure [REDACTED] was

not material. Each appellant was convicted of conspiracy to distribute and possess with intent to distribute one kilogram or more of phencyclidine ("PCP"), and 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(iii), (iv). The volume of PCP distributed, 15–20 gallons — equivalent to 39–52 kilograms — was proven through the testimony of Franklin's supplier, Herbert Martin. Each appellant's involvement was proven in multiple ways without Leftridge's testimony.

• **Count 1.** The government demonstrated the existence of the conspiracy largely through evidence from cooperating members of the M Street Crew, through wiretaps of Franklin's cellphone, and through the physical evidence accumulated during Leftridge's undercover buys. For instance, cooperator Ronnie Tucker identified Joseph Blackson, "Mike" Simmons, "Dee" Robinson, and "Shug" Wilson as selling drugs, and recognized John Franklin as the leader of the group. Tucker also testified that "we all sold drugs together. Besides that [we] watch each other's back, make sure everybody was all right." Apr. 24, 2006 PM Trial Tr. at 4–5. Similarly, cooperator Michael Abney testified that the M Street Crew would do "a variety of things" together including "selling drugs." May 2, 2006 AM Trial Tr. at 9. He named Franklin as the leader, Blackson, Robinson, and Wilson as Franklin's lieutenants, and Simmons as Franklin's most loyal foot soldier. The wiretap, audio, and video evidence corroborated the testimony of the cooperators, who were impeached on cross-examination, and provided ample evidence of conspiracy. For example, according to the transcript of Franklin's wiretapped cellphone call on August 11, 2003, Franklin told Tucker to buy PCP from Robinson rather than himself. And on the November 21, 2002 videotape recording, Leftridge bought PCP at 18th and M Streets from someone (not visible on the recording) who identified himself as "Joe" and who eventually gave her his

cellphone number. Later, on January 7, 2003, when Leftridge came back to the area to buy from "Joe," she instead bought PCP from John Franklin, who is clearly visible on videotape, and referred to "Joe" as his brother. When Franklin exited Leftridge's car, he yelled "Mike" and another individual came to the passenger window and delivered a vial. That individual's face is plainly visible. On April 10, 2003, following a cellphone conversation with Franklin, that same individual is seen on videotape getting into the car to deliver drugs to Leftridge. Again, his face was plainly visible, and a juror would have been able to recognize him in both instances as Simmons.

The above represents only a small part of the evidence demonstrating a conspiracy under 18 U.S.C. § 846. Even were Leftridge's testimony discredited by the undisclosed evidence, there is not a reasonable probability of a different verdict on Count 1 for any appellant.

• **Count 2.** Similarly, each appellant was convicted of conspiracy under RICO, 18 U.S.C. § 1962(d). Pursuant to the district court's instructions, the jury had to find: (1) an enterprise — in this case an illegal association in fact — existed; (2) the enterprise engaged in or affected interstate commerce; (3) individual defendants knowingly and intentionally agreed with another person to conduct the affairs of the enterprise; and (4) each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts. *See infra* Part IV. Elements one and three appear to have been proven primarily through cooperators. For instance, Abney described the structure of the M Street Crew, and Tucker described each of the five appellants as "members" of M Street. Leftridge's testimony as to individual buys added little information about the M Street Crew's structure, but the physical evidence accompanying her buys did corroborate the cooperators' testimony. For example, on March 26, 2003

Blackson told Leftridge that "everybody . . . buy from us." Mar. 26, 2003 Wiretap Tr. at 4. As to element four, impeachment of Leftridge's testimony with the undisclosed information would have done nothing to undermine the evidence that each appellant committed two or more racketeering acts. As noted, Franklin conceded his guilt as to all of the drug distribution charges. Wilson was not charged with drug distribution, so the two racketeering acts of which the jury found him guilty could not have involved Leftridge's undercover buys. Robinson's guilt was plain on videotape showing the May 21, 2003 sale with which he was charged, his sole possible racketeering act related to Leftridge's undercover work. Blackson is readily visible on videotape of the March 26, 2003 undercover buy and gave Leftridge his cellphone number and referred to himself as "Joe" during the November 21, 2002 buy, effectively identifying himself as the seller. Simmons is twice seen on videotape delivering drugs to Leftridge; he conceded guilt as to the April 10, 2003 buy.

Again, the above are only examples of the evidence of guilt that render a different result on Count 2 highly improbable even were the jury, based on the undisclosed evidence, to discount Leftridge's testimony.

• **Count 3.** Franklin was charged with being the principal administrator, organizer, or leader of a continuing criminal enterprise, in violation of 21 U.S.C. § 848. This count required the government to prove that he supervised five or more persons. Evidence unrelated to Leftridge's testimony showed that Franklin supervised five or more people. *See infra* Part IX. Although appellants suggest that Leftridge provided the only evidence that Franklin and Blackson worked together and that Franklin directed other members of the Crew to deliver PCP to a buyer, this ignores the physical videotape evidence of Leftridge's buys. For instance, on January 7 and April 10, 2003,

Simmons' face is visible on videotape as he delivered drugs immediately after Leftridge spoke to Franklin. And on January 22, 2003, after Leftridge contemporaneously identified "Joe" [Blackson] and asked him for a "whole one," Franklin got into Leftridge's car, took Leftridge's money, and asked her why "Joe" gave her a good price and later, "what's up with you and Joe . . . what's up with you and my little brother?" Jan. 22, 2003 Wiretap Tr. at 1, 3, 6.

The physical evidence thus demonstrates, without Leftridge's testimony, that Simmons acted as Franklin's runner and that Blackson and Franklin worked together. Undermining Leftridge's credibility through impeachment with the undisclosed evidence would therefore have had no impact on Franklin's conviction of Count 3. Although Franklin challenges the sufficiency of the evidence that he managed at least five people, *see infra* Part IX, his Count 3 conviction was not based in large part on Leftridge's testimony and, to the extent her testimony related to the Count 3 charge, it is corroborated by physical evidence.

2

Joseph Blackson was convicted of eleven counts of drug distribution, from November 21, 2002 (Count 6) through July 16, 2003 (Count 42). According to the government's brief, and uncontested in appellants' reply brief, Blackson acknowledged his guilt of distribution on March 26 and April 30, 2003 (Counts 27 and 33). Further, neither at trial nor on appeal has Blackson contested the identification of his voice with respect to the recorded undercover buys by Leftridge or the wiretapped cellphone calls. The transcripts of those recorded buys and calls identify Blackson as selling drugs to Leftridge on eight occasions (Counts 9, 10, 13, 16, 19, 23–24, and 42). During the November 21, 2002 sale (Count 6), Blackson's voice is audible

and matches the voice on the audiotape for March 26, 2003 (Count 27), a count of which Blackson acknowledged guilt. And during the same November 21, 2002 sale, Blackson gave Leftridge his cellphone number and identified himself as "Joe." Other recorded evidence also supports Blackson's convictions. On January 15, 2003 (Count 9), Blackson noted he had been "on house arrest for a minute," Jan. 15, 2003 Wiretap Tr. at 2, which corresponded with his arrest on January 3, 2003. On several occasions, Leftridge greeted Blackson by name (Counts 16, 23, and 42), and she frequently identified Blackson contemporaneously to her supervisors before or after buying drugs (Counts 10, 13, and 24).

As these examples indicate, the evidence against Blackson on drug distribution was overwhelming, and there is no reasonable probability that any of the distribution verdicts would have been different had Leftridge's testimony been impeached by the undisclosed evidence.

3

Appellants contend that impeachment of Leftridge with the undisclosed evidence would have especially undermined the evidence against William Simmons for distribution of PCP within 1,000 feet of a school on January 7 and 22 and April 10, 2003 (Counts 8, 10, and 30). However, Simmons is visible on videotape handing drugs to Leftridge on April 10, 2003. Simmons also is visible on videotape of the sale on January 7, 2003, when Franklin exited the car, shouted "Mike," and Simmons appeared at the passenger door to deliver a vial of drugs to Leftridge.

Appellants note that on January 7 and April 10 the police contemporaneously had difficulty identifying Simmons. But this is unremarkable because Leftridge testified that at the time

of the April 10, 2003 buy she had not yet heard of Simmons. It is a different question whether there is a reasonable probability that a jury, viewing Simmons in the courtroom and on videotape, would not have convicted him of Counts 8, 10, and 30 had Leftridge's testimony been impeached by the undisclosed evidence. Given the unambiguous physical evidence, there is not such a reasonable probability. This is true even as to the January 22, 2003 buy (Count 10), which is a closer call because the face of the individual on videotape delivering the drugs to Leftridge was partially obscured by a ski mask. Even without the videotape and Leftridge's testimony, however, the evidence showed: (1) During that buy, Franklin stated that the person about to deliver the PCP was his "cousin," "Mike," Jan. 22, 2003 Wiretap Tr. at 6; (2) On April 10, 2003, the next time he saw Leftridge, Simmons acknowledged that he had "done some business" with her before "round on 18th Place," Apr. 10, 2003 Wiretap Tr. at 3; and (3) cooperators testified that Simmons was Franklin's runner. Although the credibility of the cooperators was impeached, their identification of Simmons as Franklin's runner is supported by evidence that Simmons delivered drugs to Leftridge on two other occasions. Leftridge's testimony that Simmons delivered the drugs on January 22 was not inconsistent with any of the physical evidence. Moreover, the evidence that Simmons was Franklin's runner is secondary to the most damning evidence against Simmons on Count 10: the videotape of Franklin's contemporaneous identification of his cousin, "Mike." With that evidence — alongside the evidence of Simmons' previous history as Franklin's runner and two other deliveries to Leftridge — there is not a reasonable probability that a jury would have failed to convict Simmons of the January 22, 2003 sale if Leftridge's testimony had been impeached by the undisclosed evidence.

Accordingly, appellants cannot succeed on either their first Confrontation Clause contention or their *Brady* claim. The

undisclosed evidence regarding the investigation of Leftridge was not "material" under *Brady*. And, in view of the overwhelming evidence of appellants' guilt, any error by the district court in limiting cross-examination by failing to order the government to provide the defense with the undisclosed evidence regarding the investigation of Leftridge was harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 24 (1967).

B

Appellants contend that their rights under the Confrontation Clause were also violated because the district court improperly prohibited them from questioning Leftridge about an inappropriate social relationship that she had with appellant John Franklin while she was working undercover in the investigation of the M Street Crew.

During the trial, on March 30, 2006, Franklin's counsel made an *ex parte* proffer to the district court that Franklin claimed that he and Leftridge had a social relationship beyond the scope of her role as an undercover officer. Franklin claimed that he and Leftridge had met about six times: For instance, they had dinner at Union Station, they went to the movies together on at least one occasion, and Franklin had loaned Leftridge $1,000, which she repaid approximately one week later. In support of the proffer, Franklin's counsel stated that Franklin was willing to testify under oath out of the presence of the jury about the social contacts. Further, his counsel pointed to purportedly corroborating evidence, stating that wiretap recordings indicated Franklin had seen Leftridge in her personal car; recordings of Franklin asking Leftridge what car she was driving showed, counsel asserted, that there had been contact beyond the scope of the undercover investigation. Franklin's counsel argued this evidence would "tend to show that

[Leftridge] is not reliable," or "at a minimum [had] terribly bad judgment," and that "perhaps there's some kind of bias to protect herself at this point should those allegations be true." Apr. 3, 2006 AM Trial Tr. at 4. After the district court informed the prosecutor of Franklin's proffer, the prosecutor reported to the district court that Leftridge had "flatly, categorically denie[d]" Franklin's allegations and would deny them on the witness stand. Mar. 30, 2006 PM Trial Tr. at 20.

The district court ruled it would not allow any cross-examination of Leftridge about the alleged social relationship. While not assessing the credibility of the allegations, the district court reasoned that whether Leftridge exercised bad judgment in having a social relationship with a target "doesn't go directly to her credibility or her truthfulness." Apr. 3, 2006 AM Trial Tr. at 6. In the district court's view, because "everything to which [Leftridge] is testifying is supported by video and audio tape," little room was left to impeach her credibility. *Id.* Our review is for abuse of discretion, *see Lin*, 101 F.3d at 768, not for plain error, as the government suggests, because the district court cited authority addressing limitations on cross-examination — namely *Lin* and *United States v. Whitmore*, 359 F.3d 609 (D.C. Cir. 2004) — making it "apparent from the context," FED. R. EVID. 103(a)(1), that the defense was making a Confrontation Clause claim.

The Supreme Court has instructed with regard to cross-examination to expose potential bias of a prosecution witness, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. at 679. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). So too, in

Lin, this court required defense counsel to "have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness and thereby create an unfounded bias which subsequent testimony cannot fully dispel." 101 F.3d at 768 (internal quotation marks omitted). As a general matter, "the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates." *Id*. (quoting *United States v. Fowler*, 465 F.2d 664, 666 (D.C. Cir. 1972)); *see Whitmore*, 359 F.3d at 622. Because testimony that Leftridge had an inappropriate social relationship with the target of an investigation she was helping to conduct would degrade her, the issue is whether the district court impermissibly impinged on appellants' confrontation rights in concluding that the defense did not have a reasonable basis for such cross-examination.

The parties disagree about whether the defense proffer provided a "reasonable basis" to allow cross-examination of Leftridge and whether *Lin* applies. In *Lin*, the defendant sought to impeach a government witness, Guan Huan Chen, through cross-examination about Chen's involvement in a gambling business located in Chinatown. 101 F.3d at 767. Lin alleged that Chen was biased against him because Chen sought "to remove Lin from the Chinatown gambling scene." *Id.* The district court "offered to hold a hearing on the matter outside the presence of the jury," but when defense counsel refused, the district court ruled that the proffer by defense counsel was not, standing alone, enough to permit the defendant "to initiate a highly prejudicial line of cross-examination." *Id.* This court affirmed. Recognizing that "[t]he questioning that [defense counsel] sought to pursue would imply that the [prosecution's] witness was involved in illegal activities, and thus would have been highly prejudicial," this court concluded that defense counsel had not met his burden to "show that the proposed line

of cross-examination followed a lead reasonably suggested by other facts in evidence." *Id.* at 768. The court noted the defense refusal to agree to a hearing outside the presence of the jury and the district court's willingness to hear other evidence supporting the defense theory. *Id.*

Appellants point out that Franklin's counsel offered more factual support for the cross-examination of Leftridge than did Lin's counsel in seeking to cross-examine a government witness. Unlike Lin, Franklin was willing to testify outside the presence of the jury,[4] and the defense proffered recorded conversations during which Franklin had asked Leftridge on two occasions about the type of car she was driving, independently indicating, according to his counsel, that Franklin knew about her personal car and not just the government car she used for undercover drug buys. The import of the tapes is not altogether clear;[5] they may simply indicate that Franklin did not realize

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[4] The government's position that this offer was withdrawn when Franklin's counsel advised the district court that "we have nothing to add to the proffer we made [last] Thursday," Apr. 3, 2006 AM Trial Tr. at 4, is not a fair reading of the transcript. Although the district court did not accept Franklin's offer to testify, the offer was made and reaffirmed by his counsel.

[5] On April 10, 2003, when Leftridge called Franklin to set up an undercover buy, he asked her "[w]hen did I give you my number?" before appearing to realize to whom he was speaking and asking, "Oh. You drive the Acura?" Apr. 10, 2003 Wiretap Tr. at 1. During the conversation Leftridge mocks him: "You ain't even know who you was talking too [sic]. What you thought it was one of your girls again?" *Id.* at 2. The second reference to Leftridge's car, on May 21, 2003, comes from Leftridge's side of a conversation: "Huh? Yeah. I'm on the second one. Awright. It's, it's gray. It's like a dark gray. Yeah. Awright. Awright. Bye." May 21, 2003 Wiretap Tr. at 1. Leftridge testified that "[h]e was asking what car I was driving," and

with whom he was speaking when Leftridge telephoned him and needed to know the identity of the car she was driving so he could tell one of the M Street Crew to give her a vial of drugs when she arrived on the scene. Although the district court understood counsel's reference to late 2003 to refer to Leftridge's request for the $1,000 loan, the government suggests on appeal that there is some uncertainty about when the alleged social relationship occurred.[6] Of course, any uncertainty could have been explored and potentially resolved had the district court agreed to hear from Franklin outside the presence of the jury, and his testimony would have provided the district court with facts on which allowing cross-examination could turn.

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confirmed that she was referring to the same Acura in which she had conducted previous undercover drug buys. Apr. 3, 2006 PM Trial Tr. at 33.

[6] The trial transcript of March 30, 2006 PM at 6 reads:

> Franklin's counsel: The concern, Your Honor, is, given this information, we clearly believe and submit that we need to know more about what Officer Leftridge is being investigated for to the extent that that information is available.
>
> And in addition, if there is no information, some [defense] counsel intend to examine Officer Leftridge with regard to *these contacts* with Mr. Franklin in which it is suggested that money was borrowed from him during this investigation.
>
> *This contact*, I should say, lastly, was initiated, according to Mr. Franklin, by Officer Leftridge, who called him on his telephone, the phone that he would have been using when she was dealing with him. *That call* came in late 2003. (emphasis added)

We need not decide whether *Lin* applies where a defendant agrees to testify under oath about facts supporting a proffered line of cross-examination. Assuming the district court erred in denying any cross-examination of Leftridge about an inappropriate social relationship, appellants cannot show the requisite prejudice. Unlike harmless error analysis, which focuses on the totality of evidence against a defendant, for Confrontation Clause purposes the "prejudice inquiry . . . [focuses] on the particular witness, not on the outcome of the entire trial." *Delaware v. Van Arsdall*, 475 U.S. at 680. Even if the district court had concluded that there was a reasonable basis for cross-examining Leftridge about her alleged social relationship with Franklin, appellants fail to explain how the social relationship would be relevant to Leftridge's penchant for truthfulness, as would be necessary to use the evidence pursuant to Federal Rule of Evidence 608(b). As the district court observed, bad judgment is not the same as untruthfulness. Similarly, had defense counsel cross-examined Leftridge about the alleged social relationship, the prosecutor had reported that Leftridge would deny its existence, and the defense would have been stuck with her denial because specific instances of untruthfulness are not provable by extrinsic evidence under Rule 608(b), *see Whitmore*, 359 F.3d at 622. Even if Leftridge admitted having dinner, going to the movies, and borrowing money from Franklin, much of her testimony was corroborated by the physical evidence, and she might have offered a reasonable explanation for the social relationship relating to her continuing viability as an undercover officer in the M Street Crew investigation. Similarly, had the defense sought admission of evidence of the social relationship pursuant to Rule 404(b) to demonstrate bias, because of Leftridge's motive to curry favor with the government, it is unclear how this would assist the defense. Even if extrinsic evidence would have been admissible to prove the social relationship, Franklin's counsel stated that Franklin would testify outside the presence of the jury only if his

testimony could not be used against him at trial and, in view of Franklin's admissions of drug sales with Leftridge, that Franklin did not intend to pursue the matter at trial. Absent an evidentiary basis, a properly instructed jury could not use the questions Leftridge was asked on cross-examination to infer bias. *Cf. Morrison*, 98 F.3d at 628; *United States v. Gartmon*, 146 F.3d 1015, 1026 (D.C. Cir. 1998).

For these reasons, assuming the district court erred in barring cross-examination of Leftridge about an inappropriate social relationship, appellants fail to show prejudice under the Confrontation Clause. With overwhelming evidence of appellants' guilt, *see supra* Part II.A, any error in preventing this impeachment of Leftridge was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24. To the extent appellants contend that the district court abused its discretion under the federal rules of evidence, any error is harmless because it would not have "had substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

III

The appellants other than John Franklin contend that the district court abused its discretion in denying their motions for severance of their trials. In particular, they argue that the court's refusal to grant severance after Franklin's counsel conceded guilt on the drug distribution and communication facility counts prejudiced their right to a fair trial.

Prior to his opening statement, Franklin's counsel informed the court and other defense attorneys that Franklin intended to concede his guilt on the substantive drug distribution and communication facility counts. Several of these counts involved other defendants: Blackson was charged with Franklin with two

of the PCP distribution counts (Counts 10 and 42); Robinson was charged with two PCP distribution counts and three communication facility counts (Counts 36, 58, 96, 101, and 103); Simmons was charged with three distribution counts (Counts 8, 10, and 30); and Wilson was charged with three communication facility counts (Counts 104–06). Indict. at 40–49. These defendants each moved to sever, arguing that Franklin's admissions, offered without giving them any opportunity to cross-examine him, would prejudice their right to a fair trial. The court denied their motions, but instructed Franklin's counsel to make it "explicitly clear" that Franklin's admissions were not "an admission that anyone else engaged in drug dealing with him at any time." Mar. 9, 2006 PM Trial Tr. at 9. In his opening statement, Franklin's counsel stated that Franklin admitted guilt on the PCP and ecstasy distribution counts, the communication facility counts, and the felon-in-possession-of-a-firearm count. *Id.* at 15, 31. He also advised the jury that he did not represent or speak for the other defendants and that the jury should not hold Franklin's admissions against them. *Id.* at 15–16. After his opening statement, the court reiterated to the jury that the statements of counsel (including opening statements) were not evidence and explained that while Franklin's counsel had conceded Franklin's guilt, he had not admitted to joint activity with any of his codefendants. *Id.* at 52.

In his closing statement, Franklin's counsel reiterated that his client was guilty on the drug distribution counts and the communication facility counts. May 22, 2006 AM Trial Tr. at 97–98. He agreed that there was "overwhelming evidence" that Franklin had distributed PCP, or possessed it with intent to distribute, on "a number of occasions," and stated that if the jury found evidence supporting the drug distribution counts, it could simply "check guilty, guilty, guilty because we told you that in the beginning he admitted that." *Id.* at 97. In charging the jury, the court again stated that opening statements and closing

arguments were not evidence. May 17, 2006 AM Trial Tr. at 59. It also offered this instruction: "Each defendant is entitled to have his innocence or guilt of the crime for which he is on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone. The guilt or innocence of any one defendant should not control or influence your verdict as to the other defendants." *Id.* at 79. Blackson, Robinson, Simmons, and Wilson make a common argument that failing to sever their trials from Franklin's was reversible error. Wilson also argues that he was entitled to severance because of the disparity between the evidence against him and the evidence against Franklin. We address these arguments in turn.

A

Rule 8 of the Federal Rules of Criminal Procedure permits joinder of defendants who "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." FED. R. CRIM. P. 8(b). Once joined under Rule 8, defendants may seek severance under Rule 14, which provides that "[i]f the joinder of offenses or defendants . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." FED. R. CRIM. P. 14(a). The appellants do not contest the propriety of initially joining their trials with Franklin's under Rule 8. Instead, they contend they were entitled to severance under Rule 14 once Franklin made prejudicial admissions through his counsel.

We review the denial of a motion to sever for abuse of discretion. *United States v. Gbemisola*, 225 F.3d 753, 760–61 (D.C. Cir. 2000). Given the permissive wording of Rule 14, "we accord great deference to a district court's decision to deny severance." *United States v. Washington*, 12 F.3d 1128, 1133

(D.C. Cir. 1994). Moreover, as the Supreme Court recognized in *Zafiro v. United States*, 506 U.S. 534 (1993), "[t]here is a preference in the federal system for joint trials of defendants who are indicted together" because joint trials "promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.* at 537 (internal quotation marks omitted); *see also United States v. Manner*, 887 F.2d 317, 324 (D.C. Cir. 1989) ("In general, we strike a balance in favor of joint trials."). As we have stated, this preference is "especially strong" when "the respective charges require presentation of much the same evidence, testimony of the same witnesses, and involve two defendants who are charged, *inter alia*, with participating in the same illegal acts." *United States v. Ford*, 870 F.2d 729, 731 (D.C. Cir. 1989) (internal quotation marks omitted); *see United States v. Richardson*, 167 F.3d 621, 624 (D.C. Cir. 1999) ("Joint trials are favored in RICO cases.").

In reviewing the district court's decision denying severance, we apply the standard set forth in *Zafiro*, which held that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." 506 U.S. at 539. *Zafiro* gave several examples of instances in which a joint trial might create such risks: when it would permit admission of incriminating evidence that would have been inadmissible against one of the defendants, when it would require exclusion of exculpatory evidence that would have been admissible in a single defendant's trial, or when there is a marked disparity in the culpability of the defendants. *Id.*

The appellants characterize their claim as an "amalgam" of two recognized sources of prejudice: mutually antagonistic defenses and admission of a codefendant's out-of-court

statement without an opportunity for cross-examination. They acknowledge that neither situation is squarely presented here, but nonetheless assert that their situation bears some resemblance to each of these claims and that the resulting prejudice necessitated severance. Mutually antagonistic defenses exist when the defense one defendant asserts is irreconcilable with that asserted by another defendant. *United States v. Gilliam*, 167 F.3d 628, 635 (D.C. Cir. 1999). In *Zafiro*, the Supreme Court refused to adopt a bright-line rule mandating severance when mutually antagonistic defenses are present, stating that "[m]utually antagonistic defenses are not prejudicial *per se*." 506 U.S. at 538. Hence establishing an abuse of discretion requires "more than 'the presence of some hostility' among codefendants, and 'more than the fact that co-defendants whose strategies were generally antagonistic were tried together.'" *Gilliam*, 167 F.3d at 635 (quoting *United States v. (James) Brown*, 16 F.3d 423, 433 (D.C. Cir. 1994)).

We question whether Franklin's admissions through counsel actually constitute a "defense" that was irreconcilable with the defenses offered by the other defendants. Unlike a typical situation in which one defendant attempts to shift blame to another defendant, Franklin's admissions through counsel did not name any of the other defendants, identify specific counts, or describe the particular conduct that occurred. But even assuming *arguendo* that mutually antagonistic defenses were present, the district court adequately addressed any resulting prejudice by giving an appropriate limiting instruction. That instruction closely tracked the instruction the Supreme Court found sufficient to cure any prejudice arising from the mutually antagonistic defenses present in *Zafiro*. 506 U.S. at 540–41.

The appellants also assert that Franklin's admissions created an issue analogous to that the Supreme Court addressed in *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* concerned

a joint trial in which a nontestifying defendant's out-of-court confession was admitted into evidence and both defendants were subsequently convicted. The Court held that admitting one defendant's confession without giving the other defendant the opportunity to cross-examine him violated the Confrontation Clause of the Sixth Amendment. It reasoned that there was a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt." *Id.* at 126. *Bruton* and its progeny, *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998), all involved the admission of incriminating out-of-court statements made by a nontestifying codefendant.

The appellants have no *Bruton* claim, however, because Franklin's concessions through counsel do not implicate the Confrontation Clause. The Confrontation Clause prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Davis v. Washington*, 547 U.S. 813, 821 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)). The opening statement and closing argument made by Franklin's counsel, however, neither were admitted into evidence nor were they testimony. Indeed, although the appellants rely on *Bruton*, they have not identified any incriminating out-of-court statement made by Franklin that was admitted into evidence. In addition, the admissions Franklin made through counsel were not facially incriminating like the confession in *Bruton*, nor did they "refer[] directly to the 'existence' of the nonconfessing defendant" as in *Gray*, 523 U.S. at 192. Thus we conclude that the appellants' Sixth Amendment rights were not compromised.

Finally, even if Franklin's admissions through counsel created some prejudice, the district court was not obligated to

grant severance. "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro*, 506 U.S. at 538–39. Here, the court considered and responded to the objections from the other defense attorneys. It directed Franklin's counsel to limit the scope and content of the admissions and required that he explain that the admissions did not incriminate the other defendants. Moreover, the court gave several limiting instructions to the jury concerning how it should consider the admissions. These instructions helped mitigate any potential prejudice arising from the admissions.

The appellants have not shown that Franklin's admissions through counsel caused sufficient prejudice to necessitate severance. To the extent Franklin's admissions through counsel were an antagonistic defense, the court adequately responded by giving the curative instruction approved in *Zafiro*. Likewise, the appellants do not have a *Bruton* claim because no testimonial statement by Franklin was ever admitted into evidence. Thus the appellants have not shown that there was a "serious risk" that trying them with Franklin would "compromise a specific trial right" or "prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. The district court was in the best position to evaluate whether allowing Franklin's admissions through counsel would prejudice the other defendants' right to a fair trial. Having examined the record, we hold that the district court did not abuse its discretion when it denied the appellants' motions for severance.

B

Wilson contends that the district court should have granted his motion to sever because there was a great disparity between the evidence against him and the evidence against Franklin. As he correctly notes, we have previously stated that "[w]hen the

evidence against one or more defendants is 'far more damaging' than the evidence against another defendant, 'the prejudicial spillover may have deprived a defendant of a fair trial.'" *United States v. Manner*, 887 F.2d 317, 324 (D.C. Cir. 1989) (quoting *United States v. Tarantino*, 846 F.2d 1384, 1398 (D.C. Cir. 1988)). Nevertheless, Wilson has not identified any disparity that could have deprived him of a fair trial. On the contrary, as we have detailed in Part I.A, there was overwhelming evidence to support his conviction. *See also infra* Part XII. Thus the district court did not abuse its discretion in denying his motion for severance.

IV

Appellants next challenge the jury instructions on the RICO counts. Section 1962(c) of Title 18 makes it "unlawful" to "conduct or participate, directly or indirectly, in the conduct of [a qualifying] enterprise's affairs through a pattern of racketeering activity." Section 1962(d) prohibits conspiracy to violate other RICO provisions, including § 1962(c). Appellants were all convicted under RICO's conspiracy provision. Judgment of Franklin at 2; Judgment of Blackson at 2; Judgment of Robinson at 2; Judgment of Simmons at 2; Judgment of Wilson at 2. Appellants challenge the court's RICO jury instructions on three grounds. They contend that the district court's instructions failed to: (1) make clear that, to be convicted under § 1962(d), a defendant must participate in the operation or management of the enterprise; (2) adequately define an "enterprise" as requiring a structure apart from a pattern of racketeering activity; and (3) require "continuity" as a necessary element of a pattern of racketeering activity. We reject all three challenges.

A

First, appellants contend that the district court failed to instruct the jury that, to be convicted under § 1962(d), a defendant must participate in the operation or management of the enterprise. We review *de novo* the failure of the district court to provide a requested jury instruction. *United States v. Hurt*, 527 F.3d 1347, 1351 (D.C. Cir. 2008). The pertinent question is "whether, taken as a whole, [the instructions] accurately state the governing law and provide the jury with sufficient understanding of the issues and applicable standards." *United States v. Washington*, 106 F.3d 983, 1002 (D.C. Cir. 1997). Because the jury instructions given by the district court accurately reflect the current state of the law on the degree to which operation or management of the criminal enterprise is required for conviction of RICO conspiracy, we hold that the district court's jury instructions did not err in this respect.

According to the district court's jury instructions, in order to find guilt for RICO conspiracy under § 1962(d), the jury was required to find beyond a reasonable doubt: (1) that an enterprise — in this case, an illegal association in fact — existed; (2) that the enterprise engaged in or affected interstate commerce; (3) that each defendant knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise; and (4) that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts. May 17, 2006 PM Trial Tr. at 28–29. The district court subsequently elaborated on the third element, stating "the government does not have to prove that each defendant maintained a formal position in the enterprise or that each defendant was part of upper management. It is enough if the government proves beyond a reasonable doubt that the defendant, even if he is a lower rung participant agreed

to participate in an enterprise that one or more of the defendants would manage or operate." *Id.* at 32.

Appellants contend that the district court erred to the extent that it did not instruct the jury that it must find that each defendant managed or operated the enterprise. They rely primarily on *Reves v. Ernst & Young*, in which the Supreme Court held that RICO liability under 18 U.S.C. § 1962(c), RICO's prohibition on participation in a racketeering enterprise, does not extend "beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity." 507 U.S. 170, 184 (1993). Appellants claim that if a similar requirement is not extended to § 1962(d), prosecutors will be able to "get around *Reves*' limitation on RICO liability through the simple expedient of charging the defendants under § 1962(d), RICO's conspiracy provision, rather than under § 1962(c)," thereby "eviscerating" *Reves*. Appellants' Br. at 75, 77.

This court has previously declined to decide whether *Reves*' operation or management test is applicable to prosecutions under § 1962(d). *See United States v. Thomas*, 114 F.3d 228, 243 (D.C. Cir. 1997). Since *Thomas*, however, the Supreme Court has decided *Salinas v. United States*, 522 U.S. 52 (1997). In that case, the Court held that a § 1962(d) "conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Id.* at 63. Moreover, a "conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65. *Salinas* thus indicates that an individual defendant need not himself participate in the operation or management of an enterprise in order to be liable for conspiracy under § 1962(d).

Following *Salinas*, every court of appeals to consider the question has held that the *Reves* operation or management test does not apply to conspiracy under § 1962(d). *See United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004); *Smith v. Berg*, 247 F.3d 532, 537–38 (3d Cir. 2001); *United States v. Zichettello*, 208 F.3d 72, 99 (2d Cir. 2000); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000); *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998).

Moreover, contrary to appellants' contention, the Supreme Court's recent decision in *Boyle v. United States*, 129 S. Ct. 2237 (2009), does not alter this understanding of § 1962(d). *Boyle* addressed § 1962(c), not § 1962(d). To be sure, appellants are correct that the Court in *Boyle* stated that *Reves* "turned on our interpretation of the participation requirement of § 1962," rather than of § 1962(c) specifically. *Boyle*, 129 S. Ct. at 2243 n.3. However, § 1962(c) is the only subsection of § 1962 to explicitly include the sort of participation requirement discussed in *Reves*. Therefore, *Boyle*'s footnote necessarily references the provision discussed in *Reves* itself — § 1962(c).

The district court was thus correct to refuse appellants' proposed instruction requiring the jury to find that each defendant participated in the enterprise's management or operation.

We also reject Simmons' argument that he is differently situated from the other appellants. Simmons contends that because he had no role in the management or operation of the enterprise, he could not be convicted under § 1962(c), and so should not be liable under § 1962(d). He argues that it was impossible for him to conspire to violate a law that does not apply to him. This contention — that a defendant must be eligible for conviction under § 1962(c) to be convicted under § 1962(d) — is also foreclosed by *Salinas*. There, the Supreme

Court squarely held that an individual "may be liable for conspiracy even though he was incapable of committing the substantive offense." 522 U.S. at 64. Therefore, for Simmons as for all of the appellants, the district court's instructions were not in error.

B

In their opening brief, appellants also challenge the jury instructions on the ground that an association-in-fact enterprise must have some structure beyond the attendant pattern of racketeering activity.

Appellants' contention is without merit. In *Boyle*, the Supreme Court dismissed the notion that "the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering" as "incorrect." 129 S. Ct. at 2245. Rather, it held that "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise may in particular cases coalesce." *Id.* (internal quotation marks omitted).

C

Finally, appellants contend that the RICO jury instructions were flawed because the district court failed to instruct the jury that a pattern of racketeering must include an element of continuity. They acknowledge, however, that they did not raise this objection in the district court. Appellants' Br. at 70. As such, we review the absence of such an instruction only for plain error. *See* FED. R. CRIM. P. 52(b); *United States v. Wheeler*, 525 F.3d 1254, 1256 (D.C. Cir. 2008).

Assuming *arguendo* that the district court erred in this unobjected-to instruction, an appellant seeking to show plain error must still demonstrate that the district court's error affected substantial rights and seriously affected "the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (internal quotation marks omitted). Appellants cannot meet that burden.

As this court has held, continuity as a required element of a pattern of racketeering activity "may be proved by establishing either a closed period of repeated conduct or a threat of future criminal activity." *W. Assocs. Ltd. P'ship ex rel. Ave. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 633 (D.C. Cir. 2001) (internal quotation marks omitted). A closed period of repeated conduct, in turn, may be proven through "a series of related predicates extending over a substantial period of time." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989). A threat of future criminal activity may be proved by, for example, "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

Here, the evidence showed both a closed period of repeated conduct and a threat of future criminal activity. Appellants were convicted of substantive drug distribution in a course of dealing spanning the time period from November 21, 2002 (Count 6, Indict. at 39; Judgment of Blackson at 2) to March 16, 2004 (Counts 77–78, Indict. at 47; Judgment of Franklin at 2). Therefore, the predicates for appellants' RICO conspiracy spanned a substantial period of time. Furthermore, the evidence presented at trial pointed to the likelihood of the criminal activity continuing. Indeed, Franklin was recorded stating, "Nothing will stop this money train!" Oct. 1, 2003 Wiretap Tr. at 1.

In light of the evidence at trial, appellants cannot show that omission of a continuity instruction was plain error.

V

Simmons asserts that reversible error occurred when the prosecutor "vouched" for the credibility of an important witness, his counsel promptly objected, and the court did nothing to remedy the improper vouching. The witness, Roberta Moore, testified for the prosecution pursuant to a plea agreement. Apr. 19, 2006 PM Trial Tr. at 9–12. On cross-examination, Simmons' counsel used the plea agreement to attack her credibility, stating, "Now in effect, based on this 10, 11 page plea agreement the government is pulling the strings today, right?" Apr. 20, 2006 AM Trial Tr. at 40. The prosecution objected, and the court sustained its objection. After establishing that Moore would be sentenced to at least five years' imprisonment unless the government filed a motion supporting a lower sentence, Simmons' counsel continued, "So you have to keep them happy so that they'll file those motions, right?" *Id.* at 55. Again the prosecution objected. Again the court sustained the objection. Addressing Moore's obligation to testify truthfully, Simmons' counsel asked, "Basically in your situation you tell the truth when it helps you, right?" *Id.* at 62. He later asked, "And you know the reason you haven't been sentenced yet is because since the government has so much control over you they want to sit here and [] see how you perform, right?" *Id.* at 72. On redirect, the prosecutor walked Moore through the details of the plea agreement again, highlighting the fact that the government's recommendation would not bind the judge at sentencing. Referring to the judge, the prosecutor then asked, "What do you think she'd do if you lied?" *Id.* at 88. Moore responded, "I'd be locked up." *Id.* Simmons' counsel interjected, "Objection, Your Honor," but the court overruled his objection, stating, "I think it was an appropriate redirect." *Id.*

On appeal, Simmons argues that this exchange constituted improper prosecutorial vouching because it implied that the prosecution and the court could monitor and verify whether Moore testified truthfully. A prosecutor may not vouch for the credibility of a witness. "[I]t is for the jury, and not the prosecutor, to say which witnesses are telling the truth." *United States v. (Xavier) Brown*, 508 F.3d 1066, 1075 (D.C. Cir. 2007) (quoting *Harris v. United States*, 402 F.2d 656, 658 (D.C. Cir. 1968)) (internal brackets omitted). When a prosecutor vouches for a witness' credibility, it may "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant," thereby jeopardizing "the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Id.* (quoting *United States v. Young*, 470 U.S. 1, 18 (1985)). Likewise, prosecutorial vouching "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* (quoting *Young*, 470 U.S. at 18–19) (emphasis omitted).

Our standard of review depends on whether the vouching objection was properly preserved. Federal Rule of Evidence 103 states that to preserve an issue concerning the admission of evidence, a party must make "a timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context." FED. R. EVID. 103(a)(1). For nonevidentiary issues, Federal Rule of Criminal Procedure 51 requires that the objecting party inform the court of its objection "and the grounds for that objection." FED. R. CRIM. P. 51(b). In this case, Simmons' counsel objected in a timely manner, but did not state his ground for objecting, much less do so with specificity. When "the defendant fails to object or to state the specific ground for an overruled objection, we may reverse only for plain error unless the defendant can demonstrate on appeal that the ground for the objection was obvious from the

context in which it was made." *United States v. Boyd*, 54 F.3d 868, 872 (D.C. Cir. 1995). In *Boyd*, the prosecutor asked the defendant why two police eyewitnesses were "making this up." The defendant's counsel stated, "I object," and the judge replied, "Overruled." *Id.* at 870. The court reviewed this exchange only for plain error because "nothing in the context of defense counsel's unexplained objection made obvious the ground therefor." *Id.* at 872.

In this case, as in *Boyd*, the defendant's basis for his unexplained objection is not clear from the context. Moreover, nothing about the court's response indicates that it understood that Simmons' objection concerned vouching. We thus conclude that the plain error standard governs. To demonstrate plain error, an appellant must show "(1) a legal error that was (2) 'plain' (a term that is synonymous with 'clear' or 'obvious'), and that (3) affected [his] substantial rights." *(Xavier) Brown*, 508 F.3d at 1071 (quoting *United States v. Sullivan*, 451 F.3d 884, 892 (D.C. Cir. 2006)); *see also United States v. Olano*, 507 U.S. 725, 732–34 (1993). Even when a plain error has been shown, we will reverse only "if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *(Xavier) Brown*, 508 F.3d at 1071 (quoting *Sullivan*, 451 F.3d at 892–93). The appellant bears the burden of proving each element under this standard. *Id.*

In reviewing for plain error, the threshold question is whether there was a legal error. Therefore we must first determine whether the prosecutor's question constituted improper vouching. Given the context, we conclude this exchange was not plainly improper vouching, if it was vouching at all. Simmons would have us interpret the prosecutor's question to imply that the court could monitor and verify the truthfulness of Moore's testimony: "What do you think she'd do if you lied [and she would know if you did]?" But the question

could also be interpreted as "What do you think she'd do if you lied [assuming she knew you were lying]?" These possible interpretations show that the question does not necessarily imply that the judge would have known if Moore was lying. In addition, the prosecutor's question made sense in the context of the preceding cross-examination. On cross, Simmons' counsel questioned whether Moore was telling the truth, thereby putting her state of mind in question. The prosecutor's question on redirect also focused on Moore's state of mind, asking "What *do you think* she'd do if you lied?" Apr. 20, 2006 AM Trial Tr. at 88 (emphasis added). Thus the question focused on Moore's understanding of the plea agreement and her state of mind in testifying. Moreover, unlike the vouching in the cases upon which Simmons relies, it did not express the prosecutor's personal opinion about Moore's credibility. We conclude that this was hardly vouching, but was in fact a proper rejoinder to the cross-examination concerning the motive of the witness. This was not plain error, if it was error at all.

Assuming *arguendo* that Simmons had preserved this issue and it was error, we are convinced that this alleged vouching was harmless. Even discounting Roberta Moore's testimony, the evidence against Simmons was extensive. Moreover, the alleged vouching was relatively innocuous, particularly given the preceding cross-examination. In short, Simmons cannot prevail on this issue.

VI

At trial, cooperating witness Michael Abney testified that William Simmons was John Franklin's "loyalest foot soldier," describing him as Franklin's "rescue puppet." May 2, 2006 AM Trial Tr. at 42–43. When asked to clarify what he meant by "rescue puppet," he explained that Franklin had rescued Simmons from a "life of destruction," which he characterized as

"[d]rug addiction, no place to live, that type of thing." *Id.* at 44–45. The prosecutor then said, "Now let's talk about Mike's lifestyle of destruction. What did you know about him?" Abney responded, "I known that he smoked crack, snort dope. He had a history of known to be a thief, robbing, killing and stuff." *Id.* at 45. Simmons' counsel objected and sought to have Abney's answer stricken, but the court denied his motion. Although it refused to strike the statement, the court suggested, "Why don't we speak about Mr. Simmons' drug use and limit [] the testimony to that." *Id.* at 45–46.

Simmons contends that the court's failure to strike Abney's answer constitutes reversible error because it was inadmissible character evidence and its prejudicial effect substantially outweighed its probative value. Federal Rule of Evidence 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." FED. R. EVID. 404(b). In criminal cases, Rule 404(b) requires that the prosecution provide pretrial notice when it intends to introduce character evidence if the defendant has requested such notice. *Id.* We review the district court's Rule 404(b) decisions for abuse of discretion. *United States v. Long*, 328 F.3d 655, 660 (D.C. Cir. 2003). In doing so, we give "much deference" to the district court's decision. *Id.* (quoting *United States v. Cassell*, 292 F.3d 788, 792 (D.C. Cir. 2002)). We will sustain that decision "so long as the evidence is relevant under Rule 401 and is offered as proof of a matter other than the defendant's character or propensity to commit a crime." *Id.*

As a procedural matter, Simmons argues that the government failed to provide notice that it planned to introduce this evidence. Although Simmons asserts that he requested

notice, he offers no evidence to that effect. Moreover, it is not clear whether the government expected Abney to make this statement, or whether the statement came as a surprise, meaning that it had no ability to give notice. Therefore we lack sufficient information to evaluate Simmons' claim that he never received the notice he claims to have sought.

Turning to the statement itself, the government argues that it was admissible because it went to Simmons' motive for serving as Franklin's "runner." It reasons that Simmons decided to serve as Franklin's runner because Franklin saved him from a "life of destruction." The government notes that Simmons' counsel had already portrayed his client as a drug addict who would steal to get drug money and therefore could not have been a trusted member of the alleged drug conspiracy. Even accepting this argument, however, it is difficult to understand how Abney's statement about Simmons' "history . . . of robbing [and] killing" demonstrates this motive. Moreover, it is hard to see how this statement could have been admissible under Rule 403, which states that "relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403. Here, admitting evidence concerning Simmons' alleged history of killing risked substantial unfair prejudice while adding very little probative information concerning his destructive lifestyle, especially considering that Simmons' counsel had already disclosed information about Simmons' drug addiction and propensity to steal. Thus the court arguably should have stricken this statement from the record and given a limiting instruction to the jury.

Nonetheless, we conclude that considering the trial as a whole, the district court's failure to strike this statement or give a limiting instruction was harmless error. The question is whether this evidence affected Simmons' substantial rights, for "[a]ny error, defect, irregularity, or variance that does not affect

substantial rights must be disregarded." FED. R. CRIM. P. 52(a). In evaluating whether this was harmless error, we ask "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Specifically, we must determine whether "the error had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776. An error is harmless if the guilty verdict was "surely unattributable to the error." *United States v. Baugham*, 449 F.3d 167, 176 (D.C. Cir. 2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

We conclude that Abney's statement about Simmons' "history of . . . robbing [and] killing" did not have a substantial effect on the jury's verdict. First, even if the jury accepted Abney's statement as true, the information it conveyed was not particularly germane to the conspiracy and drug distribution counts on which Simmons was ultimately convicted. The statement was most probative as evidence that Simmons had a propensity for violence, but the jury found Simmons not guilty of murder and all other violent crimes with which he was charged. Verdict at 37–39. This supports our conclusion that the evidence Simmons protests, which concerned robbing and killing, did not influence the jury's verdict. Second, the other evidence against Simmons was so extensive we see no realistic possibility that this single uncorroborated remark, made in passing by a particularly garrulous witness, had any meaningful effect on the jury's verdict. Third, even though the court refused to strike the statement, it did prospectively limit Abney's testimony to Simmons' history of drug abuse, thereby avoiding additional prejudice and suggesting that Abney's statement was not especially relevant. Evaluating Abney's statement in the context of the whole trial, then, we are convinced that the district court's failure to strike this statement was harmless error and does not merit reversal.

VII

At trial, William Robinson sought to introduce two defense witnesses whose personal experiences would enable them to interpret various taped phone calls the government had introduced into evidence. The first witness was a former drug dealer; the second was a resident of the 18th and M neighborhood. The district court denied the motion, ruling that neither witness had the particularized knowledge of the events in question required of lay witnesses.

Antawan Robinson, the court found, lacked the particularized knowledge to serve as a lay fact witness "because he doesn't live in the area, he hasn't lived in the area, he has never talked to the defendants . . . by the telephone." May 16, 2006 PM Trial Tr. at 47. The district court likewise ruled that the second witness, who had even less firsthand knowledge of the conspiracy, was an inappropriate lay fact witness.

On appeal, Robinson argues only that the district court erred by excluding Antawan Robinson as a lay witness. He initially asserted error with respect to the second witness, but then offered no argument in support of that witness' admission, thereby abandoning his argument with respect the second witness. *See Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996); FED. R. APP. P. 28(a)(9)(A). We review the district court's evidentiary ruling for abuse of discretion. *United States v. Whitmore*, 359 F.3d 609, 616 (D.C. Cir. 2004).

Federal Rule of Evidence 702 governs expert testimony. Expert witnesses may testify to matters of "scientific, technical, or other specialized knowledge." FED. R. EVID. 702. Lay testimony, by contrast, is governed by Rule 701. Unlike experts, lay witnesses must base their testimony on their experiential "perception" and not on "scientific, technical, or other

specialized knowledge within the scope of Rule 702." FED. R. EVID. 701(a), (c). This requirement ensures that lay testimony is "the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). Moreover, it avoids the "risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." FED. R. EVID. 701 advisory committee's notes, 2000 amends.

A witness with firsthand experience of a particular drug operation may testify under Rule 701. *See United States v. Williams*, 212 F.3d 1305, 1309 (D.C. Cir. 2000). In the absence of firsthand experience, a witness with the requisite expertise may testify as an expert about the many aspects of drug operations falling outside the scope of lay knowledge. *See United States v. Boney*, 977 F.2d 624, 628 (D.C. Cir. 1992) ("operations of narcotics dealers" are "a suitable topic for expert testimony because they are not within the common knowledge of the average juror"). At issue here is whether a lay witness may testify about drug operations outside the scope of lay knowledge based on past personal experience with other, similar drug operations.

At least three Circuits have found that such witnesses may testify only when qualified as experts. *See United States v. Oriedo*, 498 F.3d 593, 603–04 (7th Cir. 2007); *Garcia*, 413 F.3d at 215–17; *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997). *But see United States v. Page*, 521 F.3d 101, 105 (1st Cir. 2008). We agree with those courts holding that an individual without personalized knowledge of a specific drug conspiracy may not testify about drug topics that are beyond the understanding of an average juror under Rule 701. Such a witness may be permitted to testify only as an expert under Rule 702.

For a witness to testify reliably about a matter outside the scope of typical lay knowledge, the witness' knowledge must come from one of two sources: the firsthand experience of a lay witness, FED. R. EVID. 701, or the sort of "knowledge, skill, experience, training, or education" that would qualify the witness as an expert, FED. R. EVID. 702. Thus, if a witness lacks firsthand knowledge of a matter outside the scope of lay expertise, he may testify only if qualified as an expert. To hold otherwise would conflate the "particularized" knowledge necessary to testify as a lay witness with the "specialized" personal knowledge gained from previous experience that allows a witness to testify as an expert. An individual testifying about the operations of a drug conspiracy because of knowledge of that drug conspiracy has "particularized" knowledge and should be admitted as a lay witness; an individual testifying about the operations of a drug conspiracy based on previous experiences with other drug conspiracies has "specialized" knowledge and — provided his testimony meets the rule's enumerated requirements — should be admitted as an expert.

Antawan Robinson's proposed testimony falls squarely into the category of expert testimony. Robinson proposed to testify about terminology used in drug operations, a matter outside the scope of a typical lay person's knowledge and experience. Robinson had no firsthand experience with the M Street Crew; his testimony was to have been based entirely on his own experience as a drug dealer elsewhere. Such evidence is admissible only under Rule 702. Had the defense wished to introduce Robinson's testimony, it could have done so only by attempting to qualify him as an expert based on his experience of other drug operations.

We therefore affirm the district court's ruling not to allow Antawan Robinson to testify as a lay witness for the defense.

VIII

On the morning of March 16, 2004, an FBI team entered the home of Nicole Harris to arrest her fiancé, George Wilson. The agents had an arrest warrant for Wilson, but had not yet obtained a search warrant for the residence. After arresting Wilson, they obtained written consent from Harris to search the premises. During their search, the agents discovered a 7.62mm assault rifle and approximately $80,000 in cash. Wilson filed a pretrial motion to suppress this evidence. After holding an evidentiary hearing, the district court ruled that the warrantless search did not violate the Fourth Amendment because it was conducted pursuant to valid consent. In the alternative, the court stated that even absent valid consent, the evidence would still be admissible under the inevitable discovery doctrine. Wilson appeals this ruling, arguing that there was no valid consent for the search and no probable cause upon which a warrant could have issued. In addition, he contends that the Supreme Court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), entitles him to an evidentiary hearing concerning whether the agents intentionally deprived him of the opportunity to object to the search.

Valid consent constitutes an exception to the general Fourth Amendment requirement of a warrant supported by probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). To be valid, consent must be voluntarily given. Whether consent is voluntary depends on "the totality of all the surrounding circumstances." *Id.* at 226. In applying the "totality of the circumstances" test, a court may consider various factors, including the consenting party's "age, poor education or low intelligence, lack of advice concerning his constitutional rights, the length of any detention before consent was given, the repeated and prolonged nature of the questioning, and the use of physical punishment." *United States v. Hall*, 969 F.2d 1102, 1107 (D.C. Cir. 1992) (quoting *United States v. Lloyd*, 868 F.2d

447, 451 (D.C. Cir. 1989)). Since this inquiry is factually intensive, we will reverse a district court's determination that consent was voluntary only for clear error. *United States v. Lewis*, 921 F.2d 1294, 1301 (D.C. Cir. 1990). In addition, we accord extra deference to the district court's determinations concerning witness credibility. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984).

At the evidentiary hearing, FBI team leader Kevin Ashby testified concerning the circumstances under which Harris gave consent. He testified that after arresting Wilson, he decided to seek her consent to search rather than waiting for a warrant. Jan. 5, 2006 Evid. Hg. at 44–45. Ashby spoke to Harris, who was not handcuffed, while she was sitting on her couch. *Id.* at 45. He read the consent form to Harris and explained that she could refuse to give consent, but also informed her that they were applying for a search warrant and would remain in her home until the warrant had been obtained. *Id.* at 45, 71. Harris initially refused to give consent, but after thinking about it for a few minutes, she signed the form. *Id.* at 45, 47.

Harris offered a somewhat different account of events. When the search took place, she was 33 years old and had gone to school through the twelfth grade. She testified that the FBI team burst into the upstairs bedroom where she and Wilson had been sleeping, ordered them onto the floor, and handcuffed them both. Harris, who was only wearing a "nighty," asked the officers to put more clothes on her. *Id.* at 111. Once she was clothed, the officers took her downstairs and sat her on the couch. *Id.* at 111–12. When she asked whether they had a search warrant, a male officer (presumably Ashby) told her that they did not yet have one, but that it was "sitting in front of the Judge." *Id.* at 114. The officer also told Harris that they would not leave her house until they had gotten a search warrant. *Id.* at 118. When she asked if she could make a phone call, the agents

told her no. *Id.* at 114. Harris testified that she remained handcuffed until just before she signed the consent form. *Id.* at 123. She stated that she did not sign the consent form voluntarily. When asked why she did sign it, she said, "I signed the form because I felt that I didn't have no other choice and they wouldn't allow me to make a phone call and I was scared." *Id.* at 120. On cross-examination, the prosecution used a picture that showed Harris wearing a shirt with her arms through the sleeves to impeach her repeated testimony that she was handcuffed while discussing the consent form and deciding whether to sign it. *Id.* at 136–37. In response, she admitted that she might have been mistaken about the handcuffs. *Id.* at 137. In addition, Harris admitted that she did not want the evidence seized from her home to be used in her fiancé's trial. *Id.* at 139–40.

The district court found that Harris was "only partly credible," finding that "[h]er testimony to the Court's observation was memorized and not really being drawn from her recollection of her prior experience." Jan. 9, 2006 Evid. Hg. at 119. The court surmised that the agents probably removed Harris' handcuffs while she was still upstairs, allowing her to get dressed before she was taken downstairs. *Id.* at 121. It found that although the sudden intrusion "undoubtedly startled and scared Ms. Harris at first . . . nothing in her evidence supports her statements that she continued to feel scared or pressured." *Id.* Hence the district court concluded that Harris' "consent was voluntary under the totality of the circumstances," specifically noting that she was in her "early thirties," that she was "an educated person," that she talked to Ashby for two to five minutes, that she admitted having been told that she did not have to agree to the search, and that she was not handcuffed or restrained from leaving the residence. *Id.* at 123.

On this record, we cannot say that the district court's determination that Harris gave voluntary consent was clearly

erroneous. Considering the totality of the circumstances, most factors point toward voluntariness. Harris was 33 years old and she had completed the twelfth grade. Although the raid itself must have been startling, the agents did not seek her consent to search until she was out of the handcuffs, had dressed, and was seated on the couch. Ashby read the consent form to her and made sure she understood that she could choose whether to sign it or not. Morever, she apparently weighed that decision for several minutes before signing. There was no evidence of any physical coercion, verbal threats, or other conduct that would have impinged on Harris' ability to make a voluntary decision. Wilson points to the agent's statement that the FBI team would not leave until they obtained a search warrant, arguing that it left Harris without a choice. Having found and arrested Wilson on the premises, however, it was not improper for the FBI to secure the premises while a search warrant was obtained. *See Segura v. United States*, 468 U.S. 796, 810 (1984). Consequently, we affirm the district court's decision denying Wilson's motion to suppress. Since there was valid consent, Wilson's contention that the FBI lacked sufficient probable cause to support a search warrant is irrelevant. Likewise, we need not address the court's alternate holding that the evidence would inevitably have been discovered.

We turn briefly to Wilson's argument concerning *Georgia v. Randolph*, which was decided after the search of Harris' residence. At trial, Wilson renewed his motion to suppress based on the recent decision in *Randolph*, but the court again denied it. In *Randolph*, the Supreme Court held that even given valid consent from one occupant, the express objection of a physically present co-occupant renders the search unreasonable with respect to that co-occupant. 547 U.S. at 106. *Randolph* also suggested that "evidence that the police have removed the potentially objecting tenant . . . for the sake of avoiding a possible objection" might invalidate a subsequent search with respect to

that tenant. *Id.* at 121–22. Seizing on this dicta, Wilson argues that we should remand for an evidentiary hearing to determine whether the FBI agents who arrested him intentionally deprived him of the opportunity to object to the search. We disagree. Nothing in the evidence supports the proposition that the agents arrested and removed him to mute his possible objections to the search. Moreover, as the district court noted, it strains credulity to think that the FBI somehow anticipated the *Randolph* decision and therefore whisked Wilson away to prevent him from objecting. Apr. 13, 2006 AM Trial Tr. at 76. For these reasons, we affirm the district court's decision denying Wilson's renewed motion to suppress.

IX

John Franklin was convicted of being the principal administrator, organizer, or leader of a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848 (Count 3). Pursuant to § 848(b), he was sentenced to life imprisonment. Franklin challenges his conviction on the ground that there was insufficient evidence to support the finding that he "occupie[d] a position of organizer, a supervisory position, or any other position of management" with respect to "five or more other persons," necessary for conviction on this count. 21 U.S.C. § 848(c)(2)(A).

Upon reviewing the evidence in the light most favorable to the government, as we must, we conclude that a reasonable jury could have found the essential elements of the offense beyond a reasonable doubt. *See United States v. Washington*, 12 F.3d 1128, 1135–36 (D.C. Cir. 1994) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). There was sufficient evidence to show that Franklin managed Elizabeth Lee, Monica Bell, William Simmons, William Robinson, and various of his other "lieutenants" and "foot soldiers."

• **Elizabeth Lee.** Drug "packagers" can be considered "managees" under 21 U.S.C. § 848. *United States v. Williams-Davis*, 90 F.3d 490, 509 (D.C. Cir. 1996). Elizabeth Lee, who was Franklin's common-law wife, testified regarding the drug packaging activities she pursued on Franklin's behalf. *See, e.g.*, Mar. 22, 2006 PM Trial Tr. at 7: "Well, I would get up, like I said, when the kids went off to school, and I would get the half an ounce bottles and the ounce bottles, put everything on the dresser, measuring cups and everything, measure it out and put it in the half an ounce bottles and the ounce bottles, wipe everything down, and put them in a suitcase. So when [Franklin] come in all he had to do was just grab it and go ahead back out." Other evidence showed Franklin "directed" Lee's drug packaging. *United States v. Mitchell*, 49 F.3d 769, 773 (D.C. Cir. 1995). For example, Lee testified that Franklin would sometimes "call [her] from the street" to direct her packaging activities. Mar. 22, 2006 PM Trial Tr. at 11; *see also id.* at 11, 12: "Q. And what kind of questions would he be asking you? A. What I bottle up, or [Franklin]'ll ask for a certain amount, have a certain amount done for him so he could come in and pick it up. Q. Did he ever ask you to count — tell him how much money he had available and that kind of thing? A. Yes."; "If he wanted a specific amount done, sometimes he would call back and tell me make sure you have such-and-such full ounces and half ounces."

Thus, the jury could reasonably have found beyond a reasonable doubt that Franklin managed the packaging activities of Elizabeth Lee.

• **Monica Bell.** Similarly, the evidence showed that Monica Bell, who served as a "tester" of Franklin's PCP, was under Franklin's direction. Bell testified that, "[a]bout three times a week," Franklin would "call" her and then "come by." Apr. 18, 2006 PM Trial Tr. at 82. At that point, Franklin would ask Bell "to test [a] dipper[] for him," and Bell would "[t]est PCP

laced dippers, cigarettes" "[f]or John." *Id.* at 78, 77. In exchange, Bell "might have got a dipper if [she] wanted one." *Id.* at 86. That Bell was directed by Franklin is unmistakable. Indeed, Bell testified to her direction by Franklin: "Q. Okay. Where Mr. Franklin says, hey, listen, go out front and get a cigarette from somebody, anybody, who is he telling that to? A. Me. Q. And what does he want you to do? A. Go get a cigarette from somebody outside." *Id.* at 97. Additionally, Lee, Franklin's drug packager, testified to Franklin's direction of his testers: "Q. What were you guys talking about? A. A tester. Q. What's a tester? A. He take some [PCP] out in the bottle and have people to smoke it to test it." Mar. 22, 2006 PM Trial Tr. at 40. Moreover, the fact that Bell received compensation in the form of free "dippers" and performed such services as often as three times a week renders her similarly situated to the "regular drivers" found to be managees in *Mitchell*, 49 F.3d at 773, or the "runners, packagers, or transporters" found to be managees in *Williams-Davis*, 90 F.3d at 509.

Given the evidence that she performed a service for Franklin, at his bidding, for compensation, there was sufficient evidence for the jury reasonably to find beyond a reasonable doubt that Bell was managed by Franklin.

• **William Simmons.** Drug runners can be considered managees for purposes of 21 U.S.C. § 848. *See Williams-Davis*, 90 F.3d at 509. There was sufficient evidence from a variety of sources for a jury reasonably to find beyond a reasonable doubt that William "Mike" Simmons served as a drug runner for Franklin and was under Franklin's direction.

Michael Abney testified that Simmons was "John Franklin loyalest foot soldier." May 2, 2006 AM Trial Tr. at 42. Abney further testified that Simmons' drug sales were completely directed by Franklin: "Q. What if anything did, did Mike do for

John? A. Whatever he told him. Sell bottles to people. If John need, if John needed anything done, he'd do it. He was like his, I say he was like his rescue puppet." *Id.* at 43. Abney further testified that when he bought PCP for distribution from Franklin, Simmons retrieved and delivered the drugs to him. Finally, Abney testified that his experience was not unusual: "Q. Did you see Mike [Simmons] get water [i.e, PCP] for other people under those circumstances? A. Yes. Q. Can you tell us about that? A. He do it the same way he do me. People go to get it from John, give John the money, Mike go get the water." *Id.* at 52.

Monica Bell likewise testified that when she tested Franklin's PCP for him, Simmons often delivered the "dipper" for her to test. Undercover officer Leftridge testified that on three occasions, after she purchased PCP from Franklin, another man — whom she later identified as Simmons — delivered the drugs to her. Her testimony was supported by videotape of two of those occasions. Finally, supporting evidence was presented by other cooperating government witnesses, who described Simmons as Franklin's "[s]idekick," or "running partner," Apr. 19, 2006 PM Trial Tr. at 44 (Roberta Moore), and his "runner," "flunky," "little man," or "helper," Apr. 27, 2006 AM Trial Tr. at 88 (Omari Minnis). These witnesses also testified to firsthand experience of Simmons "running" for Franklin.

• **William Robinson.** According to Michael Abney, Robinson was one of Franklin's "lieutenants." Although Abney's definition of a "lieutenant" may not correspond to that previously accepted by the court in *United States v. Thomas*, 114 F.3d 228, 259 (D.C. Cir. 1997), there was sufficient evidence for the jury reasonably to find beyond a reasonable doubt that Franklin managed Robinson. First, in several instances, the law-enforcement task force recorded conversations in which Franklin directed Robinson either to make a sale or to assist Franklin in a sale. Second, undercover officer Leftridge testified similarly,

describing how during one of her buys from Franklin, he had Robinson deliver the PCP she had purchased. Leftridge's testimony is corroborated by a surveillance video on which Robinson's face is visible as he delivers the PCP. Third, on at least one occasion, Franklin instructed Robinson to find someone to "taste" his PCP to ensure its quality.

• **Foot Soldiers.** Michael Abney classified himself and at least 16 other members of the M Street Crew as "foot soldiers." However, while "foot soldier" evokes the bottom rung of a military-like hierarchy, Abney's use of the term during his trial testimony did not deal solely with position in the chain of command. Instead, at various times he used the term "foot soldier" to indicate that his sales activity was less lucrative than that of "lieutenants," that he lacked his own source of drugs, or that his status among his peers was lower. As such, Abney's division of the members of the M Street Crew into "foot soldiers" and "lieutenants" is not dispositive evidence that Franklin managed either group.

Other evidence, however, shows that Franklin managed his "foot soldiers." For example, both Abney and another "foot soldier," Omari Minnis, described the M Street Crew's rotational system, whereby the "foot soldiers" would take turns selling drugs to customers. Minnis testified that the street sellers "took turns" in order to ensure there was "enough [business] to go around." Apr. 27, 2006 AM Trial Tr. at 79. Abney observed that the rotation system would "[k]eep a lot of hostility down." May 2, 2006 AM Trial Tr. at 98. Minnis also testified that the system was widely followed. Although Abney testified he was the only "foot soldier" not to follow the rotation system, he identified "John [Franklin] and the lieutenants" as the ones who imposed it. *Id.* at 97–98. Additionally, Tracy Ambers testified that she originally bought PCP from someone named "Ron," but Franklin

directed Ron to give Ambers Franklin's telephone number so that she could deal exclusively with Franklin in the future.

From this evidence the jury could reasonably credit Abney's description of Franklin imposing a selling regime on his "foot soldiers" and Ambers' recollection of Franklin directing "Ron" to give her Franklin's number. Franklin acknowledges that an individual exercises managerial responsibility by "maintaining control over drugs and customers by setting resale prices or determining to whom the drugs could be sold." Appellants' Br. at 122 (citing *Mitchell*, 49 F.3d at 772). Establishing when and by whom drugs can be sold is analogous. Thus, based on Abney's and Ambers' testimony, the jury could reasonably have found beyond a reasonable doubt that Franklin exercised managerial control over his "foot soldiers" and therefore fell within the purview of 21 U.S.C. § 848.

• **Lieutenants George Wilson and Joseph Blackson.** Along with William Robinson, Michael Abney classified George Wilson and Joseph Blackson as Franklin's "lieutenants." "Lieutenants" are generally managees of the "general" of a crew for the purpose of 21 U.S.C. § 848. *See Williams-Davis*, 90 F.3d at 509. However, as noted, Abney's understanding of the term "lieutenant" renders his classification insufficient to establish that Franklin managed Wilson and Blackson. Abney's view of what it meant to be a "lieutenant" fluctuated during his testimony. In describing the roles of Wilson and Blackson, Abney portrayed a "lieutenant" as a manager, but, in later testimony, he described a "lieutenant" as a more successful drug dealer who was also, to some degree, a supplier. Status as a successful drug supplier does not render a person managed by Franklin. S*ee Mitchell*, 49 F.3d at 772.

However, Abney's classification of "lieutenants" does not stand alone. Other aspects of his testimony indicate that Franklin

was in a managerial position, at least with respect to Wilson. For example, Abney described a scuffle between himself and Wilson over whether to give a discount to a regular customer. Franklin stepped in, siding with Abney, and directed Wilson to stop bullying Abney — a directive Wilson apparently obeyed. Additionally, a wiretapped conversation between Franklin and Wilson revealed that Wilson considered himself to be managed by Franklin. As such, he asked Franklin on one occasion whether Franklin would like him to kill someone (an offer that Franklin refused): "Sugg [i.e. Wilson]: Want me to put somebody head on a slab. John: Huh? Sugg: Want me to show, want me to show my loyalty? John: Naw everything alright." Sept. 27, 2003 Wiretap Tr. at 1–2. Thus the jury could reasonably find beyond a reasonable doubt that Franklin managed at least Wilson and, perhaps — based upon Abney's testimony — Blackson as well. In any event, Wilson plus Lee, Bell, Simmons, Robinson, and the "foot soldiers" brings the total number of people that a reasonable jury could find were managed by Franklin well beyond five. Franklin's challenge to the sufficiency of the evidence on Count 3 thus fails.

X

Count 31 charged Blackson with distribution of PCP on April 15, 2003. Near the end of the trial, on May 16, 2006, Blackson filed a Renewed Motion for Severance and Motion for Judgment of Acquittal asserting, in part, that the government had dismissed Count 31 by presenting no evidence. The government acknowledged that it had offered no evidence on Count 31. Count 31 did not appear on the verdict form submitted to the jury, although the record does not indicate that the district court formally dismissed the count.

Nonetheless, the district court judgment states that the jury found Blackson guilty on Count 31, and imposes a sentence of

360 months' imprisonment, based in part on that count. The government acknowledges that this was in error, and we hold the error is plain. *See United States v. Olano*, 507 U.S. 725, 732–37 (1993); *United States v. Saro*, 24 F.3d 283, 286–88 (D.C. Cir. 1994). Because the error may have affected Blackson's sentence, the error affects substantial rights, and permitting the error to go uncorrected would seriously affect the integrity of judicial proceedings. We therefore reverse Blackson's conviction on Count 31 and remand for resentencing.

XI

Simmons was convicted of conspiring to distribute one or more kilograms of PCP, of conspiring to distribute ecstasy, of RICO conspiracy, and of three counts of distribution of PCP. At sentencing, the government argued that Simmons' base offense level under the Sentencing Guidelines should be 38 because he actually knew or could reasonably foresee that the conspiracy would involve more than 30 kilograms of PCP. Simmons argued that 32 was the appropriate base level because he was only convicted of a conspiracy involving one or more kilograms. The district court agreed his base offense level was 32 and imposed a two-level increase for the use of firearms within the scope of the conspiracy, and a one-level increase based on the parties' stipulation that the drug sales occurred within 1,000 feet of a school. With this adjusted offense level of 35, combined with Simmons' Category II criminal history, the district court calculated a Guidelines range of 188 to 235 months.

The district court stated that although it was unable to find that Simmons could reasonably foresee the full 30 kilograms of PCP distributed by the M Street Crew, it was "not comfortable with 235 months either," and it would impose a prison sentence of 264 months, or 22 years. Aug. 24, 2006 Sent. Hg. at 46. To explain that sentence, the district court noted the jury's special

finding that the amount of PCP involved in the conspiracy exceeded 30 kilograms. Although that finding was associated with the CCE charge against Franklin only, the district court concluded it was "perfectly legitimate to use that [amount] in sentencing for other defendants to the extent it applies because the conduct underlying the narcotics conspiracy, the RICO conspiracy and the CCE count are all the same." *Id.* at 48.

Regarding the extent of Simmons' involvement in the conspiracy, the district court found that the evidence showed he "was on the street regularly with Mr. Franklin," "delivered testers to Monica Bell," "delivered [PCP] to Roberta Moore," and "handled PCP at M Street by being a runner for Mr. Franklin." *Id.* The district court also referenced the evidence describing Simmons as "a flunky," and found that "he would regularly retrieve PCP vials from Franklin's truck and bring [them] to M Street Crew members," that he could be seen "on the video cam[era] delivering [PCP] to the undercover officer [Leftridge]," and that "he stored 144 empty vials in his mother's house." *Id.* at 49. Nevertheless, the district court concluded that it could not find that Simmons knew or could reasonably foresee that the conspiracy involved the full 30 kilograms in view of evidence that he was not on the street every day, that "he's terribly, terribly addicted and would go off on binges on some unknown regularity," and that it was not clear exactly how often Simmons worked with Franklin. *Id.*

The district court turned to the sentencing factors in 18 U.S.C. § 3553(a). With regard to the nature and circumstances of the offense, the district court found that Simmons was a willing participant in a narcotics and RICO conspiracy. As to the history and characteristics of the defendant, the district court found that Simmons was addicted to drugs, suggesting a higher sentence. Regarding the seriousness of the offenses, the district court found that they were serious. Finally, as to the need for

adequate deterrence and to protect the public from further crimes, the district court found that Simmons' drug use made him a risk to commit future crimes. Aug. 24, 2006 Sent. Hg. at 51–52. Based on these findings, the district court concluded that a sentence within the Guidelines range would not be "just punishment" in view of Simmons' conduct, convictions, history, and characteristics, and sentenced Simmons to 264 months' imprisonment. *Id.* at 52. Upon inquiring of his counsel whether these were "the necessary findings," Simmons' counsel agreed they were, and also agreed later in the sentencing hearing that the district court had "addressed and resolved" all of Simmons' objections. *Id.* at 52, 54.

On appeal, Simmons contends his sentencing was procedurally unsound because the district court failed to give adequate reasons for imposing an above-Guidelines sentence, and the sentence was substantively unreasonable. Our review for both procedural soundness — including whether the district court considered the necessary factors and adequately explained a deviation from the Guidelines — and the substantive reasonableness of sentences is for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). Where a defendant failed to make a timely objection to the alleged procedural error in the district court, however, our review is for plain error. *In re Sealed Case*, 527 F.3d 188, 191–92 (D.C. Cir. 2008). If there was no procedural error, the court then considers whether the sentence was substantively reasonable, giving "due deference" to the district court's determination that the § 3553(a) factors, as a whole, justify the extent of the variance. *Gall*, 552 U.S. at 51. The court reviews the substantive reasonableness of a sentence under the abuse of discretion standard even when no objection was raised in the district court. *See United States v. Bras*, 483 F.3d 103, 113 (D.C. Cir. 2007).

A

Simmons contends that the district court failed to provide adequate reasons for imposing an above-Guidelines sentence. He does not contest the determination of his base offense level or the adjustments for guns and selling drugs within 1,000 feet of a school. Instead, he takes issue with the district court's reasons for imposing a sentence that was 29 months above the upper bound suggested by the Guidelines range. Maintaining that the district court gave only two justifications for this variance — the seriousness of the offense and his history of drug abuse — Simmons contends drug abuse is not an appropriate basis for imposing an above-Guidelines sentence because the Guidelines proscribe taking drug dependence or abuse into account. He cites § 5H1.4 of the Guidelines, which states that "[d]rug or alcohol dependence or abuse is not a reason for a downward departure," and various pre-*Booker* cases holding that drug history may not be a basis for a departure, but no case holding that drug history may not be a basis for an upward variance. Nevertheless, he maintains the same policy rationale supports both propositions, presumably that the Guidelines sentencing scheme encourages defendants to admit and seek treatment for their drug dependency. Appellants' Br. at 139; *see also id.* at 138 (citing *United States v. Luscier*, 983 F.2d 1507, 1510 (9th Cir. 1993)); *United States v. Richison*, 901 F.2d 778, 781 (9th Cir. 1990).

Because Simmons did not object in the district court, our review of his procedural challenge is for plain error, and we find none. The record shows the district court adequately explained its reasoning. In addition, although the district court did consider Simmons' history of drug abuse as one factor in its sentencing decision, the record does not support Simmons' claim that the district court "relied primarily" on that history of abuse in imposing an upward variance. Appellants' Br. at 137. The district court mentioned a number of other factors, especially the

extent of his involvement in the overall conspiracy. In any event, Simmons' reliance on Guidelines § 5H1.4 is misplaced because that provision refers only to *downward* departures based on drug abuse; indeed, he overlooks that § 5H1.4 states that "[s]ubstance abuse is highly correlated to an increased propensity to commit crime," suggesting drug abuse may be an appropriate reason for an increased sentence.

B

Simmons contends, for the first time in his reply brief, that the district court's sentencing process was unsound because the district court failed to provide him with a written statement of the reasons for the variance as required under 18 U.S.C. § 3553(c)(2). Simmons asserts the "Statement of Reasons" in the amended judgment and conviction order (filed on Sept. 8, 2006) was left blank as to the reasons for the upward variance. He relies on *In re Sealed Case*, where this court held it was plain error for the district court not to provide a written statement of reasons, stating that "[w]hen a district judge fails to provide a statement of reasons, as § 3553(c) requires, the sentence is imposed in violation of law," and "[t]he absence of a statement of reasons is prejudicial in itself because it precludes appellate review of the substantive reasonableness of the sentence." 527 F.3d at 191, 193. Accordingly Simmons contends, because this court is unable to determine the reasonableness of his sentence, a remand for resentencing is required.

This contention fails for at least two reasons. First, the contention is untimely because it is first raised in a reply brief. *See, e.g.*, *United States v. Berkeley*, 567 F.3d 703, 711 n.4 (D.C. Cir. 2009); *United States v. Johnson*, 216 F.3d 1162, 1168 (D.C. Cir. 2000). Second, the contention would be subject only to review for plain error because Simmons did not so object in the district court, and there is no error, much less plain error.

Although the complete judgment does not appear in the joint appendix filed by the parties and the "Statement of Reasons" was sealed in the district court, the complete judgment in fact includes a "Statement of Reasons" by the district court referencing its findings at the sentencing hearing.[7] Under the section titled "Advisory Guideline Sentencing Determination," the district court wrote: "Narcotics and RICO conspiracy of insufficient foreseeability of 30 kg but significantly more than 1–3 kg, offense of conviction: → See sentencing transcript." Statement of Reasons at 2. In the section titled "Departures Authorized by the Advisory Sentencing Guidelines," the district court indicated that the sentence was above the advisory Guideline range and listed the following "facts justifying the departure": "Aggravating: Clearly foreseeable of more than 1–3 kg but not full 30 of co-conspirators." *Id*. With the "Statement of Reasons" appended to the original judgment and commitment order, this court is able to conduct appellate review of the reasonableness of Simmons' sentence, including the variance, and a remand is unnecessary. *See In re Sealed Case*, 527 F.3d at 193. (Although the "Statement of Reasons" termed Simmons' increased sentence a "departure," the record makes clear the district court was imposing a variance. *Compare United States v. (Daniel) Brown*, 578 F.3d 221, 225–28 (3d Cir. 2009).)

C

Simmons contends his sentence was substantively unreasonable because his "sad personal history and characteristics, and his limited role in the offenses of conviction, would have supported a variance below the guideline range."

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[7] The "Statement of Reasons" remains under seal except insofar as this opinion refers to information in the Statement. *See United States v. Reeves*, 586 F.3d 20, 22 n.1 (D.C. Cir. 2009); *United States v. Parnell*, 524 F.3d 166, 167 n.1 (2d Cir. 2008).

Appellants' Br. at 137–38. He points out that the government did not request the upward variance and emphasizes his minor role in the conspiracy: Unlike his co-conspirators, he did not make much money from the conspiracy, did not possess a firearm, and lived in poverty.

Simmons fails to demonstrate that his sentence was substantively unreasonable for several reasons. He acknowledges that the government advocated an initial base offense level of 38, not 32, and he cannot deny that the evidence of his participation in the conspiracy was substantial. The district court provided a reasoned explanation for Simmons' sentence based on the statutory factors. As is evident from a comparison of his sentence with the sentences imposed on the other appellants, the district court accounted for the level and significance of Simmons' participation in the conspiracy. *See United States v. Thomas*, 114 F.3d 228, 261–62 (D.C. Cir. 1997). And, in relying on considerations invoking sentencing discretion, Simmons points to no reason this court should not accord due deference to the district court's determination that the § 3553(a) factors justify a variance. *See Gall*, 552 U.S. at 51.

XII

A

William Robinson, George Wilson, and Joseph Blackson challenge the district court's calculation of their Guidelines ranges. They contend that the district court incorrectly attributed to each of them the distribution of 30 or more kilograms of PCP.

The district court properly could find that more than 30 kilograms of PCP were involved in the M Street Crew conspiracy. Pursuant to 21 U.S.C. § 848(b), the instructions regarding the continuing criminal enterprise charge against

Franklin (Count 3) required the jury to find that the CCE involved distributing at least 30 kilograms of PCP, and the jury so found. The only CCE predicate offense involving that amount of PCP was Count 1, narcotics conspiracy, of which all appellants were found guilty. Drugs distributed by a co-conspirator in furtherance of a conspiracy are attributable to a member of the conspiracy so long as the distribution was "reasonably foreseeable" to that member. *United States v. Childress*, 58 F.3d 693, 722 (D.C. Cir. 1995); U.S.S.G. § 1B1.3(a)(1)(B). Even if reasonably foreseeable, however, a member of a conspiracy is not necessarily accountable for a co-conspirator's "side deals" that are not in furtherance of the conspiracy. *United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994).

Herbert Martin testified that he had supplied Franklin with "[a]t least about 15, 20 gallons" of PCP. Mar. 14, 2006 AM Trial Tr. at 65. Conservatively estimated, in accordance with the instructions to the jury, 15 gallons is 39 kilograms. There was evidence, however, that Franklin had sold 6 kilograms of PCP to Ceasar Harris independent of the M Street Crew conspiracy. Subtracting the 6 kilograms sold to Harris left 33 kilograms of PCP. During the course of the investigation, the law enforcement task force intercepted 6,916 of Franklin's telephone calls and there was no reference in the recorded conversations to outside sales other than to Harris. Robinson, Wilson, and Blackson do not claim, much less point to evidence of, any other side deals by Franklin. Neither do they contend the jury instructions failed to instruct on the scope of the conspiracy. Therefore, in the absence of evidence of other side deals, the district court's finding that the M Street Crew distributed more than 30 kilograms of PCP was not clearly erroneous. The question remains whether the 30 kilograms of PCP was reasonably foreseeable to Robinson, Wilson, and Blackson individually.

• **William Robinson.** During sentencing the district court made individualized findings that the M Street Crew sales were foreseeable by Robinson in their entirety. We find no clear error. The district court relied on the evidence that Robinson "was engaged in selling activities almost daily," that he "was the source of PCP when Franklin was otherwise not handy," and that he "had regular and constant communications with Mr. Franklin about the quantity of PCP on the street and who should get PCP from whom and to whom should he sell it to and that sort of thing." Sept. 6, 2006 Sent. Hg. at 53. These findings are supported by wiretaps and the testimony of Abney and undercover officer Leftridge.

• **George Wilson.** In finding Wilson could reasonably foresee the full extent of the PCP sold by the M Street Crew, the district court referred to Wilson's proximity to the day-to-day activities of the Crew ("Wilson was on the street at 18th and M Northeast daily"), his proximity to Franklin ("Wilson was in almost daily contact with Mr. Franklin"), and his role in directing sales (Wilson was "observant as to the actions of the crew and the members and engaged in sales" and reported his observations to Franklin). Aug. 17, 2006 Sent. Hg. at 37–38. These findings, too, are supported by wiretaps and Abney's testimony, and are not clearly erroneous.

• **Joseph Blackson.** Blackson was incarcerated following his arrest on July 29, 2003. The district court found that "Mr. Blackson had direct knowledge of the growth of the scope of the conspiracy," that his trafficking to Officer Leftridge was "part and parcel of the growth of that drug trafficking," and that "for a period of time he could certainly observe the level of sales by his co[-]conspirators." Aug. 31, 2006 Sent. Hg. at 66. The district court also found that Blackson never "withdrew from the conspiracy" and that he "immediately went back to trafficking" after his release, so that he knew or could reasonably

foresee the full amount of PCP sold by the M Street Crew, including that sold while he was incarcerated. *Id.* at 67. These findings are not clearly erroneous. Blackson concedes that his imprisonment in 2003 did not constitute a withdrawal from the conspiracy, and he does not challenge the district court's finding that he went back to selling drugs upon his release. Testimony from Ronnie Tucker, Abney, and undercover officer Leftridge supports the district court's finding that Blackson had sufficient involvement in the conspiracy to reasonably foresee the amount of PCP sold.

B

Wilson and Blackson also challenge the increase in their sentences under the Guidelines for having played a management or supervisory role with respect to the M Street Crew's distribution of PCP, ecstasy, and crack cocaine. *See* U.S.S.G. § 3B1.1(b). The Guidelines list a number of factors that a sentencing court should consider when deciding whether to apply an enhancement under § 3B1.1(b) for a defendant's role, including:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1 App. Note 4; *see also United States v. Smith*, 374 F.3d 1240, 1249 (D.C. Cir. 2004). The court has held that "[a]ll persons receiving an enhancement [under § 3B1.1] must exercise some control over others." *United States v. Graham*,

162 F.3d 1180, 1185 (D.C. Cir. 1998). Because the evidence supports such a finding as to Wilson and Blackson, we affirm.

• **George Wilson.** The evidence relied upon by the district court at sentencing demonstrates both that a number of the relevant factors were present in Wilson's case and that the district court considered them in sentencing him. Abney's testimony, for example, indicates that Wilson exercised decision-making authority. Indeed, the district court cited Abney's testimony in stating that "Mr. Wilson directed others. Mr. Abney characterized Mr. Wilson, Mr. Robinson and Mr. Blackson as lieutenants as opposed to foot soldiers[, and] when Mr. Franklin was absent, the street sellers would go to the lieutenants when they needed advice." Aug. 17, 2006 Sent. Hg. at 42. Additional evidence relied upon by the district court shows Wilson directly planning or organizing: A wiretapped conversation revealed Wilson "talking of holding a gun to the man suspected of theft of the crew drugs that also shows taking charge in a way that the others did not." *Id.* at 43. The district court further found based on cooperating Crew-member testimony that Wilson had chased a non-Crew member from the street in order "to protect the sales for the organization." *Id.* at 42–43. And, based on other testimony, the district court found that Wilson was viewed as a leader by Crew members. *Id.* at 43.

These findings are supported by evidence showing that Wilson exercised "some control over others," *Graham*, 162 F.3d at 1185. For example, after classifying Wilson as a "lieutenant," Abney referred to "John [Franklin] and the lieutenants" as those "whose recommendation or whose suggestion [it] was that there be" a rotational system of drug selling. May 2, 2006 AM Trial Tr. at 16, 98. These "lieutenants" resolved altercations among the "foot soldiers" in Franklin's absence. Abney's view of Wilson as a supervisor is also supported by at least one wiretap recording on which Wilson was recorded telling Franklin that he

had admonished "foot soldier" Ronnie Tucker for "his failure to maintain sales the way he was suppose[d] to." Aug. 17, 2006 Sent. Hg. at 43. Given the district court's findings and the record evidence demonstrating his management or supervisory role, Wilson's contention that "the court did not take into account the totality of Abney's testimony" in sentencing him, Appellants' Br. at 150, is unpersuasive. *See Smith*, 374 F.3d at 1250.

• **Joseph Blackson.** The district court made a similar finding regarding Joseph Blackson's role in the conspiracy. The district court found that Blackson was heavily involved in drug sales on M Street, as exemplified by his dealings with undercover officer Leftridge. He "was the one with whom Officer Leftridge made her initial connections," "he sold her wholesale quantities of drugs," and "he got the PCP that he sold from Mr. Franklin." Aug. 31, 2006 Sent. Hg. at 68. Blackson's own words to undercover officer Leftridge confirmed this: He told her "that he and his brother supply everyone on M Street," and that "he and his brother sold Ecstasy before PCP." *Id.* The district court also found that investigating officers initially thought Blackson was the Crew leader based on his "conduct and position," and that while in jail Blackson wanted to know what was happening to others who were still on the street. *Id.* at 68–69. Additionally, the district court found that some cooperating witnesses identified Blackson as a "lieutenant." *Id*. at 69. The district court concluded:

> Proving that Mr. Blackson was a leader in other ways isn't really in the record. But I think what is in the record and the totality of the evidence is sufficient for the Court to find that with individual attention to Mr. Blackson that he was more of a supervisor/leader/manager type than the guys who were selling on the streets. They certainly viewed him in that way.

Id.

Although the district court's findings might have been clearer concerning whether Blackson exercised some control of others, they suffice. There was record evidence supporting the district court's finding that Blackson was a manager/supervisor. Most pertinently, Abney had named "John [Franklin] and the lieutenants" as suggesting the rotational system of drug selling. May 2, 2006 AM Trial Tr. at 98. According to Abney, these "lieutenants," including Blackson, resolved altercations among "foot soldiers" in Franklin's absence, *id.* at 13–15, and Ronnie Tucker testified Blackson sometimes held PCP for Franklin when he was not around, Apr. 24, 2006 PM Trial Tr. at 18. However, the district court did agree with Blackson that Abney's and Tucker's testimony was "somewhat disjointed and difficult to really pin down." Aug. 31, 2006 Sent. Hg. at 68. At times Abney seemed to confuse status as a "lieutenant" possessing command authority with either a dealer's separate drug connection, his financial success, or with his self-esteem. *See supra* Part IX. Also, Tucker appeared at one point to equate Blackson to Simmons, a "foot soldier"; this evidence might have tended to show that Blackson was at the bottom level of the conspiracy, which would not be sufficient to justify an enhancement under § 3B1.1(b), *Graham*, 162 F.3d at 1184.

But recognizing these problems, the district court could sort through the evidence, credit Abney's testimony that Blackson would settle altercations in Franklin's absence, and find that some "foot soldiers" viewed Blackson as having control over them. Abney's testimony supports the finding that Blackson exercised the requisite degree of "control over others," *Graham*, 162 F.3d at 1185. Likewise, Blackson's statements to Officer Leftridge that he and Franklin supplied everyone on M Street and that dealing with Franklin was the same as dealing with him both indicate a managerial role in the conspiracy. Moreover, the fact that the investigating officers initially thought Blackson was the Crew leader at least supports the conclusion that his role was that

of a manager/supervisor. According due deference to the district court's application of the Sentencing Guidelines to evidentiary findings, *United States v. Tann*, 532 F.3d 868, 874 (D.C. Cir. 2008), the district court had a sufficient basis to conclude that Blackson was a manager/supervisor.

* * *

For the foregoing reasons, except for Blackson's judgment as to Count 31, we affirm the district court's judgments. We vacate Blackson's judgment on Count 31 and remand to the district court for further proceedings consistent with this opinion.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5384 **September Term, 2009**

FILED ON: MAY 24, 2010

SYED K. RAFI,

APPELLANT

v.

KATHLEEN SEBELIUS, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:02-cv-02356-JR)

Before: SENTELLE, *Chief Judge*, GARLAND and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the court and briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. RULE 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

The National Institutes of Health (NIH) failed to hire appellant Syed Rafi for twelve positions for which he applied between 1993 and 1998. Rafi alleges that the failures to hire constituted discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* We affirm the district court's dismissal of Rafi's claims as to ten of the positions on the ground that he failed to exhaust his administrative remedies in a timely fashion. Rafi did not contact an NIH counselor until

February 10, 1998 -- long after the 45-day deadline. *See* 29 C.F.R. § 1614.105(a). He contends that he did not realize he had been discriminated against until he received a letter from NIH on January 23, 1998, and that accordingly, he "did not know and reasonably should not have . . . known that the discriminatory matter or personnel action occurred" until that date. *Id.* § 1614.105(a)(2). But the district court correctly concluded that there was no material difference between the January 1998 letter and a letter that Rafi received on July 21, 1997.

We affirm the district court's decision to direct a verdict as to the remaining two claims. Rafi offered no evidence at trial from which a reasonable jury could have concluded that the NIH was actually "seeking applicants" for the two positions he sought, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), a required component of the case because the absence of an available position is one of the "most common nondiscriminatory reasons for [a] plaintiff's rejection," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Finally, we find no abuse of discretion in the district court's response to Rafi's requests for discovery.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* FED. R. APP. P. 41(b); D.C. CIR. RULE 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5367 **September Term 2009**

1:09-cv-01672-UNA

Filed On: May 24, 2010

Roderick Williams,

Appellant

v.

United States Department of Justice, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief and motion to "save evidence and investigate" filed by the appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's orders issued September 2, 2009, and October 9, 2009, be affirmed. The district court properly dismissed the appellant's complaint for damages and injunctive relief pursuant to 28 U.S.C. § 1915A(b)(1). The claims of prosecutorial misconduct in the appellant's complaint, if successful, would have a probabilistic effect of invalidating his conviction; therefore, he must first demonstrate that his conviction has been reversed on direct appeal, expunged by executive order, or called in question by a federal court's issuance of a writ of habeas corpus. See Razzoli v. Bureau of Prisons, 230 F.3d 371, 373-76 (D.C. Cir. 2000); see also Edwards v. Balisok, 520 U.S. 641 (1997) (applying Heck v. Humphrey, 512 U.S. 477 (1994), to bar a state prisoner's claims for declaratory and injunctive relief in addition to money damages). To the extent that the appellant seeks injunctive relief to compel the Attorney General to investigate his claims of prosecutorial misconduct, the appellant failed to state a claim for such relief because the Attorney General has prosecutorial discretion to determine whether to investigate any alleged

misconduct by federal prosecutors. See 28 U.S.C. § 526(a)(1) ("The Attorney General may investigate. . . the United States attorneys. . .") (emphasis added); see also United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). The district court did not err in denying the appellant's motion for leave to amend the complaint because he "cannot possibly win relief" on his claims of prosecutorial misconduct. See Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998). It is

FURTHER ORDERED that the motion to "save evidence and investigate" be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5177 **September Term, 2009**

FILED ON: MAY 18, 2010

MICHAEL A. DIAMEN, ALSO KNOWN AS SALVATORE M. INFANTOLINO,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:00-cv-03045-RMC)

Before: HENDERSON, GRIFFITH and KAVANAUGH, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: May 18, 2010

Opinion for the court filed by Circuit Judge Henderson.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5292 **September Term 2009**

1:04-cv-01660-HHK
1:06-cv-02120-HHK

Filed On: May 18, 2010

Friends of Animals, et al.,

Appellees

v.

Kenneth Lee Salazar, Secretary of the Interior and Dale Hall, Director, Fish and Wildlife Service, originally in 06-2120,

Appellees

Exotic Wildlife Association,

Appellant

Safari Club International Foundation and Safari Club International,

Appellees

Consolidated with 09-5313

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for leave to file motions to dismiss, the opposition thereto incorporating a motion to strike, and the reply; the oppositions to the motion to strike and the replies; the motions to dismiss, the opposition thereto, and the replies; and the motion for stay pending review, it is

ORDERED that the motions for leave to file motions to dismiss be granted. The Clerk is directed to file the lodged documents. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5292 **September Term 2009**

FURTHER ORDERED that the motion to strike be denied. Appellant provides no proper basis for the motion. See Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 571 (2004) ("Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment."). Furthermore, motions to strike often burden the court unnecessarily and are disfavored. See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981). It is

FURTHER ORDERED that the motions to dismiss be granted. The district court's order remanding to the U.S. Fish and Wildlife Service for further proceedings is not a "final decision" within the meaning of 28 U.S.C. § 1291. See N.C. Fisheries Ass'n, Inc. v. Gutierrez, 550 F.3d 16, 19 (D.C. Cir. 2008) ("It is black letter law that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291."); Pueblo of Sandia v. Babbitt, 231 F.3d 878 (D.C. Cir. 2000) (concluding that a district court's order remanding and vacating agency action is not a final order). Although there is a "limited exception permitting a government agency to appeal immediately," this exception "is not normally available to a private party." N.C. Fisheries Ass'n, Inc., 550 F.3d at 19-20 (internal citation omitted); see also Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 330 (D.C. Cir. 1989). It is

FURTHER ORDERED that the motion for stay pending review be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Heather T. Stockslager
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5292 **September Term 2009**

1:04-cv-01660-HHK
1:06-cv-02120-HHK

Filed On: May 18, 2010

Friends of Animals, et al.,

Appellees

v.

Kenneth Lee Salazar, Secretary of the Interior and Dale Hall, Director, Fish and Wildlife Service, originally in 06-2120,

Appellees

Exotic Wildlife Association,

Appellant

Safari Club International Foundation and Safari Club International,

Appellees

Consolidated with 09-5313

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for leave to file motions to dismiss, the opposition thereto incorporating a motion to strike, and the reply; the oppositions to the motion to strike and the replies; the motions to dismiss, the opposition thereto, and the replies; and the motion for stay pending review, it is

ORDERED that the motions for leave to file motions to dismiss be granted. The Clerk is directed to file the lodged documents. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5292 **September Term 2009**

FURTHER ORDERED that the motion to strike be denied. Appellant provides no proper basis for the motion. See Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 571 (2004) ("Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment."). Furthermore, motions to strike often burden the court unnecessarily and are disfavored. See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981). It is

FURTHER ORDERED that the motions to dismiss be granted. The district court's order remanding to the U.S. Fish and Wildlife Service for further proceedings is not a "final decision" within the meaning of 28 U.S.C. § 1291. See N.C. Fisheries Ass'n, Inc. v. Gutierrez, 550 F.3d 16, 19 (D.C. Cir. 2008) ("It is black letter law that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291."); Pueblo of Sandia v. Babbitt, 231 F.3d 878 (D.C. Cir. 2000) (concluding that a district court's order remanding and vacating agency action is not a final order). Although there is a "limited exception permitting a government agency to appeal immediately," this exception "is not normally available to a private party." N.C. Fisheries Ass'n, Inc., 550 F.3d at 19-20 (internal citation omitted); see also Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 330 (D.C. Cir. 1989). It is

FURTHER ORDERED that the motion for stay pending review be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Heather T. Stockslager
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5303 **September Term 2009**

1:06-cv-01697-JDB

Filed On: May 17, 2010

Haji Wazir, Detainee, and Mohammad Sharif,
as Next Friend of Haji Wazir,

Appellants

v.

Robert M. Gates, Secretary, United States
Department of Defense, et al.,

Appellees

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellees' unopposed motion to dismiss as moot and appellants' unopposed motion for vacatur, it is

ORDERED that the motion to dismiss be granted and the appeal be dismissed as moot. It is

FURTHER ORDERED that the motion for vacatur be granted. The district court's memorandum opinion and order filed June 29, 2009, granting respondents' motion to dismiss the habeas corpus petition, is hereby vacated, Wazir v. Gates, 629 F. Supp. 2d 63 (D.D.C. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1259 **September Term 2009**

NTSB-EA-5473

Filed On: May 13, 2010

Piya Navanugraha,

Petitioner

v.

Federal Aviation Administration, et al.,

Respondents

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of petitioner's motion to govern further proceedings, which requests summary reversal of the National Transportation Safety Board's decision and a remand with instructions; and the opposition thereto; and respondents' motion to govern further proceedings, which requests a remand for further administrative proceedings, it is

ORDERED that the Board's decision be vacated and this case be remanded for further proceedings in light of Singleton v. Babbitt, 588 F.3d 1078 (D.C. Cir. 2009) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5230 **September Term 2009**

1:08-cv-00969-UNA

Filed On: May 12, 2010

Yusuf Bush,

Petitioner

v.

Paul M. Schultz,

Respondent

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief and appendix, filed February 10, 2009, construed as including a request for a certificate of appealability (COA); this court's per curiam order filed March 18, 2009; and appellant's supplemental brief, filed February 16, 2010, it is

ORDERED, on the court's own motion, that the portion of the district court's dismissal order filed June 5, 2008, pertaining to appellant's claim of ineffectiveness of appellate counsel, be vacated and the case remanded to the district court for further proceedings consistent with this court's opinion in Williams v. Martinez, 586 F.3d 995 (D.C. Cir. 2009).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to send a certified copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7117 **September Term 2009**

1:08-cv-00766-RBW

Filed On: May 12, 2010

Denise Allison Robinson,

Appellant

v.

District of Columbia Housing Authority,

Appellee

BEFORE: Sentelle, *Chief Judge*, and Brown and Kavanaugh, *Circuit Judges*

O R D E R

Upon consideration of the stipulation of dismissal of this appeal, it is

ORDERED that the Clerk note on the docket that this case is dismissed. No mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7130 **September Term 2009**

1:06-cv-00366-RMU

Filed On: May 10, 2010

Kelly A. Green,

Appellant

v.

American Federation of Labor and Congress of Industrial Organizations and Mark Zobrisky, Individually and in his official capacity as an employee of AFL-CIO,

Appellees

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant entered into a binding settlement agreement with the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") that bars him from pursuing "all claims of any nature . . . that relate to or arise out of [his] employment with or separation from the [AFL-CIO]." Moreover, appellant has failed to meet the burden of showing the invalidity of the agreement. See Gains v. Cont'l Mortgage Inv. Corp., 865 F.2d 375, 378 (D.C. Cir. 1989) ("The strong policies favoring enforcement of settlements require that '[o]ne who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity.'") (quoting Callen v. Pennsylvania Railroad Co., 332 U.S. 625, 630 (1948)). Accordingly, the district court properly granted summary judgment in favor of appellees.

In addition, the district court did not abuse its discretion in denying appellant's motions for sanctions and discovery. See Rafferty v. NYNEX Corp., 60 F.3d 844, 851

(D.C. Cir 1995) (affirming the district court's denial of a motion for Rule 11 sanctions under an abuse of discretion standard); J. Roderick MacArthur Foundation v. F.B.I.,102 F.3d 600, 605 (D.C. Cir. 1996) ("The district court has broad discretion to grant or deny a discovery request, and we will reverse such a decision only in unusual circumstances.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5368 **September Term 2009**

1:09-cv-01682-RWR

Filed On: May 10, 2010

Curtis Lee Watson,

Appellant

v.

Scott Middlebrooks,

Appellee

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which is construed as including a motion for a certificate of appealability, it is

ORDERED that the motion be denied. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). District of Columbia prisoners are precluded from bringing habeas claims in federal court unless the local remedy is inadequate or ineffective, see D.C. Code § 23-110; Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998), and appellant has made no such showing here.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5443 **September Term 2009**

1:09-cv-02328-UNA

Filed On: April 23, 2010

Tommy Lee Stevens,

Appellant

v.

United States Department of Health and Human Services, Washington, DC and Department of Health And Human Resources,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief and supplement filed by the appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order issued December 8, 2009, be affirmed. The district court properly dismissed the appellant's complaint as frivolous. The complaint contains factual allegations that are so implausible as to be "fantastic or delusional." See Nietzke v. Williams, 490 U.S. 319, 328 (1989). The district court did not err in dismissing the complaint without the consent of the Attorney General, 31 U.S.C. § 3730(b)(1), because pro se plaintiffs may not file a qui tam action pursuant to the False Claims Act, and section 3730(b)(1) only applies to voluntary dismissals by qui tam plaintiffs. See United States ex rel. Mergent Servs. v. Flaherty, 540 F.3d 89, 91-94 (2d Cir. 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5443 **September Term 2009**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5077 **September Term 2009**

1:09-cv-01295-RJL

Filed On: April 22, 2010

In re: Christopher Earl Strunk,

Petitioner

BEFORE: Sentelle, Chief Judge, and Ginsburg and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to proceed on appeal in forma pauperis ("IFP"), and the petition for a writ of mandamus and preliminary injunction, it is

ORDERED that the motion to proceed on appeal IFP be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus and preliminary injunction be denied. A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Mandamus does not lie unless petitioner's right to relief is "clear and indisputable," and there is "no other adequate means" by which petitioner may attain the relief he seeks. See In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998). Here, petitioner has failed to demonstrate his entitlement to the extraordinary writ. Nor has petitioner satisfied the stringent standards required for an injunction pending appeal. See, e.g., Davis v. Pension Benefit Guarantee Corp., 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) (and cases cited therein).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1053 **September Term, 2009**

FILED ON: APRIL 16, 2010

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION AND DEPARTMENT OF LABOR,
RESPONDENTS

On Petition for Review of a Final Rule
of the Occupational Safety & Health Administration

Before: TATEL and KAVANAUGH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the petition for review of an order of the Occupational Safety & Health Administration and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review is denied, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: April 16, 2010

Opinion for the court filed by Senior Circuit Judge Randolph.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3013 **September Term, 2009**

FILED ON: APRIL 15, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

JOHN DOWNS, III, ALSO KNOWN AS J.D.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cr-00227-RBW-9)

Before: GINSBURG, ROGERS and KAVANAUGH, *Circuit Judges*

JUDGMENT

This appeal was presented to the court, and briefed and argued by counsel. The court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* D.C. CIR. RULE 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

John Downs, III appeals his conviction by a jury of conspiracy to distribute and possess with intent to distribute one kilogram or more of phencyclidine ("PCP"), 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(A)(iv), on two grounds. Neither is persuasive.

First, Downs contends the district court clearly erred in attributing to him at sentencing 3,285.7 grams of liquid PCP that were seized from two drug couriers at Dulles International Airport ("IAD") in Virginia, which raised his base offense level from 32 to 34. We find no such error. *See United States v. Henry*, 557 F.3d 642, 645 (D.C. Cir. 2009).

The evidence showed that Downs' involvement in the conspiracy headed by Darnell Jackson and Troy Hopkins was generally through Jackson. Jackson would often give PCP to Downs to sell and Downs would pay Jackson from the profits from his subsequent PCP sales in

Annapolis, Maryland. Downs was aware that Jackson obtained his PCP from a supplier (Tony Hilt) in Compton, California. Jackson and Hopkins paid couriers $1,000 plus expenses to bring PCP back to the Washington, D.C. area from California. In early May, Jackson and Downs discussed the immediate unavailability of PCP. In a series of taped conversations, Jackson confirmed with his supplier on May 12 that PCP was available and later that day telephoned Downs to ask him for $1,400 to send two drug couriers to California to pick up PCP, and Downs agreed to provide it. Jackson and Downs spoke again on May 13, confirming Downs' efforts to get Jackson the $1,400 for the couriers. On May 15, two couriers flew from IAD to California on flights costing roughly $1,400. On May 22 Downs also agreed to give Jackson $1,000 for PCP that Jackson had "fronted" for Downs. On May 23, Jackson told Hopkins he expected to get $3,000 from Downs that Jackson would use to pay for two couriers' trip from California to IAD. On May 24, two couriers arrived at IAD from California, and the FBI seized 3,285.7 grams of liquid PCP from them. When Jackson learned of the seizure, he telephoned Downs to inform him because Downs "was waiting . . . for the [PCP] to come in" that day. Oct. 23, 2007 Tr. at 31.

The district court acknowledged that the May 12 telephone call and the $1,400 Jackson requested from Downs may not have related to the shipment of PCP that was seized at IAD on May 24. Nonetheless the district court found that, together, the May 12 telephone call discussing the $1,400, Downs' selling PCP "fronted" to him by Jackson, and the May 24 call informing Downs of the seizure indicated that Downs was part of the ongoing conspiracy to bring PCP to the Washington, D.C. area from California. Downs offers no reason for this court to view this as other than a reasonable inference from the evidence. *Cf. United States v. Hart*, 324 F.3d 740, 747 (D.C. Cir. 2003). Downs has never denied agreeing to make the $1,400 payment, only that he actually intended to pay; the May 12 and subsequent telephone conversations of Downs' repeated assurances he would pay belie his denial. The district court could properly hold Downs responsible for the 3,285.7 grams of PCP seized at IAD even if he did not know about that shipment because the shipment was reasonably foreseeable to him and in furtherance of his agreed upon and jointly undertaken criminal activity. *United States v. Tabron*, 437 F.3d 63, 66 (D.C. Cir 2006); *United States v. Stover*, 329 F.3d 859, 874 (D.C. Cir. 2003); U.S.S.G. § 1B1.3(a)(1)(B); *see generally Pinkerton v. United States*, 328 U.S. 640 (1946). Downs' challenge to his 120 months' sentence of imprisonment, consistent with the statutory mandatory minimum after he received the benefit of the safety valve (resulting in a Guideline range of 121 151 months), thus fails.

Second, Downs contends the district court abused its discretion in denying his motion for a new trial because of the ineffectiveness of his trial counsel. *See United States v. Alexander*, 331 F.3d 116, 128 29 (D.C. Cir. 2003). However, under *Strickland v. Washington*, 466 U.S. 668 (1984), Downs has shown neither that his trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment nor that he was prejudiced. *See id.* at 687. The record shows that trial counsel informed Downs of the risks of calling character witnesses because that would allow the prosecutor to introduce rebuttal

evidence of Downs' admissions, during post-arrest debriefing meetings with FBI agents, to purchasing PCP from Jackson on repeated occasions and reselling it in Annapolis.

The district court found, after an evidentiary hearing, that Downs' trial counsel made a reasonable tactical decision in deciding to put on evidence of Downs' good character in the community. Essentially, the district court noted trial counsel faced a difficult decision in view of Downs' insistence on going to trial (and testifying) and calling character witnesses even after being advised of the risk. The district court found that the decision to call character witnesses was a mutual one made by Downs and his trial counsel and that, given the government's evidence, trial counsel was not deficient in pursuing a character defense. As trial counsel explained, calling character witnesses might be beneficial by "humaniz[ing]" Downs. Oct. 16, 2008 Tr. at 81. Downs does not explain how the district court erred. *See Strickland*, 466 U.S. at 689. Further, Downs does not attempt to show how he was prejudiced, and this alone suffices for the court to affirm the district court's rejection of his Sixth Amendment claim. *See id.* His own cross-examination covered many of the same matters as the cross-examination of one of the character witnesses. The district court noted Downs' own testimony hurt his case, observing that "he was a very bad witness." Oct. 29, 2008 Tr. at 48. Downs' new counsel for sentencing appeared to agree, observing that the jury had no choice except to find Downs guilty because he admitted on the witness stand that he committed the offense. Feb. 5, 2009 Tr. at 36.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. RULE 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

No. 09-3127 **September Term 2009**

1:89-cr-00162-RCL
1:89-cr-00162-RCL-4

Filed On: April 9, 2010

In re: James Antonio Jones,

Petitioner

Consolidated with 09-3128

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to file a successive § 2255 motion, the opposition thereto, and the reply, all filed in No. 09-3127; the notice of appeal, construed as a petition for writ of mandamus, and the memorandum of law and fact in support thereof, both filed in No. 09-3128; and the motion for extension of time to respond to the memorandum of law and fact, it is

ORDERED that the petition for writ of mandamus be denied. The transfer of the appellant's § 2255 motion to this court as a motion for leave to file a successive § 2255 motion was appropriate. Appellant has filed two prior § 2255 motions, one of which was filed after his resentencing and after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. It is

FURTHER ORDERED that the motion for leave to file a successive § 2255 motion be denied. Movant's § 2255 motion is based neither on newly discovered evidence nor on a new, previously-unavailable rule of constitutional law that the Supreme Court has made retroactively applicable to cases pending on collateral review. See 28 U.S.C. § 2255; United States v. Ortiz, 131 F.3d 161, 163-64 (D.C. Cir. 1998). It is

FURTHER ORDERED that the motion to extend time to respond to the memorandum of law and fact be dismissed as moot. See D.C. Cir. Rule 21(a).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5449 **September Term 2009**

1:09-cv-02327-UNA

Filed On: April 9, 2010

In re: Ralph Thomas,

Petitioner

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, construed as a petition for a writ of mandamus, and the response to this court's order issued March 4, 2010, it is

ORDERED, on the court's own motion, that this case be remanded to the district court for consideration of petitioner's December 31, 2009 filing as a motion for reconsideration of the district court's order issued December 8, 2009, transferring petitioner's civil action to the United States District Court for the Southern District of Indiana.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5355 **September Term 2009**

1:09-cv-01040-UNA

Filed On: April 8, 2010

Edem Aka,

Appellant

v.

Warden, Atlantic City Detention Center,

Appellee

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel, this court's order to show cause issued January 15, 2010; the response thereto, construed as including a request for a certificate of appealability; and the motion to hold the appeal in abeyance, it is

ORDERED that the order show cause be discharged. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to hold the appeal in abeyance be denied. It is

FURTHER ORDERED that the request for a certificate of appealability be denied and the appeal be dismissed. See 28 U.S.C. § 2253(c)(2); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000). The district court correctly held that appellant cannot challenge his District of Columbia conviction in federal court unless his remedy under D.C. Code § 23-110 is inadequate or ineffective. See, e.g., Garris v. Lindsay, 794 F.2d 722, 725-27 (D.C. Cir. 1986) (per curiam). Appellant has failed to demonstrate that D.C. Code § 23-110 affords him an inadequate or ineffective remedy.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5355 **September Term 2009**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7101 **September Term 2009**

1:09-cv-01623

Filed On: April 8, 2010

Eugene Jerome Cunningham,

Appellant

v.

District of Columbia, Municipal Incorporation,

Appellee

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of habeas corpus filed August 26, 2009, in Civil Action No. 09-1623 (D.D.C.), which the court has construed as a second or successive motion under 28 U.S.C. § 2255; the district court's Notice dated January 13, 2010; this court's order to show cause filed January 15, 2010, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that permission to file the § 2255 motion be denied. The district court denied the habeas petition appellant filed in 2005. Cunningham v. United States, No. 05cv1200, 2005 WL 1903374 (D.D.C. July 19, 2005), aff'd, 207 Fed. Appx. 5 (D.C. Cir. 2006). Thereafter, this court denied appellant's request for leave to file a second or successive § 2255 motion, In re Cunningham, No. 07-3128 (D.C. Cir. Feb. 5, 2008), which presented claims that are substantively the same as the claims at issue in the current motion. Appellant has set forth no grounds for this court to authorize another § 2255 motion asserting those claims. The motion is not based either on newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3144 **September Term 2009**

1:01-cr-00438-GK-1

Filed On: April 7, 2010

United States of America,

Appellee

v.

George Thomas Coumaris,

Appellant

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; and the motion for a certificate of appealability, the opposition thereto, and the reply, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion for certificate of appealability be denied. See 28 U.S.C. § 2253. Appellant has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), because he has not demonstrated "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3150 **September Term, 2009**

FILED ON: MARCH 22, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

NEWETT VINCENT FORD,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 05cr00100-09)

Before: GARLAND and KAVANAUGH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the court, and briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

Appellant Newett Ford appeals his conviction on one count of conspiracy to distribute and possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846, and on two counts of distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). Ford principally challenges the sufficiency of the evidence supporting his conspiracy conviction. We conclude that the government presented ample evidence at trial upon which a "'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Arrington*, 309 F.3d 40, 48 (D.C. Cir. 2002) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Appellant's subsidiary arguments also fail. The court did not act improperly in declining to conduct a pre-trial hearing regarding the conspiracy evidence, and instead permitting it to come in "subject to connection." *United States v. Gewin*, 471 F.3d 197, 200-01 (D.C. Cir. 2006); *see United States v. Jackson*, 627 F.2d 1198, 1218-19 (D.C. Cir.

1980). And because there was ample evidence that the appellant was a member of the conspiracy, the claim that he was prejudiced by "other crimes" evidence is wrong in its factual premise: the evidence to which he objects was not about "other" crimes, but rather about crimes committed as part of the conspiracy for which he was responsible.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold the issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3051 **September Term, 2009**

FILED ON: MARCH 22, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

FARZAD DARUI, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 07-cr-0149)

Before: SENTELLE, *Chief Judge*, and Garland and Kavanaugh, *Circuit Judges*.

J U D G M E N T

Upon consideration of the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties, it is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed.

Appellant Farzad Darui appeals the district court's denial of his Motion to Dismiss Superseding Indictment as Violative of the Double Jeopardy Clause. He claims that the district court should have granted the motion because at the end of his first trial the district court committed reversible error when it declared a mistrial unsupported by "manifest necessity" as required by *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978). Because there was no "manifest necessity" to the mistrial declaration, Darui argues, retrying him on the same charges would put him in double jeopardy in violation of the Fifth Amendment.

In *Arizona v. Washington* the Supreme Court concluded that a trial judge is allowed "broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury." 434 U.S. at 509. Here, on the record before us, including the trial judge's jury instructions, the trial judge's communications with the jury during its deliberations, and the length of the jury's deliberations, we conclude that the trial judge did not abuse his "broad discretion" in declaring a mistrial based on manifest necessity. We therefore affirm the district court's denial of Darui's motion.

No. 09-3051

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. See Fed R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3077 **September Term, 2009**

FILED ON: MARCH 9, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

TROY ANTOINE HOPKINS, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 06-cr-227)

Before: SENTELLE, *Chief Judge*, and GINSBURG and KAVANAUGH, *Circuit Judges*.

JUDGMENT

Upon consideration of the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties, it is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed.

Appellant Troy Antoine Hopkins appeals his conviction for conspiracy to distribute one kilogram or more of phencyclidine, seeking to have his conviction reversed and his case remanded to the district court for a new trial. He contends that the district court erred when it denied him a continuance of his trial, and further that during closing argument the government made improper and inflammatory remarks constituting error that affected his substantial rights.

First, Hopkins sought the continuance of his trial in order to replace appointed counsel with retained counsel. As this court noted in *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), "the granting or refusal of a continuance is a matter within the discretion of the judge who hears the application, and is not subject to review absent a clear abuse." We also noted in *Burton* that when the continuance is sought to replace counsel, "the defendant's Sixth Amendment right to assistance of counsel is implicated. In such circumstances, the right to select counsel must be carefully balanced against the public's interest in the orderly administration of justice." *Id.* Here, the record shows that

the district court "carefully balanced" Hopkins' right to counsel against the negative impact a continuance would have on the court, the prosecution, the co-defendants (some of whom were in custody), their attorneys, and the witnesses. The court also found that Hopkins had competent appointed counsel and that Hopkins was responsible for his having relatively less time to prepare for trial than had his co-defendants because he chose to remain a fugitive for 10 months. We conclude that the district court did not abuse its discretion in denying Hopkins a continuance.

Second, the remarks made by the prosecutor during closing argument and complained of by Hopkins may indeed have been error. To reverse his conviction, however, we must determine whether the improper remarks were plainly erroneous because Hopkins did not object to the remarks at trial. *United States v. Gartmon*, 146 F.3d 1015, 1026 (D.C. Cir. 1998). "In making that determination, the critical question is whether the error prejudiced defendant in a way that affected the outcome of the trial." *Id.* When assessing potential prejudice from an improper remark in a prosecutor's closing argument, this court looks to the centrality of the issue affected by the error, the closeness of the case, and the steps taken to mitigate the error. *Id.* Here, the remarks complained of were minor in light of the prosecutor's lengthy closing argument and none were central to the conspiracy case against Hopkins. Furthermore, the case was not close as the evidence against Hopkins was substantial. Finally, and most importantly, the district court ensured that the prosecutor's remarks did not prejudice Hopkins by promptly directing the prosecutor to clarify his remarks, and by instructing the jury that its recollection of the evidence controls, that it must decide the case based on the evidence alone, and that the closing arguments of counsel are not evidence. In light of these facts the prosecutor's remarks, even if improper, were not plainly erroneous.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. See Fed R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3119 **September Term, 2009**

FILED ON: FEBRUARY 26, 2010

UNITED STATES OF AMERICA,
APPELLEE

v.

EVERETTE LEE HAYES, JR.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cr-00500-JR-1)

Before: GINSBURG and KAVANAUGH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). It is

ORDERED and **ADJUDGED** that the judgment of the District Court be affirmed.

Responding to reports of gunshots, two police officers came upon Everette Hayes, naked, wielding a nine-millimeter Beretta pistol. Hayes was subsequently convicted of being a felon in possession of a firearm. Hayes challenged his conviction, arguing that his trial counsel was ineffective in failing to introduce cell phone records to corroborate his claim that he was carrying a cell phone rather than a gun during his encounter with the police. Hayes' argument is unpersuasive: Two officers saw Hayes holding the gun, one officer testified to having been shot at by Hayes, and the police later recovered a gun from the scene. In light of that evidence, there was no "reasonable probability" that "the result of the proceeding would have been different" if Hayes' counsel had sought to introduce his cell phone records. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1356 **September Term, 2009**

FILED ON: JANUARY 12, 2010

PETALUMA FX PARTNERS, LLC AND RONALD SCOTT VANDERBEEK, A PARTNER OTHER THAN THE TAX MATTERS PARTNER,
APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
APPELLEE

Appeal from the United States Tax Court

Before: SENTELLE, *Chief Judge*, and GRIFFITH and KAVANAUGH, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record compiled before the United States Tax Court and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the Tax Court appealed from in this case is hereby affirmed in part and reversed in part; and the Tax Court's decision on the penalties question is vacated and remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: January 12, 2010

Opinion for the court filed by Chief Judge Sentelle.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3028 **September Term, 2009**

FILED ON: DECEMBER 29, 2009

IN RE: TONY LEWIS,

PETITIONER

Consolidated with 09-3030

Petition for Writ of Mandamus to the United States District Court
for the District of Columbia and Motion for an Order Authorizing the District Court to Consider
a Successive 28 U.S.C. § 2255 Application
(Nos. 1:89-cr-00162-TFH-6, 1:89-cr-00162-TFH)

Before: GINSBURG, BROWN, and KAVANAUGH, *Circuit Judges*

J U D G M E N T

This petition and motion were considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for writ of mandamus and motion for an order authorizing the district court to consider a successive 28 U.S.C. § 2255 application be denied.

Lewis has filed a petition for writ of mandamus and a motion for an order authorizing the district court to consider a successive § 2255 application, *see* 28 U.S.C. § 2244(b)(3)(A). The relief Lewis requests is premised on his argument that a motion for a sentence reduction based on post-conviction rehabilitation is cognizable under 28 U.S.C. § 2255. It is not. *See United States v. Addonizio*, 442 U.S. 178, 186-87 (1979). We therefore deny his petition for a writ of mandamus and motion for an order authorizing the district court to consider a successive § 2255 application.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7022 **September Term 2009**

1:08-cv-00087-RCL

Filed On: December 23, 2009

Debabrata Saha, Professor,

Appellant

v.

George Washington University, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's orders filed September 23, 2008, and January 28, 2009, be affirmed. The district court properly granted summary judgment to appellee George Washington University ("the University") with respect to appellant's sole claim that survived the motion to dismiss. See Czekalski v. Peters, 475 F.3d 360, 363 (D.C. Cir. 2007). Appellant has failed to state a plausible claim for relief with respect to his other claims, because he has not identified any provision of the Faculty Code that the University's conduct violated. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, he has failed to state a claim for breach of contract as to the individual appellees, because he has not identified any binding contract between himself and those appellees. See Rittenberg v. Donohoe Constr. Co., 426 A.2d 338, 341 (D.C. 1981). Finally, Appellant has not shown that the district court abused its discretion in denying his motion for leave to file an amended complaint. Belizan v. Hershorn, 434 F.3d 579, 582 (D.C. Cir. 2006).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7022 **September Term 2009**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5508 **September Term, 2009**

FILED ON: DECEMBER 22, 2009

ILENE HAYS,
APPELLEE

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01032-HHK)

Before: TATEL and KAVANAUGH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: December 22, 2009

Opinion for the court filed by Circuit Judge Tatel.
Concurring opinion filed by Senior Circuit Judge Randolph.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5069 **September Term 2009**

1:07-cv-00687-RMC

Filed On: December 9, 2009

Gerald L. Rogers,

Appellant

v.

Mary L. Schapiro, Securities and Exchange Commission, et al.,

Appellees

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, the motion for summary affirmance, the opposition thereto, and the Rule 28(j) letters, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court did not abuse its discretion in granting the appellees' motion for a protective order. Nor did the court err in granting the appellees' motion to dismiss, as appellant has already litigated or had the opportunity to litigate the claims presented here. See, e.g., Rogers v. United States District Court for the District of Colorado, 06-cv-1010, 2007 WL 1087475 (D.D.C. Apr. 10, 2007), aff'd, No. 07-5132, 2007 WL 2935533 (D.C. Cir. Sept. 27, 2007) (per curiam); United States Securities and Exchange Commission v. Rogers, 283 Fed. Appx. 242 (5th Cir. 2008) (per curiam); United States Commodity Futures Trading Commission v. Rogers, 326 Fed. Appx. 718 (5th Cir. 2009) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7144 **September Term, 2009**

FILED ON: DECEMBER 7, 2009

FOOTBRIDGE LIMITED TRUST,
APPELLEE

v.

JAMES ZHANG,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:04-cv-00347-CKK)

Before: HENDERSON, TATEL and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties pursuant to D.C. Circuit Rule 34(j). It is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

James Zhang appeals the district court's denial of his motion for Rule 11 sanctions against Footbridge Limited Trust ("Footbridge"). The sanctions motion stemmed from a complaint filed by Footbridge against Zhang alleging legal malpractice and negligence. Specifically, Footbridge accused Zhang of failing to timely perfect a security interest on a loan it made to a third party through a holding company that employed Zhang as a commercial transaction attorney. After more than four years of litigation and an "extensive and contentious discovery" process, the district court granted Zhang's motion for summary judgment because, among other reasons, Footbridge could not establish the applicable standard of care in the absence of expert testimony. *Footbridge Ltd. Trust v. Zhang*, 584 F. Supp. 2d 150, 157, 160 (D.D.C. 2008).

Zhang filed a motion for Rule 11 sanctions against Footbridge's attorneys, claiming that they had failed to make a reasonable inquiry before filing the complaint against him, presented legal arguments that were unwarranted based on existing law, and made a factual allegation

without evidentiary support. After explaining the legal standard for imposing Rule 11 sanctions, the district court rejected Zhang's motion. *Footbridge Ltd. Trust v. Zhang*, No. 04-347 (D.D.C. Nov. 13, 2008) (order denying Rule 11 sanctions motion) ("*Order*"). We review the district court's denial of the Rule 11 motion for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Lucas v. Duncan*, 574 F.3d 772, 775 (D.C. Cir. 2009).

On appeal, Zhang complains that the district court abused its discretion by failing to address his arguments or provide an adequate explanation for its decision not to impose sanctions. The district court, however, specifically identified each of the arguments Zhang put forward in his sanctions motion and articulated the correct legal standard for imposing sanctions under Rule 11. The court then explained why it declined to impose Rule 11 sanctions in this case:

> Although [Zhang] prevailed on his Motion for Summary Judgment, the Court cannot find that [Footbridge's] Complaint, nor the factual and legal assertions therein, were presented for improper purposes, nor that they were so incredible as to warrant sanctions. On the contrary, the parties' respective positions required extensive discovery and briefing before the Court could ultimately render its November 5, 2008 decision. The Court therefore finds, in its discretion, that there is no basis to award Rule 11 sanctions in this case.

Order at 2 3. In view of this analysis, Zhang's assertions that the district court ignored his legal arguments and provided an insufficient explanation for its decision are without merit. Furthermore, although Zhang contends that the district court found that sanctions were unwarranted "*solely*" because Footbridge's complaint was not presented for improper purposes, Appellant's Br. 19, we do not read the court's decision to be so limited. Noting the complicated nature of the proceedings, the court concluded that Footbridge's complaint was not "so incredible as to warrant sanctions." *Order* at 2. Thus, the district court clearly considered the substance of the complaint and not just Footbridge's motive for bringing it.

Zhang's contention that the district court based its decision on clearly erroneous factual findings is similarly unavailing. *See Cooter*, 496 U.S. at 405 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."). Zhang feels particularly aggrieved by the district court's reference to his sanctions motion as "an apparent effort to prolong this seemingly never-ending litigation." *Order* at 1. Protesting that it was in fact the district court that unnecessarily protracted the litigation, Zhang complains that the court's assertion "was patently false and was directly contradicted by Zhang's strenuous efforts to end" the lawsuit. Appellant's Br. 7. Zhang goes so far as to invite the district court to impose sanctions against him for his allegedly dilatory behavior. But the district court did not, as Zhang alleges, base its decision on Zhang's perceived motives for filing his sanctions motion. Rather, the court denied his motion because it concluded that Footbridge's complaint was not presented for any improper purpose or "so incredible as to warrant sanctions." *Order* at 2. Whether or not Zhang sought to delay the litigation is therefore irrelevant.

Zhang further asserts that Footbridge's complaint was frivolous because it lacked evidentiary support and because Footbridge failed to produce expert testimony establishing the

applicable standard of care. In this circuit, however, "'decisions concerning Rule 11 sanctions are better left to the discretion of the district court which has a bird's eye view of the actual positions taken by the litigants,' and [we] will not second guess the factual determinations integral to the district court's decision not to impose Rule 11 sanctions." *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 425 (D.C. Cir. 2005) (internal citations omitted). The district court concluded that although Footbridge's complaint was ultimately a loser, it was not so frivolous as to warrant sanctions. We see no reason to second guess that determination or the court's exercise of its discretion in this case.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3048 **September Term, 2009**

FILED ON: DECEMBER 1, 2009

UNITED STATES OF AMERICA,
APPELLEE

v.

FRANCISCO MARTINEZ,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cr-00355-JDB-1)

Before: HENDERSON, TATEL and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed and the defendant's motion to remand the case under Federal Rule of Criminal Procedure 36 be denied.

Martinez was sentenced to 46 months in prison after pleading guilty to unlawful possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(c). Martinez seeks resentencing based on an alleged factual error in his presentence report regarding the status of an immigration detainer against him. Because Martinez did not object to the factual accuracy of the presentence report during sentencing, the district court's factual findings are subject only to plain error review. This Court has held that a district court's adoption of the factual findings of a presentence report can be plain error only when the facts therein "are internally contradictory, wildly implausible, or in direct conflict with the evidence that the sentencing court heard at trial." *United States v. Saro*, 24 F.3d 283, 291 (D.C. Cir. 1994). The presentence report did not contain facts meeting that standard. Moreover, at sentencing, the

district court did not refer to or rely on the status of an immigration detainer; as a result, Martinez cannot meet the prejudice prong of the plain error test. *Saro*, 358 F.3d at 288.

As to the motion to remand, a defendant may not employ Federal Rule of Criminal Procedure 36 to correct the kind of error at issue in this case. Rule 36 provides for the correction of clerical errors "in a judgment, order, or other part of the record" or the correction of "an error in the record arising from oversight or omission." FED. R. CRIM. P. 36. Alleged factual inaccuracies in a presentence report are not within the narrow confines of this rule.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5449 **September Term 2009**

1:05-cv-00663

Filed On: November 30, 2009

Lannie Prince,

Appellant

v.

Hillary Rodham Clinton,

Appellee

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance; and the orders to show cause, filed April 3, 2009 and July 10, 2009, why the appeal should not be dismissed for lack of prosecution, in which the court "provid[ed] appellant [an additional sixty days] to either retain another attorney who will respond to the motion for summary affirmance or respond herself to the motion for summary affirmance, and provide the requisite initial submissions," and appellant's response thereto, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted as conceded. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) (argument not made on appeal is deemed waived). Despite two extensions of time in which to file a response to the motion for summary affirmance, appellant has failed to address any of the arguments contained in appellee's motion.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5069 **September Term 2009**

1:08-cv-01797-RJL

Filed On: November 30, 2009

Montgomery Blair Sibley,

Appellant

v.

Samuel A. Alito, Jr., et al.,

Appellees

BEFORE: Ginsburg, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to recuse, which contains a motion for reconsideration of the court's August 19, 2009 order and a motion to expedite consideration of appellant's motions, and the opposition thereto; the motion filed June 12, 2009, which contains a motion for summary reversal, the opposition thereto, which contains a motion for summary affirmance, and the reply, it is

ORDERED that the motion to recuse be denied. Appellant has not demonstrated the court's impartiality might reasonably be questioned. See 28 U.S.C. § 455. It is

FURTHER ORDERED that the motion to reconsider the court's August 19, 2009 order be denied. Appellant has provided no basis for reconsideration aside from his request for recusal. It is

FURTHER ORDERED that the motion to expedite consideration of appellant's motions be dismissed as moot. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's request for removal of the Justices of the Supreme Court is a political question that is nonjusticiable. See Nixon v.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5069 **September Term 2009**

U.S., 506 U.S. 224, 233-37 (1993). Finally, appellant's claims for damages against the deputy clerk of the Supreme Court fail, because such clerks enjoy absolute immunity from damages for the performance of tasks that are an integral part of the judicial process. See Sindram v. Suda, 986 F.2d 1459 (D.C. Cir. 1993).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1375 **September Term 2009**

PRC-10/24/08 decision

Filed On: November 24, 2009

Charles F. Murray,
Petitioner

v.

Postal Regulatory Commission,
Respondent

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a preliminary injunction, the opposition thereto, the motion to dismiss, the opposition thereto, the supplement to the opposition, the reply, the informal brief, the motion for leave to prepare discovery requests, the opposition thereto, the motion for summary judgment, the opposition thereto, the motion for leave to file a reply to the opposition to the motion for leave to prepare discovery requests and the opposition to the motion for summary judgment, and the lodged reply, it is

ORDERED that the motion for leave to file a reply be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the motion for a preliminary injunction be denied. Petitioner has not shown that he is entitled to the requested relief. It is

FURTHER ORDERED that the motion to dismiss be granted. Petitioner seeks review of a decision dated October 24, 2008. He seeks review pursuant to 39 U.S.C. § 3663, which states that a petition for review must be filed "within 30 days after [the] order or decision becomes final." As no statute or regulation provides otherwise, the challenged decision became final on the date of the decision – October 24, 2008 – not on the date it was mailed to, or received by, petitioner. Petitioner acknowledges in his opposition to the motion to dismiss and the supplement thereto that he filed his petition for review on November 25, 2008, which was more than thirty days after the challenged decision became final. His petition for review must therefore be dismissed as untimely. Federal Rule of Appellate Procedure 4(a)(1)(B) does not require a different result, as the rule's sixty-day requirement applies to notices of appeal of district court orders, not petitions for review of agency decisions. It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1375 **September Term 2009**

FURTHER ORDERED that the motion for leave to prepare discovery requests and the motion for summary judgment be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7117 **September Term 2009**

1:01-cv-02516

Filed On: November 24, 2009

John Doe, in his capacity as the executer of the Estate of Jane Doe, in his personal capacity, and as the personal representative of Jane Doe,

Appellee

v.

Sheikh Usama Bin-Muhammad Bin-Laden, also known as Osama Bin Laden, et al.,

Appellees

Islamic Emirate of Afganistan, also known as Islamic State of Afghanistan,

Appellant

Republic of Iraq,

Appellee

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction, the opposition thereto, and the reply; the renewed motion to dismiss for lack of jurisdiction; the lodged supplement to the opposition to the motion to dismiss, the motion for leave to file the supplement, and the opposition thereto; the transfer order of the Judicial Panel on Multidistrict Litigation ("MDL Panel"); and the motion to govern future proceedings and the opposition thereto, it is

ORDERED that the appeal and pending motions be transferred to the United States Court of Appeals for the Second Circuit. Transfer to the Second Circuit best

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7117 **September Term 2009**

achieves the "coordination benefits" of 28 U.S.C. § 1407. See Hill v. Henderson, 195 F.3d 671, 677-78 (D.C. Cir. 1999). This court does not decide whether the district court's order issued September 30, 2008, is subject to immediate review under the collateral order doctrine.

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Second Circuit. Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3075 **September Term 2009**

1:95-cr-00298-TFH-1

Filed On: November 23, 2009

In re: Clifford Theophilus Bogle,

Petitioner

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of audita querela, transferred to this court for consideration as a request for leave to file a successive 28 U.S.C. § 2255 motion, and the opposition thereto, it is

ORDERED that the motion for leave to file a successive 28 U.S.C. § 2255 motion be denied. Petitioner's § 2255 motion is not based on newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. See 28 U.S.C. § 2255(h).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7007 **September Term 2009**

1:08-cv-00754-CKK

Filed On: November 23, 2009

Courtney Anthony Bailey,

Appellant

v.

District of Columbia, et al.,

Appellees

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; the motion for summary affirmance and the opposition thereto; and the motion for summary reversal and the opposition thereto, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly determined that the unknown District of Columbia jail officials, the only defendants named in appellant's amended complaint, are entitled to qualified immunity because no constitutional violation has been alleged. See Saucier v. Katz, 533 U.S. 194, 201 (2001); see also Pearson v. Callahan, 129 S. Ct. 808, 821 (2009). A good faith arrest made pursuant to a facially valid warrant does not violate the Constitution. See White v. Olig, 56 F.3d 817, 820 (7th Cir. 1995); Mensh v. Dyer, 956 F.2d 36, 40 (4th Cir. 1991); see also United States v. Hewlett, 395 F.3d 458, 462 (D.C. Cir. 2005) (concluding arrest was lawful when arresting officers reasonably believed that the warrant was valid). The District of Columbia jail officials, as representatives of the District's executive, had the

discretion to allow federal officials to take custody over the appellant for prosecution on federal charges prior to his extradition to Maryland on state charges, and they needed no court order to allow them to do so. See Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); United States v. Dowdle, 217 F.3d 610, 611 (8th Cir. 2000); United States v. Warren, 610 F.2d 680, 684-85 (9th Cir. 1980). Having allegedly violated the laws of at least two sovereigns, appellant is "subject to prosecution by both, and he may not complain of or choose the manner or order in which each sovereign proceeds against him." Rawls v. United States, 166 F.2d 532, 534 (10th Cir. 1948); see also Ponzi, 258 U.S. at 260. The district court also properly determined that, due to the presence of the warrant, appellant did not make out a constitutional claim of false imprisonment. See Voyticky v. Village of Timberlake, 412 F.3d 669, 677 (6th Cir. 2005); see also Baker v. McCollan, 443 U.S. 137, 142-44 (1979) (person arrested and detained pursuant to a facially valid warrant had no constitutional claim of false imprisonment).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3098 **September Term 2009**

1:93-cr-00315-03

Filed On: November 18, 2009

In re: Jerome A. Porter,

Petitioner

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to file a second or success motion under 28 U.S.C. § 2255, the opposition thereto, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for leave to file a second or successive motion under 28 U.S.C. § 2255 be denied. Petitioner's § 2255 motion is not based on newly discovery evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, as required under § 2255.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5116 **September Term 2009**

1:09-cv-00543-UNA

Filed On: November 18, 2009

Raymond Quigley,

Appellant

v.

Ronnie Holt, Warden,

Appellee

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for appointment of counsel and appellant's brief, construed as including a request for a certificate of appealability, it is

ORDERED that the motions for appointment of counsel be denied because the interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the request for a certificate of appealability be denied and the appeal be dismissed because appellant has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000). The district court correctly held that appellant must bring his challenges to his District of Columbia convictions by motion under D.C. Code. Ann. § 23-110, and that a lack of success does not make that remedy inadequate or ineffective. See, e.g., Garris v. Lindsay, 794 F.2d 722, 725-27 (D.C. Cir.) (per curiam), cert. denied, 479 U.S. 993 (1986).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3126 **September Term, 2009**

FILED ON: NOVEMBER 16, 2009

UNITED STATES OF AMERICA,
APPELLEE

v.

NAIBEYE KOUMBARIA, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 07-cr-61)

Before: SENTELLE, *Chief Judge*, ROGERS and KAVANAUGH, *Circuit Judges*.

JUDGMENT

Upon consideration of the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties, it is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed.

We note that appellant's brief did not comply with FED. R. APP. P. 28(a)(9), which states that the appellant's brief must contain "the argument, which must contain: (A) appellant's contentions and the reasons for them . . . ." With respect to at least two of the four issues raised in the appellant's brief, little or no reasoning was presented. We nevertheless considered all issues raised and find no error warranting reversal of the district court's judgment.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3054 **September Term, 2009**

FILED ON: NOVEMBER 13, 2009

UNITED STATES OF AMERICA,
APPELLEE

v.

CHARLES HARRISON,
APPELLANT

Consolidated with 08-3063

Appeals from the United States District Court
for the District of Columbia
(No. 1:98-cr-00235-RCL-5)

Before: ROGERS, GARLAND and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the District Court be affirmed.

Defendants were convicted of conspiracy to possess with intent to distribute heroin. In 2004, both defendants received sentences of life imprisonment. In *United States v. Henry*, 472 F.3d 910 (D.C. Cir. 2007), this Court vacated those sentences and remanded for resentencing pursuant to *United States v. Booker*, 543 U.S. 220 (2005). On remand, the District Court resentenced both defendants to life imprisonment.

During resentencing, the District Court painstakingly complied with the *procedural* requirements of *Booker*. *See United States v. Gardellini*, 545 F.3d 1089, 1092 n.2 (D.C. Cir. 2008). Defendants claim, however, that the life sentences the District Court imposed were *substantively* unreasonable. *See Gall v. United States*, 128 S. Ct. 586, 597 (2007). We disagree.

To begin with, defendants' life sentences were within the Guidelines range, which in this case was 30 years to life. We afford a presumption of substantive reasonableness to within-Guidelines sentences such as these. *See United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006). Indeed, this Court has not as yet reversed any within-Guidelines sentence as substantively unreasonable. In light of our deferential standard of review and the very serious facts and circumstances relating to the offenses and the defendants, which the District Court addressed at some length at the sentencing hearing, we cannot say that these within-Guidelines sentences were substantively unreasonable. *See Gardellini*, 545 F.3d at 1093.

Defendants advance a variety of other sentencing-related arguments, none of which is persuasive.

First, defendants assert that application of the *Booker* remedial opinion results in a "de facto Sixth Amendment violation" because federal courts in practice have continued to treat the Guidelines as mandatory. That claim fails because the District Court in this case did not treat the Guidelines as mandatory.

Second, defendants suggest that the *Booker* remedial opinion is incorrect. As a lower court, we of course are bound to follow *Booker*.

Third, defendants argue that due process requires that sentences be based on facts proved to a jury beyond a reasonable doubt. That contention is unavailing because a sentence may be based on facts determined by the sentencing judge by a preponderance of the evidence, as long as the sentence is not greater than the statutory maximum. *See United States v. Bras*, 483 F.3d 103, 108 (D.C. Cir. 2007); *Dorcely*, 454 F.3d at 371-73.

Fourth, defendants contend that sentencing them under *Booker* for their pre-*Booker* offenses violates ex post facto principles. That claim fails because this Court has held that application of *Booker* to a pre-*Booker* offense does not violate ex post facto principles, at least so long as the sentence does not exceed the applicable Guidelines range, which it did not in this case. *See United States v. Alston-Graves*, 435 F.3d 331, 343-44 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7021 **September Term 2009**

Filed On: November 6, 2009

In re: Peter Paul Mitrano,

Respondent

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

ORDER OF DISBARMENT

Upon consideration of the order issued by the District of Columbia Court of Appeals on July 17, 2008, oral argument, and the brief filed by Respondent, it is

ORDERED that Peter Paul Mitrano be disbarred from the practice of law before the United States Court of Appeals for the District of Columbia. Reinstatement before this court shall be conditioned on proof that Respondent has been reinstated in the District of Columbia Court of Appeals. Respondent has provided no support for his contention that reciprocal discipline may not be imposed based on the District of Columbia Court of Appeals' independent disciplinary proceeding. Nor has he demonstrated that there was any lack of notice or infirmity of proof in the District of Columbia Court of Appeals' proceeding; that the disbarment with conditional reinstatement is gravely unjust; or that his misconduct warrants substantially different discipline. *See In re Sibley*, 564 F.3d 1335, 1339-40 (D.C. Cir. 2009); D.C. Cir. Rules, App. II, Rule IV(c). It is

FURTHER ORDERED that Peter Paul Mitrano be prohibited from holding himself out to be an attorney at law licensed to practice before the United States Court of Appeals for the District of Columbia.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3086 **September Term, 2009**

FILED ON: OCTOBER 29, 2009

UNITED STATES OF AMERICA,
APPELLEE

v.

ERIK DONAIRE CONSTANZA BRAN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cr-00248-JDB-2)

Before: BROWN and KAVANAUGH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

J U D G M E N T

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the court and briefed by counsel. The court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the judgment of the district court be affirmed. The appellant has not identified any reversible errors in the district court's decision. *Senior Circuit Judge* WILLIAMS appends a concurring statement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

CONCURRING STATEMENT OF SENIOR CIRCUIT JUDGE WILLIAMS

On March 11, 2008 Erik Donaire Constanza Bran pled guilty to conspiring to distribute five or more kilograms of cocaine, knowing that it would have been unlawfully imported into the United States, in violation of 21 U.S.C. §§ 959, 960 and 963. At the plea hearing, Bran and the government jointly submitted a plea agreement stating that "[t]he parties agree[d] that the Defendant will receive a sentence of confinement of 144 months (12 years) in accordance with Federal Rule of Criminal Procedure 11(c)(1)(C)." The agreement also allowed the "United States, within its sole discretion, [to] file a motion to reduce the Defendant's sentence under Section 5K1.1 of the U.S.S.G. and/or Rule 35 of the Federal Rules of Criminal Procedure." Thus the plea agreement effectively provided for a sentence that ranged between 144 and, subject to the prosecutor's and court's discretion, 0 months. The district court explained that at the sentencing hearing it would consider whether to accept the plea agreement.

After the court accepted the plea (subject to defendant's right to withdraw from the plea in the event that the court later rejected the plea agreement, see Federal Rule of Criminal Procedure 11(c)(5)), but before the sentencing hearing, Bran filed a motion seeking to withdraw from the plea agreement. At the sentencing hearing, the district court denied that motion, accepted the plea agreement, and sentenced Bran to 144 months in accordance with the agreement.

Bran appealed, arguing that it was improper for the district court to apply the "fair and just reason" standard stated in Rule 11(d)(2)(B), as that rule governs the withdrawal of pleas, whereas his motion sought to withdraw only the plea agreement. When applying the fair and just reason standard to a defendant's motion to withdraw a plea, courts consider three factors: "(1) whether the defendant has asserted a viable claim of innocence; (2) whether the delay between the guilty plea and motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and (3) whether the guilty plea was somehow tainted." United States v. West, 392 F.3d 450, 455 (D.C. Cir. 2004). The last of these three factors is the most important. Id.

Bran does not provide a reason for applying a different standard, though he does suggest a basis for giving the

latitudinarian "fair and just" criterion a somewhat different content. Citing United States v. Lopez, 385 F.3d 245 (2d Cir. 2004), he argues that the first and third of the standard factors "don't readily apply in the context of a withdrawal from the agreement" and that the government would not be prejudiced by his withdrawal from the agreement. See id. at 253-54. This contention's premise, that the plea and plea agreement are completely separable, is inconsistent with United States v. Standiford, 148 F.3d 864, 867-68 (7th Cir. 1998). Standiford holds that they are not, so that to withdraw from the agreement the defendant must satisfy the "fair and just" standards explicitly governing the right to withdraw from the plea itself.

The Lopez decision considered an effort by the defendant to withdraw from a plea agreement made under Rule 11(c)(1)(B), a type of agreement evidently not under consideration in Standiford. It first held that such an agreement could be withdrawn with no impact on the plea itself. Under Rule 11 such an agreement involves no more than a government recommendation of a sentence (or agreement not to oppose a sentence), and the court held that the plea was thus "wholly independent of the court's acceptance of the recommendations." 385 F.3d at 251. It followed that the defendant could similarly withdraw from the agreement with no consequences for the plea itself. Id. Lopez did not explain why the court's acceptance or rejection of a Rule 11(c)(1)(B) recommendation was equivalent to accepting or rejecting the plea agreement. Compare Rule 11(c)(3)(A) (providing for the court's acceptance or rejection of a plea agreement under Rule 11(c)(1)(A) or 11(c)(1)(C)) with Rule 11(c)(3)(B) (providing that with a plea agreement under Rule 11(c)(1)(B) the court is to advise defendant that he or she has no right to withdraw the plea if the court does not follow the recommendation or request).

Lopez's reason for delinking the plea and plea agreement is obviously inapplicable here. Bran's plea was under Rule 11(c)(1)(C), so that court rejection of the agreement would give Bran a right to withdraw his plea. See Rule 11(c)(5). The holding of Lopez, therefore, provides no reason to separate withdrawal from Bran's plea agreement from withdrawal from his plea. (The Lopez court suggested in dictum that agreements under subsections (A) and (C) of Rule 11(c)(1) might also be defeasible separately from the plea, but without explanation of what would prevent the defendant from exercising his right under Rule 11(c)(5) to withdraw from a plea if the associated plea agreement ceased to have effect. See 385 F.3d at 251-52 n.13.)

The government, however, does not rely on the different character of the plea in Lopez. Rather, it points out that that court, though finding that the "just and fair reason" standard did not directly apply (as it governs pleas), nonetheless ruled that the distinction did "not prevent us from borrowing the 'fair and just reason' requirement for use in this situation." 385 F.3d at 253.

One may assume in Bran's favor that Rule 11 allows a party to withdraw from a Rule 11(c)(1)(C) agreement without withdrawing from the underlying plea. One may further assume in his favor the suitability of applying the framework he advocates—namely that of the Lopez court. But even under that framework the district court did not abuse its discretion in denying Bran's motion. Bran argues that the government would not be prejudiced because he does not seek a new trial and the government could seek a higher sentence just as he could seek a lower sentence. [Blue 6-7]. But whether the government would be prejudiced is not the only inquiry required by Lopez. The Lopez court, adjusting the three-factor test to fit the plea agreement context, reformulated the question of whether the plea was tainted into an inquiry whether elements of the plea agreement other than defendant's commission of the crime were somehow illegitimate, namely, "whether the defendant failed to understand, was misled about, or simply does not like certain subsidiary terms of the plea agreement (e.g., the length of the sentence)," id. at 255 (emphasis added), plainly regarding the latter as no basis for withdrawal from the agreement. Because Bran has offered no reason for the withdrawal from his plea agreement other than his dissatisfaction with the length of the sentence, the judgment of the district court deserves to be affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 16, 2009 Decided October 23, 2009
Reissued October 22, 2010

No. 07-5411

IN RE: SEALED CASE (*BOWLES*)

Stephen L. Snyder argued the cause for appellant. On the briefs was *Frederick D. Cooke, Jr.*

Kathleen V. Gunning argued the cause for appellee. With her on the brief were *Colleen J. Boles* and *Lawrence H. Richmond*.

Before: ROGERS and KAVANAUGH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In *Bowles v. Russell*, 551 U.S. 205 (2007), the Supreme Court held that 28 U.S.C. § 2107,[1] as

[1] 28 U.S.C. § 2107 provides:

> **(a)** Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> **(b)** In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to

carried into practice by Appellate Rule 4(a)(6),[2] is jurisdictional

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all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

[2] Appellate Rule 4(a)(6) provides:

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the

and that courts lack power to create equitable exceptions. The question presented in this appeal is whether Federal Rule of Civil Procedure 60(b) remains available to circumvent the 180-day deadline in the appellate rule for reopening the time to file an appeal. Appellant maintains there are unique circumstances explaining its failure to note a timely appeal: (1) the usual means of obtaining notice about the status of its case were unavailable because the case was sealed; (2) appellant's counsel was diligent in attempting to discover the status of the case, by filing a written inquiry about pending motions and making oral inquiries of the Clerk of the Court; and (3) neither party obtained notice of the dismissal of the case until after the 180-day deadline in Appellate Rule 4(a)(6) had passed. Reading *Bowles* narrowly, appellant contends that because the time limits in Rule 60(b) are not jurisdictional, the unique circumstances exception applies

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> judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> **(C)** the court finds that no party would be prejudiced.

Federal Rule of Civil Procedure 77(d) provides:

> **(1)** ***Service.*** Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).
>
> **(2)** ***Time to Appeal Not Affected by Lack of Notice.*** Lack of notice of the entry does not affect the time for appeal or relieve--or authorize the court to relieve--a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

and the district court therefore abused its discretion in denying relief pursuant to Rule 60(b). The holding in *Bowles*, however, is broadly stated and appellant's view that the district court retained power to recognize an equitable exception to the 180-day deadline rests on precedent expressly overturned by *Bowles*. Moreover, concluding that Rule 60(b) is unavailable to allow appellant to file a timely appeal is in accord with the majority of circuits holding that with the 1991 amendment adding subsection (6), Appellate 4(a)(6) became the exclusive means of reopening the time to appeal. Accordingly, we affirm.

In affirming we are cognizant of the unfairness of denying relief to appellant in this sealed case where none of the usual means of learning the status of its case were available and, as the parties agree and we will assume, appellant made diligent efforts through counsel to discover the status of its case. A sealed case generally presents special circumstances. Neither the federal rules of civil procedure nor the district court's local rules specifically address how parties shall be notified in sealed cases. Not only is there no public docket in a sealed case, but the parties and their counsel also may not be able to access the sealed docket or receive electronic notification. The ad hoc procedures in appellant's case were inadequate to ensure notice. The sealed docket stated electronic notice would not be given and listed participants to be notified by other means. No other means were employed. Although counsel for the parties were also listed on page 1 of the sealed docket as "ATTORNEY[S] TO BE NOTICED," neither parties' counsel received notice of the October 26, 2006 dismissal of the case. These circumstances explaining the parties' failure to receive timely notice of the dismissal of the case are unique, not to be found in precedent addressing reopening of the time to appeal. This may be because the district court and the parties have made special arrangements for receiving notice in other sealed cases and those arrangements have worked. When they do not, through no fault

of the parties and despite the best efforts of the parties to obtain information about the status of the proceedings, the civil justice system has failed in light of the implicit assumption underlying the federal rule on notice, FED. R. CIV. P. 77(d), that parties will have an easy way to determine the status of their case. The purpose of the civil rules set forth in Rule 1 contemplates a just as well as speedy resolution of disputes. FED. R. CIV. P. 1. Given the mandatory 180-day deadline for reopening the time to file appeals in civil cases, it would be appropriate in light of *Bowles* for the district court to adopt procedures to ensure that parties and their counsel, if any, in sealed cases receive prompt notice of final orders and judgments.

I.

On May 11, 2005 appellant filed an application under the Federal Arbitration Act, 9 U.S.C. § 10, to vacate an arbitration award rejecting its claim to additional attorneys fees under a written contingency fee agreement with the Federal Deposit Insurance Corporation ("FDIC") in connection with recovering the subrogated claims of a failed bank against an accounting firm. The FDIC moved on June 14, 2005 to seal its pleadings because matters in the arbitration were confidential, and also moved on June 21, 2005 to dismiss the application to vacate. Appellant filed an opposition on July 7, 2005, and the FDIC filed a reply on July 25, 2005. On August 22, 2005 appellant filed a motion for a hearing on its application to vacate the arbitration award and a supplemental memorandum on its application. Appellant also filed on August 29, 2005 a request for the district court to take judicial notice of a district court opinion decided August 23, 2005 in a different case involving the FDIC. The FDIC filed an opposition to that request on September 9, 2005, and appellant filed a reply on September 19, 2005.

Meanwhile, on June 21, 2005, the district court sealed the case upon joint consent motion of the parties. Thereafter neither the district court's sealed docket nor electronic notification were available to inform the parties of the status of pending and later filed motions. As it turns out, despite the filing by appellant's counsel of a Notice of Inquiry on February 28, 2007, shortly after new counsel entered his appearance, inquiring about the pending motions, the parties represent that neither party or their counsel received notice of the district court's October 26, 2006 dismissal of the case until May 30, 2007. *See* Appellant's Br. 7–9, 15–16; Appellee's Br. 5 n.5, 13. On May 30, upon a call to the district court judge's chambers, a law clerk advised appellant's counsel of the dismissal on the merits.

Appellant moved on June 8, 2007, within 7 days of receiving notice of the dismissal, to reopen the time to appeal pursuant to Appellate Rule 4(a)(6). The district court denied the motion as untimely on July 26, 2007. Appellant also moved on August 31, 2007 for relief from the judgment or order of dismissal pursuant to Rule 60(b). The motion recounted, among other things, the events leading to appellant's late notice of the dismissal of its case and its late motion to reopen pursuant to Appellate Rule 4(a)(6), and requested either a status conference or the grant of its pending motion to reopen the time to appeal. The FDIC filed an opposition on September 12, 2007, citing *Bowles*. The district court summarily denied the Rule 60(b) motion on November 26, 2007. Appellant filed a notice of appeal on December 18, 2007.

II.

Pursuant to Rule 60(b)(6), a party may seek relief from a judgment or order for "any other reason that justifies relief," FED. R. CIV. P. 60, upon a showing of "extraordinary

circumstances," *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). The unique circumstances doctrine recognized in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. INS*, 375 U.S. 384 (1964), arose in view of the inequity of foreclosing appeals by parties whose failure to file timely notices of appeal results from reliance on the court.[3] As later clarified in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), the doctrine applied only where a party performed an act, which if properly done, would postpone the filing deadline and had received specific assurance by a judicial officer that the act has properly been done. When the doctrine originated, the Federal Rules of Civil and Appellate Procedure did not contain a more specific avenue of relief. It was not until 1991 that the Rules were amended to add subsection (6) to Appellate Rule 4(a), setting forth a 180-day extension of the time to reopen the time to file an appeal when "the moving party did not receive notice under Federal Rule of Civil Procedure 77(d)." *See* 16A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §§ 3950.3, 3950.6 (4th ed. 2008) ("16A Wright & Miller").

In *Bowles*, a prisoner filed a motion pursuant to Appellate Rule 4(a)(6) to reopen the time to appeal the denial of his petition for a writ of habeas corpus. 551 U.S. at 207. The district court judge granted the motion and extended the

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[3] *Harris Truck* and *Thompson* concern "unique circumstances" relating to time limits in Federal Rule of Civil Procedure 73. In 1968, Rule 73 was "abrogated" and "[m]ost of the provisions of Rule 73 now appear in substance in Appellate Rules 3, 4, 7, 8, and 12." 12 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3062 (2d ed. 1997). Courts, including this one, applied similar reasoning to Rule 60(b)(6) motions. *See, e.g.*, *Polylok Corp. v. Manning*, 793 F.2d 1318 (D.C. Cir. 1986).

deadline by 17 days rather than the 14 days allowed by the rule and the statute that tracks the rule, 28 U.S.C. § 2107(c). *Id.* Bowles relied on the judge's ruling and filed his motion 16 days after the order. *Id.* The Supreme Court held that § 2107, as carried into practice by Appellate Rule 4(a)(6), was a jurisdictional grant and limitation, and the court of appeals could not hear Bowles' appeal regardless of the circumstances. *Id.* at 213. Of significance here, the Supreme Court also stated:

> Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the "unique circumstances" doctrine is illegitimate.

Id. at 214. The Court proceeded to "overrule *Harris Truck Lines*[, *Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962)] and *Thompson* [*v. INS*, 375 U.S. 384 (1964)] to the extent they purport to authorize an exception to a jurisdictional rule." *Id.*

Read as narrowly as possible, *Bowles* did not reach the issue of when "unique circumstances" might apply on a motion pursuant to Rule 60(b). To support its application, appellant depicts Rule 60(b) as a "court promulgated rule," in which time limitations are not jurisdictional because it is a "claim-processing" rather than statutory rule. Appellant's Br. 14, 17. Because Rule 60(b)'s time requirements are not jurisdictional and may be extended for good cause, appellant suggests that the *Harris Truck* line of cases overruled in *Bowles* with respect to an Appellate Rule 4(a)(6) motion nonetheless still applies to Rule 60(b) motions.

Although the Supreme Court has acknowledged "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress," *Bowles*, 551 U.S. at 211–212, the

Court has never held that a party could use a court-promulgated rule to circumvent the jurisdictional bar on limits for reopening the time to appeal enacted by Congress. The effect of appellant's requested relief — that a court could vacate and reinstate a judgment pursuant to Rule 60(b) because of "unique circumstances" in order to allow a party to appeal where Appellate Rule 4(a)(6) would otherwise withhold appellate jurisdiction — would create precisely this scenario. The Supreme Court has read Congress' codification of Appellate Rule 4(a)(6)'s reopening provisions as a jurisdictional limitation, and taken that limitation very seriously. In so doing, *Bowles* changed the legal landscape for Rule 60(b) motions. The Court spoke in unequivocal and uncompromising terms in stating that courts lacked power to carve out equitable exceptions to jurisdictional statutory requirements. 551 U.S. at 212 n.4, 213–14. It noted the deadline applied even where life itself was at stake. *Id.* 212 n.4. While not referring specifically to Rule 60(b), the Court overruled its precedent on which lower courts had relied in creating equitable exceptions to time limits. *Id.* at 213–14. Hence it would be difficult to imagine that the Court would not also view the use of Rule 60(b) to circumvent the deadline in Appellate Rule 4(a)(6) as "illegitimate," *id.* at 214. The Court's acknowledgment, then, of a distinction between the jurisdictional statutory requirements of Appellate Rule 4(a)(6) and claim processing rules adopted by the courts, *id*. at 210–13, cannot reasonably be read to entertain Rule 60(b) circumstances as overriding the deadline in Appellate Rule 4(a)(6).

Reading *Bowles* as foreclosing Rule 60(b) as an alternative to Appellate Rule 4(a)(6) accords with the prior holding of the majority of the circuits that the 1991 amendment adding subsection (6) to the appellate rule was the exclusive means to reopen the time to appeal because of lack of notice. These circuits reasoned that using Rule 60(b) to circumvent the 180-

day deadline in Appellate Rule 4(a)(6) would frustrate the clear purpose in promoting finality through prohibiting such appeals. *See e.g.*, *Vencor Hospitals, Inc. v. Standard Life & Accident Ins. Co.*, 279 F.3d 1306, 1310–11 (11th Cir. 2002); *Clark v. Lavallie*, 204 F.3d 1038, 1040–41 (10th Cir. 2000); *In re Stein*, 197 F.3d 421, 425–26 (9th Cir. 1999); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 360 (8th Cir. 1994). The courts relied on both the plain text of Appellate Rule 4(a)(6) and the 1991 advisory committee notes describing the amended rule as providing that "[r]eopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier," FED R. APP. P. 4 advisory committee notes to 1991 amendments. Thus, in *Vencor* the Eleventh Circuit concluded that "[a]s with the language of the amendment itself, the advisory committee's notes evidence an intent to provide an exclusive, limited opportunity for relief when a party fails to receive notice of the entry of a judgment or order." 279 F.3d at 1310–11. The Eighth Circuit adopted similar reasoning, quoting the advisory committee notes that subsection (6) "establishes an *outer* time limit" of 180 days for noting an appeal. *Zimmer*, 32 F.3d at 360 (emphasis in original). One circuit, without referencing the 1991 amendments, took a contrary path, *see Lawrence v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 320 F.3d 590 (6th Cir. 2003); *Lewis v. Alexander*, 987 F.2d 392 (6th Cir. 1993), but it has also acknowledged in holding that Appellate Rule 4(a)(6) was jurisdictional that "[t]he Appellate Rules underscore the exclusivity of the 4(a)(6) remedy," *Bowles v. Russell*, 432 F.3d 668, 672 (6th Cir. 2005). *See* 16A Wright & Miller §§ 3950.3 & .6.

Notably, even before *Bowles* and the 1991 amendment to Appellate Court Rule 4(a)(6), the circumstances appellant recounts might not have entitled it to relief pursuant to Rule 60(b)(6). In *Expeditions Unlimited Aquatic Enterprises, Inc. v.*

Smithsonian Institute, 500 F.2d 808 (D.C. Cir. 1974), this court adopted a narrow exception to the then existing time limit for noting an appeal: the district court may vacate and re-enter a judgment pursuant to Rule 60(b) when (1) "neither party had actual notice of the entry of judgment," (2) "the winning party is not prejudiced by the appeal," and (3) "the losing party moves to vacate the judgment within a reasonable time after he learns of its entry." *Id.* at 810. *See Polylok Corp.*, 793 F.2d at 1320; *Ashby Enterprises, Ltd. v. Weitzman*, Dym & Assocs., 780 F.2d 1043 (D.C. Cir. 1986). Other circuits also carved out equitable exceptions to the time to appeal pursuant to Rule 60(b), although most required both lack of notice and diligence by counsel. *See, e.g.*, *Wilson v. Atwood Group*, 725 F.2d 255, 258 (5th Cir., 1984) (en banc) (citing *Mizell v. Att'y Gen. of the State of New York*, 586 F.2d 942, 944–45 n.2 (2d Cir. 1978), *cert. denied*, 440 U.S. 967 (1979)). However, since *Osterneck*, 489 U.S. 169, this court has required a showing of reliance on "some affirmative assurance which, if proper, would have extended or postponed the deadline for filing the notice of appeal," and that the assurance was based upon "official judicial action," which does not include statements from the Clerk of the Court's office. *Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 164 (D.C. Cir. 1996). Appellant points to its filing of a Notice of Inquiry, to which it states it received no response, and to claims it received assurances from the Clerk of the Court that the district court judge had not issued any order regarding that inquiry or with respect to the pending motions, Appellant's Br. at 7, 15. But the district court's silence in response to inquiries does not constitute an "affirmative assurance," *see Moore*, 100 F.3d at 164, and the assurances from the Clerk of the Court, no matter how affirmative, do not constitute "official judicial action," *Williams v. Washington Convention Ctr. Auth.*, 481 F.3d 856, 859 (D.C. Cir. 2007).

What makes this case unique is that it is a sealed case. The usual mechanisms under the federal rules of civil procedure for the parties and their counsel to obtain information about the status of court proceedings were unavailable. Although providing for notice by the clerk pursuant to Civil Rule 77(d), the rules do not specifically address how parties shall receive notice of judgments or orders in sealed cases. Neither do the district court's local rules. The ad hoc procedure for notice described in the sealed docket in this case proved inadequate. Although the sealed docket stated "[t]he following participants should be noticed by other means," the parties advise that no "other means" were employed and they did not learn of the October 26, 2006 judgment and order dismissing the case until after the 180-day deadline had passed. Under the circumstances, appellant was not in a position to make a timely "'free, calculated, deliberate' choice not to appeal." *Expeditions Unlimited*, 500 F.2d at 809 (quoting *Ackermann*, 340 U.S. at 198). Had the arbitrator ruled in appellant's favor, and awarded it the millions of dollars in attorneys' fees that it claimed it was entitled to under the contingency fee agreement, the FDIC likewise would have been barred from challenging the district court's affirmance of the award had it learned of the district court's dismissal of its case only after the 180-day deadline for appealing.

A system of procedural rules employing temporal deadlines implicitly assumes there will be an easy way for the parties to learn the status of their case. The reference to Civil Rule 77(d) in the 1991 amendment adding subsection (6) to the appellate rule evidences such an assumption with regard to noting an appeal as does the requirement for diligence by counsel. *See, e.g.*, *Fox v. American Airlines, Inc.* 389 F.3d 1291, 1296 (D.C. Cir. 2004); *Wilson*, 725 F.2d at 258 (citing *Mizell*, 586 F.2d at 944–45). Rule 1 of the Federal Rules of Civil Procedure provides: "These rules govern the procedure in all civil actions

and proceedings in the United States district courts. . . . They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1; see FED. R. APP. P. 1(a)(2). Under the circumstances confronting appellant — (1) the usual means provided pursuant to the federal civil rules for notifying the parties of the status of the case were unavailable in this sealed case; (2) appellant's counsel was, the parties agree and we will assume, diligent in attempting to discover the status of the case; and (3) neither party received notice of the dismissal of appellant's case until after the 180-day deadline — the rules failed to accomplish their just purpose. As this court observed long ago, "[i]f the parties do not know of the entry of judgment, the winning party cannot rely on the judgment and the losing party cannot make a 'free, calculated, deliberate' choice not to appeal." *Expeditions Unlimited*, 500 F.2d at 809 (quoting *Ackermann*, 340 U.S. at 198). "In these circumstances the purposes behind Rule 77(d) would not be served by denying the losing party the privilege of appealing and, in our view, justice demands that the losing party be given that opportunity." *Id*. So too here. Because a sealed case raises different concerns about notice to the parties and reliance on ad hoc procedures based on a listing in the district court's sealed docket of the participants to be notified "by other means" has proven inadequate, it would be appropriate in light of *Bowles* for the district court to adopt procedures to ensure parties to sealed cases shall obtain timely notice of orders and judgments.

Accordingly, we hold in light of *Bowles* that the district court lacks power to adopt a unique circumstances exception pursuant to Rule 60(b) to circumvent the 180-day deadline of

Appellate Rule 4(a)(6), and because appellant's other challenge to the denial of its Rule 60(b) motion lacks merit,[4] we affirm.

[4] Appellant's contention that the district court erred by not taking judicial notice of a recent district court opinion sanctioning the FDIC attorney in the arbitration proceedings lacks merit. Appellant's allegations of fraud do not meet the high threshold for showing a fraud on the court. *See Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.*, 98 F.3d 640, 642–43 (D.C. Cir. 1996). Rather the district court denied appellant's request to take judicial notice, "in its discretion," because the other case "pertains to matters that are outside the scope of this court's limited review of an arbitration award." Mem. Op. at 10 n.8 (Oct. 26, 2006). Appellant's protest that it was denied an opportunity to demonstrate fraud by the FDIC in securing the arbitration award is belied by the record. Appellant's Rule 60(b) motion stated it was filed "to bring to the [district court's] attention a more accurate statement of the reasons that [it] should take judicial notice" of the other district court case. Having acknowledged its own earlier failure to articulate the reasons for judicial notice, appellant cannot use Rule 60(b) to avoid its strategic choice. *See Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). Explaining its earlier deficiency as a result of the rush to file before the district court ruled on the pending motions, appellant fails to explain why it could not have elaborated its reasoning in its September 19, 2005 reply to the FDIC's opposition to appellant's request for judicial notice.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7124 **September Term 2009**

1:06-cv-01264

Filed On: September 29, 2009

Lisa F. Wallace, A developmentally disabled person, by and through her next friend, co-trustee and brother Stephen P. Wallace and Stephen P. Wallace, Individually, and all those similarly situated in the case,

Appellants

v.

Patricia W. Hastings, An Individual, et al.,

Appellees

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed April 22, 2009, and the response thereto, filed August 10, 2009; the motions for leave to proceed in forma pauperis; the motion for appointment of counsel; the motion to hold the case in abeyance, which contained a request for judicial notice, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motions for leave to proceed in forma pauperis be denied, as appellant has not provided the affidavit required by Fed. R. App. P. 24. It is

FURTHERED ORDERED that the motion for judicial notice be denied. See Fed. R. Evid. 201(b). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7124 **September Term 2009**

FURTHER ORDERED that the district court's orders filed March 30, 2007 and September 30, 2008, be summarily affirmed. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d. 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly denied removal of appellant's case, see Bush v. Cheaptickets, Inc., 425 F.3d 683, 686 (9th Cir. 2005) ("The removal statute, 28 U.S.C. § 1441 is quite clear that only a 'defendant' may remove the action to federal court...") (citing Shamrock Oil & Gas Corp. v. Sheets, 314 U.S. 100 (1941)). And appellant has waived any objection to the sanctions imposed by the district court by failing to raise this issue on appeal. See Wood v. Department of Labor, 275 F.3d 107, 112 n.9 (D.C. Cir. 2001).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3089 **September Term 2009**

1:00-cr-00440-CKK-1

Filed On: September 18, 2009

United States of America,

Appellee

v.

Kofi Apea Orleans-Lindsay, also known as Kofi Apea Kofi Apea Orleans Lindsay, also known as Bean,

Appellant

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability ("COA"), the affidavit in support thereof, and the lodged revised supplemental motion for a COA; the motion for leave to file the lodged revised supplemental motion for a COA; the motion for appointment of counsel; and the motion to dismiss for lack of a COA; it is

ORDERED that the motion for appointment of counsel be granted. The interests of justice warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion for leave to file the supplemental revised motion for a COA be granted. The Clerk is directed to file the lodged revised supplemental motion. It is

FURTHER ORDERED that the motion for a COA be denied and the motion to dismiss for lack of a COA be granted. A COA will issue only upon "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and this requirement is met if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant has not made a substantial showing of the denial of a constitutional right on his challenge to the factual basis for his guilty plea. Appellant stated during his plea

colloquy that he decided to shoot Trooper Toatley while returning to the car and that he continued to think about this decision while standing outside of the car. Therefore, he acted with the requisite premeditation and deliberation for first-degree murder. See United States v. Mack, 466 F.2d 333, 338 (D.C. Cir. 1972) ("[T]he law requires only that 'some appreciable time' elapse during which the necessary premeditation could take place."). Appellant cannot prevail on a claim of ineffective assistance of counsel because he has not shown that: (1) counsel's performance was not "within the range of competence demanded of attorneys in criminal cases;" and (2) there is a "reasonable probability" that, but for the errors of his counsel, he "would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 56-59 (1985). Nor has appellant shown that his right to counsel was denied when the district court replaced one of his attorneys who was not death penalty qualified with attorneys who were, or that the district court abused its discretion by not providing an evidentiary hearing. See United States v. Pollard, 959 F.2d 1011, 1031 (D.C. Cir. 1992) ("Only where the § 2255 motion raises detailed and specific factual allegations whose resolution requires information outside of the record or the judge's personal knowledge or recollection must a hearing be held.") (internal quotations omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no COA has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1369 **September Term 2009**

FCC-BTCCT-20050819AA

Filed On: September 15, 2009

Free Press,

Appellant

v.

Federal Communications Commission,

Appellee

Fox Entertainment Group, Inc., et al.,
Intervenors

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for voluntary dismissal, the response and opposition thereto, the reply, and the sur-reply; the motions to govern further proceedings, the responses thereto, and the reply; and the response to this court's June 28, 2007 order and the reply, it is

ORDERED that the motion for voluntary dismissal be granted. Intervenor Media General has set forth no valid reason why the parties should be required to proceed with this petition for review. An intervenor is not entitled to expand the scope of this case beyond the issues raised by the petitioner. See National Ass'n of Regulatory Utility Comm'rs v. ICC, 41 F.3d 721, 729 (D.C. Cir. 1994) (citing Illinois Bell Tel. Co. v. FCC, 911 F.2d 776, 786 (D.C. Cir. 1990)). It is not apparent that Free Press is seeking dismissal of this case for improper strategic reasons. Cf. Albers v. Eli Lilly & Co., 354 F.3d 644, 646 (7th Cir. 2004) (dismissal sought after oral argument); Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004) (same). Finally, Media General has not shown that it would be prejudiced by dismissal of this case.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1369 **September Term 2009**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 10, 2009 Decided September 11, 2009

No. 08-7008

HAIDAR MUHSIN SALEH, ET AL.,
APPELLANTS

v.

TITAN CORPORATION,
APPELLEE

CACI INTERNATIONAL INC. AND CACI PREMIER TECHNOLOGY, INC.,
INTERVENORS

Consolidated with 08-7009

Appeals from the United States District Court
for the District of Columbia
(No. 05cv01165)

Susan L. Burke argued the cause for appellants. With her on the briefs were *Katherine Gallagher*, *Shereef Hadi Akeel*, and *L. Palmer Foret*.

Ari S. Zymelman argued the cause for appellee. With him on the brief were *F. Whitten Peters*, *Kannon K. Shanmugam*, and *F. Greg Bowman*.

J. William Koegel Jr. argued the cause for intervenors CACI International Inc. and CACI Premier Technology, Inc. With him on the brief was *John F. O'Connor*.

Before: GARLAND and KAVANAUGH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* GARLAND.

SILBERMAN, *Senior Circuit Judge*: Plaintiff Iraqi nationals brought separate suits against two private military contractors that provided services to the U.S. government at the Abu Ghraib military prison during the war in Iraq. The district court granted summary judgment in behalf of one of the contractors, Titan Corp., on grounds that the plaintiffs' state tort claims were federally preempted. But the court denied summary judgment on those grounds to the other contractor, CACI International Inc. The court also dismissed claims both sets of plaintiffs made under the Alien Tort Statute (which is appealed only by the Titan plaintiffs) and reserved for further proceedings in the CACI case that contractor's immunity defense. We have jurisdiction over this interlocutory appeal under 28 USC §§ 1291 and 1292(b). We affirm the district court's judgment in behalf of Titan, but reverse as to CACI.

I

Defendants CACI and Titan contracted to provide in Iraq interrogation and interpretation services, respectively, to the U.S. military, which lacked sufficient numbers of trained personnel to undertake these critical wartime tasks. The contractors' employees were combined with military personnel for the purpose of performing the interrogations, and the military retained control over the tactical and strategic parameters of the mission. Two separate groups of plaintiffs, represented by the named plaintiffs Haidar Muhsin Saleh and Ilham Nassir Ibrahim, brought suit alleging that they or their relatives had been abused by employees of the two contractors during their detention and interrogation by the U.S. military at the Abu Ghraib prison complex. While the allegations in the two cases are similar, the Saleh plaintiffs also allege a broad conspiracy between and among CACI, Titan, various civilian officials (including the Secretary and two Undersecretaries of Defense), and a number of military personnel, whereas the Ibrahim plaintiffs allege only that CACI and Titan conspired in the abuse.

As we were told, a number of American servicemen have already been subjected to criminal court-martial proceedings in relation to the events at Abu Ghraib and have been convicted for their respective roles. While the federal government has jurisdiction to pursue criminal charges against the contractors should it deem such action appropriate, *see* 18 U.S.C. §§ 2340A, 2441, 3261, and although extensive investigations were pursued by the Department of Justice upon referral from the military investigator, no criminal charges eventuated against the contract employees. (Iraqi contract employees are also subject to criminal suit in Iraqi court.) Nor did the government pursue any contractual remedies against either contractor. The U.S. Army

Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734. Saleh pursued such a route, succeeding in obtaining $5,000 in compensation, despite the fact that the Army's investigation indicated that Saleh was never actually interrogated or abused.

While the terms "torture" and "war crimes" are mentioned throughout plaintiffs' appellate briefs and were used sporadically at oral argument, the factual allegations in the plaintiffs' briefs are in virtually all instances limited to claims of "abuse" or "harm." To be sure, as the dissent emphasizes, certain allegations in the complaints are a good deal more dramatic. But after discovery and the summary judgment proceeding, for whatever reason, plaintiffs did not refer to those allegations in their briefs on appeal. Indeed, no accusation of "torture" or specific "war crimes" is made against Titan interpreters in the briefs before us. We are entitled, therefore to take the plaintiffs' cases as they present them to us. And although, for purpose of this appeal, we must credit plaintiffs' allegations of detainee abuse, defendants point out–and it is undisputed–that government investigations into the activities of the apparently relevant Titan employees John Israel and Adel Nakhla suggest that these individuals were not involved in detainee abuse at all. Other linguists mentioned in plaintiffs' briefs–"Iraqi Mike," Etaf Mheisen, and Hamza Elsherbiny–are not alleged to have engaged in abuse involving the plaintiffs. Steven Stefanowicz, alleged in one set of complaints to have been an employee of Titan, was in fact an employee of CACI. And only one specified instance of activity that would arguably fit the definition of torture (or possibly war crimes) is alleged

with respect to the actions of a CACI employee. *Titan* J.A. 567-570.[1]

Plaintiffs brought a panoply of claims, including under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*., government contracting laws, various international laws and agreements, and common law tort. In a thoughtful opinion, District Judge Robertson dismissed all of the Ibrahim plaintiffs' claims except those for assault and battery, wrongful death and survival, intentional infliction of emotional distress, and negligence. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005). Following our decisions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring), and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), the district court held that because there is no consensus that *private* acts of torture violate the law of nations,

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[1] The Torture Victim Protection Act, § 3(b)(1), 28 U.S.C. § 1350, defines "torture" as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual *for such purposes* as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." (emphasis added) *See Price v. Socialist People's Libyan Arab Jamalhiriya*, 294 F.3d 82, 91-94 (D.C. Cir. 2002). There is an allegation that one of *CACI*'s employees observed and encouraged the beating of a detainee's soles with a rubber hose, which could well constitute torture or a war crime.

such acts are not actionable under the ATS's grant of jurisdiction. *Ibrahim*, 391 F. Supp. 2d at 14-15.[2]

As for the remaining claims, the district court found that there was, as yet, insufficient factual support to sustain the application of the preemption defense, which the defendants had asserted. The judge ordered limited discovery regarding the military's supervision of the contract employees as well as the degree to which such employees were integrated into the military chain of command. *Id*. at 19. A year later, the district court dismissed the federal claims of the Saleh plaintiffs. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006). The two sets of cases were consolidated for discovery purposes.

Following discovery, the contractors filed for summary judgment, again asserting that all remaining claims against them should be preempted as claims against civilian contractors providing services to the military in a combat context. In the absence of controlling authority, the district judge fashioned a test of first impression, according to which this preemption defense attaches only where contract employees are "under the direct command and *exclusive* operational control of the military chain of command." *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007) (emphasis added). He concluded that Titan's employees were "fully integrated into [their] military units," *id*. at 10, essentially functioning "as soldiers in all but name," *id*. at 3. Although CACI employees were also integrated with military personnel and were within the chain of command, they were nevertheless found to be subject to a "dual chain of command" because the company retained the power to give "advice and

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[2] The ATS reads, in its entirety, "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

feedback" to its employees and because interrogators were instructed to report abuses up both the company and military chains of command. *Id*. The CACI site manager, moreover, said that he had authority to prohibit interrogations inconsistent with the company ethics policy, which the district court deemed to be evidence of "dual oversight." *Id*. Thus, the remaining tort claims were held preempted as to Titan but not as to CACI. *Id*.

The losing party in each case appealed, and we heard their arguments jointly. We thus have before us two sets of appeals. The first consists of the Iraqi plaintiffs' appeals from the district court's decision in favor of Titan on both the preemption and ATS issues. The second features CACI's appeals from the district court's denial of its motion for summary judgment on the basis of preemption. We have jurisdiction pursuant to 28 U.S.C. § 1291 over the former. As to the latter, the district court has certified its denial of summary judgment for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The plaintiffs only half-heartedly object to the district judge's exercise of discretion under § 1292(b). Even if we were inclined to withdraw this permission to appeal–which we are not–we would still be required to rule on the appropriate test for combatant activities preemption in the plaintiffs' appeals against the judgment for Titan. We also have jurisdiction over the district judge's dismissal of the ATS claim in the Titan case, but not his corollary dismissal of the ATS claim in the CACI case; the plaintiffs did not cross-appeal that decision.

We think the district judge properly focused on the chain of command and the degree of integration that, in fact, existed between the military and both contractors' employees rather than the contract terms–and affirm his findings in that regard. We disagree, however, somewhat with the district court's legal test: "exclusive" operational control. That CACI's employees were expected to report to their civilian supervisors, as well as

the military chain of command, any abuses they observed and that the company retained the power to give advice and feedback to its employees, does not, in our view, detract meaningfully from the military's operational control, nor the degree of integration with which CACI's employees were melded into a military mission. We also agree with the district court's disposition of the ATS claim against Titan.

II

We conclude that plaintiffs' D.C. tort law claims are preempted for either of two alternative reasons: (a) the Supreme Court's decision in *Boyle*; and (b) the Court's other preemption precedents in the national security and foreign policy field.

* * *

Although both defendants assert that they meet the district court's "direct command and exclusive operational control" test for application of the preemption defense, CACI disputes the appropriateness of that test, arguing that it does not adequately protect the federal interest implicated by combatant activities. In CACI's view, the wartime interests of the federal government are as frustrated when a contractor within the chain of command exercises *some* level of operational control over combatant activities as would be true if all possible operational influence is exclusively in the hands of the military. For their part, the Iraqi plaintiffs agree with the district court's finding that CACI exerted sufficient operational control over its employees as to have been able to prevent the alleged prisoner abuse and thus that the company should be subject to suit. As to Titan, plaintiffs argue that the district court overlooked critical material facts, including allegations that Titan breached its contract and that the military lacked the authority to discipline Titan employees.

As noted, both defendants asserted a defense based on sovereign immunity, which the district court has reserved. Presumably, they would argue that, notwithstanding the exclusion of "contractors with the United States" from the definition of "Federal agency" in the Federal Tort Claims Act ("FTCA")–which, of course, waives sovereign immunity–when a contractor's individual employees under a service contract are integrated into a military operational mission, the contractor should be regarded as an extension of the military for immunity purposes. The Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1992), the primary case on which defendants rely for their preemption claim, reserved the question whether sovereign immunity could be extended to non-governmental employees, *id*. at 505 n.1, even in a case where the contractor provided a discrete product to the military.

We agree with the defendants (and the district judge) that plaintiffs' common law tort claims are controlled by *Boyle*. There, a lawsuit under Virginia tort law was brought in federal district court in behalf of a Marine pilot who was killed when his helicopter crashed into the water and he was unable to open the escape hatch (which opened out rather than in). The defendant that manufactured the helicopter alleged that the door was provided in accordance with Department of Defense specifications and, therefore, Virginia tort law was preempted. The Supreme Court agreed; it reasoned that first "uniquely federal interests" were implicated in the procurement of military equipment by the United States, and once that was recognized, a conflict with state law need not be as acute as would be true if the federal government was legislating in an area traditionally occupied by the states.

Nevertheless, the court acknowledged that a significant conflict must exist for state law to be preempted. In *Boyle*, the court observed that the contractor could not satisfy both the

government's procurement design and the state's prescribed duty of care. It looked to the FTCA's exemption to the waiver of sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused," 28 U.S.C. § 2680(a), to find a statutory provision that articulated the "outlines" of the significant conflict between federal interests and state law. *Boyle*, 487 U.S. at 511. Since the selection of the appropriate design of military equipment was obviously a governmental discretionary function and a lawsuit against a contractor that conformed to that design would impose the same costs on the government indirectly that the governmental immunity would avoid, the conflict is created.

The crucial point is that the court looked to the FTCA exceptions to the waiver of sovereign immunity to determine that the conflict was significant and to measure the boundaries of the conflict. Our dissenting colleague contends repeatedly that the FTCA is irrelevant because it specifically excludes government contractors. *See* Dissent Op. at 8, 15-16, 19. But, in that regard, our colleague is not just dissenting from our opinion, he is quarreling with *Boyle* where it was similarly argued that the FTCA could not be a basis for preemption of a suit against contractors. *See* Supplemental Brief of Petitioner at 10-11, 1988 WL 1026235; *see also* 487 U.S. at 526-27 (Brennan, J., dissenting). In our case, the relevant exception to the FTCA's waiver of sovereign immunity is the provision excepting "any claim arising out of the combatant activities of the military or armed forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j).[3] We note that this exception is even

[3] Although the combatant activities exception was the only FTCA exception briefed, it was suggested at oral argument that other provisions could conceivably conflict with the plaintiffs' claims,

broader than the discretionary function exception. In the latter situation, to find a conflict, one must discover a discrete discretionary governmental decision, which precludes suits based on that decision, but the former is more like a field preemption, *see*, *e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), because it casts an immunity net over any claim that *arises* out of combat activities. The arising-out-of test is a familiar one used in workmen's compensation statutes to denote *any* causal connection between the term of employment and the injury.[4]

The parties do not seriously dispute the proposition that uniquely federal interests are implicated in these cases, nor do the plaintiffs contend that the detention of enemy combatants is not included within the phrase "combat activities." Moreover, although the parties dispute the degree to which the contract employees were integrated into the military's operational activities, there is no dispute that they were in fact integrated and performing a common mission with the military under ultimate military command. They were subject to military direction, even if not subject to normal military discipline. Instead, the plaintiffs argue that there is not a significant conflict

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potentially including 28 U.S.C. § 2680(k) (exempting from the immunity waiver "any claim arising in a foreign country"). Of course, since that issue has not been properly raised, we do not reach it.

[4] *See*, *e.g.*, *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). In the District of Columbia, scope of employment law is expansive enough "to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1982)).

in applying state or Iraqi tort law to the behavior of both contractors' employees because the U.S. government itself openly condemned the behavior of those responsible for abusing detainees at Abu Ghraib–at least the Army personnel involved.

In order to determine whether a significant conflict exists between the federal interests and D.C. tort law, it is necessary to consider the reasons for the combat activities exception. The legislative history of the combatant activities exception is "singularly barren," but it is plain enough that Congress sought to exempt combatant activities because such activities "by their very nature should be free from the hindrance of a possible damage suit." *Johnson v. U.S.*, 170 F.2d 767, 769 (9th Cir. 1948). As the Ninth Circuit has explained, the combatant activities exception was designed "to recognize that during wartime encounters[,] no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Koohi v. U.S.*, 976 F.2d 1328, 1337 (9th Cir. 1992) (holding preempted claims against a defense contractor implicated in the Navy's accidental shoot-down of an Iranian commercial airliner); *see also Ibrahim*, 391 F. Supp. 2d at 18 ("war is an inherently ugly business").

To be sure, to say that tort duties of reasonable care do not apply on the battlefield is not to say that soldiers are not under any legal restraint. Warmaking is subject to numerous proscriptions under federal law and the laws of war. Yet, it is clear that all of the traditional rationales for *tort* law–deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors–are singularly out of place in combat situations, where risk-taking is the rule. *Koohi*, 976 F.2d at 1334-35; *see also*, *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993). In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign

regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit. And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control. Indeed, these cases are really indirect challenges to the actions of the U.S. military (direct challenges obviously are precluded by sovereign immunity).

The nature of the conflict in this case is somewhat different from that in *Boyle*–a sharp example of discrete conflict in which satisfying both state and federal duties (*i.e.*, by designing a helicopter hatch that opens both inward and outward) was impossible. In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state or foreign sovereign. Rather, it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare. Thus, the instant case presents us with a more general conflict preemption, to coin a term, "battle-field preemption": the federal government occupies the field when it comes to warfare, and its interest in combat is always "precisely contrary" to the imposition of a non-federal tort duty. *Boyle*, 487 U.S. at 500.

Be that as it may, there are specific conflicts created if tort suits are permitted. Of course, the costs of imposing tort liability on government contractors is passed through to the American taxpayer, as was recognized in *Boyle*. More important, whether the defendant is the military itself or its contractor, the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings is the

same where, as here, contract employees are so inextricably embedded in the military structure. Such proceedings, no doubt, will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies. Allowance of such suits will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations.[5]

Further, given the numerous criminal and contractual enforcement options available to the government in responding to the alleged contractor misconduct–which options the government evidently has foregone–allowance of these claims will potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors. *See*, *e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350-53 (2001). And as noted above, the Army Claims Service has confirmed that plaintiffs will not be totally bereft of all remedies for injuries sustained at Abu Ghraib, as they will still retain rights under the Foreign Claims Act. Thus, in light of these alternative remedies, it is simply not accurate to say, as the dissent does, that our decision today leaves the field without any law at all, Dissent Op. at 30-31.

Just as in *Boyle*, however, the "scope of displacement" of the preempted non-federal substantive law must be carefully tailored so as to coincide with the bounds of the federal interest being protected. In that case, the Supreme Court promulgated a three-part test to determine when preemption is required in the design defects context: "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1)

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[5] The dissent asserts that such conflicts can be ameliorated through a *deus ex machina* of litigation management. Dissent Op. at 25-26. We think that is an illusion.

the United States approved reasonably precise specifications; (2) the equipment conformed to these specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle*, 487 U.S. at 512. This test served to ensure that a "discretionary function" of the government was truly at stake and to eliminate any perverse incentive for a manufacturer to fail to disclose knowledge of potential risks. *Id.* at 512-13. Here, the district court concluded that the federal interest in shielding the military from battlefield damage suits is sufficiently protected if claims against contract employees "under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers" are preempted. *Ibrahim*, 556 F. Supp. 2d at 5.

We agree with CACI that this "exclusive operational control" test does not protect the full measure of the federal interest embodied in the combatant activities exception. Surely, unique and significant federal interests are implicated in situations where operational control falls short of exclusive. As CACI argues, that a contractor has exerted *some* limited influence over an operation does not undermine the federal interest in immunizing the operation from suit. Indeed, a parallel argument drawn from the Eleventh Circuit for a rule that would preclude suit "only if . . . the contractor did not participate, or participated only minimally, in the design of the defective equipment" was rejected by the Supreme Court in *Boyle* as "not a rule designed to protect the federal interest embodied in the 'discretionary function' exemption." Whether or not the contractors participated in the design of the helicopter door, the government official made the policy judgment, and it is that judgment that is protected by preemption. 487 U.S. at 513.

The district court's test as applied to CACI and Titan, moreover, creates a powerful (and perverse) economic incentive for contractors, who would obviously be deterred from reporting abuse to military authorities if such reporting alone is taken to be evidence of retained operational control. That would be quite anomalous since even uniformed military personnel are obliged to refuse manifestly unlawful orders, *see United States v. Calley*, 22 U.S.C.M.A. 534, 544 (1973), and, moreover, are encouraged to report such outside of the chain of command to inspector generals, *see, e.g.*, 10 U.S.C. § 1034. Again we see an analogy to *Boyle*. As noted, the Eleventh Circuit would have allowed the contractor a preemption defense only if the contractors did not participate at all in the design of the helicopter door. The Supreme Court pointed out that that test would create an analogous perverse incentive, discouraging contractors from participating in design features where their expertise would help to better the product. *Boyle*, 487 U.S. at 512-13.

We think that the following formulation better secures the federal interests concerned: During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted. We recognize that a service contractor might be supplying services in such a discrete manner–perhaps even in a battlefield context–that those services could be judged separate and apart from combat activities of the U.S. military.[6]

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[6] Plaintiffs contend that government contractor preemption should be limited to procurement contracts (as in *Boyle* or *Koohi*) and should not extend to service contracts, as here. While some lower courts have limited preemption in this manner, *see*, *e.g.*, *McMahon v. Presidential airways Inc.*, 460 F. Supp. 2d. 1315, 1331 (M.D. Fla. 2006); *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615 (S.D. Tex. 2005), we agree

That would be analogous to the court's recognition in *Boyle* that a supply contractor that had a contract to provide a product without relevant specifications would not be entitled to the preemption defense if its sole discretion, rather than the government's, were challenged (although we are still puzzled at what interest D.C., or any state, would have in extending its tort law onto a foreign battlefield).

We believe, *compare* Dissent Op. at 21-22, our decision is consistent with statements made by the Department of Defense in a rulemaking proceeding after the alleged events in this case in which it stated that "[t]he public policy rationale behind *Boyle* does not apply when a *performance-based statement of work* is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor . . . ." Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008) (emphasis supplied). Because performance-based statements of work "describe the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided," 48 C.F.R. § 37.602(b)(1), by definition, the military could not retain command authority nor operational control over contractors working on that basis and thus tort suits against such contractors would not be preempted under our holding. Indeed, there is no

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with the Eleventh Circuit, which has held that the question of preemption *vel non* is not contingent on whether a contract is for goods or services. *Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1345 (11th Cir. 2003) (holding claims that service contractor negligently maintained military helicopters preempted by the discretionary functions exception); *see also*, *Ibrahim*, 556 F. Supp. 2d at 4 n.3 (following *Hudgens*). Rather, "the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest." *Hudgens*, 328 F.3d at 1334.

indication from the department's statements that it considered, much less ruled out, whether tort suits against service contractors working within the military chain of command should be preempted on the basis of the FTCA's "combatant activities" exception.

It is argued that because the executive branch has not chosen to intervene in this suit or file an amicus brief on behalf of defendants, this case differs from *Boyle*. But the government did not participate in *Boyle* below the Supreme Court, which has also been the case in some other proceedings. *See e.g.*, *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 54 n.9 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363; *Davidowitz v. Hines*, 30 F.Supp. 470 (D. Pa. 1939), *aff'd* 312 U.S. 52; *see also Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (finding Oregon statute preempted even though Solicitor General argued as amicus that application of the statute did not "unduly interfere[] with the United States' conduct of foreign relations" because "the basic allocation of power between the States and the Nation . . . cannot vary from day to day with the shifting winds at the State Department") (Stewart, J. concurring). To be sure, the executive branch has broadly condemned the shameful behavior at Abu Ghraib documented in the now infamous photographs of detainee abuse. This disavowal does not, however, bear upon the issue presented in this tort suit against these defendants. Indeed, the government acted swiftly to institute court-martial proceedings against offending military personnel, but no analogous disciplinary, criminal, or contract proceedings have been so instituted against the defendants. This fact alone indicates the government's perception of the contract employees' role in the Abu Ghraib scandal. In any event, Congress at least has indicated that common law tort suits "arising out of" combatant activities conflict with the very real interests of the military in time of war.

Our holding is also consistent with the Supreme Court's recent decision in *Wyeth v. Levine*, 555 U.S. __ (2009). In that case, the Court held that federal law did *not* preempt a patient's state law inadequate warning claim against a drug manufacturer, because compliance with both the state and federal duties was not impossible and because the manufacturer's interpretation of congressional intent was overly broad. The Court cited two "cornerstones" of preemption jurisprudence, both of which helpfully illuminate the distinctions between the instant case and *Wyeth*. *Id*., slip op. at 8. The first is congressional intent, which, while murky at best in the context of federal drug regulations, is much clearer in the case of the statutory text of the combatant activities exception. *Id*. And the second is the strong presumption against preemption in fields that the states have traditionally occupied but where Congress has legislated nonetheless. *Id*. Unlike tort regulation of dangerous or mislabeled products, the Constitution specifically commits the Nation's war powers to the federal government, and as a result, the states have traditionally played no role in warfare. We think that these "cornerstones" of preemption secure the foundation of our holding.

The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only broad–it is also obvious. Plaintiffs did not, at the briefing stage, even identify *which* sovereign's substantive common law of tort should apply to their case although at oral argument counsel explained that, in its view, D.C. law applied.[7] Defendants' actions thus were at a minimum potentially subject to the laws of fifty states plus the District of Columbia, perhaps even U.S.

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[7] Our dissenting colleague suggests that plaintiffs are ill-advised to base their tort claims on D.C. law. *See* Dissent Op. at 28-29. But again, we must take the case plaintiffs bring before us.

overseas dependencies and territories (if detainee counsel's reliance at oral argument on "all law" is to be credited). And as we have pointed out, on appeal plaintiffs rely on general claims of abuse which include assault and battery, negligence, and the intentional infliction of emotional distress. The application of those tort concepts surely differ in 51 jurisdictions. We can also imagine many other causes of action, which vary by jurisdiction, that under the dissent's standard could apply to employees of government contractors on the battlefield such as defamation, invasion of privacy, etc. Indeed, in light of the District's choice of law principles, *see Drs. Groover, Christie & Merrit, P.C. v. Burke*, 917 A.2d 1110, 1117 (D.C. 2007) (applying a "government interests analysis"), it is far from unlikely that the applicable substantive law would be that of Iraq.

The dissent suggests that some jurisdictions' tort laws – which, are not specified – might be selectively preempted, *see* Dissent Op. at 27, but apparently not even "intentional infliction of emotional distress." The dissent's focus on the notoriety of Abu Ghraib and its failure to specify which torts would be preempted runs the risk of fashioning an encroachment with federal interests that is like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

* * *

Arguments for preemption of state prerogatives are particularly compelling in times of war. In that regard, even in the absence of *Boyle* the plaintiffs' claims would be preempted. The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making. *See* U.S. Const. Art I, § 10; *see also*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003) ("If a State

were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government."); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply."); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). On the other side of the balance, the interests of any U.S. state (including the District of Columbia) are *de minimis* in this dispute–all alleged abuse occurred in Iraq against Iraqi citizens. The scope of displacement under our "ultimate military authority" test is thus appropriately broader than either *Boyle*'s discretionary functions test or the rule proposed by the district court. The breadth of displacement must be inversely proportional to state interests, just as it is directly proportional to the strength of the federal interest.

While the dissent suggests that the cases cited above are inapposite because the "preempted state laws conflicted with express congressional or executive policy," Dissent Op. at 16-17, the assertion is simply not accurate.[8] In *Garamendi*, for

[8] Neither are we persuaded by our dissenting colleague's suggestion that these cases are of little precedential weight because the state laws in the above cited cases were "specifically targeted at issues concerning the foreign relations of the United States." Dissent Op. at

example, the Supreme Court held that a California statute requiring insurance companies doing business in that state to disclose information concerning policies it sold in Europe between 1920 to 1945 was preempted by federal law. 539 U.S. at 401. As the source of preemption, the Court relied on an executive agreement between the United States and Germany. The agreement provided that Germany would form and provide funding for a foundation which would adjudicate Holocaust-era insurance claims. *Id.* at 406. For its part, the United States agreed that, should any plaintiff file a Holocaust-era insurance claim against a German company in U.S. court, the executive would submit a non-binding statement indicating "that U.S. policy interests favor dismissal on any valid legal ground." *Id.* The state and federal law thus posed no express conflict – it would have been entirely possible for insurance companies to disclose information under California's legislation and still benefit from the national government's intervention should suit be filed against them in U.S. courts. Nonetheless, the Supreme Court held that the California statute was preempted because the California statute "employs a different state system of economic pressure and in doing so undercuts the President's diplomatic discretion and choice he has made exercising it." *Id.* at 423-24 (quotation omitted); *see also id.* at 427 ("The basic fact is that California seeks to use an iron fist where the President has

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16. Insofar as this lawsuit pursues contractors integrated within military forces on the battlefield, we believe it similarly interferes with the foreign relations of the United States as well as the President's war making authority. Moreover, contrary to the dissent, it is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion). The Supreme Court's preemption cases thus reject the dissent's attempted distinction.

consistently chosen kid gloves."). While the dissent attempts to distinguish *Garamendi* by pointing out that the Supreme Court *characterized* the state statute at issue there as posing a "clear conflict" with federal policy, the same words could be used here.

Similarly, in *Crosby*, the Supreme Court held that a Massachusetts statute prohibiting the state from purchasing goods and services from companies doing business in Burma was preempted by a federal statute that *inter alia* gave the President the power to, upon certain conditions, prohibit United States persons from investing in Burma. 530 U.S. at 367-69. As in *Garamendi*, despite the fact that companies could comply with both state and federal laws, the Court explained that the state statute was preempted because it was "at odds with . . . the federal decision about the right degree of pressure to employ." *Id.* In other words, in both *Crosby* and *Garamendi*, preemption arose not because the state law conflicted with the express provisions of federal law, but because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests. Much the same could be said here. Not only are these cases not inapposite, they provide an alternative basis for our holding.[9]

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[9] Even had plaintiffs focused and limited their allegations before us to actual torture, we note that Congress has passed comprehensive legislation dealing with the subject of war crimes, torture, and the conduct of U.S. citizens acting in connection with military activities abroad. Through acts such as the Torture Victim Protection Act, 28 U.S.C. § 1350, the Military Commissions Act, 10 U.S.C. § 948a *et seq*, the federal criminal torture statute, 18 U.S.C. § 2340-2340A, the War Crimes Act, 18 U.S.C. § 2441, the Foreign Claims Act, 10 U.S.C. § 2734, and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq*, Congress has created an extensive body of law with respect to allegations of torture. But Congress has declined to create a civil tort cause of action that plaintiffs could employ. In the TVPA, for example, Congress provided a cause of action whereby

We therefore reverse the district court's holding as to CACI and affirm its Titan holding on a broader rationale.

III

It will be recalled that our jurisdiction to entertain the ATS issue extends only to the plaintiffs' appeals against Titan and *not* to CACI's appeals from the district court's denial of its summary judgment motion on preemption grounds. The statute is a simple, if mysterious, one. It states, "the district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court recently has wrestled with its meaning and its scope. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Appellants argue that the district court erred in dismissing their claims against Titan under this statute based on their reading of *Sosa*. Titan argues that the district court correctly followed our precedents in *Tel-Oren*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring), and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), which conclude that the ATS provides a cause of action against states but not private persons and which survive the Supreme Court's analysis in *Sosa*.

U.S. residents could sue foreign actors for torture, but Congress exempted American government officers and private U.S. persons from the statute. Congress has also adopted criminal statutes that would apply to these defendants had they committed acts of torture, *see* 18 U.S.C. §§ 2340A, 2241, 3261, but Congress has not created a corresponding tort cause of action. Moreover, even in the years since Abu Ghraib, Congress has not enacted a civil cause of action allowing suit for torture, it only has extended the UCMJ to cover military contractors. 10 U.S.C. § 802.

The latter case involved a tort claim brought, *inter alia*, against a Mexican national, Sosa, who purportedly acted on the DEA's behalf to abduct a Mexican physician accused of torture and murder and bring him from Mexico to stand trial in the United States. Sosa was acquitted of criminal charges and then brought his suit. The Supreme Court, reversing the Ninth Circuit, held that four DEA agents also named as defendants were immune from suit because of an exception to the FTCA waiver of sovereign immunity for actions in foreign countries.[10] Then it turned to the claim against Sosa under the ATS. Sosa and the U.S. government argued that the ATS was only a jurisdictional grant; it did not create any substantive law, but the Court disagreed, concluding that when the statute was passed by the first Congress as part of the Judiciary Act of 1789, three limited causes of action were contemplated: piracy, infringement of ambassadorial rights, and violation of safe conduct.[11] And more important for our case, the Court opened the door a crack to the possible recognition of new causes of action under international law (such as, perhaps, torture) if they were firmly grounded on an international consensus. *Sosa*, 542 U.S. at 732-33. The court noted, but declined to decide, the issue which divides us from the Second Circuit, whether a private actor, as opposed to a state, could be liable under the ATS. *Id*. at 733 n.20.

The holding in *Sosa*, however, was to reject the ATS claim that Alvarez was arbitrarily arrested and detained in Mexico in violation of international law because, at the threshold, there

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[10] Apparently, Sosa never argued for federal preemption of the claims against him on grounds analogous to the instant case.

[11] There is some indication that the thoroughly modern act of aircraft hijacking may also be on this short list of universal concerns. *See*, *e.g.*, *Kadić v. Karădzíc*, 70 F.3d 232, 240 (2d Cir. 1995)).

was no settled norm of international law bearing on that question that was analogous to the consensus that existed in 1789 with respect to the three concerns that motivated Congress.

Appellants argue that despite the footnote reserving the issue dividing the D.C. and Second Circuits, since the Court went on to analyze whether an ATS cause of action existed against Alvarez, it must have implicitly determined that a private actor could be liable. But that is not persuasive: courts often reserve an issue they don't have to decide because, even assuming *arguendo* they favor one side, that side loses on another ground.

Plaintiffs rely heavily on the Second Circuit's opinion in *Kadić v. Karădzíc*, 70 F.3d 232, 239 (2d Cir. 1995)), which held that for certain categories of action, including genocide, the scope of the law of nations is not confined solely to state action but reaches conduct "whether undertaken by those acting under the auspices of a state or only as private individuals." Despite the apparent breadth of this formulation, it must be remembered that in *Kadić*, the defendant was the self-proclaimed President of the Serbian Republic of Bosnia-Herzegovina, so the holding is not so broad. While Srpska was not yet internationally recognized as a state–thus technically rendering its militia a private entity–a quasi-state entity such as Radovan Karădzíc's militia is easily distinguishable from a private actor such as Titan.

The *Sosa* Court, while opening the door a crack to the expansion of international law norms to be applied under the ATS, expressed the imperative of judicial restraint. It was pointed out that federal courts today–as opposed to colonial times–are and must be reluctant to look to the common law, including international law, in derogation of the acknowledged role of legislatures in making policy. Bearing that caution in

mind, and in light of the holding in *Sosa*, we have little difficulty in affirming the district judge's dismissal of the ATS claim against Titan. As we have noted, appellants' claim–as it appeared in their briefs and oral argument before us–is stunningly broad. They claim that any "abuse" inflicted or supported by Titan's translator employees on plaintiff detainees is condemned by a settled consensus of international law. At oral argument, counsel claimed that included even assault and battery.[12] We think that is an untenable, even absurd, articulation of a supposed consensus of international law. (Indeed, it is doubtful that we can discern a U.S. national standard of treatment of prisoners–short of the Eighth Amendment.) In *Price v. Socialist People's Libyan Arab Jamalhiriya*, 294 F.3d 82, 93-4 (D.C. Cir. 2002), we specifically held that the Libyan police's very rough and abusive handling of American detainees was not a violation of the Torture Victim Protection Act ("TVPA"), § 3(b)(1), 28 U.S.C. § 1350. Although appellants there did not make a claim under the ATS, if their treatment did not violate *American* law, perforce they could not draw upon an international consensus.

Assuming, *arguendo*, that appellants had adequately alleged torture (or war crimes), there still remains the question whether

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[12] "Court: So, your allegations are broader than torture.

Counsel: Yes. Your Honor, the allegations turn on the physical force whether or not those are labeled definitionally as torture or not doesn't really matter because we're talking about assault and batteries. And so, you know, if for example, you know, something like–

Court: So, assault and battery would be covered by the law of nations, as well. . . . Is that correct?

Counsel: . . . Yes. In this context it would be . . . ."

they would run afoul of *Sosa*'s comments. Although torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors. *See*, *e.g.*, *Sanchez-Espinoza*, 770 F.2d at 206-7; *see also*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. I, para. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (limiting definition of torture to acts by "a public official or other person acting in an official capacity"); TVPA, § 2(a), 28 U.S.C. § 1350 (establishing liability exclusively for individuals "under actual or apparent authority, or color of law, of any foreign nation").[13]

Alternatively, it is asserted that defendants, while private parties, acted under the color of law. Although we have not held either way on this variation, in *Tel-Oren*, Judge Edwards' concurring opinion, while not a court holding, suggests that the ATS extends that far. 726 F.2d at 793. And the Supreme Court in *Sosa* implied that it might be significant for Sosa to establish that Alvarez was acting "on behalf of a government." 542 U.S. at 735 (although which government–the U.S. or Mexico–is unclear). Of course, plaintiffs are unwilling to assert that the contractors are state actors. Not only would such an admission make deep inroads against their arguments with respect to the preemption defense, it would virtually concede that the contractors have sovereign immunity. Thus, as the district court recognized, appellants are caught between Scylla and Charybdis: they cannot artfully allege that the contractors acted under color

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[13] Even if torture suits cannot be brought against private parties–at least not yet–it may be that "war crimes" have a broader reach. Of course, we reiterate that appellants have not brought to our attention any specific allegations of such behavior. Presumably for this reason, when the district court considered appellants' ATS argument, it analyzed only an asserted international law norm against torture, not war crimes.

of law for jurisdictional purposes while maintaining that their action was private when the issue is sovereign immunity. *Ibrahim*, 391 F. Supp. 2d at 14 (citing *Sanchez-Espinoza*, 770 F.2d at 207).

In light of the Supreme Court's recognition of Congress' superior legitimacy in creating causes of action, *see Sosa*, 542 U.S. at 725-28, we note that it is not as though Congress has been silent on the question of torture or war crimes. Congress has frequently legislated on this subject in such statutes as the TVPA, the Military Commissions Act, 10 U.S.C. § 948a *et seq*., the federal torture statute, 18 U.S.C. 2340-2340A, the War Crimes Act, 18 U.S.C. § 2441, and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq*., but Congress has never created this cause of action. Perhaps most relevant is the TVPA, in which Congress provided a cause of action whereby U.S. residents could sue foreign states for torture, but did not–and we must assume that was a deliberate decision–include as possible defendants either American government officers or private U.S. persons, whether or not acting in concert with government employees. We note that in his signing statement for the TVPA, President George H. W. Bush stated: "I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad . . . ." Statement by President of the United States, *Statement by President George [H. W.] Bush upon Signing H.R. 2092*, 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992).

The judicial restraint required by *Sosa* is particularly appropriate where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches. *See*, *e.g*., *Garamendi*, 539 U.S. at 413-15; *Zschernig*, 389 U.S. at 440-41. As the *Sosa* Court explained: "Since many attempts by federal courts to craft remedies for the violation of new norms of

international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Sosa*, 542 U.S. at 727-28.[14]

Finally, appellants' ATS claim runs athwart of our preemption analysis which is, after all, drawn from congressional stated policy, the FTCA. If we are correct in concluding that state tort law is preempted on the battlefield because it runs counter to federal interests, the application of international law to support a tort action on the battlefield must be equally barred. To be sure, ATS would be drawing on federal common law that, in turn, depends on international law, so the normal state preemption terms do not apply. But federal executive action is sometimes treated as "preempted" by legislation. *See*, *e.g.*, Chamber *of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332-39 (D.C. Cir. 1996). Similarly, an elaboration of international law in a tort suit applied to a battlefield is preempted by the same considerations that led us to reject the D.C. tort suit.

IV

For the aforementioned reasons, the judgment of the district court as to Titan is affirmed. The judgment as to CACI is

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[14] We note that the Justice Department, in its brief before the Ninth Circuit in the *Sosa* matter, took the position that "the [ATS] is not intended as a vehicle for U.S. courts to judge the lawfulness of U.S. government actions abroad in defense of national security[,] and any remedies for such actions are appropriately matters for resolution by the political branches, not the courts." Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment against Defendant-Appellant Jose Francisco Sosa, *Alvarez-Machain v. Sosa*, No. 99-56880 (9th Cir. Mar. 20, 2000).

reversed in the accompanying order. Thus, plaintiffs' remaining claims are dismissed.

So ordered.

GARLAND, *Circuit Judge*, dissenting: The plaintiffs in these cases allege that they were beaten, electrocuted, raped, subjected to attacks by dogs, and otherwise abused by private contractors working as interpreters and interrogators at Abu Ghraib prison. At the current stage of the litigation, we must accept these allegations as true. The plaintiffs do not contend that the United States military authorized or instructed the contractors to engage in such acts. No Executive Branch official has defended this conduct or suggested that it was employed to further any military purpose. To the contrary, both the current and previous Administrations have repeatedly and vociferously condemned the conduct at Abu Ghraib as contrary to the values and interests of the United States. So, too, has the Congress.

No act of Congress and no judicial precedent bars the plaintiffs from suing the private contractors -- who were neither soldiers nor civilian government employees. Indeed, the only statute to which the defendants point expressly excludes private contractors from the immunity it preserves for the government. Neither President Obama nor President Bush nor any other Executive Branch official has suggested that subjecting the contractors to tort liability for the conduct at issue here would interfere with the nation's foreign policy or the Executive's ability to wage war. To the contrary, the Department of Defense has repeatedly stated that employees of private contractors accompanying the Armed Forces in the field are *not* within the military's chain of command, and that such contractors *are* subject to civil liability.

Under the circumstances of these cases, there is no warrant for displacing the ordinary operation of state law and dismissing the plaintiffs' complaints solely on preemption grounds. Accordingly, I would affirm the district court's denial of summary judgment as to CACI and reverse its grant of summary judgment in favor of Titan.

I

Following the 2003 invasion of Iraq, the United States took over Abu Ghraib prison and used it as a detention facility. According to official Department of Defense (DOD) reports, "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at Abu Ghraib between October and December 2003. MAJ. GEN. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004). Those reports noted the participation of contractor personnel in the abuses and specifically identified Titan and CACI employees as being among the perpetrators. *Id.* at 48; MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 72-73, 79, 81-82, 84, 86, 87, 89, 130-34 (2004) [hereinafter REPORT OF MAJ. GEN. FAY].

Responding to the release of graphic photographs of the conduct at Abu Ghraib, President George W. Bush declared that "the practices that took place in that prison are abhorrent and they don't represent America." White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004). Concerned that those "who want to dislike America will use this as an excuse to remind people about their dislike," he assured "[t]he people of the Middle East . . . that we will investigate fully, that we will find out the truth . . . and [that] justice will be served." *Id.* Secretary of Defense Donald Rumsfeld, testifying before Congress, similarly condemned the abuses as "inconsistent with the values of our nation." Donald H. Rumsfeld, *Testimony Before the Senate and House Armed Services Committees* 1 (May 7, 2004).[1] He, too,

[1] *Available at* http://armed-services.senate.gov/statemnt/2004/May/Rumsfeld.pdf.

stressed the damage "[t]o the reputation of our country," but said that "this is also an occasion to demonstrate to the world the difference between those who believe in democracy and human rights and those who believe in rule by the terrorist code. . . . Part of [our] mission -- part of what we believe in -- is making sure that when wrongdoing or scandal occur, that they are not covered up, but exposed, investigated, publicly disclosed -- and the guilty brought to justice." *Id.* at 1, 6. Congress expressed the same sentiments.[2]

The seventeen named plaintiffs in the cases now before us contend that they (or their deceased husbands) were among the detainees who were subjected to the abuses that the President and Secretary of Defense decried. According to their complaints, they are Iraqi nationals (or their widows) who were detained at Abu Ghraib and eventually released without charge. The defendants are two private American companies, CACI and Titan. Pursuant to government contracts, CACI provided interrogators and Titan provided interpreters who worked at Abu Ghraib.

The plaintiffs contend that CACI and Titan employees subjected them to the following acts, among many others:

> "[T]ortur[ing] [Plaintiff Ibrahim's husband] by repeatedly inflict[ing] blows and other injuries to his

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[2]*See* S. Res. 356, 108th Cong. (2004) ("condemn[ing] in the strongest possible terms the despicable acts at Abu Ghraib prison"); H.R. Res. 627, 108th Cong. (2004) (declaring that the abuses at Abu Ghraib "are offensive to the principles and values of the American people and the United States military . . . and contradict the policies, orders, and laws of the United States and the United States military and undermine the ability of the United States military to achieve its mission in Iraq").

head and body[,] . . . thereby causing extreme physical and mental pain and suffering and, ultimately, his death." Second Am. Compl. ¶ 33, *Ibrahim v. Titan Corp.* [hereinafter *Ibrahim* Compl.].

"[T]ortur[ing] [Plaintiff] Aboud . . . [b]y beating him with fists and sticks; . . . urinating on him; . . . [and] threatening to attack him with dogs." *Id.* ¶ 38.

"[T]ortur[ing] [Plaintiff] Hadod . . . [b]y beating him with fists and striking his head against a wall; [and] forcing him to watch his elderly father being hung up and then beaten." *Id.* ¶ 42.

"[T]ortur[ing] [Plaintiff Al Jumali's husband] by beating him, gouging out one of his eyes, electrocuting him, breaking one of his legs, and spearing him, . . . thereby causing . . . his death." *Id.* ¶ 51.

"Roping Plaintiff Saleh and 12 other naked prisoners together by their genitals and then pushing one of the male detainees to the ground, causing the others to suffer extreme physical, mental and emotional distress; . . . . [r]epeatedly shocking Plaintiff Saleh with an electric stick and beating him with a cable; . . . [and] [t]ying his hands above his head and sodomizing him . . . ." Third Am. Compl. ¶ 116, *Saleh v. Titan Corp.* [hereinafter *Saleh* Compl.].

"Stripping [Plaintiff Al-Nidawi], tying his hands behind his back and releasing dogs to attack his private parts." *Id.* ¶ 142.

> "[F]orc[ing] Plaintiff Haj Ali to stand on a box, with electrical wires attached to his wrists and [shocking] him with intense pulses of electricity . . . ." *Id.* ¶ 125.

Plaintiffs sued defendants for (inter alia) the common law torts of assault, battery, and intentional infliction of emotional distress. In their complaints, they name specific CACI and Titan employees alleged to have brutalized them. *Ibrahim* Compl. ¶¶ 37, 55; *Saleh* Compl. ¶¶ 17-19, 24-27, 49-50.

Although today's opinion states that the plaintiffs complain only of "abuse" and not "torture," Slip Op. at 4, the complaints repeatedly describe the conduct to which they were subjected as "torture." *See, e.g., Ibrahim* Compl. ¶ 1 ("Specifically, the Plaintiffs allege that they or their decedents . . . were unlawfully tortured by agents or employees of the Defendants . . . ."); *Saleh* Compl. ¶ 1 ("alleg[ing] that Defendants tortured and otherwise mistreated Plaintiffs"). The district court certainly understood that to be what the plaintiffs allege. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (Plaintiffs "assert that defendants and/or their agents tortured one or more of them."). And that is what the plaintiffs continue to allege in their briefs on appeal, which accuse both CACI and Titan employees of torturing them. *See, e.g.*, Plaintiffs-Appellees' Br. 17 (regarding CACI); Plaintiffs-Appellants' Reply Br. 11, 13, 16 (regarding Titan). In any event, the quotations set out in the previous paragraph describe some of the most egregious of the conduct at issue, and there is no dispute that if tort law applies, plaintiffs have stated a cause of action.

The court's opinion also appears to take issue with the merits of some of the plaintiffs' allegations, suggesting that government determinations cast doubt upon whether the plaintiffs were actually subjected to this conduct by the

defendants. That is not correct.[3] More important, it is irrelevant. To date, there has been *no* discovery or summary judgment on the merits of the plaintiffs' allegations -- the district court limited these to the issue of preemption. *See* 391 F. Supp. 2d at 18-19. Accordingly, and as the court acknowledges, at this stage of the litigation we must take the allegations of the complaints to be true. Slip Op. at 4; *see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). In light of the DOD reports about what happened at Abu Ghraib, we can hardly regard those allegations as implausible.

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[3]For example, the court accepts Titan's view that government investigations found that its employees were not involved in detainee abuse at Abu Ghraib. Slip Op. at 4. But Titan is wrong. *See* REPORT OF MAJ. GEN. FAY at 133 (finding that a Titan employee "[a]ctively participated in detainee abuse"); *id.* at 130-34 (referring two Titan and three CACI employees for possible prosecution); *see also id.* at 84 (finding that "[t]he use of dogs in the manner directed by" a CACI employee "was clearly abusive and unauthorized"). Moreover, there is no indication that the government investigators had before them the same evidence that these plaintiffs intend to present. The court also notes that the U.S. Army Claims Service has rejected one plaintiff's claim for compensation (that of Saleh himself), Slip Op. at 3-4, but there is no hint that the Claims Service has ever considered the merits of the sixteen other plaintiffs' cases. Finally, the court notes that, to date, the government has not criminally charged the contract employees. Slip Op. at 3, 18. But this sheds little light on the merits of the plaintiffs' claims, given the different burdens of proof applicable to civil and criminal proceedings, as well as the special jurisdictional problems potentially attendant to the latter. *See* REPORT OF MAJ. GEN. FAY at 49-50 (noting that, because CACI's contract may have been with the Interior Department rather than DOD, its employees "may not be subject to the Military Extraterritorial Jurisdiction Act").

Moreover -- and more important still -- today's decision preempts all such litigation, regardless of its merit. Indeed, the decision would preempt any lawsuit, even if the plaintiff had photographs that unambiguously showed private contractors in the act of abusing them. Given the findings of DOD and the declarations of President Bush and Secretary Rumsfeld, there may be at least some prisoners who have equivalent evidence. Nonetheless, far from simply "tak[ing] the plaintiffs' cases as they present them to us," Slip Op. At 4, my colleagues effectively dispose of any cases that any plaintiffs could possibly present.

Finally, it should also be emphasized that neither the *Ibrahim* nor the *Saleh* complaints allege that the defendants' actions were ordered or authorized by the United States government. Nor has any party proffered any evidence that the United States did order or authorize such conduct, or that it was undertaken to obtain information or to further any other military purpose.[4] To the contrary, the plaintiffs contend that the contractors "acted unlawfully and *without military authorization*." Plaintiffs-Appellees' Br. 46 (emphasis added).[5]

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[4]*See* Plaintiffs-Appellees' Br. 45-46 ("The limited discovery permitted by the District Court to date, combined with the military investigations and testimony regarding Abu Ghraib, strongly suggests that the CACI employees actually were the ringleaders in the illegal abuse. . . . CACI failed to present any evidence whatsoever that the CACI employees were directed by the military, [or] received military authorization and approval, to abuse prisoners.").

[5]*See Ibrahim* Compl. ¶ 29 (alleging that the defendants committed the acts "[d]espite . . . clear expressions of United States policy, and despite the expectation that the Defendants would perform their contractual duties in accordance with United States and international law"); *Saleh* Compl. ¶ 108 (alleging that the United States intended the contractors to "conduct interrogations in accord

The *Saleh* (but not the *Ibrahim*) complaint does charge that the private contractors acted together with a small number of low-ranking soldiers -- soldiers who were later court-martialed for their unauthorized, illegal conduct. *Saleh* Compl. ¶ 28; Plaintiffs-Appellees' Br. 17-18, 24.[6] But there is no allegation, and no evidence, that those soldiers had any control, de jure or de facto, over the defendants. Hence, it is incorrect to say that "these cases are really indirect challenges to the actions of the U.S. military." Slip Op. at 12. Rather, they are direct challenges to the unlawful and unauthorized actions of private contractors.

II

The court directs the dismissal of the plaintiffs' common law tort claims on the ground that they are preempted by federal law. But what federal law does the preempting?

The defendants (and the court) cite only one law: the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80. But if we follow our usual rule -- to learn the meaning of a statute by reading its text -- preemption under that Act is inappropriate. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The text of the FTCA does indeed evidence congressional concern with common law

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with the relevant domestic and international laws").

[6]A separate RICO statement, filed solely by the *Saleh* plaintiffs, also alleged a broader conspiracy, but the district court dismissed the RICO count and the *Saleh* plaintiffs have abandoned the allegation. *See* Plaintiffs-Appellees' Br. 46. The *Ibrahim* plaintiffs never made such an allegation. *See id.* at 2.

tort claims, but that concern is directed solely at claims leveled "against the United States" for the wrongful acts of "any employee of the Government." *Id.* § 1346(b)(1). The Act *permits* plaintiffs to sue the United States in federal court for state-law torts committed by government employees within the scope of their employment, but contains specific exceptions that preserve the government's sovereign immunity under certain circumstances. *Id.* §§ 1346(b), 2671-80. Nothing in the language of the statute applies to suits brought against independent contractors, like the defendants in these cases. In fact, the reverse is true. Although the FTCA states that the term "[e]mployee of the government" includes "employees of any federal agency," it expressly states that "the term 'Federal agency' . . . *does not include any contractor* with the United States." *Id.* § 2671 (emphasis added).

In *Boyle v. United Technologies Corp.*, the Supreme Court invoked an implied, but direct conflict with the FTCA to conclude that the manufacturer of a Marine helicopter could not be held liable under state tort law for injury caused by a design defect. 487 U.S. 500 (1988). The defendants and my colleagues believe that "plaintiffs' common law tort claims are controlled by *Boyle*." Slip Op. at 9. I agree. In this Part, I will explain why a straightforward application of *Boyle* yields the conclusion that preemption of the plaintiffs' claims is unwarranted, and why we should hesitate to extend *Boyle* beyond the scope of the discretionary function exception and direct-conflict rationale that the Court relied upon in that case. My "quarrel" is not with *Boyle* -- as my colleagues suppose, *id.* at 10 -- but rather with the way in which they have extended *Boyle* beyond its rationale.

A

Nothing in *Boyle* itself warrants the preemption of state tort law in these cases. *Boyle* involved the co-pilot of a U.S. Marine

helicopter who was killed when the helicopter crashed into the ocean. His father brought a diversity action against the contractor that built the helicopter for the United States, alleging that the design was defective because the escape hatch opened outward instead of inward -- rendering it inoperable in a submerged craft. The first question the Supreme Court asked was whether the case involved "uniquely federal interests." *Boyle*, 487 U.S. at 504-05. With little difficulty, the Court concluded that "the liability of independent contractors performing work for the Federal Government . . . is an area of uniquely federal interest." *Id.* at 505 n.1. There is likewise no dispute regarding that question here.

But *Boyle* also declared that the fact that "the procurement of equipment by the United States is an area of uniquely federal interest does not . . . end the inquiry." *Id.* at 507. "That merely establishes a necessary, not a sufficient, condition for the displacement of state law." *Id.* "Displacement," the Court declared, "will occur only where . . . a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation." *Id.* (internal citations and quotation marks omitted). "The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied. . . . *But conflict there must be*." *Id.* at 507-08 (emphasis added) (internal quotation marks omitted).

The Court began with a hypothetical illustrating an instance when preemption would not be warranted. "[I]t is easy to conceive," the Court said, of a "situation[] in which the duty sought to be imposed on the contractor" by state law "is not identical to one assumed under the contract, but is also not contrary to any assumed":

> If, for example, the United States contracts for the purchase . . . of an air conditioning-unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care.

Id. at 509. "No one suggests that state law would generally be pre-empted in this context," the Court said. *Id.* By contrast to the hypothetical air conditioner, however, the Court found a significant conflict of duties in the case of the helicopter:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) *is precisely contrary to the duty imposed by the Government contract* (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).

Id. (emphasis added).

The Court then invoked the FTCA's "discretionary function" exception to delimit the circumstances in which a state-imposed duty that is "precisely contrary to" a government contract should be preempted. The Court noted that one of the circumstances that the FTCA excepted from the statute's consent to suit was for:

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform *a discretionary function* or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. at 511 (emphasis added) (quoting 28 U.S.C. § 2680(a)). "[T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision," the Court said, and "state law which holds Government contractors liable for design defects in military equipment does *in some circumstances* present a 'significant conflict' with federal policy and must be displaced." *Id.* at 511-12 (emphasis added). The Court then outlined "the scope of displacement" necessary to avoid such conflict as follows:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment . . . . The first two of these conditions assure . . . that the design feature in question was considered by a Government officer, and not merely by the contractor itself.

Id. at 512.

The contracts at issue in the instant cases are like the one for the hypothetical air conditioner, not the helicopter. As in the contract for the air conditioner, these contracts simply required the contractors to provide particular receivables: interrogators and interpreters. The "asserted basis of the contractor's

liability" -- the abuse of prisoners -- is plainly not "precisely contrary to the duty imposed by the Government contract." No party's pleadings contend that the government required or authorized the contractor personnel at Abu Ghraib to do what state law forbids. To the contrary, the plaintiffs' contention is that the contractors "acted unlawfully and *without military authorization*." Plaintiffs-Appellees' Br. 46 (emphasis added); *see supra* note 5.

Boyle has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both.[7] Hence, these cases are not "within the area where the policy of the 'discretionary function' would be frustrated," and they present no "significant conflict" with federal interests. *Boyle*, 487 U.S. at 512. Preemption is therefore not justified under *Boyle*.

B

Recognizing that they cannot prevail under either the text of the FTCA or the holding of *Boyle*, the defendants ask us to

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[7]My colleagues appear to acknowledge that, if the contractors' employees committed the acts alleged here, their conduct would violate U.S. law. *See* Slip Op. at 3 (citing 18 U.S.C. § 2340A (torture); *id.* § 2441 (war crimes); *id.* § 3261 (certain criminal offenses committed by anyone "employed by or accompanying the Armed Forces outside the United States")); *see also, e.g.*, 18 U.S.C. § 113 (describing assaults within the compass of § 3261). The Army Field Manual requires contractors to "comply with all applicable US and/or international laws." U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD § 1-39 (2003); *see also* REPORT OF MAJ. GEN. FAY at 12-13 (stating that "civilians who accompany or work with the US Armed Forces" are "bound by Geneva Conventions").

expand the scope of judge-made preemption. Instead of basing preemption on the FTCA's discretionary function exception -- the only exception *Boyle* discussed -- the defendants ask us to extend *Boyle* to the exception for "claim[s] arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j). That request finds no support in either *Boyle* or other precedents.

At the heart of *Boyle*'s analysis is the doctrine of conflict preemption. *See supra* Part II.A. As my colleagues note, preemption under the discretionary function exception is in accord with that doctrine, as it requires "a sharp example of discrete conflict in which satisfying both state and federal duties (*i.e.*, by designing a helicopter hatch that opens both inward and outward) was impossible." Slip Op. at 13. By contrast, preemption under the combatant activities exception is extraordinarily broad; as employed by my colleagues, it results not in conflict preemption but in "field preemption." *Id.* at 10, 13. Given that using the FTCA to preempt suits against private contractors is atextual, the *Boyle* Court's decision to require discrete conflict was quite sensible.

Moreover, if we go down this road and extend *Boyle* to the combatant activities exception, there is no reason to stop there. The FTCA's exceptions are not limited to discretionary functions and combatant activities. As my colleagues note, they also include "any claim arising in a foreign country." Slip Op. at 10 n.3 (quoting 28 U.S.C. § 2680(k)). Hence, the "degree of integration" test that my colleagues carefully construct for combatant activities preemption, Slip Op. at 7, seems wholly beside the point: the plaintiffs' claims arose in Iraq, a foreign country, so why should that not be the end of the matter? Indeed, the FTCA has an additional exception that protects the government from suit for "assault [and] battery" -- whether it occurs abroad or in the United States. 28 U.S.C. § 2680(h). On

the court's theory, why should these exceptions not apply to private contractors as well? Once we depart from the limiting principle of *Boyle*, it is hard to tell where to draw the line.

The Supreme Court has never extended *Boyle* beyond the discrete conflicts that application of the discretionary function exception targets. Quite the opposite, in *Correctional Services Corp. v. Malesko*, the Court described the *Boyle* defense as a "special circumstance" in which the "government has directed a contractor to do the very thing that is the subject of the claim." 534 U.S. 61, 74 n.6 (2001). *Wyeth v. Levine*, the Supreme Court's most recent preemption case, further reflects the Court's unwillingness to read broad preemptive intent from congressional silence. As *Wyeth* explained, the Court starts with the presumption that state law is not to be superseded "unless that was the clear and manifest purpose of Congress." 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The Court "rel[ies] on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Id.* at 1195 n.3 (quoting *Medtronic*, 518 U.S. at 485). Thus, *Wyeth* counsels against extending *Boyle* beyond its holding, as the FTCA evidences no "clear and manifest purpose of Congress" to preempt state-law actions against contractors under the combatant activities exception. *Id.* at 1195. Although my colleagues perceive support for their own position in *Wyeth* -- a decision in which the Court found that a federal statute *did not* preempt state tort claims -- I do not see it. It may be that congressional intent "is much clearer in the case of the statutory text of the combatant activities exception" than in "federal drug regulations." Slip Op. at 19. But the only intent that is clear in the former text is the intent to preserve sovereign immunity in suits against the United States. The FTCA says nothing at all about suits against "contractors" other than that contractors are

not "federal agenc[ies]" for purposes of the Act. 28 U.S.C. § 2671.

No other circuit court has gone as far as our circuit goes today. *Koohi v. United States* was, like *Boyle*, a products liability case. 976 F.2d 1328 (9th Cir. 1992). There, the Ninth Circuit did apply the combatant activities exception to bar suit against the manufacturer of an air defense system deployed on a U.S. naval vessel that shot down an Iranian aircraft. As my colleagues recognize, however, the Ninth Circuit's rationale was that tort liability is inappropriate where "*force is directed as a result of authorized military action*." Slip Op. at 12 (emphasis added) (quoting *Koohi*, 976 F.2d at 1337). Unlike the situation in *Koohi*, where sailors fired the weapon, there is no claim here that the force used against the plaintiffs was either "directed" or "authorized" by U.S. military personnel.

Nor are my colleagues assisted by the foreign policy cases they cite. Slip Op. at 20-21. Those cases involved preemption of state laws that were *specifically targeted* at issues concerning the foreign relations of the United States, a description the court does not dispute.[8] Moreover, in virtually all of them, the

[8]Rather than dispute this, the court notes that it is "a black-letter principle of preemption law that generally applicable state laws *may* conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law." Slip Op. at 21 n.8 (emphasis added). As long as the word "may" is emphasized, that principle is correct. But this does not call into question the fact that no precedent has employed a foreign policy analysis to preempt generally applicable state laws (not to mention the fact that there is also no "federal scheme" here). *See* Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1711 (1997) (explaining that foreign affairs preemption should be limited to, at most, state laws that purposely interfere with foreign policy, not state laws that "are facially neutral and were not designed with the purpose of influencing U.S.

preempted state laws conflicted with *express* congressional or executive policy regarding the targeted issues. Although the court does dispute this description as to two of the cited cases, the description is accurate. In *American Insurance Association v. Garamendi*, the Supreme Court found a "clear conflict" between a California statute applying only to Holocaust-era insurance "policies issued by European companies, in Europe, to European residents," and "express federal policy" contained in Executive Branch agreements with Germany, Austria, and France. 539 U.S. 396, 425-26 (2003). Similarly, in *Crosby v. National Foreign Trade Council*, the Court preempted a state statute that expressly purported to regulate foreign commerce with Burma in ways that "undermine[d] the intended purpose and 'natural effect'" of a congressional sanctions regime aimed directly at Burma. 530 U.S. 363, 373 (2000).[9]

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foreign relations"). The three additional Supreme Court cases that the court cites, Slip Op. at 21 n.8, are simply inapposite. None involved foreign policy and all three involved statutory provisions that expressly preempted state law. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007-8 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442-43 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-23 (1992) (plurality opinion).

[9]*See also Zschernig v. Miller*, 389 U.S. 429, 432, 440 (1968) (holding that an Oregon probate statute, which barred residents' inheritances from going to heirs in countries with confiscatory property laws, was being used to "withhold[] remittances to legatees residing in Communist countries" and thereby "intru[de] . . . into the field of foreign affairs"); *Hines v. Davidowitz*, 312 U.S. 52, 67, 74 (1941) (concluding that Pennsylvania's Alien Registration Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting "a single integrated and all-embracing system" in the federal Alien Registration Act). *See generally Medellin v. Texas*, 128 S. Ct. 1346, 1371-72 (2008) (describing *Garamendi* as a mere foreign "claims-settlement case[]

The cases before us, by contrast, involve the application of facially neutral state tort law. And there is no express congressional or executive policy with which such law conflicts. *See infra* Part II.C.[10] No precedent has employed a foreign policy analysis to preempt state law under such circumstances.[11]

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involv[ing] a narrow set of circumstances"); *Garamendi*, 539 U.S. at 417 (describing *Zschernig* as involving a state law that "in practice had invited minute inquiries concerning the actual administration of foreign law and so was providing occasions for state judges to disparage certain foreign regimes" (internal citation and quotation marks omitted)). The remaining case cited by the court, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), involved application of the Constitution's Foreign Commerce Clause to state taxation of foreign commerce.

[10]In a footnote to this part of their argument, my colleagues list a miscellany of federal civil and criminal statutes relating to torture. Although they describe the list as "comprehensive," Slip Op. at 23 n.9, that description is not Congress' characterization, but theirs. Nor is there any evidence that Congress affirmatively "*declined to* create a civil tort cause of action that plaintiffs could employ," *id.* (emphasis added) -- let alone that Congress intended these statutes to displace existing state or federal law. Indeed, the only evidence of the purpose of the principal civil statute the court cites, the Torture Victim Protection Act, 28 U.S.C. § 1350 note, is that it was intended to "enhance the remedy already available" for torture victims under the ATS, S. REP. NO. 102-249, at 5 (1991); *see* H.R. REP. NO. 102-367, at 4 (1991) (same). As for the federal criminal statutes, Congress has passed a myriad of such statutes covering virtually every area of modern life, and no court has ever suggested that in so doing the legislature intended to preempt existing state laws. If anything, the cited statutes -- all of which condemn torture -- confirm that there is no conflict between state law and federal policy on that issue.

[11]*Cf. Medellin*, 128 S. Ct. at 1371-72 (refusing to preempt a "neutrally applicable state law[]" despite the President's affirmative

C

My colleagues acknowledge that the "nature of the conflict" they perceive in these cases is "somewhat different from that in *Boyle* -- a sharp example of discrete conflict in which satisfying both state and federal duties . . . was impossible." Slip Op. at 13. "Rather," they say, here "it is the imposition per se" of state tort law "that conflicts with the FTCA's *policy* of eliminating tort concepts from the battlefield." *Id.* (emphasis added). In short, the court's decision to utilize the combatant activities exception requires it to shift from preemption based on conflict-of-duty to preemption based on conflict-of-policy. But even if this shift were justified, we would still have no basis for ruling that such a conflict of policy exists.

1. According to the court, "the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield," and that policy is "equally implicated whether the alleged tortfeasor is a soldier or a contractor" under the circumstances at issue in these cases. Slip Op. at 12. The court is plainly correct that the FTCA's policy is to eliminate *the U.S. government's* liability for battlefield torts. That, after all, is what the FTCA says. But it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (declaring that "[t]he best evidence of [congressional] purpose is the statutory text"). Nor, as the court

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submission that United States foreign policy would be undermined); *Garamendi*, 539 U.S. at 425-26 (preempting a California insurance statute, but distinguishing it from "a generally applicable 'blue sky' law" because the California statute "effectively singles out only policies issued by European companies, in Europe, to European residents").

recognizes, is there any support for its position in the "singularly barren" legislative history of the combatant activities exception. Slip Op. at 11 (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)).

Congress knows full well how to make its intention to preclude private liability known. *See, e.g.*, 22 U.S.C. § 2291-4(b) (providing that interdiction of an aircraft over foreign territory pursuant to a presidentially approved program "shall not give rise to any civil action . . . against the United States or its employees *or agents*" (emphasis added)). It has not done so here. Rather, as already discussed, Congress expressly excluded contractors from the definition of federal agencies that retained sovereign immunity under the exceptions to the Act. *See* 28 U.S.C. § 2671.

Indeed, because the FTCA concerns only the immunity of the United States, the FTCA itself does not even protect soldiers or other government employees from tort suits. That protection is afforded by the Westfall Act, which provides that, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment," the federal employee is dismissed and "the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). "Thereafter, the suit is governed by the FTCA and is subject to all of the FTCA's exceptions" to the waiver of sovereign immunity, including the combatant activities exception. *Wuterich v. Murtha*, 562 F.3d 375, 380 (D.C. Cir. 2009); *see* 28 U.S.C. § 2679(d)(4).

But contractors are not covered by the Westfall Act either. In fact, because that Act uses the FTCA's definitions, they are again expressly excluded from its protections. 28 U.S.C. § 2671. And yet, the court preempts this state tort action without requiring (or receiving) the Attorney General certification that

would have been necessary had the defendants been government employees rather than private contractors. It thus grants private contractors *more* protection than our soldiers and other government employees receive. Such a congressional policy cannot be inferred from the language of the FTCA.

2. There is also no indication that the Executive Branch shares the court's judgment that military contractors must be exempt from tort law. To the contrary, DOD has advised contractors that accompany the Armed Forces in the field that they *are* subject to civil liability, and it has rejected a request to extend *Boyle* to all combatant activities. Moreover, it has lent no support whatsoever to the defense of the contractors here.

In a rulemaking "to implement DoD policy regarding contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States," the Department explicitly advised military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or *civil liability* under the laws of the United States and the host nation." Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,764, 16,767 (Mar. 31, 2008) (emphasis added) [hereinafter DFARS Rule]; *see* 48 C.F.R. § 252.225-7040(b)(3)(iii) (same).[12] When contractors expressed concern about the consequences of this advisory for their defenses in tort litigation, DOD made clear that it thought "the rule adequately allocates risks." DFARS Rule, 73 Fed. Reg. at 16,768. And it specifically rejected a suggestion that it "invite courts" to expand the reach of *Boyle* by adopting "language that would

[12]As there is no existing federal common law of torts that could impose civil liability, DOD's warning of civil liability under the laws of the United States can only be a reference to state tort law.

immunize contractors from tort liability." *Id.* The Department stated:

> [T]he clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors. . . . The public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors. . . . Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government. However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties.

Id.[13]

Nor has the Executive Branch evinced any concern about the imposition of tort liability in the cases now before us, notwithstanding the Army's knowledge of the ongoing

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[13]The court states that "there is no indication" in the above-quoted statement that DOD "considered, much less ruled out, whether tort suits against service contractors *working within the military chain of command* should be preempted." Slip Op. at 17 (emphasis added). But as discussed below, DOD's position is that contractors are *not* within the military chain of command. *See infra* Part III.A.

litigation.[14] My colleagues are nonetheless convinced that the failure to institute criminal proceedings against the contractors "indicates the government's perception of the contract employees' role in the Abu Ghraib scandal." Slip Op. at 18.[15] No such inference from prosecutorial silence is warranted. The government may well believe that it faces a jurisdictional barrier to prosecution, *see supra* note 3; it may lack the evidence that these plaintiffs have; it may feel that its evidence is insufficient to satisfy the higher burden of proof applicable to a criminal prosecution; or it may simply prefer to rely on the tort system. What we cannot conclude, however, is that the government doubts "the contract employees' role in the Abu Ghraib scandal." Slip Op. at 18. *See* REPORT OF MAJ. GEN. FAY at 130-34 (implicating two Titan and three CACI employees in wrongdoing at Abu Ghraib); *id.* at 84 (finding that "[t]he use of dogs in the manner directed by" a CACI employee "was clearly abusive and unauthorized"); *id.* at 133 (finding that a Titan employee "[a]ctively participated in detainee abuse").

The position DOD took in its rulemaking on contractor liability may reflect the government's general view that

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[14]*Compare Garamendi*, 539 U.S. at 411, 413 (citing a letter from Deputy Secretary Eizenstat to California officials stating that the California statute threatened to derail U.S. negotiations with Germany, and the amicus brief of the United States in support of preemption); *Crosby*, 530 U.S. at 386 (reasoning that "repeated representations by the Executive Branch . . . demonstrate that the state Act stands in the way of Congress's diplomatic objectives"); *Boyle*, 487 U.S. at 501-02 (in which the United States appeared as amicus curiae in support of preemption); *Hines*, 312 U.S. at 56 (same).

[15]The court also states that no "disciplinary" or "contract proceedings" have been instituted. Slip Op. at 18. There is, however, nothing in the record indicating whether such proceedings have been brought.

permitting contractor liability will advance, not impede, U.S. foreign policy by demonstrating that "the United States is committed to ensuring that its contractors are subject to proper oversight and held accountable for their actions." U.S. Dep't of State, Press Release, Department of State Legal Adviser Promotes Accountability for Private Military and Security Companies (Sept. 17, 2008).[16] The government may have refrained from participating in the two cases now before us for the same reason. As President Bush stated, "the practices that took place in that prison are abhorrent and they don't represent America." White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004). Under these circumstances, the government's failure to defend the contractors may reflect the Executive Branch's view that the country's interests are better served by demonstrating that "people will be held to account according to our laws." White House, Press Release, Press Conference of the President, 2006 WLNR 10248633 (June 14, 2006). And the Executive may believe that one way to show that "people will be held to account" is to permit this country's legal system to take its ordinary course and provide a remedy for those who were wrongfully injured.

None of this is to suggest that we can know with certainty the unexpressed policy views of Congress or the Executive, or to discount the reasonableness of the policy concerns expressed by my colleagues. Quite the contrary. But the existence of plausible yet divergent assessments of the policy consequences of tort liability further counsels against judicial preemption. If Congress believes that such liability would hamper the war effort, it can amend the FTCA or the Westfall Act to protect

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[16] *Available at* http://geneva.usmission.gov/Press2008/September/0917PrivateSecurity.html.

private contractors. If the Executive is of that view, it can say so.

Under the rule adopted today, however, the court has removed an important tool from the Executive's foreign policy toolbox. Even if the Executive believes that U.S. interests would be advanced by subjecting private contractors to tort liability under these circumstances, today's decision makes it impossible to accomplish that end absent congressional action. That is a particularly ironic consequence of a rule that the court adopts based upon a quite proper concern that the Judiciary not interfere with the Executive's flexibility in the area of foreign policy.

3. In addition to their argument that the imposition of tort liability on contractors constitutes a per se conflict with the policy of the political branches, my colleagues raise more specific policy conflicts they believe tort suits would engender. Slip Op. at 13-14.

The court notes, for example, that "the costs of imposing tort liability on government contractors [will be] passed through to the American taxpayer, as was recognized in *Boyle*." *Id.* at 13. The *Boyle* Court did indeed recognize the risk of a monetary pass-through, but it did not respond by preempting all tort liability for government contractors. In fact, the Court thought that was "too broad" a response to the potential pass-through problem, *Boyle*, 487 U.S. at 510, and instead barred recovery only where there was a direct conflict with a government-imposed duty, *see id.* at 512.

My colleagues also express concern that, in the absence of preemption, U.S. military personnel will be haled into court or deposition proceedings involving private contractors. Slip Op. at 13. But that concern does not require across-the-board

preemption. Where discovery would hamper the military's mission, district courts can and must delay it -- until personnel return stateside, or until the end of the war if necessary.[17] Where production of witnesses or documents would damage national security regardless of timing, the usual privileges apply.[18] To deny preemption is not to grant plaintiffs free reign.[19]

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[17]*See Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (noting that district courts have the tools, "in cases involving third-party subpoenas to government agencies or employees," to "properly accommodate the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations" (internal quotation marks omitted)).

[18]*See Watts*, 482 F.3d at 508 (noting that Federal Rule of Civil Procedure 45 "requires that district courts quash subpoenas that call for privileged matter or would cause an undue burden"); *Ibrahim*, 391 F. Supp. 2d at 16 (declining "to dismiss otherwise valid claims at this early stage," but suggesting that the court would dismiss if "[m]anageability problems" emerge, "especially if discovery collides with government claims to state secrecy").

[19]The court further suggests that "allowance of these claims will potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors." Slip Op. at 14. The court does not say why punishment and civil liability cannot coexist, or indeed, why they do not complement each other. The prospect of material interference is hardly self-evident, as parallel government and private litigation is the norm in cases ranging from assault, to antitrust, to securities regulation. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1202 (noting that state law tort suits can complement federal enforcement by the FDA). In any event, the executive branch -- which presumably knows more about what would interfere with its prerogatives than we do -- has taken the position that civil liability should be available against military contractors. *See supra* Part II.C.2.

4. The court further suggests that the broad field preemption it prescribes is required to properly balance the federal and state interests at stake in this kind of litigation. In support of this contention, the court declares that the "federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns . . . is not only broad -- it is also obvious." Slip Op. at 19. The point is indeed obvious, but also inapposite. As discussed above, there is nothing in the pleadings or record to suggest that the abuse alleged here was part of any "military policy." Moreover, even if there were a jurisdiction whose tort law conflicted with military policy, *Boyle* itself would provide a narrower answer: selective preemption of "only particular elements" of the state's law. *Boyle*, 487 U.S. at 508 (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595 (1973), for the proposition that, "assuming state law should generally govern federal land acquisitions, [the] particular state law at issue may not").[20]

The court also expresses puzzlement over what interest any state could "have in extending its tort law onto a foreign battlefield." Slip Op. at 17. But there is no issue of "extending" a state's law here; the case involves only the application of a state's traditional, generally applicable tort law. That such law

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[20]My colleagues repeatedly raise the specter that the district court might apply Iraqi tort law. *See* Slip Op. at 11, 12, 19. But the plaintiffs reject Iraqi law as a basis for their claims, and the district court did not contemplate it. Plaintiffs-Appellees' Br. 53-54. Nor is it a realistic possibility. As we explained in *Sami v. United States*, "prevailing conflicts [of law] principles . . . permit application of an alternate substantive law when foreign law conflicts with a strong public policy of the forum." 617 F.2d 755, 763 (D.C. Cir. 1979) (footnote omitted). But even if that specter were more corporeal, it would at most warrant application of the selective preemption option mentioned above and discussed in *Boyle*, 487 U.S. at 508, not the kind of field preemption adopted in today's ruling.

may apply to conduct in a foreign country is hardly unusual. Under the Foreign Sovereign Immunities Act, for example, state tort law typically provides a cause of action even for plaintiffs who sue foreign sovereigns, including for conduct that takes place abroad.[21]

This is not to deny that many states would indeed have little or no interest in this particular litigation. But it is not clear that Virginia and California,[22] the states in which CACI and Titan maintain their principal places of business, have no interest in ensuring that their corporations refrain from abusing prisoners -- even in a foreign country. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. f (1971) ("[A] person is most closely related to the state of his domicil[e], and this state has jurisdiction to apply its local law to determine certain of his interests even when he is outside its territory. It may, for example, . . . forbid him to do certain things abroad.").

More important, even if the court were correct that "the interests of any U.S. state . . . are *de minimis* in this dispute" because "all alleged abuse occurred in Iraq against Iraqi citizens," Slip Op. at 21, today's decision cuts a much wider swath. It would bar suit even if the victims of the contractors'

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[21]*See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 685 & n.4 (2004); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1125, 1129 (D.C. Cir. 2004).

[22]The *Saleh* plaintiffs originally filed their complaint in federal district court in Titan's home jurisdiction of California, from which the case was transferred at CACI's request. *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1155 (S.D. Cal. 2005). Our district court has not yet addressed the question of which state law should apply, having limited initial proceedings to the question of preemption.

assaults were fellow Virginians or Californians -- including fellow employees of the same contractors. *See, e.g.*, *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339 (S.D. Tex. May 9, 2008) (tort suit by a Texas woman alleging rape by fellow contractor employees in Iraq). Indeed, the decision would bar suit even if the victims were soldiers whom the contractors were hired to support. The rule the court has announced, then, is not truly one in which the "breadth of displacement" of state law is "inversely proportional to state interests." Slip Op. at 21. Rather, and notwithstanding its best intentions, the court has crafted a rule that overrides state interests altogether, regardless of their strength in a given case.

In any event, there are certainly ways short of broad preemption to ensure that a trial court neither asserts jurisdiction over a case that lacks a significant connection with the forum, nor applies the law of a state with no interest in the matter. The doctrine of forum non conveniens is one such tool.[23] So, too, are the limits that states impose on the extraterritorial reach of their own courts,[24] as well as limitations imposed by the Constitution's Due Process Clause.[25] Indeed, if my colleagues

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[23]*See, e.g.*, *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 541 (5th Cir. 1997) (dismissing extraterritorial tort claims under forum non conveniens).

[24]*See, e.g.*, *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509-10 (D.C. Cir. 2002) (noting the limits of the District of Columbia's long-arm statute).

[25]*See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (barring extraterritorial application of a state's substantive law unless the state has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"); *see also Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984) (holding that, for in

are right about the state interests at stake here, it is possible that one of these doctrines could end these cases without resort to nontextual preemption.

Finally, even if the prospect of applying state laws in this kind of case would present an insurmountable conflict with federal interests, *Boyle* again counsels a different disposition from that which my colleagues adopt. As *Boyle* explained, "where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts [with] *and is replaced by federal rules*." 487 U.S. at 507 (emphasis added). Accordingly, where the Supreme Court finds field preemption appropriate, it does not normally preempt state law and simply leave the field vacant. Instead, it substitutes a federal common law regime.[26] That is what the Court did in *Clearfield Trust Co. v. United States*, the case my colleagues cite as the archetypal example of "field preemption." Slip Op. at 10, 11; *see* 318 U.S. 363, 366-67 (1943) (holding that the rights and obligations of the United States with respect to commercial paper must be governed by a uniform federal rule). It is also what my colleagues' own analysis would dictate. *See* Slip Op. at 13 (arguing that the government's "interest in combat is always

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personam jurisdiction to be asserted over a nonresident corporate defendant, there must be "'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

[26] *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (displacing New York's "act of state" rule because "the scope of the act of state doctrine must be determined according to federal law"); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (holding that, because collective bargaining agreements require uniform interpretation, federal law based on "the policy of our national labor laws" must substitute for state law).

'precisely contrary' to the imposition of a *non-federal* tort duty" (emphasis added)). Yet here, the court simply leaves the field.[27]

III

For the reasons just stated, the preemption question in these cases should be controlled by *Boyle*, which authorizes displacement of state law only when a federal contract imposes a directly conflicting duty on a contractor. Because there is no such conflict here -- indeed, because the duties imposed are congruent rather than incompatible -- there is no warrant for preemption.

Nonetheless, I cannot say that my colleagues' arguments in favor of extending *Boyle* to the combatant activities exception lack weight. What I can say, in agreement with them, is that even if we do extend *Boyle*, "the 'scope of displacement' of the preempted non-federal substantive law must be carefully tailored so as to coincide with the bounds of the federal interest being protected." Slip Op. at 14 (quoting *Boyle*, 487 U.S. at 512). Subpart III.A sets out what the appropriate "scope of displacement" would be were we to rely upon the combatant activities exception, and then explains why these cases fall outside that scope. Subpart III.B discusses the problems posed by the essentially untailored test my colleagues apply instead.

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[27]The court states that preemption of state law will not leave the plaintiffs "totally bereft of all remedies . . . as they will still retain rights under the Foreign Claims Act." Slip Op. at 14. But plaintiffs have no "rights" under that Act, which merely authorizes designated officials to make (or not make) certain payments as a matter of their unreviewable discretion. 10 U.S.C. §§ 2734, 2735; *see Collins v. United States*, 67 F.3d 284, 286-89 (Fed. Cir. 1995); *Niedbala v. United States*, 37 Fed. Cl. 43, 46, 50 (1996).

A

The FTCA's combatant activities exception preserves the United States' sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j). According to the statutory text, that exception -- like the discretionary function exception, the other exceptions, and the FTCA as a whole -- applies only in "civil actions . . . against the United States" and only for injuries caused by an "employee of the Government." *Id.* § 1346(b)(1). In light of the FTCA's text, the *Boyle* Court crafted preemption conditions that would assure that the discretionary function in question "was considered by a Government officer, and not merely by the contractor itself." 487 U.S. at 512. If we are to extend *Boyle* to the combatant activities exception, we must demand the same assurance. Hence, for preemption to be appropriate, it must be for "claim[s] arising out of the combatant activities *of the military or naval forces*," 28 U.S.C. § 2680(j) (emphasis added), and not for those arising out of acts performed "by the contractor itself," *Boyle*, 487 U.S. at 512.

How, then, can we tell whether a contractor's conduct actually involved the combatant activities of the military? In this respect, I agree with my colleagues that, at a minimum, the contractor must be "under the military's control." Slip Op. at 12. I disagree, however, as to how to determine the existence of such control. In the military, control is achieved through the chain of command. And the official view of the U.S. Department of Defense is that private contractors accompanying the Armed Forces in the field are *not* in that chain.

The DOD's position, as set out in its regulations governing "Contractors Accompanying the Force," is that contractors are responsible for the supervision of their own employees and that

their personnel are not in the military chain of command. The regulations state:

> The commercial firm(s) providing battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain of command.

U.S. DEP'T OF THE ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE § 3-2(f) (1999). The regulations further state: "Contracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel." *Id.* § 3-3(b). Titan's contract with the Army is consistent with this position. *See* Titan Statement of Work § C-1.1 (*Titan* J.A. 386) ("The Contractor shall provide all . . . supervision, and other items and services . . . necessary to provide foreign language interpretation and translation services in support of United States (U.S.) Forces.").[28]

The Army Field Manual on "Contractors on the Battlefield" is, if anything, even more emphatic on these points:

> Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government

[28]Titan's contract further states that "[p]ersonnel performing work under this contract shall remain employees of the Contractor and will not be considered employees of the Government." *Id.* § C-1.4.1 (*Titan* J.A. 387). CACI's contract states that its employees "are considered non-combatants." CACI Statement of Work ¶ 20(j) (*CACI* J.A. 332).

> employees); only contractors manage, supervise, and give directions to their employees.

U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD § 1-22 (2003). As the Field Manual further explains:

> It is important to understand that the terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.

Id. § 1-25; *see also id.* § 4-45 ("Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. . . . It is the contractor who must take direct responsibility and action for his employee's conduct."); JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS, at V-8 (2000) (*Titan* J.A. 568) (stating that "[c]ontract employees are disciplined by the contractor" and that "[c]ommanders have no penal authority to compel contractor personnel to perform their duties").

In sum, under the existing regulatory regime, contractor personnel are not subject to the command and control of the military. The responsibility for their supervision belongs to their civilian employers. "Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command." FIELD MANUAL 3-100.21, § 1-22. And "[c]ontracted support service personnel shall not be supervised or directed by military or Department of

the Army (DA) civilian personnel." ARMY REG. 715-9, § 3-3(b). The government exercises control only "through the contract," FIELD MANUAL 3-100.21, § 1-25, which gives the government no more control than any contracting party has over its counterparty. And that -- without more -- is not enough to make the conduct of a contractor "the combatant activities *of the military or naval forces*." 28 U.S.C. § 2680(j) (emphasis added).

Of course, the fact that preemption is not warranted by application of the combatant activities exception does not mean that preemption is never warranted. If a plaintiff challenges contractor activity that has been authorized or directed by the military, preemption by application of the discretionary function exception may result -- as it did in *Boyle*. There is no evidence in the record of these cases, however, that the brutality the plaintiffs allege was authorized or directed by the United States.

B

My colleagues reach a different disposition than I do under the combatant activities exception because they employ a different test for preemption. The test they adopt is as follows: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." Slip Op. at 16. But what does "integrated into" mean? How "integrated" into combatant activities must the contractor be? And what does "retains command authority" mean in light of the DOD regulations discussed above? My colleagues have created a vague and amorphous test and, in so doing, have invited precisely the kind of litigation they fear.

Today's opinion further holds that "the district judge properly focused" not on "the contract terms," but "on the chain of command *and the degree of integration that, in fact, existed* between the military and both contractors' employees." Slip Op. at 7 (emphasis added). But why should that be the proper focus? Why should we ignore the military's own description of its chain of command -- as set forth in its contracts, regulations, and manuals -- and instead investigate the facts on the ground? Does this not again invite the wide-ranging judicial inquiry -- with affidavits, depositions, and conflicting testimony -- that the court rightly abjures? The irony is again evident: we must have a robust contractor defense so as not to interfere with the Executive's conduct of war; but in applying that defense, we do not take the military at its word and instead inquire into the actual operation of its chain of command.

None of these problems are apparent in today's opinion, but that is only because the court does not apply its test to the facts of these cases. Instead, it simply states that "there is no dispute that [the contract employees] were in fact integrated and performing a common mission with the military under ultimate military command." Slip Op. at 11. But there is in fact considerable dispute over whether the contract employees were truly under the military's command at Abu Ghraib. The plaintiffs made that point in this court,[29] and they submitted substantial evidence of lack of military control in the district court.

For example, the plaintiffs submitted an affidavit from the Brigadier General in charge at Abu Ghraib, who declared: "The

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[29] *See, e.g.*, Plaintiffs-Appellants' Br. 25 ("A reasonable jury could certainly find that the [Titan] translators who conspired with CACI employees to abuse Plaintiffs were not under the United States military's command or control.").

Titan translators and other corporate employees were not integrated into the military chain of command. . . . [M]ilitary officials could not give Titan translators and other corporate employees direct orders." Decl. of Brig. Gen. Janis Karpinski ¶ 7 (*Titan* J.A. 725-26). Similarly, an affidavit from a Military Intelligence Specialist at the prison stated: "Titan translators . . . did not act like soldiers, and my unit did not treat them like soldiers. They did not fall within the military chain of command . . . . [W]e had no means of disciplining Titan translators if they did not do what we requested." Decl. of Anthony Lagouranis ¶¶ 11-12 (*Titan* J.A. 733). Affidavits from Titan employees were in accord. A Titan Translator affirmed that: "I received assignments from soldiers, and tried to maintain a good relationship with them, but they could not give me orders. I was employed by Titan -- and only Titan could fire me. I did not report to a military chain of command." Decl. of Marwan Mawiri ¶ 9 (*Titan* J.A. 519). And a Titan employee who supervised Titan translators in Iraq declared: "Only the Titan management had the power to supervise and discipline Titan translators. . . . The military could not fire or discipline a Titan employee." Decl. of Thomas Crowley ¶¶ 7-8 (*Titan* J.A. 515).

Needless to say, there was contrary evidence as well. But surely the plaintiffs' testimonial affidavits, alone or in combination with DOD's regulatory and contractual statements, are sufficient to create a genuine issue of material fact. And for that reason, the defendants are not entitled to judgment as a matter of law at the current stage of this litigation, even under my colleagues' own test. *See* FED. R. CIV. P. 56(c) (providing that summary judgment should be granted only if "there is no genuine issue as to any material fact"); *see also Boyle*, 487 U.S. at 514 (holding that "whether the facts establish the conditions for the [preemption] defense is a question for the jury"). That the court does not reach this conclusion only confirms the

breadth of the protective cloak it has cast over the activities of private contractors.[30]

IV

No congressional statute bars the plaintiffs' state-law actions from running their ordinary course in these cases. Indeed, the only cited statute suggests the opposite. No statement of the Executive Branch declares that its interests require dismissal of these cases. Again, the only indications we have from the government are to the contrary. Nor is there any claim that "the state-imposed duty of care that is the asserted basis of the contractor[s'] liability . . . is precisely contrary to the duty imposed by the Government contract," *Boyle*, 487 U.S. at 509, or even that the contractors came within the military's view of its chain of command.

Because "[c]ourts should preempt state law only when the justification for preemption is fairly traceable to the foreign policy choices not of the federal courts, but rather of the federal political branches," Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 213, and because the political branches have not made such policy choices evident here, I respectfully dissent.

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[30]Because I conclude that we should permit the state-law claims to go forward at this stage, and because the plaintiffs do not contend that their Alien Tort Statute claims would provide them with different relief, *see* 28 U.S.C. § 1350, I do not address the latter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7001 **September Term, 2009**

FILED ON: SEPTEMBER 11, 2009

HAIDAR MUHSIN SALEH, ET AL.,
APPELLEES

v.

CACI INTERNATIONAL INC., A DELAWARE CORPORATION AND CACI PREMIER TECHNOLOGY, INC., A DELAWARE CORPORATION,
APPELLANTS

Consolidated with 08-7030, 08-7044, 08-7045

Appeals from the United States District Court
for the District of Columbia
(No. 1:04-cv-01248-JR)
(No. 1:05-cv-01165-JR)

Before: GARLAND* and KAVANAUGH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record from the district court and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the district court judgment be reversed for the reasons stated in the opinion in the case *Saleh v. Titan*, 08-7008, *et al*. issued on September 11, 2009.

* Circuit Judge Garland dissents for the reasons set forth in his dissenting opinion in *Saleh v. Titan Corp.*, No. 08-7008, issued on September 11, 2009.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3081 **September Term 2008**

1:98-cr-00025-TFH-1

Filed On: August 21, 2009

United States of America,

Appellee

v.

Edward Jackson,

Appellant

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief and the joint appendix; and the motion to dismiss and the response thereto, it is

ORDERED that the motion to dismiss be denied. This court has jurisdiction over 09-11550appellant's appeal from the district court's judgment filed on July 29, 2008. See 28 U.S.C. § 1291. It is

FURTHER ORDERED, on the court's own motion, that the district court's judgment filed July 29, 2008, be affirmed. 18 U.S.C. § 3585(b) does not authorize the district court to award at sentencing credit for time served. See United States v. Wilson, 503 U.S. 329, 333-35 (1992). Instead, the Attorney General, through the Bureau of Prisons, determines the amount of the credit as an administrative matter when imprisoning the defendant. Id. at 335. Appellant's request for credit for time served, therefore, must be made to the Bureau of Prisons in the first instance. See id.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Laura Chipley
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5381 **September Term 2008**

1:07-cv-00749-HHK

Filed On: August 20, 2009

Gregory Bonaparte,

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Ginsburg, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance; the motion for leave to exceed the page limits for the opposition, and the lodged opposition; and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for leave to exceed the page limits be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly held that the government satisfied its obligation under the Freedom of Information Act, 5 U.S.C. § 552(a)(3), to search for records responsive to appellant's request. Appellant's challenge to the adequacy of the search fails because he has not provided sufficient evidence to raise "substantial doubt" concerning the adequacy of the search. See Iturralde v. Comptroller of the Currency, 315 F.3d 311, 314 (D.C. Cir. 2003). Specifically, The Executive Office for United States Attorneys is not obligated to search for or reacquire documents it did not retain to satisfy plaintiff's Freedom of Information Act request. See McGehee v. CIA, 697 F.2d 1095, 1103 n.33 (D.C. Cir. 1983). Furthermore, it was reasonable for the government to limit its search to the United States Attorney's Office for the Middle District of Florida, given that,

according to the government's affidavits, that was the "likely" location for the requested documents. See Steinberg v. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (the question is not "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate") (quotations and citations omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1069 **September Term 2008**

FERC-ER04-691-065

Filed On: August 14, 2009

In re: Minnesota Municipal Power Agency,

Petitioner

BEFORE: Ginsburg, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of prohibition, the oppositions thereto, and the reply, it is

ORDERED that the petition be denied. Petitioner has failed to demonstrate that it has no other adequate means to obtain the relief requested, and that its right to the relief requested is "clear and indisputable." See In re: GTE Service Corp., 762 F.2d 1024, 1027 (D.C. Cir. 1985); Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 11, 2008 Decided August 7, 2009

No. 07-1209

ALASKA AIRLINES, INC. ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
RESPONDENT

CITY OF LOS ANGELES ET AL.,
INTERVENORS

Consolidated with 07-1223, 07-1273, 07-1276

On Petitions for Review of Orders of the
Department of Transportation

M. Roy Goldberg argued the cause for petitioners Terminal 1 and 3 Airlines and the Air Transport Association of America, Inc. With him on the briefs were *Robert W. Kneisley*, *Howard E. Kass*, *Robert P. Silverberg*, *Claire L. Shapiro*, and *David A. Berg*.

Steven S. Rosenthal argued the cause for petitioner the City of Los Angeles and intervenor Airports Counsel

International - North America. With him on the briefs were *Jeffery A. Tomasevich*, *J. D. Taliaferro*, and *Scott P. Lewis*. *Douglas A. Tucker* entered an appearance.

Mary F. Withum, Senior Trial Attorney, U.S. Department of Transportation, argued the cause for respondent. With her on the brief were *Robert B. Nicholson* and *Nickolai G. Levin*, Attorneys, U.S. Department of Justice, *Paul M. Geier*, Assistant General Counsel, U.S. Department of Transportation, and *Dale C. Andrews*, Deputy Assistant General Counsel.

M. Roy Goldberg argued the cause for intervenor Terminal 1 and 3 Airlines. With him on the brief were *Robert W. Kneisley* and *Howard E. Kass*.

Steven S. Rosenthal argued the cause for intervenors the City of Los Angeles and Airports Counsel International - North America. With him on the briefs were *Jeffery A. Tomasevich*, *J. D. Taliaferro*, and *Scott P. Lewis*. *Patricia A. Hahn* entered an appearance.

Before: GINSBURG, GARLAND, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: Various airlines asked the Department of Transportation (DOT) to declare unlawful certain of the methods used by the City of Los Angeles to calculate the rental rates they pay for terminal space at Los Angeles International Airport (LAX). Both the City and the airlines petition for review of the DOT's Final Decision, *Alaska Airlines v. Los Angeles World Airports*, Docket No. OST-2007-27331, 2007 DOT Av. LEXIS 437 (Jun. 15, 2007)

(*Final Decision*). We grant each petition in part, deny each petition in part, and remand the matter to the DOT for further proceedings.

I. Background

The airline petitioners (T1/T3 Airlines) rent space in Terminals 1 and 3 at LAX. The City charges the airlines a "base rent" for their terminal space plus a share of the airport's maintenance and operation (M&O) costs. Each airline's base rent and M&O charges are determined in part by multiplying a fee per square foot by the amount of terminal space the airline occupies; an airline's rent may change, therefore, if the City changes either the fee per square foot or the way in which it calculates the amount of terminal space occupied by the airline. When the leases of the T1/T3 Airlines expired and negotiations over new lease terms reached an impasse, the City, seeking increased rental payments to offset increased security costs and to pay for planned airport improvements, adopted a new methodology, increasing both the fee per square foot and the amount of terminal space attributed to each airline.

The new methodology introduced three changes here relevant. First, the City increased M&O charges for all airlines operating out of LAX, including not only the T1/T3 Airlines but also airlines with leases that had not expired. Second, the City changed the formula for calculating the T1/T3 Airlines' rent. Under the "useable space" formula previously employed, the City had multiplied the rental fee by the amount of space used exclusively by each airline. Under the new "rentable space" formula, the City allocated to each of the T1/T3 Airlines a share of the terminal's common areas, such as corridors and stairwells, thus increasing its square footage and hence its base rent. Finally, the City newly based

the fee per square foot for the T1/T3 Airlines upon the "fair market value" (FMV) of the space, whereas under the expired contracts, the rental fee had been based upon the "historical cost" of the space.

Airlines in other terminals continue to pay rent based upon the historical cost of useable space; the City is unable to impose its new methodology upon these carriers because they have long-term leases, entered into in the 1980s and still in effect. The City nonetheless increased those airlines' M&O charges, but after the airlines filed suit, ultimately settled for a lesser increase.

The T1/T3 Airlines complained to the DOT that the new charges imposed by the City were unreasonable and, as compared with the charges paid by airlines using other terminals, unjustly discriminatory. The DOT assigned the matter to an Administrative Law Judge, who recommended the DOT rule in favor of the T1/T3 Airlines in most respects. *Recommended Decision of U.S. Administrative Law Judge Richard C. Goodwin*, Docket No. OST-2007-27331 at 77-78 (Dep't of Transp. May 15, 2007). The DOT rejected much of the ALJ's recommendation and held: (1) The increase in M&O charges was reasonable and non-discriminatory; (2) the rentable space methodology unjustly discriminated against the T1/T3 Airlines; and (3) the City may use fair market value rather than historical cost in setting terminal fees but the particular method it used was unreasonable as applied to the T3 Airlines; because the T1 Airlines did not file a separate written complaint with the Secretary of Transportation within the time required by statute, the DOT did not consider whether the fair market value method was unreasonable as applied to them. *Final Decision*, 2007 DOT Av. LEXIS 437, at *1.

Both the T1/T3 Airlines and the City petition for review of the Final Decision. The T1/T3 Airlines argue (1) the increase in M&O fees is unjustly discriminatory; (2) it was unreasonable for the City to use fair market value but, if the City was permitted to use fair market value, then the DOT should have decided whether its use was unreasonable as applied to the T1 as well as the T3 Airlines; and (3) the DOT erred by declining to consider whether LAX has monopoly power. For its part, the City argues (1) the DOT should not have considered whether the M&O fee increase was unreasonable; (2) the method it used to determine fair market value was reasonable; and (3) the rentable space methodology does not unjustly discriminate against the T1/T3 Airlines because they are not entitled to the benefits for which the airlines with long-term leases bargained.

II. Analysis

This case arises under 49 U.S.C. § 47129(a)(1), which provides that, upon written request, the DOT "shall issue a determination as to whether a fee imposed upon one or more air carriers ... is reasonable." To approve of a fee increase, the DOT must have "receive[d] written assurances ... that ... air carriers making similar use of the airport will be subject to substantially comparable charges." 49 U.S.C. § 47107(a)(2). The DOT's "findings of fact are conclusive if supported by substantial evidence; and we will affirm [its] decision unless it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *City of Los Angeles Dep't of Airports v. DOT* (*LAX I*), 103 F.3d 1027, 1031 (D.C. Cir. 1997) (internal citations omitted).

We begin by considering the challenges to the M&O fee increase. Next, we turn to the DOT's assessment of the City's use of FMV. We then determine whether the DOT

erred in holding the City's rentable space methodology was discriminatory. Finally, having analyzed the DOT's treatment of particular aspects of the City's new methodology for calculating rent, we consider the airlines' overarching objection to the DOT's analysis, namely that the agency should have considered whether LAX has monopoly power in a relevant geographic market.

A. M&O Charges

Although the DOT held the M&O fee increase was reasonable, the City petitions for review on the ground that, because the increase was imposed "pursuant to a written agreement with air carriers using the facilities of an airport," 49 U.S.C. § 47129(e)(1), the DOT did not have the authority to determine whether it was reasonable. The agreements to which the City refers are the T1/T3 Airlines' leases, which had expired, and pursuant to which the T1/T3 Airlines were occupying terminal space as holdover tenants upon a month-to-month basis. According to the City, the continuing application of the expired leases and the City's reliance upon the clauses in each allowing for "adjustment" of the M&O rent deprives the DOT of authority to review the reasonableness of the increase. The DOT, however, held the "written agreement" exception did not apply because "[a] standard or boilerplate 'holdover' agreement, creating a tenancy at will on a month to month basis, subsequent to lease expiration, does not constitute the type of written agreement that forecloses a § 47129 proceeding." *Final Decision*, 2007 DOT Av. LEXIS 437, at *104.

The T1/T3 Airlines challenge neither the DOT's authority nor the reasonableness of the increased M&O charge but rather argue the result of the increase was unjustly discriminatory vis-à-vis other airlines at LAX, in violation of

49 U.S.C. § 47107(a)(2). The City nonetheless disputes the DOT's decision that the "written agreement" exception did not apply "because," it says, it fears "the future effects of [the] incorrect ruling." Because the airlines do not challenge the decision under 49 U.S.C. § 47129, there is no case or controversy as to whether the "written agreement" exception applies; even if we held the DOT lacked authority to consider the reasonableness of the increase in M&O charges, that holding would not have any effect on the charges. Because "no justiciable 'controversy' exists when parties ... ask for an advisory opinion," *Mass. v. EPA*, 549 U.S. 497, 516 (2007) (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)), we cannot decide the question presented by the City.

We reject the T1/T3 Airlines' argument that the increase in M&O fees was unjustly discriminatory. As of the date of the Final Decision, all airlines operating out of LAX were paying the increased M&O fees. At some time between that date and the filing of the T1/T3 Airlines' petition for review, the City and the airlines operating out of the other terminals agreed, in settlement of their dispute, to a lesser increase in the M&O fee. Although the DOT could not have foreseen the outcome of that litigation, the T1/T3 Airlines argue the Department should have considered the possibility that the other airlines would either prevail in or reach a favorable settlement of their dispute with the City.

The DOT did not act unreasonably in refusing to consider the range of potential outcomes in the litigation between the City and the other airlines. The DOT could not determine whether the T1/T3 Airlines were being unjustly discriminated against without knowing whether the other airlines had achieved a favorable result with the City, much less whether the result was so favorable as to constitute unjust discrimination against the T1/T3 Airlines. The DOT's

decision to base the Final Decision upon what it knew, rather than upon what it might have predicted, was not arbitrary and capricious.

B. Rent Per Square Foot

Both the T1/T3 Airlines and the City find fault with the DOT's treatment of FMV. The T1/T3 Airlines argue the Final Decision is arbitrary and capricious because the DOT failed to explain why, although an airport may not use FMV, as measured by opportunity cost, when setting airfield rental rates, it is permitted to use opportunity cost in setting FMV rates for space inside a terminal. The City objects to the DOT's dual requirements that, in using FMV to set terminal rates, the City may look to the opportunity cost of devoting the space only to "other aeronautical uses," and must use an independent appraiser to determine FMV. Finally, the T1 Airlines argue the DOT erred in holding the City's use of FMV was unreasonable as applied only to the T3 Airlines on the ground that the T1 Airlines had failed to complain to the DOT within the time allotted by statute.

1. Airfield vs. non-airfield space

In *LAX I* we held the Anti-Head Tax provision of the Federal Aviation Act does not prohibit an airport from considering its opportunity cost in setting airfield fees. 103 F.3d at 1034. We directed the DOT on remand to decide whether an FMV methodology that considers the most valuable alternative use of the land would more accurately "reflect [its] true cost." *Id.* In *Air Transport Association of America v. DOT* (*ATA*), 119 F.3d 38, 40 (1997), we reviewed the subsequent Policy Statement, in which the DOT distinguished between "airfield fees — aeronautical fees charged for the use of runways, taxiways, ramps, aprons, and

roadway land," and the fees for the use of all other airport space. *Id.* The Policy Statement required airports to set airfield fees based upon "historic cost" but allowed them to use "any reasonable methodology," including opportunity cost, to set non-airfield fees. *Id.* In vacating the Policy Statement we observed: "[T]he [DOT] simply has not explained why fair market valuation may be appropriate for other portions of the airport, but [is purportedly] too difficult to use in valuing airfield assets." *Id.* at 44.

The T1/T3 Airlines argue the DOT has again failed to explain its disparate treatment of fees for airfield and for non-airfield (*i.e.*, terminal) space. The Final Decision merely tracks the Policy Statement, asserting it is "within [the DOT's] discretion" to allow an airport to consider opportunity cost when setting non-airfield fees, *Final Decision*, 2007 DOT Av. LEXIS 437, at *157, and adds that nothing in the "controlling decisional guidance precludes the use of FMV," *id.* at *153. Both statements may be true, but neither is a reasoned basis for allowing an airport to use opportunity cost as a measure of FMV for one type of airport space and not another. We must therefore grant the T1/T3 Airlines' petition and again remand the matter to the DOT either to justify or to abandon its disparate treatment of airfield and non-airfield space.

2. Other aeronautical uses of terminal space

Although it approved of using FMV in theory, the DOT went on to hold the City may not base terminal rents upon a measure of FMV that takes account of what non-aeronautical users, such as retail merchants, would be willing to pay for terminal space. The City argues this limitation was arbitrary and capricious because the DOT failed to offer a satisfactory explanation for its disparate treatment of aeronautical and

non-aeronautical uses. The DOT supported its position with the observation that "airports have grant assurance obligations to operate the facility for aeronautical purposes." *Id.* at *152.

In *LAX II* we upheld the DOT's decision to bar setting airfield rates based upon the opportunity cost of non-aeronautical uses, *City of Los Angeles v. DOT*, 165 F.3d 972 977-79 (1999), because the City was legally obligated to use the airfield land as an airport. *Id.* at 976 ("The Department ... concluded that it would be unreasonable for the City to recover compensation through its landing fees for a 'lost opportunity' that does not lawfully exist"). The DOT offers the same rationale to justify the prohibition against considering non-aeronautical uses for space inside the terminal.

Although an airport is obligated to use non-airfield space to support airport services, the DOT does not suggest all non-airfield space must be dedicated solely to aeronautical uses, which would be to deny the obvious; these days commercial airports feature many retail vendors of food, clothing, toiletries, periodicals, and more. A commercial airport foregoes lost opportunities aplenty when it leases to an airline space it could lease to a non-aeronautical tenant. The difference between the airfield and the terminal is that aeronautical and non-aeronautical uses cannot coexist in the airfield; safety, among other reasons, precludes retail or other non-aeronautical operations on the tarmac or runways. In the terminal, by contrast, aeronautical and non-aeronautical businesses are compatible, perhaps even complementary. It makes no sense, therefore, to say the City may not rely upon the rental value of retail space in calculating the FMV of terminal space leased to airlines because "airports have grant assurance obligations to operate the facility for aeronautical purposes." *Final Decision*, 2007 DOT Av. LEXIS 437, at

*152. An airport does not cease to operate for aeronautical purposes because it also rents terminal space to a retailer. The DOT's decision to limit the City's use of FMV to the consideration of lost aeronautical opportunities is therefore arbitrary and capricious. We grant the City's petition in this respect and direct the DOT on remand, either to justify or to abandon its objection to the City's considering non-aeronautical uses when setting terminal rents based upon FMV.

3. Third-party appraisal

The City also argues it was arbitrary and capricious for the DOT to require that it obtain "a neutral third party appraisal," *id.* at *151, in order to determine the FMV of rental space. The DOT's concern was that the City's "establishment of fair market value was not an objective determination, but rather a determination established ... in-house" by the City itself. *Id.* at *158. The City objects to the notion that an in-house appraisal may not be objective and reliable. Be that as it may, one need not consult precedents to see that requiring an independent appraisal to ensure an objective determination of the FMV for terminal space is neither arbitrary nor capricious but only a prudent acknowledgement of human nature and institutional incentives.

4. Timeliness of T1 Airlines' objection

An air carrier may appeal to the DOT for review of an airport charge per 49 U.S.C. § 47129(a)(1)(B), as follows:

> The Secretary of Transportation shall issue a determination as to whether a fee imposed upon one or more air carriers ... by the owner

> or operator of an airport is reasonable if ... a written complaint requesting such determination is filed with the Secretary by an affected air carrier within 60 days after such carrier receives written notice of the establishment or increase of such fee.

When the T1/T3 Airlines filed their complaint, only the T3 Airlines had received notice that their non-airfield rent would be based upon FMV. The City did not give notice to the T1 airlines until after the complaint had been filed. The ALJ advised the T1 Airlines that because the complaint had already been filed, it was unnecessary to "revise" the complaint in order for the T1 Airlines to join the T3 Airlines' arguments against the City's use of FMV. Upon review, however, the DOT held "[t]he reasonableness of the market method [as applied] to the T1 Carriers ... is outside the scope of this proceeding." *Final Decision*, 2007 DOT Av. LEXIS 437, at *15 n.5.

In support of their petition for review by this court, the T1 Airlines argue the ALJ's invitation equitably tolled the 60 day requirement. The DOT responds that the 60 day requirement limits the agency's jurisdiction and therefore could not be equitably tolled.

As the Supreme Court has observed, "the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver .... [and] permit[s] courts to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750, 753 (2008). Some statutes of limitations however,

> seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal .... The Court has often read the time limits of these statutes as more absolute, ... forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. As a convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional."

Id. (internal citations omitted).

In *Zipes v. Trans World Airlines*, the Supreme Court held the statute that required filing with the Equal Employment Opportunity Commission a claim under Title VII of the Civil Rights Act of 1964 was not jurisdictional because "it does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the tribunal. 455 U.S. 385, 394 (1982). Nor does § 47129(a) speak in jurisdictional terms or refer in any way to the Secretary's authority. The statute simply requires the Secretary to issue a determination upon receiving a timely-filed written complaint; it is silent as to whether the Secretary may, in his discretion, act upon a complaint that does not meet all the formalities. *Cf. Wilbur v. CIA*, 355 F.3d 675, 676-78 (D.C. Cir. 2004) (per curiam) (finding jurisdiction where agency, in its discretion, accepted appeal four years after deadline).

The DOT argues its interpretation of the statute is owed deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837: If the Congress has "directly spoken to the precise question at issue," *id.* at 842, then we must "give effect to the unambiguously expressed intent of Congress," *id.* at 843; if

instead the "statute is silent or ambiguous with respect to the specific issue," then we defer to the DOT's interpretation so long as it is "based on a permissible construction of the statute." *Id.* Here the statute is silent as to whether the Secretary may exercise his jurisdiction without having received a timely-filed complaint. But the DOT's interpretation is not based upon a permissible construction of the statute because it ignores both *John R. Sand & Gravel* and *Zipes*. The former case teaches that a statute of limitations ordinarily serves only as an affirmative defense, 128 S.Ct. at 753, the latter that a statute of limitations is "jurisdictional" only if it speaks in jurisdictional terms.

Consequently we hold the 60-day time limit in 49 U.S.C. § 47129(a) is not a jurisdictional requirement but is rather the type of limitation that, when raised as an affirmative defense, is subject to rules of forfeiture, waiver, and equitable tolling. Accordingly, on remand the DOT must consider any argument the T1 Airlines have preserved that the 60-day limitation ought not be enforced against them.

C. Rentable Space

Because the T1/T3 carriers and the airlines with long-term leases are "making similar use of the airport" but are not "subject to substantially comparable charges," the DOT held the rentable space methodology used by the City ran afoul of the requirement of non-discrimination in 49 U.S.C. § 47107(a)(2). The City disputes neither that the rentable space methodology leads to substantially higher charges for the T1/T3 Airlines, nor that the T1/T3 Airlines and the long-term lessee airlines make similar use of airport common areas. Instead the City argues, as it did before the DOT, that the T1/T3 Airlines are not situated similarly to the long-term tenants, which struck their bargains with LAX more than two

decades ago. This distinction, the City contends, creates a "reasonable classification" such that the two groups may lawfully be charged different rates.

The City also argues the Final Decision is contrary to law because the DOT improperly placed upon it the burden of persuasion that the difference in rents was based upon a reasonable classification. In *Port Authority of New York and New Jersey v. DOT* (*Newark*), we considered a petition filed by several airlines for review of a DOT decision denying their claim of unjust discrimination under § 47107. 479 F.3d 21, 39-45 (2007). In that case the airport did not charge Continental Airlines certain fees it charged other airlines because Continental, unlike the others, operated and maintained its own terminal. *Id.* at 42. We held the airline complaining of unjust discrimination had the burden of showing another airline making similar use of the airport was not subject to comparable charges. *See id.*; 49 U.S.C. § 47107(a)(2). On the other hand, as we said, the statutory exception for a difference based upon a reasonable classification, *see* 49 U.S.C. § 47107(a)(2)(B), "could arguably be viewed as an affirmative defense," as to which "the agency is free to choose which party bears the burden of proof," 479 F.3d at 42. We were quite clear, however, the DOT "would violate [§ 556(d) of the Administrative Procedure Act] if it placed the full burden of persuasion on the [airport] as to the reasonableness of the proposed fees." *Id.* at 43 n.17; *see* 5 U.S.C. § 556(d) ("the proponent of a[n] ... order has the burden of proof").

Before the DOT in this case, the City argued "it can reasonably distinguish between airlines who signed long-term leases in the 1980s ... on the one hand, and airlines who did not sign leases of that duration ... on the other hand." *Final Decision*, 2007 DOT Av. LEXIS 437, at *166. In support of

this affirmative defense, the City pointed to its need "to expand LAX for the 1984 Olympic Games," which the long-term leases facilitated. *Id.* at *175. There is indeed evidence in the record that the airlines with long-term leases got them in return for their part in helping LAX secure financing for the needed expansion, whereas at least some of the T1/T3 Airlines declined the same offer. Because the City asserted and placed evidence in the record that the rate differential was based upon a reasonable classification, thus perfecting its affirmative defense, the burden rested upon the complaining T1/T3 Airlines to persuade the DOT that the City's classification was not reasonable. *See Newark*, 479 F.3d at 43 n.17.

There is no mention in the Final Decision of any evidence the T1/T3 Airlines introduced to show the City's distinction between the long-term tenants and the T1/T3 Airlines was not reasonable; the T1/T3 Airlines simply stated the size of the fee disparity and that the various airlines made similar use of their terminal space. The DOT nonetheless ruled as follows:

> Because carriers making similar use are not being charged on a comparable basis, and because [the City] has not offered an adequate justification for this practice, we think the use of the rentable space methodology in [this] context ... violates the prohibition against unjust discrimination.

Final Decision, 2007 DOT Av. LEXIS 437, at *149-50. By holding the City's justification "inadequate" without pointing to any evidence to that effect put forward by the T1/T3 Airlines, the DOT effectively assigned the burden of persuasion to the City, whereas the Administrative Procedure

Act places that burden squarely upon the complaining airline. 5 U.S.C. § 556(d); *see Newark*, 479 F.3d at 43 n.17.

Because the DOT failed to require the T1/T3 Airlines to put forward evidence that the City's distinction between long- and short-term tenants was unreasonable, the Final Decision contains no discussion of whether the economic conditions facing LAX and the airlines in the 1980s justified the disparate treatment of the long-term tenants. We therefore grant the City's petition to the extent of directing the DOT on remand to revisit the T1/T3 Airlines' complaint of discrimination and to apply to them the burden of persuasion that their disparate treatment is unjust.

D. Monopoly Power

We now turn to the elephant in the room: Whether LAX had monopoly power over the provision of commercial airport services in a relevant geographic market. LAX's monopoly power *vel non* is relevant both to whether the City could lawfully consider evidence of fair market value to set rental rates for terminal space and to whether the rentable space methodology unjustly discriminated against the T1/T3 Airlines. The extent to which market value may be considered "fair" is surely affected by whether the market is competitive rather than dominated by a government with monopoly power. Whether it was unjust for the City to charge the T1/T3 Airlines, but not the other airlines, rent for a portion of terminal common areas might also be affected by the City's alleged monopoly position; a more competitive market might have led to rent based only upon area used exclusively by an airline. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 44 (2006) (observing price discrimination "is strong evidence of market power").

In the Policy Statement under review in *ATA*, the DOT responded this way to airlines' concern that airports would exercise monopoly power in setting fees:

> The carriers' claims ... are not supported by the Department's experience .... Airport proprietors generally seek to improve air services for their communities. This objective would be frustrated by charging exorbitant fees for aeronautical facilities .... In the extraordinary situation, the Department would consider airline complaints concerning significant disputes through an expedited administrative procedure (14 CFR Part 302).

Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31,994, 32,007 (1996). In their complaint, the T1/T3 Airlines unmistakably raised the issue when they alleged the City "has monopoly power over access to LAX, and airlines must have access to LAX on fair and reasonable terms in order to serve the Los Angeles region effectively." *Joint Complaint in Opposition to New Terminal Charges at Los Angeles Int'l Airport* at 22. The ALJ did not overlook this issue; he found LAX had monopoly power. The DOT, however, disregarded that finding because it said the "issue was not within the scope of the Instituting Order." *Final Decision*, 2007 DOT Av. LEXIS 437, at *185.

The Policy Statement clearly stated the DOT would consider whether an airport impermissibly exercised monopoly power if an airline sought its review using the procedure the T1/T3 Airlines followed. The T1/T3 Airlines raised the issue in their complaint, but the DOT failed to include the issue in the Instituting Order. *See Instituting Order*, Docket No. OST-2007-27331 (Dep't of Transp. March

16, 2007). It was arbitrary and capricious for the DOT, having invited airlines to raise the monopoly power issue, when it was raised to ignore it without good and sufficient reason. On remand the DOT must explain why this case does not present the "extraordinary situation" in which alleged monopoly power is relevant to a fee dispute or, if it cannot, then go on to consider whether LAX had monopoly power in a relevant geographic market.

III. Conclusion

For the foregoing reasons, we grant both the City's and the Airlines' petitions in part, deny both in part, and remand this matter to the DOT for further consideration. With respect to the Airline petitioners, we uphold the increased M&O fees as non-discriminatory, and direct the DOT to explain why an airport may use FMV to set non-airfield rates but not airfield rates. We further hold 49 U.S.C. § 47129(a) is not a jurisdictional statute of limitation and direct the DOT to determine whether the 60 day filing requirement should be tolled with respect to the T1 Airlines. Finally, we direct the DOT on remand to consider whether LAX has monopoly power and, if so, how that affects the City's methods for calculating the rent to be paid by the T1/T3 Airlines.

As to the City's petition, on remand the DOT shall explain or abandon its position that, in establishing the FMV for non-airfield space, the City may consider only "other aeronautical uses." We find no fault with the DOT's requirement that FMV be established by an independent appraisal. Finally, we hold the DOT unlawfully placed the burden of persuasion upon the City to justify its use of different methods for determining rentable space for the T1/T3 Airlines and the long-term tenants.

So Ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3057 **September Term 2008**

1:06-cr-00029-PLF-1

Filed On: August 7, 2009

United States of America,

Appellee

v.

Anthony Stewart,

Appellant

BEFORE: Ginsburg, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to withdraw as counsel, the confidential memorandum in support thereof and supplement thereto; appellant's response to the motion and supplement thereto; and appellant's motion for appointment of new counsel, it is

ORDERED that the motion for leave to withdraw be granted. See Anders v. California, 386 U.S. 738 (1967). it is

FURTHER ORDERED that the motion for appointment of new counsel be denied. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed. An independent review of the record indicates there are no nonfrivolous issues for appeal. See Anders, 386 U.S. at 744.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 11, 2008 Decided July 31, 2009

No. 07-5264

THEODORE R. LUCAS, ET AL.,
APPELLANTS

v.

ARNE DUNCAN, IN HIS OFFICIAL CAPACITY AS SECRETARY,
U.S. DEPARTMENT OF EDUCATION, HIS AGENTS AND
SUCCESSORS,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 01cv02393)

John F. Karl, Jr. argued the cause and filed the briefs for appellant.

Richard R. Renner was on the brief for *amicus curiae* National Employment Lawyers Association in support of appellant.

Mercedeh Momeni, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Jeffrey A. Taylor*, U.S. Attorney, and *R. Craig Lawrence* and *Yule Kim*, Assistant U.S. Attorneys.

Before: GINSBURG, GARLAND, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: This is an appeal from an order imposing sanctions against an attorney under Rule 11 of the Federal Rules of Civil Procedure. A magistrate judge imposed the sanctions for statements that the attorney made in pleadings he filed on behalf of his client, the plaintiff in an employment discrimination suit. For the reasons stated below, we vacate the sanctions order.

I

Attorney John F. Karl, Jr.'s client, Theodore Lucas, was an employee in the Department of Education's Office of Civil Rights. In 1998, Lucas applied for a promotion to a position as a management and program analyst. At that time, he was 61 years old and had both a law degree and more than 25 years' experience in civil rights enforcement. The promotion went to Jerelyn Berry, a 43-year-old high school graduate, who had never attended college and who had previously worked as Lucas' secretary.

On November 16, 2001, Lucas sued the Secretary of Education under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, alleging that he was denied the promotion because of his age. Pursuant to 28 U.S.C. § 636(c)(1), the parties consented to proceed before a United States magistrate judge for all purposes. Following discovery, the Department filed a Motion for Summary Judgment and a Statement of Material Facts Not in Dispute. The Department's motion asserted that Berry's selection was based principally on

interviews with the candidates and that Berry had outperformed Lucas in those interviews.

Karl filed an opposition on Lucas' behalf. The opposition consisted of the following: a 35-page memorandum, entitled Plaintiff's Opposition to Defendant's Motion for Summary Judgment; a 104-paragraph document, entitled Plaintiff's Statement of Material Facts in Dispute and Material Facts Omitted by Defendant; an affidavit by Lucas; and numerous supporting exhibits. Lucas' papers asserted that there was direct evidence of discrimination: he said that at his selection panel interview, the selecting official -- Dr. Paul Fairley -- called Lucas an "old timer" and told him, "[y]ou know what this is all about." Pl.'s Statement of Material Facts in Dispute and Material Facts Omitted by Def. ¶ 78 [hereinafter Pl.'s Rule 7(h) Statement]. But Lucas primarily relied on circumstantial evidence, including that he was substantially more qualified than Berry and that she had been preselected before the interviews. As to the latter, Lucas contended that there was evidence indicating that Berry had received interview questions in advance and had been coached regarding how to respond, and that Fairley had created after-the-fact interview notes to support the preordained result.

On September 28, 2004, the magistrate judge issued an order requiring Karl to show cause why he had not violated Federal Rule of Civil Procedure 11(b)(3). That rule obligates an attorney to certify as to any written submission that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3). The magistrate judge identified twelve statements in the papers Karl filed on behalf of Lucas that the judge

believed ran afoul of Rule 11(b)(3). The order was issued sua sponte, without a motion from the defendant suggesting that there was a Rule 11 problem in the plaintiff's pleadings. Karl filed a response to the order to show cause on December 2, addressing each of the statements that the order had highlighted as problematic.

On January 10, 2006, the magistrate judge issued a Memorandum Opinion and Order, in which he accepted Karl's explanation of a proofreading mistake in one of the twelve statements, but imposed sanctions on the basis of the other eleven. *Lucas v. Spellings*, 408 F. Supp. 2d 8 (D.D.C. 2006). The judge held, inter alia, that "Karl's statements obliterate again and again the distinction between drawing an inference and stating a fact and must therefore be condemned as a violation of the requirement of Rule 11 that the factual allegations in a document have evidentiary support." *Id.* at 13. The judge imposed a monetary sanction of $3000 and referred Karl to the United States District Court's Committee on Grievances to determine whether he violated the District of Columbia Rules of Professional Conduct.[1] *Id.* at 26-27.

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[1]Appellant's brief represents that the District Court Committee on Grievances has advised Karl that the committee "decided, after careful review, that no further action is warranted as a result of the January 13, 2006 referral." Appellant's Br. 6 n.3. The brief further represents that the D.C. Office of Bar Counsel has advised Karl that: (1) "Because you filed an appropriate pleading to challenge the defendant's motion seeking to have your client's civil suit dismissed, we are unable to conclude by clear and convincing evidence that your conduct violated Rule 8.4(d)"; and (2) "there is insufficient evidence to support a finding that your conduct in drafting and filing the plaintiff's opposition to the motion for summary judgment violated Rule 3.1." *Id.*

The magistrate judge subsequently denied the Department of Education's summary judgment motion, and the case went to trial. At the close of the bench trial, the judge ruled in favor of the Department, and the plaintiff has filed an appeal that brings before us the interlocutory rulings that preceded the court's final judgment. *See Ciralsky v. CIA*, 355 F.3d 661, 668 (D.C. Cir. 2004). Lucas does not challenge his loss on the merits, and the sole issue on appeal is the appropriateness of the Rule 11 sanctions imposed on attorney Karl.

II

In *Cooter & Gell v. Hartmarx Corp.*, the Supreme Court held that appellate courts "should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." 496 U.S. 384, 405 (1990). The Court noted, moreover, that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.*; *see* FED. R. CIV. P. 11, Advisory Comm. Notes (1993) (same).

Cooter & Gell involved sanctions imposed by the court upon motion of the opposing party. *See* FED. R. CIV. P. 11(c)(2). This case, by contrast, involves sanctions imposed by the court sua sponte, without motion of the opposing party. *See* FED. R. CIV. P. 11(c)(3). In recognition of the unusual position of the trial court in such circumstances, serving at once as both prosecutor and judge, the circuit courts have utilized different linguistic formulations to express the same idea: when the trial court imposes sanctions sua sponte, the reviewing court should engage in "careful appellate review" to assess whether there was an abuse of discretion. *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 40 (1st Cir. 2005); *see Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003) (holding that "[s]ua sponte Rule 11 sanctions . . . must be

reviewed with particular stringency" (internal quotation marks omitted)); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002) (holding that, where a sanction "was imposed sua sponte, we must examine the court's assertion that [the plaintiff's] legal contention was frivolous with particular stringency" (internal quotation marks omitted)).

Although both Karl and the Department of Education agree that this court should review the magistrate judge's order for abuse of discretion with particular care, *see* Oral Arg. Recording at 32:15-32:30, they disagree as to the substantive standard that the judge should himself have applied. Karl notes that Rule 11(c)(2), which governs Rule 11 sanctions initiated upon a party's motion, contains a "safe harbor" provision that permits the filer to avoid sanctions by withdrawing or correcting the challenged pleading within 21 days. Rule 11(c)(3), which governs sanctions imposed on the court's own initiative, does not contain such a provision. In light of this difference, and citing language in the Advisory Committee notes, Karl argues that only actions "akin to a contempt of court" should be subject to the sua sponte imposition of Rule 11 sanctions.[2] Citing the language of the rule itself,[3] which does not distinguish between sanctions imposed after motion or sua sponte, the Department argues that the standard under which an attorney's actions must be measured is in all cases "an objective standard of

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[2]*See* FED. R. CIV. P. 11, Advisory Comm. Notes (1993) ("Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative.").

[3]*See* FED. R. CIV. P. 11(b) (In presenting a pleading, an attorney certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the factual contentions have evidentiary support.).

reasonableness under the circumstances." Appellee's Br. 6 (citing *Bus. Guides v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551 (1991)). That is the standard the magistrate judge applied. *See Lucas*, 408 F. Supp. 2d at 11 ("Rule 11 requires . . . a determination as to whether, judged by the standard of a reasonable party or lawyer, the party or lawyer offended one of the rule's provisions. . . . Rule 11 . . . is based upon an objective evaluation of the lawyer's conduct.").

Both sides have support for their positions in the case law.[4] We need not enter this debate, however, because the sanctions order requires reversal regardless of which standard applies. As discussed below, the determination that the eleven statements violated Rule 11 was premised on two legal errors. And a trial court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Cooter & Gell*, 496 U.S. at 405.

A

As the magistrate judge explained, the principal basis upon which he imposed sanctions was his finding that many of the eleven statements that Karl drafted were "classic examples of inferences disguised as statements of fact." *Lucas*, 408 F. Supp. 2d at 12. "[A] classic misstatement," he said, "is one in which an inference that might or might not be drawn from the facts is stated as a fact itself." *Id.* The judge illustrated this point with the following example:

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[4]Compare cases adopting the "akin to contempt" standard, *e.g.*, *Kaplan*, 331 F.3d at 1256; *In re Pennie & Edmonds LLP*, 323 F.3d 86, 90 (2d Cir. 2003), with cases applying an objective reasonableness standard, *e.g.*, *Jenkins v. Methodist Hosps. of Dallas*, 478 F.3d 255, 264 (5th Cir. 2007); *Young*, 404 F.3d at 39.

> [T]hat a man walks into a room with a wet umbrella might permit the inference that the man was recently outside and that it was raining. It might also be true that the man decided to wash the umbrella. Given these facts, an advocate cannot first say "it was raining" but later, when challenged, explain that what was originally stated as a fact was actually only an inference that could have been drawn from the fact that the umbrella was wet. The statement, "it was raining" is objectively false. It asks the reader to believe that what is merely an inference that may be drawn from a set of facts is itself a fact.

Id. at 12-13. Citing a Ninth Circuit decision, which in turn quoted a 1954 New Jersey Supreme Court opinion, the magistrate judge held that "[w]hen he is indulging, as he has every right to do, in inferences or reasoning from the facts, [an attorney] must say so." *Id.* at 13 (quoting *In re Curl*, 803 F.2d 1004, 1006 (9th Cir. 1986) (quoting *In re Greenberg*, 104 A.2d 46, 47-48 (N.J. 1954))).[5]

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[5]The magistrate judge quoted Karl's statements and then explained why he found that they improperly conflated inferences and facts. For example, Karl stated that "[e]xamination of the interview notes certainly supports a finding that Ms. Berry was given the interview questions" in advance. 408 F. Supp. 2d at 14. The judge imposed sanctions on the ground that "[e]quating what counsel claims is a fact -- that the notes show that Berry had the questions -- with a series of inferences drawn from all the other evidence (including the notes) is the very vice condemned as sanctionable conduct." *Id.* In another statement, Karl said that "Fairley refused to respond" to interrogatories. *Id.* at 17. For that statement, the judge imposed sanctions on the ground that, although "at one point Fairley failed to answer[,] . . . [t]o derive from his not answering the declaratory statement that he refused to answer . . . states as a fact what may or may not be true." *Id.* at 18. Karl also stated that "[t]here is

There is no basis in the text of Rule 11(b)(3) for the legal proposition that an attorney must separately identify "fact" and "inference." The Rule merely requires an attorney to certify that the factual contentions in a paper he presents to the court "have evidentiary support." FED. R. CIV. P. 11(b)(3). "Inferences" -- which are commonly described as "circumstantial evidence" -- are as capable of providing evidentiary support as "facts" -- which are commonly described as "direct evidence."[6] *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence."); *Doe v. U.S. Postal Serv.*, 317 F.3d 339, 343 (D.C. Cir. 2003) ("[W]e generally draw no distinction between the probative value of direct and circumstantial evidence."). As a consequence, "juries are

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circumstantial evidence sufficient to create an inference that the interview notes" that Fairley ultimately produced "were manufactured after the fact to justify a decision previously made on discriminatory grounds." *Id.* The magistrate judge sanctioned Karl on the ground that the statement impermissibly "equate[d] a fact -- that Fairley did not take contemporaneous notes -- with a conclusion -- that Fairley concocted notes afterwards to hide his preference for Berry because she was younger than" Lucas. *Id.* at 19. Karl was also sanctioned for stating that "the requirements of the job [were] watered down . . . in order to make Ms. Berry appear to be qualified," because the judge found that statement was based only on an inference from the fact that the requirements "were modified to uniformly reduce the value of all the [prior] criteria by 0.5 in order to permit the addition of a new category for evaluation." *Id.* at 15.

[6] *See* BAR ASS'N OF D.C., STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (rev. ed. 2002) § 2.10 ("Direct evidence is the direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is indirect evidence of a fact which is established or *logically inferred* from a chain of other facts or circumstances." (emphasis added)).

routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quoting 1A K. O'MALLEY, J. GRENIG & W. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL § 12.04 (5th ed. 2000)). "The reason for treating circumstantial and direct evidence alike," the Supreme Court has explained, "is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Id.* (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

It is also relevant that Karl filed his opposition to summary judgment pursuant to Local Rules 7(h) and 56.1. Those rules require that "[a]n opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, *which shall include references to the parts of the record relied on to support the statement.*" D.D.C. LOCAL RULE 7(h) (emphasis added); *id.* 56.1 (same). Karl adhered to the rules, and each of the criticized sentences in Karl's Rule 7(h) Statement was followed by record citations indicating which evidence Karl thought supported the statement.[7] Thus, there was no hiding of the ball. Even if it mattered whether the supporting evidence was direct or circumstantial (and it does not), there was no possibility that the reader would be misled.

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[7]Five of the sentences that the magistrate judge criticized were included in Karl's Opposition memorandum, rather than in the Statement, and hence arguably were not subject to Rule 7(h). Nonetheless, two of the five were followed by record citations, two referenced attached exhibits, and the last simply asserted a failure of explanation on the part of the agency.

There is, then, nothing in Rule 11 that required Karl's pleadings to distinguish between direct and circumstantial evidence. Nor does judicial precedent require such a distinction. The quotation from the 1954 New Jersey Supreme Court opinion is inapplicable, as that court was applying canons of professional responsibility and not a Federal Rule. *See In re Greenberg*, 104 A.2d at 48-49. Likewise inapposite is the Ninth Circuit's opinion in *Curl*, which contains the quotation from the New Jersey court: in *Curl*, the circuit admonished an attorney for misrepresenting the content of a Mexican judicial decision, not for failing to distinguish between kinds of evidence. *In re Curl*, 803 F.2d at 1006 (finding that the attorney represented that a Mexican appellate court had "affirmed the lower court," when it had not).[8] And even if a code of professional responsibility did require making such a distinction (although the District of Columbia's code apparently does not, *see supra* note 1), Rule 11 does not incorporate such codes,[9] and the magistrate judge

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[8]Also inapplicable are the other precedents the magistrate judge cited for the proposition that Rule 11 requires a lawyer to "distinguish a fact from an inference he seeks to press on the court." *Lucas*, 408 F. Supp. 2d at 13 (quoting *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 819 (7th Cir. 1987)). *See Skycom*, 813 F.2d at 819 (stating that "[i]t is *unprofessional conduct* to represent inferences as facts" (emphasis added)); *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986) (imposing discipline for "conduct unbecoming a member of the bar" under Federal Rule of Appellate Procedure 46(c), for presenting "a shot in the dark, a guess, . . . as positive fact, though [the attorney] made no effort to determine whether it was fact"); *see also In re: Cent. Ice Cream Co.*, 836 F.2d 1068, 1073 (7th Cir. 1987) (indicating that counsel violates Rule 11 by presenting "as a fact what counsel thinks *should have* occurred" (emphasis added)).

[9]*See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829-30 (9th Cir. 1986) ("Rule 11 is not a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of civil

stressed that he based his authority "to punish [Karl] solely on Rule 11." *Lucas*, 408 F. Supp. 2d at 11.

In short, the basic legal premise upon which sanctions were imposed was incorrect. To take the magistrate judge's example: If an attorney has evidence that a man "walked into a room with a wet umbrella" at a certain time, the attorney does have "evidentiary support" for the "factual contention" that "it was raining" at that time. *Id.* at 12.[10] He may not have proof by a preponderance, but he certainly has "support." Accordingly, a lawyer does not violate Rule 11 by saying so.

B

The magistrate judge also imposed sanctions on the premise that, when an attorney makes a factual contention, he must simultaneously disclose evidence that is contrary to that contention. The judge thought that Karl's failure to do so violated Rule 11, notwithstanding that he did have affirmative evidentiary support for his contentions.

For example, as evidence to show that Berry's promotion was not based on a fair competition, Karl stated: "Ms. Berry received the interview questions and coaching from [Management and Program Analyst] Art Besner prior to her

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cases.").

[10] *Cf.* STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 2.10 ("For example, direct evidence of whether an animal was running in the snow might be the testimony of a person who actually saw the animal in the snow. Circumstantial evidence might be the testimony of a person who saw the tracks of the animal in the snow, rather than the animal itself. . . . The law makes no distinction between the weight to be given [to] either . . . .").

interview." Pl.'s Rule 7(h) Statement ¶ 85. In support, Karl cited evidence, which the magistrate judge described as follows:

> Both Mr. Lucas and [fellow employee] Ms. Powell heard Ms. Berry thank Mr. Besner for giving her the interview questions prior to the interview and telling her how to prepare for the interview. Mr. Lucas heard Mr. Besner tell Ms. Berry that he "hoped" he "helped her" prepare for the interview, and Ms. Berry replied that he did, and "thank you very much."

Lucas, 408 F. Supp. 2d at 23 (internal citations omitted) (quoting Pl.'s Rule 7(h) Statement ¶ 86). The magistrate judge did not disagree that Karl had such evidence, and in fact he did.[11] But the judge imposed sanctions because "the reader is never told about the information that, at the barest minimum, indicates that there are serious reasons to doubt the truthfulness of the assertion that Besner gave Berry the questions: the inconsistencies in plaintiff's testimony and Besner's insistence, confirmed by [selection panel member Jan] Gray, that Besner's questions were not the ones used in the interview." *Lucas*, 408 F. Supp. 2d at 24.

In a similar vein, Karl asserted that Berry had been preselected for the position before Lucas was interviewed. *See*

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[11]In his deposition, Lucas testified that he overheard a conversation in which Besner asked Berry, "Did the material or did the questions help you in the interview[?]" Lucas Dep. 142 (Dec. 20, 2002); *see also id.* at 143-44. Powell's sworn declaration states that she overheard a conversation between Besner and Berry in which, "Ms. Berry thanked Mr. Besner for his assistance in giving her the information he had given to her *prior to the interview* and telling her what to study and how to prepare for the interview." Powell Decl. ¶ 13 (Dec. 6, 1999).

Goostree v. Tennessee, 796 F.2d 854, 861 (6th Cir. 1986) ("Evidence of preselection operates to discredit the employer's proffered explanation for its employment decision."). In the Rule 7(h) Statement, Karl wrote: "Dr. Fairley told Ms. Berry at her interview that she had been selected for the position, even though she was interviewed more than an hour *before* Mr. Lucas." Pl.'s Rule 7(h) Statement ¶ 78. To support this assertion, Karl cited Berry's deposition testimony wherein, as the magistrate judge recounted,

> Berry testified that during her interview, Fairley told her that the interviewing panel had selected her and that he then congratulated her. Karl then asked her: "So, presumably, he was telling you at that time you got the promotion." Berry responded yes.

Lucas, 408 F. Supp. 2d at 21 (internal citations omitted). Again, the judge did not dispute that Berry so testified, but imposed sanctions because the assertion of preselection did not take account of Berry's testimony on redirect examination that "Fairley told her she was the first choice of the interviewing panel but did not tell her she had received the position," and of the government's position that selection by the panel was not the same thing as selection by Fairley. *Id.*; *see* Berry Dep. 77-80 (Oct. 1, 2002).

The magistrate judge also criticized Karl for asserting that "Dr. Fairley refused to respond to the interrogatories from [an] EEO investigator and refused to turn over the notes during the first stages of the administrative process." *Lucas*, 408 F. Supp. 2d at 17 (quoting Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 26). Again, there is no doubt that Karl had support for this assertion. The EEO investigation report itself stated: "Mr. Fairley refused to provide the successful candidate's and the other candidates[']responses to the interview questions." Investigation Report at

4. A memo attached to the report further stated that Dr. Fairley "failed to provide responses to the Interrogatories" after being "asked to respond to the Interrogatories on the record." Memorandum from Gertrude Brittingham-Bowman (EEO Investigator). Nonetheless, the magistrate judge thought it a "half-truth to tell the reader that Fairley refused to turn over the notes but then not tell the reader why and then how the notes were turned over." *Lucas*, 408 F. Supp. 2d at 18. Karl violated Rule 11, the judge said, by failing to include Fairley's explanation -- that he had turned over some notes and did not turn over others because his counsel told him not to. *Id.* at 17.

There is nothing in the text of Rule 11(b)(3) to suggest that any of these statements violated that rule. In each case, the "factual contentions" in Karl's pleadings had "evidentiary support," and that is all the rule requires. *See Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993) ("Rule 11 normally does not require one party to uncover and to set forth the facts that support the other side's position."). This is not to say that it may never be misleading to assert that something has evidentiary support without advising the court of contrary facts. But once again, context is relevant.

The pleading at issue here was an opposition to the defendant's motion for summary judgment. The defendant's motion asserted that "there is no genuine issue of material fact precluding the entry of judgment for defendant as a matter of law." Def.'s Mem. in Supp. of Its Mot. for Summ. J. at 1. Under Local Rules 7(h) and 56.1, Karl's obligation in opposing the defendant's motion was to file a separate statement "setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated." To do that, Karl was obliged to do no more than set forth facts in contravention of the defendant's claims. The rules do not require him to rehearse the government's evidence, and nothing in Rule 11 imposes that

added burden. Nor could the omission of that evidence have been misleading to the reader. Many of the facts that the magistrate judge criticized Karl for failing to disclose in his opposition were contained in the government motion to which he was responding.[12] *Cf. Stitt v. Williams*, 919 F.2d 516, 528 (9th Cir. 1990) ("[Rule 11] [p]recedents regarding the filing of a frivolous complaint are not necessarily controlling in the case of an opposition to a summary judgment motion. . . . By the time a summary judgment motion is made, the record is sufficient for a court to determine frivolity on the basis of what appears before it, including the papers and documents relied on by the moving party. If the opposition is truly frivolous, the district judge can readily grant judgment for the movant . . . .").

Part of the problem may have been a misapprehension regarding the nature of the pleading that Karl filed on behalf of Lucas. At several points, the magistrate judge proceeded as if it were Karl -- rather than the defendant -- who was asserting that "there was no genuine issue of material fact." *Lucas*, 408 F. Supp. 2d at 22; *id.* at 23 (same). But Karl's pleadings did not contend that there was no genuine issue as to any fact. To the contrary, his contention was that there *was* a genuine dispute. He was opposing summary judgment, not seeking it, and hence had to show there was a factual dispute. *See* FED. R. CIV. P. 56(e)(2).[13] To accomplish that, he filed an "Opposition to

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[12]*See, e.g.*, Def.'s Mem. in Supp. of Its Mot. for Summ. J. at 25-30 (regarding plaintiff's claim that Berry received the questions and coaching prior to her interview); *id.* at 5 (regarding plaintiff's claim that Berry was preselected before Lucas was interviewed).

[13]There was one exception, which Karl made clear. He did seek "partial summary judgment" for plaintiff on a single point: he asked the court to rule that Fairley's comment -- that Lucas was an "old timer" -- was direct evidence of age discrimination. Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 33.

Defendant's Motion for Summary Judgment" and attached a "Statement of Material Facts in Dispute and Material Facts Omitted by Defendant." The second sentence of the Opposition made its purpose clear: "As we show below, the agency's position lacks merit *because there are disputes of material fact* as to the real reason Mr. Lucas was denied the promotion at issue." Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 1 (emphasis added). Karl did not have to repeat the government's factual contentions in order to make that point or abide by the dictates of Rule 11.[14]

III

We have examined each of the eleven statements at issue on this appeal. In light of the foregoing analysis, we conclude that none warranted the imposition of Rule 11 sanctions. Accordingly, the sanctions order is

Vacated.

[14]In a footnote, the Department agrees that Karl did not assert that the "Material Facts in Dispute" listed in the first half of the Rule 7(h) Statement were undisputed, but claims that he did make that assertion about the "Material Facts Omitted by Defendant" listed in the Statement's second half. Appellee's Br. 46 n.15. That is incorrect. The pleading neither suggested that plaintiff believed those material facts were undisputed, nor sought (rather than opposed) summary judgment based upon them.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 26, 2009 Decided July 10, 2009

No. 08-3020

UNITED STATES OF AMERICA,
APPELLEE

v.

ANTOINE H. BLALOCK,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cr-00157-HHK-1)

Edward C. Sussman, appointed by the court, argued the cause and filed the brief for appellant.

Michael T. Ambrosino, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Jeffrey A. Taylor*, U.S. Attorney, and *Roy W. McLeese III*, Assistant U.S. Attorney.

Before: GINSBURG, GARLAND, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: Appellant Antoine Blalock pled guilty to unlawful possession of a firearm by a convicted felon, in exchange for the government's agreement to drop other gun and drug charges. At sentencing, the parties disagreed over whether Blalock was subject to an upward adjustment under the United States Sentencing Guidelines for possessing the firearm in connection with another felony offense. The district court concluded that Blalock possessed the gun in connection with his possession with intent to distribute marijuana, and it therefore applied the enhancement. Blalock now appeals, contending that the district court erred in enhancing his sentence. Finding no error, we affirm the judgment of the district court.

I

On the morning of May 21, 2007, Blalock drove up to the Metropolitan Police Department's (MPD) Seventh District station in southeast Washington, D.C.[1] He stopped his car in the middle of the street, got out, walked around to the back, and pulled a black bag from the trunk. Moments later, he began shooting a gun into the air. As he fired, a witness heard him yell: "[T]he police should leave us alone and let us sell our weed." Proffer of Evidence 1 (Nov. 9, 2007). MPD officers heard the shots and ran outside. An officer drew his weapon and approached Blalock, ordering him to put the gun down. Blalock removed the magazine from the gun and threw both magazine and gun to the ground. He then took off all his clothes and stood naked in the street.

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[1]Our recitation of the facts draws on information from a "Proffer of Evidence" that Blalock signed as part of his plea agreement, and from a factual statement in his Presentence Investigation Report that he did not contest.

The police arrested Blalock without further incident. From the area at his feet, they recovered a semi-automatic handgun and five shell casings. Amidst Blalock's belongings scattered near his car's trunk, officers found twenty-four individually packaged bags of marijuana. According to the "Proffer of Evidence" that Blalock signed as part of his plea agreement, the bags contained an aggregate of 44.1 grams of marijuana, which was "packaged in a manner and found in an amount that was consistent with the way marijuana is distributed in the District of Columbia." *Id.* at 2.

Upon his arrest, Blalock told the officers that he had driven to the police station to win recognition for his record label. The officers then drove Blalock to a hospital, where he was found to have phencylidine (PCP) in his bloodstream. He was released to police custody later that day.

On June 9, 2007, a grand jury indicted Blalock on one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1); one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(D); and one count of using, carrying, and possessing a firearm during a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1). On November 9, 2007, Blalock entered into a plea agreement with the government. He agreed to plead guilty to unlawful possession of a firearm by a convicted felon; in return, the government agreed to dismiss the remaining charges. The agreement specifically stated that neither party was "precluded from arguing for or against the applicability of . . . §2K2.1(b)(6) of the Sentencing Guidelines," Plea Agreement 3 (Nov. 9, 2007), which provides for a four-level increase in a defendant's base offense level "[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense," U.S. SENTENCING

GUIDELINES MANUAL § 2K2.1(b)(6) (2007) [hereinafter U.S.S.G.].

Prior to sentencing, the U.S. Probation Office prepared a Presentence Investigation Report (PSR) that calculated Blalock's criminal history and offense level under the Guidelines. It noted that Blalock's multiple previous convictions generated a criminal history category of IV, and that his base offense level started at 20 because he committed the weapons offense after sustaining at least one felony conviction for a crime of violence. *See* U.S.S.G. § 2K2.1(a)(4)(A). Because Blalock accepted responsibility for the gun crime, the PSR reduced his offense level to 17, *see id.* § 3E1.1, which, coupled with his criminal history category, would have yielded a sentencing range of 37 to 46 months' imprisonment. *See id.* ch. 5, pt. A (sentencing table). But the PSR then added a four-offense-level enhancement under Guideline § 2K2.1(b)(6) based on the conclusion that Blalock had used or possessed the firearm in connection with another felony offense, namely, possession with intent to distribute marijuana. The resulting offense level of 21 generated a sentencing range of 57 to 71 months. *See id.* ch. 5, pt. A.

At the sentencing hearing that followed, Blalock's counsel objected to the four-level enhancement under § 2K2.1(b)(6). Counsel argued that, because Blalock was suffering from PCP intoxication at the time of his arrest, he did not possess the marijuana with the specific intent to distribute it. The government responded that Blalock's PCP intoxication did not prevent him from forming the intent necessary to commit the drug offense. Although the court told Blalock that his counsel "ma[d]e a very good argument on [his] behalf," Sentencing Hr'g Tr. 31-32 (March 7, 2008), it nonetheless found by a preponderance of the evidence that Blalock possessed the marijuana with the intent to distribute it. The court imposed a

sentence of 57 months' incarceration, which is the subject of this appeal.

II

In the wake of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines "are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable.'" *Gall v. United States*, 128 S. Ct. 586, 594 (2007). We review the reasonableness of a sentence in two steps. First, we must "ensure that the district court committed no significant procedural error, such as . . . improperly calculating . . . the Guidelines range." *Id.* at 597. Second, we "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* This appeal involves only the accuracy of the district court's Guidelines calculation.

Blalock's sole contention is that the court erred by increasing his offense level under Guideline § 2K2.1(b)(6). To determine whether the increase was warranted, the district court properly applied a preponderance of the evidence standard. *See United States v. Watts*, 519 U.S. 148, 156-57 (1997) (citing U.S.S.G. § 6A1.3 cmt.); *In re Sealed Case*, 246 F.3d 696, 698 (D.C. Cir. 2001). In reviewing a sentencing determination, we "'shall accept the findings of fact of the district court unless they are clearly erroneous' and 'shall give due deference to the district court's application of the guidelines to the facts.'" *United States v. McCants*, 554 F.3d 155, 160 (D.C. Cir. 2009) (quoting 18 U.S.C. § 3742(e)).[2] "[D]ue deference presumably

[2]Although *Booker* "held § 3742(e) unconstitutional insofar as it required courts to reverse sentences falling outside the applicable Sentencing Guidelines range, we have since held that this section continues to provide the standard by which we review a district court's

. . . fall[s] somewhere between *de novo* and clearly erroneous." *Id.* (internal quotation marks omitted).

Section 2K2.1(b)(6) provides for a four-level increase in a defendant's offense level if he "used or possessed any firearm or ammunition in connection with another felony offense." U.S.S.G. § 2K2.1(b)(6). The "[]other felony offense" the court found here was possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(D), as charged in Blalock's indictment. Blalock objects to two determinations the district court made in applying § 2K2.1: (1) that he possessed marijuana with the intent to distribute it; and (2) that he possessed his weapon "in connection with" that drug crime.

We review the first of these determinations for clear error, as it is plainly a finding of fact. *McCants*, 554 F.3d at 160. What standard applies to the district court's "in connection with" determination is a closer question. On the one hand, the Eighth Circuit has treated the issue as a factual finding subject to clear error review. *See United States v. Regans*, 125 F.3d 685, 686 (8th Cir. 1997). On the other hand, when this circuit "has focused on whether particular conduct was sufficient to warrant [an] enhancement, it has largely accorded due deference." *United States v. Henry*, 557 F.3d 642, 645 (D.C. Cir. 2009); *cf. McCants*, 554 F.3d at 161 (noting that the due deference standard applies to a district court's determination that a defendant's acts "fall within the Sentencing Guidelines' definition of relevant conduct"). Because whether a defendant's conduct meets the "in connection with" requirement seems best described as an application of the Guidelines to the facts, we review that determination under the due deference standard.

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application of the Sentencing Guidelines." *McCants*, 554 F.3d at 160 n.3; *see United States v. Tann*, 532 F.3d 868, 874 (D.C. Cir. 2008).

A

Blalock's first contention is that he did not possess his firearm in connection with "another felony offense," U.S.S.G. § 2K2.1(b)(6), because he did not commit another felony offense. He notes that the only such offense alleged -- possession with intent to distribute marijuana -- requires the specific intent to distribute a controlled substance. And he maintains that, as a result of PCP intoxication, he lacked the capacity to form the necessary *mens rea*. We find no clear error in the district court's determination that Blalock had the requisite intent. *See* Sentencing Hr'g Tr. 25-26.

It is true both that voluntary intoxication can prevent a defendant from being able to form the requisite state of mind for a specific intent crime, *see Parker v. United States*, 359 F.2d 1009, 1012 n.5 (D.C. Cir. 1996); *Heideman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958), and that possession with intent to distribute a controlled substance is such a crime, *see United States v. Douglas*, 482 F.3d 591, 596 (D.C. Cir. 2007). But intoxication does not always have that effect, and whether it does in any given case depends upon the evidence. *See Heideman*, 259 F.2d at 946. The leading precedent is *Heideman v. United States*, in which the defendant -- a sailor attached to a navy ship docked in Washington, D.C. -- was charged with assaulting a taxi driver with the intent to rob him. The defendant did not dispute that he had "sandbagged" the driver, hitting him from behind with a sock filled with gravel. But he did dispute that he had the requisite intent, employing -- literally -- a "drunken sailor" defense: the defendant maintained that he was too intoxicated to have had the required intent to rob. The court disagreed, observing that the defendant had not been too drunk to fill the sock with gravel before entering the taxi or to rifle the driver's pockets after hitting him. *Id.* at 947. Holding that "[d]runkenness, while efficient to reduce or remove

inhibitions, does not readily negate intent," the court concluded that "the evidence in this case could not create a reasonable doubt in the mind of any reasonable man as to whether appellant possessed the requisite intent" for the crime of robbery. *Id.* at 946-47 (footnote omitted).

We need not go that far to resolve this appeal. There is no dispute that Blalock was high on PCP when he arrived at the police station. Nor is there any doubt that Blalock's intoxication reduced his inhibitions, as evidenced by his decision to strip naked on the street. At the same time, however, he was sufficiently in control of his faculties to operate a motor vehicle, deliberately drive to the police station, retrieve his gun from the trunk, fire the weapon into the air several times, and then remove the magazine and throw down both the gun and magazine when ordered to do so. This evidence is adequate to support the court's conclusion, by a preponderance of the evidence, that the PCP had not "negate[d]" Blalock's ability to form the necessary intent. *Id.* at 946.[3]

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[3] *See United States v. Trabue*, No. 99-6406, 2000 WL 1828671, at *2 (6th Cir. Dec. 5, 2000) (holding that the district court reasonably found the defendant's alcohol consumption did not negate his intent to commit aggravated assault because, "even though [the defendant] had been drinking, [he] had the presence of mind to take hostages, refuse to speak with a . . . negotiator, exit the back door in an attempt to evade the SWAT team, and then circle around the house when he was confronted by officers"); *United States v. Briseno-Mendez*, 1998 WL 440279, at *12 (10th Cir. July 17, 1998) (holding that, even if the defendant "was drunk at the time he was arrested," there was "no evidence his intoxication created a mental impairment sufficient to negate the existence of specific intent" to commit conspiracy).

Moreover, as the district court also concluded, what Blalock's intent was is indicated by the words he uttered while firing his gun: "[T]he police should leave us alone and let us sell our weed." Proffer of Evidence 1. Indeed, those words confirm the reasonable inference that can be drawn from the fact that the twenty-four bags of marijuana scattered on the ground around his trunk were "packaged in a manner and found in an amount that was consistent with the way marijuana is distributed in the District of Columbia." *Id.* at 2; *see, e.g.*, *United States v. Williams*, 233 F.3d 592, 595 (D.C. Cir. 2000) (noting that intent to distribute narcotics may readily be inferred when drugs are packaged in a large number of individual bags).[4] In combination with the evidence that Blalock retained significant control of his faculties, these facts require us to conclude that the district court did not clearly err in finding that Blalock was capable of forming -- and did form -- the specific intent to distribute marijuana. *See, e.g.*, *United States v. Richardson*, 459 F.2d 1133, 1134 (D.C. Cir. 1972) (holding that, despite some evidence that the defendant might have been under the influence of narcotics, "there [wa]s clear evidence supporting an inference that appellant had the requisite specific intent [to commit robbery], *e.g.*, appellant's statement to the teller, 'Now you can help me, you can give me those fives, tens, and twenties, and put them neatly in a bag'").

Blalock contends that "it would be ludicrous to conclude that [he] . . . arrived [at the police station] with the distribution

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[4] *See also United States v. Glenn*, 64 F.3d 706, 711 (D.C. Cir. 1995) ("[T]he segregation of the cocaine found on [the defendant] into nine individual ziplock bags could reasonably have supported the jury's inference that [the defendant] intended to distribute it."); *United States v. Herron*, 567 F.2d 510, 513 (D.C. Cir. 1977) (noting that intent to distribute narcotics could be inferred from the fact that "the heroin . . . was packaged in a convenient manner as if for sale").

or sale of marijuana in mind." Appellant's Br. 7. But an intent to distribute at any particular place or time is not an element of 21 U.S.C. § 841(a)(1). As the Seventh Circuit held in *United States v. Hairston*, "[t]he question is not whether [the defendant] intended to distribute the drugs at the moment of his arrest[,] . . . but whether [he] intended to distribute them at *any* time (within the period of limitations)." 23 Fed. Appx. 555, 556 (7th Cir. 2001). *See generally United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir. 1999); *United States v. Bruce*, 939 F.2d 1053, 1056 (D.C. Cir. 1991). It was not clearly erroneous for the district court to conclude that a man who said he wanted the police to "let us sell our weed" intended to do just that.

B

Blalock's second contention is that he did not use or possess his weapon "in connection with" the marijuana offense. Application Note 14 to § 2K2.1 provides that, in general, the "in connection with" requirement is satisfied if "the firearm . . . facilitated, or had the potential of facilitating, another felony offense." U.S.S.G. § 2K2.1 cmt. n.14(A). When the other felony offense is a drug trafficking crime, the Application Note states that the enhancement applies if the "firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia." *Id.* § 2K2.1 cmt. n.14(B). In such a case, "application of [the enhancement] is warranted because the presence of the firearm has the potential of facilitating another felony offense." *Id.*; *see also United States v. Hardin*, 248 F.3d 489, 498-99 (6th Cir. 2001) ("The fact that the firearm was found in the same room where the cocaine was stored can lead to the justifiable conclusion that the gun was used in connection with the felony."); *Regans*, 125 F.3d at 686 (explaining that, because "a firearm is a 'tool of the trade' for drug dealers[,] . . . a factfinder may infer a connection when defendant carried a firearm and a distribution quantity of illegal drugs").

In this case, there is no dispute that Blalock's handgun was found "in close proximity to drugs"; when the police confronted him, the gun was in his hand and the marijuana was scattered nearby. Accordingly, his counsel had to concede that the only way to reverse the district court's "in connection with" finding would be to disregard Application Note 14. Oral Arg. Recording at 6:53-58. But "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline," *Stinson v. United States*, 508 U.S. 36, 38 (1993), and there is no such violation or inconsistency here. Indeed, even without the Application Note, we would have to agree with this observation of the district court: "[I]t's hard to get around the proposition that the firing [of] the gun in the air is . . . connected with letting us sell our weed when, in fact, weed was in the car from which Mr. Blalock emerged and was scattered around on the ground[]." Sentencing Hr'g Tr. 25; *see id.* at 32.

III

For the foregoing reasons, the judgment of the district court is

Affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 21, 2009 Decided July 10, 2009

No. 08-7092

VERIZON WASHINGTON, D.C. INC.,
APPELLEE

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, AS DESIGNATED AGENT AND REPRESENTATIVE FOR LOCAL 2336,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cv-01460-PLF)

Stephen M. Koslow argued the cause for the appellant. *James B. Coppess* was on brief.

Julia M. Broas argued the cause for the appellee. *R. Scott Medsker* and *Willis J. Goldsmith* were on brief. *Jacqueline M. Holmes* entered an appearance.

Before: HENDERSON, ROGERS and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

Separate concurring statement filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: The Communications Workers of America, AFL-CIO (CWA) appeals from the district court's order granting summary judgment to Verizon Washington, D.C. Inc. (Verizon), vacating and remanding an arbitration award. *Verizon Washington, D.C. Inc. v. Commc'ns Workers of Am.*, 569 F. Supp. 2d 121, 129 (D.D.C. 2008). Because we conclude that the arbitration award "draws its essence from the collective bargaining agreement," *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (citation and quotation marks omitted), we reverse.

I.

Sometime in 1997, Verizon began to assign its Corporate Voice Mail Group employees (Voice Mail Clerks) additional duties. For a time, Verizon paid the Voice Mail Clerks extra for performing the new duties but stopped doing so at some point between 1998 and 2000. On December 9, 2001, the CWA filed a grievance on behalf of the Voice Mail Clerks, asserting that they were being unfairly treated in that they were performing the duties associated with a higher position (RCMAC Clerk) but were classified at, and paid the salary of, a lower position (General Clerk).[1] On March 6, 2002, Verizon denied the

[1]A General Clerk is responsible for "the handling of orders and preparation of reports, accessing multiple systems for inputting retrieval of data on a computer, and heavy client interfacing at all levels of management[.]" Opinion and Award of Arbitrator Susan T. Mackenzie, *Commc'ns Workers of Am., Local 2336 v. Verizon Washington, D.C. Inc.*, CWA Case No. 2-04-21, at 8 (Feb. 28, 2006) (quotations omitted) (Mackenzie Award). An RCMAC Clerk, on the other hand, must "translat[e] . . . complex codes in switches . . . [,] ensure that the changes made in one service do not affect other services, [and] engage in time-sensitive projects and coordinating work." *Id.* at 10. The General Clerk position is "semi-skilled" while

grievance and the CWA appealed. During the grievance process, Verizon conducted a job evaluation of the Voice Mail Clerks and eventually, on June 2, 2003, determined that the Voice Mail Clerk position was appropriately classified as a General Clerk position. On July 28, 2003, the CWA submitted its grievance to arbitration pursuant to Article 13 of the collective bargaining agreement between Verizon and the CWA. *See* General Agreement Between CWA and Verizon, Inc. at 18-19 (Aug. 3, 2003) (CBA).

The dispute centers on Article 16B of the CBA, which sets forth the procedure Verizon and the CWA must follow "[w]henever the Company determines it appropriate to create a new job title or job classification in the bargaining unit, or to restructure or redefine an existing one." CBA at 24. The procedure is "the exclusive means by which [the CWA] may contest the schedule of wage rates which [Verizon] sets for any new, restructured, or redefined job title or classification." *Id.* at 25. Section 1(e) of Article 16B allows the CWA to demand, "if the parties are unable to reach agreement within sixty (60) days following receipt of notice from [Verizon],"[2] "that the issue of an appropriate schedule of wage rates be submitted for

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the RCMAC Clerk position is "technical." Opinion and Award of Arbitrator Paul F. Gerhart, *Verizon Washington, D.C. Inc. v. Commc'ns Workers of Am., Local 2336*, Parties' Case No. 2001-91650, at 6 (May 30, 2007) (Gerhart Award).

[2]Article 16B.1(a) of the CBA requires Verizon to "notify the Union in writing of [a new] job title or classification and . . . furnish a job description of the duties and the wage rates and schedules initially determined for such job titles and classifications. . . . Following such notice to the [CWA], [Verizon] may proceed to staff such job titles or classifications." CBA at 24. Article 16B.1(b) gives the CWA, once notified, the right to "initiate negotiations concerning the initial wage rates or schedules established by [Verizon]." *Id.*

resolution to a neutral third party," that is, an arbitrator. *Id.* Significantly, if the arbitrator devises a different schedule of wage rates, "the new schedule shall be placed in effect retroactive to the date the change or new job was implemented, except that in no event shall the retroactive effect exceed 150 days." *Id.* The parties are bound by the arbitrator's decision.

After arbitration hearings were held on April 1, 2005, July 14, 2005 and October 20, 2005, an arbitrator issued an award on February 28, 2006, concluding that Verizon "violate[d] Article 16.B by failing to give notice to [the CWA] and afford an opportunity to negotiate over its assignment of duties to Voice Mail Clerks outside of the scope of their General Clerk Job Description, constituting a redefinition or restructure of the existing job title for purposes of Article 16.B." Opinion and Award of Arbitrator Susan T. Mackenzie, *Commc'ns Workers of Am., Local 2336 v. Verizon Washington, D.C. Inc.*, CWA Case No. 2-04-21, at 12 (Feb. 28, 2006) (Mackenzie Award). Accordingly, the arbitrator directed Verizon to comply with Article 16B's notification and negotiations requirements within 60 days of the issuance of her award. *Id.* at 13.

Pursuant to the award, Verizon and the CWA began negotiations but soon reached an impasse. The CWA, invoking its right to "demand that the issue of an appropriate schedule of wage rates be submitted for resolution to a neutral third party," CBA at 25, then requested arbitration at some point before August 9, 2006. Another arbitrator heard the matter on September 15, 2006 and issued his award eight months later, on May 30, 2007.[3] The arbitrator summarized the three issues as

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[3]Article 16B.1(f) provides in part:

> At the request of either party, a hearing shall be held to receive . . . evidence. Any such hearing shall be held within thirty (30) days after the matter is referred to the

follows:

1. The threshold issue before the arbitrator is to determine what discretion the Agreement affords him in fashioning an award in this matter. That is, is the arbitrator constrained to choose between the positions of the parties as in "last offer" arbitration, or is he free to identify and award some other outcome in the matter?

2. The principal issue before the arbitrator is, of course, to determine an award with respect to the appropriate wage schedule for the Voice Mail Clerks.

3. Finally, the arbitrator must determine a remedy. This will require the arbitrator to interpret the language of Article 16B.1(f) which states that "in no event shall the retroactive effect exceed 150 days." Did the drafters of the Agreement intend, as the Company contends, that the new wage rate for the Voice Mail Clerks must be effective no more than 150 days prior to the date of the instant arbitrator's award, or, *pursuant to the Union's interpretation*, that the revised wage rate must have effect 150 days prior to [sic][4] the Union's initial grievance, i.e.,

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> neutral third party. . . . A written decision as to the appropriate schedule of wage rates will be rendered by the neutral third party *within sixty (60) days* of the date that the matter is referred for resolution. . . .

CBA at 25 (emphasis added).

[4]The arbitrator misstated the CWA's interpretation here. December 9, 2001 is the date on which the CWA filed its initial grievance, *see* Mackenzie Award at 4; Gerhart Award at 17, and the CWA argued that it is to this date that the retroactivity award should

December 9, 2001?

Opinion and Award of Arbitrator Paul F. Gerhart, *Verizon Washington, D.C. Inc. v. Commc'ns Workers of Am., Local 2336*, Parties' Case No. 2001-91650, at 38-39 (May 30, 2007) (emphasis added) (Gerhart Award). The arbitrator determined that after two years of service, a Voice Mail Clerk should be "allowed to apply for and immediately be promoted to the Senior Voice Mail Clerk job title." *Id.* at 54. He also held that "[a]ll current Voice Mail Clerks with two or more years of actual service in that title shall immediately be offered the opportunity to upgrade to the Senior Voice Mail Clerk job" and that any Voice Mail Clerk with two or more years of actual service as of December 9, 2001 "shall receive a pay adjustment reflecting the difference between what she (or he) actually earned and what she would have earned had she been properly classified as of that date." *Id.* at 57 (emphasis omitted). In setting the retroactivity award, the arbitrator reasoned as follows:

> . . . Inasmuch as the upgrade of experienced Voice Mail Clerks should have taken place in 2001, the effective date of the creation of the Senior Voice Mail job title shall be December 9, 2001, the date of the Union's grievance in this matter. . . .
>
> The arbitrator is mindful of the admonition in Article 16B.1(f) which asserts that "in no event shall the retroactive effect exceed 150 days." Had [Verizon] not violated the Agreement as found by Arbitrator Mackenzie, and had [it] properly notified [the CWA] of

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reach back, *see* Gerhart Award at 17. The error is simply a scrivener's error, however, because the arbitrator correctly implemented the CWA's interpretation in spelling out his remedy. *See infra* pp. 12-14.

> the changes in the Voice Mail Clerk job in response to [the CWA's] December 2001 grievance, and had the matter been processed and ultimately referred to a "neutral third party" as required by Article 16B.1(e) and (f), a decision by the neutral third party would have been rendered on or about May 9, 2002 which is 150 days after December 9, 2001.[5] Thus, in the absence of the contractual violation by [Verizon], this neutral third party award would have been effective on December 9, 2001, fully within the boundaries of retroactivity prescribed by the [CBA]. It would shock the sensibilities of any reasonable person if [Verizon] were allowed to benefit from its own bre[a]ch of the [CBA], as found by Arbitrator Mackenzie, particularly since it violated the very Article of the [CBA] that it now seeks to use to limit the contractually agreed-upon remedy in this matter.

Id. at 55-56.

On August 13, 2007, Verizon filed suit in district court under section 301(a) of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185(a), seeking partial vacatur of the award to the extent the retroactive pay award exceeded 150

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[5]Although the arbitrator did not specify how he settled on the 150-day time period between the CWA's December 9, 2001 grievance and the hypothetical May 9, 2002 award, it appears that he relied on the timetable set out in the CBA. Under the CBA, the CWA has 60 days from Verizon's initial notice of the creation, restructuring or redefinition of a job title or classification in which to negotiate and reach agreement. CBA at 25. If no agreement is reached, the CWA has an additional 30 days to demand arbitration. *Id.* The arbitrator has 60 days from the date the matter is referred for resolution to issue his award. *Id.*; *see supra* note 3. Added together, 150 days from the date of the CWA's grievance is May 9, 2002.

days.[6] The CWA counterclaimed seeking enforcement. On August 5, 2008, the district court granted summary judgment to Verizon, holding that "Arbitrator Gerhart exceeded his arbitral authority under the parties' agreement" in that "he chose to disregard the unambiguous limitations of Article 16B.1(f)—a limitation that he characterized as a mere 'admonition'—because he concluded that it would be unfair to observe that limitation in this case." *Verizon Washington, D.C. Inc.*, 569 F. Supp. 2d at 127. Indeed, highlighting the arbitrator's "shock the sensibilities" language, the court concluded that the arbitrator's retroactivity determination "was based on 'his own brand of industrial justice.'" *Id.* at 128 (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). The CWA then filed a timely notice of appeal.

II.

We have "final order" jurisdiction of this appeal under 28 U.S.C. § 1291 ("courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States"). Despite remanding the matter to an "arbitrator of the parties' choosing," the district court order is a final, appealable order given that the remand—limited to modifying the retroactive effect of the award "in a manner consistent with . . . [the court's] Opinion," that is, retroactive to 150 days before the date of the arbitrator's award—is ministerial in nature. *See Verizon Washington, D.C. Inc.*, 569 F. Supp. 2d at 129; *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 881 (D.C. Cir. 2000)

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[6]Section 301(a) of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

("[R]emand orders may be considered final where a court remands for solely 'ministerial' proceedings. . . ."); *cf. Jays Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20*, 208 F.3d 610, 612 (7th Cir. 2000) ("'*Provided that the matter left for determination is not merely ministerial*, . . . an order that does not determine the entire substantive relief to which the plaintiff is entitled is not a final decision . . . .'") (quoting *Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of Am.*, 909 F.2d 248, 249 (7th Cir. 1990)) (emphasis added).[7] Our review of the district court's grant of summary judgment is *de novo*. *USPS v. Am. Postal Workers Union*, 553 F.3d 686, 692 (D.C. Cir. 2009).

The CWA contends that under United States Supreme Court precedent as well as our own, the district court erred in concluding that the arbitrator's award did not "'draw[] its essence' from the terms of the collective bargaining agreement." *Howard Univ. v. Metro. Campus Police Officer's Union*, 512 F.3d 716, 720 (D.C. Cir. 2008) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (alteration in *Howard Univ.*). The arbitrator, the CWA continues, plainly satisfied this standard when he determined that the award should apply retroactively to December 9, 2001—the date the CWA grievance was filed—because the arbitrator adopted the CWA's interpretation of the 150-day limit. Br. of Appellant at 19-23. Noting that but for Verizon's breach of the CBA's notice/negotiations requirements, the Voice Mail Clerks' wage rate would have been determined 150 days

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[7]Relying on *Jay's Foods*, *supra*, the CWA asserts that our subject matter jurisdiction comes from the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(E), which provides that "[a]n appeal may be taken from . . . an order . . . modifying, correcting, or vacating an [arbitral] award." Br. of Appellant at 1-2. Verizon's suit was brought under section 301 of the LMRA, however, and, accordingly, we do not reach the applicability *vel non* of the FAA.

after the December 9, 2001 grievance was filed, the arbitrator agreed with the CWA that Verizon should not benefit from its breach. *Id.* at 20-21. According to the CWA, the notification/negotiations requirements set forth in Article 16B of the CBA were conditions precedent—with which both parties were obligated to comply—to the Voice Mail Clerks' assumption of additional duties, making any back pay remedy retroactive to the date they assumed the additional duties.[8] Having prevented the CWA from pursuing the grievance process in a timely manner because of its failure to notify/negotiate, Verizon should not reap the benefit of interpreting the 150-day retroactivity limit literally to reach back only to December 31, 2006 (150 days before the date of the arbitrator's award). Thus, the CWA submits, the district court erred by "substituting its interpretation of the parties' agreement for the Arbitrator's." *Id.* at 27.

We "may vacate a labor arbitration award only if it does not 'draw[] its essence' from the terms of the collective bargaining agreement." *Howard Univ.*, 512 F.3d at 720 (quoting *Enter. Wheel & Car Corp.*, 363 U.S. at 597). We therefore "'play only a limited role when asked to review the decision of an arbitrator.'" *Teamsters Local Union No. 61 v. UPS, Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987)). Indeed, "'[w]hile courts . . . may review the substance of an arbitration award, only the narrowest circumstances will justify setting the award aside. An arbitrator cannot, for instance . . . ignore the contract and dispense his own brand of industrial justice. But if

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[8]See also section 1(d) of Article 16B, which provides "[i]f agreement is reached between the parties within the sixty (60) days following the Union's receipt of notice from [Verizon] concerning the initial wage rates and schedules, the agreed upon wage rates and schedules shall be retroactive to the date the change or new job was implemented." CBA at 25.

an arbitrator was *arguably* construing or applying the contract, a court must defer to the arbitrator's judgment.'" *Howard Univ.*, 512 F.3d at 720 (quoting *Madison Hotel v. Hotel & Rest. Employees, Local 25*, 144 F.3d 855, 858-59 (D.C. Cir. 1998) (en banc) (citations and internal quotation marks omitted and emphasis added)). Moreover, an arbitrator need not be "'confined to the express provisions of the contract'" when issuing his award but may also consider "the structure of the contract as a whole." *Madison Hotel*, 144 F.3d at 859 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)). As the Supreme Court declared in *Misco, Inc.*,

> To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

484 U.S. at 38.[9]

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[9]*Cf. Grand Rapids Die Casting Corp. v. Local Union No. 159, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 684 F.2d 413, 415 (6th Cir. 1982) (Sixth Circuit held arbitrator exceeded his authority by ignoring relevant contractual provisions because he found them so "offensive" as to "shock[] [his] conscience."); s*ee also Anheuser-Busch, Inc. v. Int'l Bhd. of*

Read in its entirety, the arbitrator's opinion and award manifests that he accepted the CWA's interpretation of Article 16B.1(f) in concluding that December 9, 2001, the date the CWA filed its grievance, was the "effective date of the creation of the Senior Voice Mail job title." Gerhart Award at 55; *see also* Br. of Appellant at 20-21. In fact, the CWA's interpretation drew its essence from the CBA. But regardless whether it did, the arbitrator's decision did. While the arbitrator recognized his duty to "interpret the language of Article 16B.1(f) which states that 'in no event shall the retroactive effect exceed 150 days,'" he then had to determine whether "as [Verizon] contends, . . . the new wage rate for the Voice Mail Clerks must be effective no more than 150 days prior to the date of the instant arbitrator's award, or, pursuant to [the CWA's] interpretation, . . . the revised wage rate must have effect 150 days prior to [sic] the Union's initial grievance, i.e., December 9, 2001." Gerhart Award at 38-39. In setting the December 9, 2001 date, then, the arbitrator interpreted the collective bargaining agreement as the CWA did—namely, that the 150-day retroactivity provision must be read in view of Verizon's failure to give notice under Article 16B.1(a) of the CBA. Gerhart Award at 17-18. So read, the 150-day retroactivity provision correlates to the period the arbitration process is to take once proper notice is given.[10] Furthermore, interpreting Article 16B.1(f) in light of the "structure of the contract as a whole," *Madison Hotel*, 144 F. 3d

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Teamsters, Local Union No. 744, 280 F.3d 1133, 1138 (7th Cir. 2002) ("arbitrator cannot shield himself from judicial correction by merely 'making noises of contract interpretation'" (quoting *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985)) (emphasis omitted).

[10]*See supra* note 5, showing the 150-day calculation between the time of notice under Article 16B.1(a) and the issuance of an arbitration award under Article 16B.1(f).

at 859—including the CBA's notice provision—is within the arbitrator's authority, *see id.* Therefore we cannot say that the arbitrator was not "arguably construing or applying the contract and acting within the scope of his authority." *Misco*, 484 U.S. at 38.

Finally, the arbitrator included a hypothetical calculation that "[had Verizon] not violated the Agreement as found by Arbitrator Mackenzie, and had [Verizon] properly notified [the CWA] of the changes in the Voice Mail Clerk job in response to the [] December 2001 grievance, and had the matter been processed and ultimately referred to a 'neutral third party' as required by Article 16B.1(e) and (f), a decision by the neutral third party would have been rendered on or about May 9, 2002 which is 150 days after December 9, 2001." Gerhart Award at 55. In fact, the grievance process took from late 2001 until May 30, 2007 and the second arbitrator alone took over eight months to issue his award notwithstanding the CBA's requirement that any arbitration award issue "within sixty . . . days of the date that the matter is referred for resolution." CBA at 25. Even were we to conclude that his calculation was a "serious error," *Misco*, 484 U.S. at 38, our conclusion would not allow us to vacate the reward. Indeed, "[t]he 'parties having authorized the arbitrator to give meaning to the language of the agreement,' courts cannot 'reject [the] award on the ground that the arbitrator misread the contract.'" *Madison Hotel*, 144 F.3d at 859 (quoting *Misco*, 484 U.S. at 38). The arbitrator constructed a time line consistent with Article 16B.1(f) of the CBA. Accordingly, we uphold the award and reverse the district court's grant of summary judgment to Verizon.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

I write separately to state that for me reversal is tied to the fact that the arbitrator adopted the CWA's interpretation of Article 16B.1(f), which interpretation is itself grounded in Article 16B of the collective bargaining agreement. Although—following the Supreme Court's lead—we apply a largely "hands off" standard of review to an arbitral award, that does not mean *anything* goes, as even the CWA counsel recognized:

> Q: . . . . What if he had not felt confined by the 150 days—the Union had taken a different position or said take it all the way back to the first day we got these additional duties. Would that be enough to say he had exceeded his authority?
>
> Coslow: If he imposed a remedy that didn't have reference to the 150 days and its relationship to notice, I think the Company's argument would be much stronger. But he anchored it in the notice requirement, in the 150 days, in the Company's breach. Those are all appropriate considerations in interpretation.
>
> Q: . . . Let me ask you one [other thing]. Have you given us an example [] in this case [of] what would have exceeded his authority?
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> Coslow: Well I suppose . . . I think you've presented one and that is suppose he said, well I am going to, arbitrarily, because I think it's fair . . . I'm just [going to] grant these employees this amount of money just [be]cause I think they should have it. That, I think we'd all say oh that's over the top. But he didn't do that . . . .

Oral Argument Recording, *Verizon Washington, D.C. Inc. v. Commc'ns Workers of Am.*, No. 08-7092, at 49:49-51:08 (argued Apr. 21, 2009).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5376 **September Term 2008**

1:07-cv-00484

Filed On: July 8, 2009

American Forest Resource Council,

Appellant

v.

H. Dale Hall, et al.,

Appellees

BEFORE: Ginsburg, Henderson, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion of the Federal appellees for permission to file dispositive motion out of time and the lodged motion of the Federal appellees to dismiss as moot; and the notice of defendant-intervernor-appellees of joinder in the motion to dismiss; the opposition thereto, and the replies, it is

ORDERED that the motion for permission to file be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motion to dismiss as moot be granted, and this case is hereby dismissed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7019 **September Term 2008**

07cv01686

Filed On: June 25, 2009

Kenneth T. Davis,

Appellant

v.

Senator, Honorable of New Jersey,
Individually and In his official capacity and his successor, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's May 7, 2009 pleading, which appears to move for voluntary dismissal of the appeal and for leave to amend the complaint, it is

ORDERED that the motion for voluntary dismissal of the appeal be granted, and this case is hereby dismissed. It is

FURTHER ORDERED that the motion for leave to amend the complaint be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5021 **September Term 2008**

1:08cv01068

Filed On: June 24, 2009

In re: James Neuman,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition for a writ of mandamus be denied. First, it is not clear what specific relief petitioner is seeking. See In re Aleshin, 17 Fed. Appx. 969 (Fed. Cir. 2001) (denying mandamus petition because, inter alia, it was "not entirely clear what specific relief" was being sought). Second, petitioner has not shown that his right to mandamus is "clear and indisputable," and that "'no other adequate means to attain the relief' exist." In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (citations omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5450 **September Term 2008**

1:08-cv-00147-RJL

Filed On: June 24, 2009

Kenneth N. Hammond,

Appellant

v.

United States Parole Commission,

Appellee

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of a certificate of appealability; and the opposition thereto and appellant's brief, both of which are construed as including a request for a certificate of appealability**,** it is

ORDERED that the request for a certificate of appealability be denied and the motion to dismiss be granted. Because appellant has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5037 **September Term 2008**

1:07cv00433

Filed On: June 23, 2009

In re: James Ramsey,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and the supplement thereto, it is

ORDERED that the petition for writ of mandamus be dismissed as moot. By order filed May 4, 2009, the district court ruled on petitioner's petition for habeas or writ of coram nobis, the action petitioner sought to compel in his mandamus petition.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

The Clerk is directed to send a copy of this order to petitioner, by whatever means necessary to ensure receipt, along with the district court's order and accompanying opinion in No. 07cv00433.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5062 **September Term 2008**

1:08-cv-00137-RMU

Filed On: June 23, 2009

Oscar Beck, Jr.,

Appellant

v.

United States Marine Corps,

Appellee

BEFORE: Sentelle, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to appoint counsel, and the court's order to show cause filed March 13, 2009, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motions to appoint counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed as untimely. Appellant filed his notice of appeal more than 60 days after the October 9, 2008, entry of the challenged order. See Fed. R. App. P. 4(a)(1)(B).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-3019 **September Term 2008**

1:02-cr-00098-EGS-1

Filed On: June 22, 2009

In re: Gregory T. Lancaster,

Petitioner

BEFORE: Sentelle, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to file a second or successive motion pursuant to 28 U.S.C. § 2255; the motion for leave to proceed in forma pauperis; and the motion to dismiss and the responses thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for leave to file a second or successive motion pursuant to 28 U.S.C. § 2255 be denied. Petitioner's motion does not contain newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255(h); United States v. Ortiz, 136 F.3d 161, 163-64 (D.C. Cir. 1998). It is

FURTHER ORDERED that the motion to dismiss be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 24, 2008 Decided June 9, 2009

No. 07-3070

UNITED STATES OF AMERICA,
APPELLEE

v.

DUANE PHILLIP JONES, ALSO KNOWN AS CHICKEN JONES,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 06cr00273-01)

Mary E. Davis, appointed by the court, argued the cause and filed the briefs for appellant.

Nicholas P. Coleman, Assistant U.S. Attorney, argued the cause for appellee. On the brief were *Jeffrey A. Taylor*, U.S. Attorney, and *Roy W. McLeese III*, *Mary B. McCord*, and *Michael T. Ambrosino*, Assistant U.S. Attorneys.

Before: ROGERS, GARLAND, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: A jury convicted Duane Phillip Jones of gun and drug crimes. Jones contends that he is entitled to a new trial for two reasons. First, he argues that the district court erred in failing to suppress a statement he made at the time of his arrest. Second, he maintains that the government improperly disclosed inadmissible information to the jury. We find no error on either ground, and we therefore affirm Jones' convictions.

I

The facts surrounding Jones' arrest are not in dispute. The Superior Court of the District of Columbia issued a warrant for Jones on a charge of first-degree murder while armed, in connection with a homicide that took place on June 27, 2006. At a law enforcement briefing held on August 10, 2006, Deputy U.S. Marshal James Cyphers learned that the murder had been committed with a handgun; that Jones might possess two firearms because the victim's gun was taken during the murder; and that Jones had previous convictions for gun and drug offenses.

On the afternoon of August 10, Cyphers and approximately twenty other members of the U.S. Marshals Service Fugitive Task Force converged on the Clay Terrace area in northeast Washington, D.C., in search of Jones. Clay Terrace, which Cyphers characterized as "an open-air drug market" and "a very dangerous part of the city," was filled with people, some of whom fled when the marshals arrived. Mot. Hr'g Tr. 6-7, 20 (Jan. 16, 2007). As Cyphers got out of his vehicle, he made eye contact with Jones, who stood up and turned "frantic[ally]" in circles. *Id.* at 21. Jones then took off running, and Cyphers chased him for approximately 100 yards. During the chase, Cyphers heard a gunshot fired somewhere to his left. Jones eventually ran into the stairwell of an apartment building;

moments later, two small children emerged from the stairwell. Cyphers pursued Jones into the stairwell, which was semi-lit, and finally apprehended Jones there by grabbing him around the waist and pulling him to the ground. Jones, who was wearing a bulky jacket, landed on his stomach.

Within thirty seconds of apprehending Jones, and before administering *Miranda* warnings, Cyphers asked Jones whether he had "anything on" him. *Id.* at 12. Jones replied, "I have a burner in my waistband," which Cyphers understood to mean a gun. *Id.* at 13. Another deputy marshal then recovered a loaded firearm from Jones' waistband. Jones was handcuffed and escorted to a police car, where a third deputy marshal conducted a pat-down search and discovered a bag containing crack cocaine in Jones' back pocket.

On September 15, 2006, a grand jury indicted Jones on three counts: possession with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(iii); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and unlawful possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Before trial, Jones moved to suppress his statement regarding the gun on the ground that it was obtained in contravention of the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). After listening to Cyphers' testimony at the suppression hearing, the district court denied the motion to suppress, concluding that Jones' statement fell within the public safety exception to *Miranda*. *See New York v. Quarles*, 467 U.S. 649 (1984).

At trial, Cyphers and other deputy marshals testified about the circumstances surrounding Jones' arrest, including the statement Jones made about the gun. Jones did not testify or call any witnesses. On January 24, 2007, the jury convicted him on

all counts. The district court sentenced Jones to a term of 135 months' incarceration on the first count, a consecutive term of 60 months' incarceration on the second count, and a concurrent term of 120 months' incarceration on the third count. Jones now raises two challenges to his convictions and also seeks a remand for resentencing under a retroactive amendment to the Sentencing Guidelines.

II

Jones' first contention is that the district court erred in denying his motion to suppress his statement concerning the gun. Statements made in response to custodial interrogation are normally inadmissible unless preceded by *Miranda* warnings. *See Miranda*, 384 U.S. at 444-45. In *New York v. Quarles*, however, the Supreme Court announced a "'public safety' exception" to the *Miranda* rule. 467 U.S. at 655-56. In *Quarles*, police officers followed the defendant into a supermarket after a rape victim told them that her attacker had just entered the store carrying a gun. When the defendant noticed one of the officers, he turned and ran toward the rear of the store. The officer eventually caught the defendant, frisked him, and discovered that he was wearing an empty shoulder holster. After handcuffing the defendant, but before advising him of his rights, the officer asked him where the gun was, and the defendant responded, "the gun is over there." *Id.* at 652.

Concluding that, "under the circumstances involved[,] . . . overriding considerations of public safety justif[ied] the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon," the Court held the defendant's statement admissible at trial. *Id.* at 651. "[T]he need for answers to questions in a situation posing a threat to the public safety," the Court said, "outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege

against self-incrimination." *Id.* at 657. Hence, *Miranda* should not apply to situations "in which police officers ask questions reasonably prompted by a concern for the public safety," *id.* at 656, or for the safety of the arresting officers, *id.* at 658-59. In *Dickerson v. United States*, the Court confirmed that the public safety exception to *Miranda* is "as much a normal part of constitutional law as the original decision." 530 U.S. 428, 441 (2000).

To date, this circuit has had only one occasion to address the exception. In *United States v. Brown*, police officers who apprehended a defendant moments after he robbed a bank asked him about the location of the gun he had used during the robbery. 449 F.3d 154, 159 (D.C. Cir. 2006), *abrogated in part on other grounds by Dean v. United States*, 129 S. Ct. 1849 (2009). Although the officers had not read Brown his rights, we held that their "inquiries f[e]ll squarely within the public-safety exception to *Miranda v. Arizona*, recognized by the Supreme Court in *New York v. Quarles*." *Id.* (citations omitted).

Based on the totality of the circumstances that confronted Deputy Marshal Cyphers when he asked Jones whether he had "anything on" him, we conclude that Cyphers' question fell squarely within the public safety exception as well. *See United States v. Reyes*, 353 F.3d 148, 152 (2d Cir. 2003) (describing the public safety exception as "'a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case'" (quoting *United States v. Banks*, 540 U.S. 31, 36 (2003))). Before Cyphers entered the Clay Terrace area, he knew that Jones was wanted for murder while armed, that he could well be in possession of two firearms, and that he had previously been convicted of gun and drug offenses. Mot. Hr'g Tr. at 5-7. Cyphers testified that Clay Terrace was known as a dangerous drug market, and that "[f]irearms are used in the drug trade as

protection and coercion." *Id.* at 6. Indeed, the Marshals Service dispatched *twenty* marshals to arrest Jones specifically because of his criminal record, the severity of the crime for which he was sought, and the dangerous nature of the Clay Terrace area. *Id.* at 30. Moreover, once Cyphers made eye contact with Jones, several factors further heightened the threat to public safety: Jones led Cyphers on a chase in a crowded area; Cyphers heard a gunshot fired during the pursuit; the stairwell where Cyphers apprehended Jones was dimly lit; children had been present in the stairwell only moments earlier; Jones was wearing a bulky jacket that could conceal a weapon; and Cyphers had not yet been able to handcuff Jones when he asked whether Jones had anything on him.

We need not assess the weight of each of these individual factors, as in combination they clearly establish that Cyphers' question was "reasonably prompted by a concern for the public safety." *Quarles*, 467 U.S. at 656. Jones maintains that "no Court has gone so far as the district court did" in applying the public safety exception, Appellant's Br. 8, but that is plainly incorrect. Without necessarily endorsing them, we note that decisions in which other circuits have found the exception satisfied have emphasized the following factors, among others: the defendant's prior criminal record, *see United States v. Everman*, 528 F.3d 570, 572-73 (8th Cir. 2008); *United States v. Coleman*, No. 97-4078, 1999 WL 147262, at *2 (4th Cir. Mar. 18, 1999); the defendant's drug dealing, *see United States v. Estrada*, 430 F.3d 606, 613 (2d Cir. 2005); *United States v. Edwards*, 885 F.2d 377, 384 (7th Cir. 1989); the fact that the defendant was not yet handcuffed, *see Reyes*, 353 F.3d at 154; and the dangerous nature of the neighborhood where the defendant was arrested, *see United States v. Brady*, 819 F.2d 884, 888 (9th Cir. 1987). The instant case includes all of these factors, as well as the others noted in the preceding paragraph.

Jones raises two specific objections to the application of the public safety exception in this case. First, he argues that there was "no objectively reasonable need to protect either the public or the officer from immediate danger" because the murder for which he was wanted had taken place six weeks earlier, rendering it "not reasonable to believe that . . . Jones would still be in possession of both firearms." Appellant's Br. 10. We see nothing unreasonable about an officer worrying that a person who committed a murder just six weeks before, and who had a previous conviction for a firearm offense, would be in the habit of carrying a weapon. In any event, this is just one factor among the many that, in their totality, warrant a finding that the public safety exception applies here.

Second, Jones claims that Cyphers' question was "designed to elicit testimonial evidence" rather than to address safety concerns. *Id.* at 11. Jones bases this argument on Cyphers' testimony during the suppression hearing that he chose the words, "do you have anything on you?," because "[i]f you go into specifics, then they give you a specific answer. If you keep it general, then they usually tell you what they have." Mot. Hr'g Tr. at 12-13. But Jones' argument fails in light of the Supreme Court's instruction that "the availability of th[e] exception does not depend upon the motivation of the individual officers involved." *Quarles*, 467 U.S. at 656. As the Court explained, "[i]n a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception . . . should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer." *Id.* The Court recognized that "[u]ndoubtedly most police officers . . . would act out of a host of different, instinctive, and largely unverifiable motives -- their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect." *Id.* The

Court trusted that officers would "distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed *solely* to elicit testimonial evidence from a suspect." *Id.* at 658-59 (emphasis added). So do we.

Furthermore, Cyphers' question does not appear to have been crafted solely to obtain testimonial evidence. In fact, Cyphers made it clear that he phrased the question generally in order to elicit whether Jones had *any* weapon, rather than a specific weapon like a gun. Mot. Hr'g Tr. at 12-13 (testimony by Cyphers that his question was intended to find out whether Jones had "anything that can hurt me . . . anything at all"). As the Second Circuit has held, "a question need not be posed as narrowly as possible, because precision crafting cannot be expected in the circumstances of a tense and dangerous arrest." *Estrada*, 430 F.3d at 612 (internal quotation marks omitted); *see also United States v. Williams*, 181 F.3d 945, 954 n.13 (8th Cir. 1999). Moreover, Cyphers' actions bolster his testimony that his query related to safety concerns: he asked the question within 30 seconds of apprehending Jones, and he did not follow up with more questions. *See Quarles*, 467 U.S. at 659 (explaining that the officer clearly recognized the distinction between safety-related questions and investigatory questions because he had "asked only the question necessary to locate the missing gun before advising [the defendant] of his rights"); *Reyes*, 353 F.3d at 154-55 (noting the significance of the "arresting officer's disinclination to exploit the situation" by asking further questions); *United States v. Carrillo*, 16 F.3d 1046, 1050 (9th Cir. 1994) (emphasizing the officer's "deliberate refusal" to ask further questions).

Finally, Jones reminds us that "the public safety exception is just that -- an exception." Appellant's Br. 10. He is plainly correct about that. *See Quarles*, 467 U.S. at 658 (characterizing

the exception as "narrow"). We must therefore take care that the exception not be applied so routinely as to swallow the rule. *Cf. Estrada*, 430 F.3d at 613-14 (warning that the exception "must not 'be distorted into a *per se* rule as to questioning people in custody on narcotics charges,'" and emphasizing "that the exception will apply only where there are sufficient indicia supporting an objectively reasonable need to protect the police or the public from immediate harm" (quoting *Reyes*, 353 F.3d at 155)). But although *Quarles* was decided a quarter century ago, this is only the second time we have reviewed a case in which the government has relied on the public safety exception. Our decision today holds only that, based on the totality of the circumstances in this case, Cyphers' single question was "reasonably prompted by a concern for the public safety," *Quarles*, 467 U.S. at 656, and therefore fell within the exception.

III

Jones' second contention is that he is entitled to a new trial because the government disclosed to the jury that he was arrested for murder. The district court had ruled that the nature of the charge upon which the warrant was based was inadmissible because its prejudicial effect outweighed its probative value. Jones maintains that, despite this ruling, the government showed the jury an unredacted Drug Enforcement Administration (DEA) form -- a "DEA-7" -- that specified that Jones was arrested pursuant to a homicide warrant. Jones concedes that the DEA-7 was not available to the jury during its deliberations, Oral Arg. Recording at 9:06-10, but he insists that the government inadvertently displayed it to the jurors on a projection screen for a few seconds during the testimony of a government witness.

The parties disagree on the standard that governs our review of this claim. Jones argues that we must evaluate it under the harmless error standard. The government, by contrast, contends that plain error review applies because Jones failed to object sufficiently at trial. *See generally United States v. Coumaris*, 399 F.3d 343, 347 (D.C. Cir. 2005) (describing the differences between harmless and plain error review).

We need not resolve this dispute because Jones has not established that the jury ever saw the DEA-7. Regardless of which standard of review applies, an appellant bears the initial burden of showing that the events allegedly constituting error did, in fact, occur. *See, e.g.*, *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988) (explaining that a defendant who alleged that jurors engaged in unauthorized communications with third parties bore the burden of establishing "that an unauthorized contact was made"); *Anderson v. Acad. Sch. Dist.*, 122 Fed. Appx. 912, 914 (10th Cir. 2004) ("The appellant bears the burden of providing this court with the materials necessary to establish that error occurred in the district court."); *see also Sherman v. Smith*, 89 F.3d 1134, 1155 (4th Cir. 1996) (Motz, J., dissenting on other grounds) (observing that a defendant who claimed that a juror made an unauthorized visit to the crime scene "bore the initial burden of proving that the site visit occurred"). In most cases, the burden will be met easily and without explicit discussion because the transcript will reflect -- or the parties will not dispute -- what happened at trial. But when, as here, a factual dispute exists, it is the appellant's burden to show that the events allegedly constituting error actually took place.

The DEA-7 is a one-page form that was included as part of a three-page document labeled "Government Exhibit 2A." The three pages of Exhibit 2A were, in consecutive order: (1) a DEA laboratory report analyzing the drugs; (2) photographs of the

analyzed drugs; and (3) the DEA-7. R. Material for Appellee Tab A at 1-3. A DEA-7 is a "report of drug property collected" by the police, *id.* at 3, and is filled out by the seizing officer for transmission to the DEA laboratory. In this case, the DEA-7 contained the following statement: "On August 10th 2006, members of the Metropolitan Police Department arrested the above named Defendant for HOMICIDE (Arrest Warrant #2006CRW001978)." *Id.* This reference to the homicide warrant appeared only on the DEA-7 and not on the other two pages of the exhibit. *Id.* at 1-3.

Although the prosecutor used Exhibit 2A when questioning an expert witness and repeatedly described it as "the DEA-7," it is clear from the transcript that he used the term as shorthand to refer to the entire three-page document and only displayed the first page. *See, e.g.*, Trial Tr. 387 (Jan. 23, 2007) ("Do you see on your monitor . . . the *front page* of the DEA-7?") (emphasis added). This is also clear from the testimony of the witness, who described what he was seeing on the screen as a "certified report of controlled substance analysis," which was the laboratory report included as the first page of Exhibit 2A. *Id.* at 388. There is no evidence that the last page of the exhibit -- the DEA-7 itself -- was ever displayed to the jurors.

Jones' attorney did interrupt the testimony regarding Exhibit 2A and stated that the prosecutor "ha[d] the wrong *side* on there." *Id.* (emphasis added). The most natural reading of the attorney's comment is that the back side of the first page of Exhibit 2A -- the laboratory report analyzing the drugs -- was on the screen. Had the DEA-7 itself been displayed, the attorney would have stated that the wrong *page* was on the monitor. Indeed, the government clarified during a bench conference that the prosecutor "didn't use the '7'" when questioning the witness. *Id.* at 389. At the end of the conference, the court confirmed that "[w]hat we have on the screen is a laboratory report itself"

-- which, again, was the first page of Exhibit 2A. *Id.* And after the prosecution rested, the court stated there was no "need to worry about [Exhibit 2A] going back" with the jury because the DEA-7 indicating the arrest warrant charge was not "part of the evidence." *Id.* at 426-27.

At oral argument, Jones' appellate counsel stated that the transcript is "at best . . . confusing," and that it is "really not clear what was on the screen [in front of the jurors]." Oral Arg. Recording at 9:41-47. Even if counsel were correct, the most that can be said is that the issue is unclear, in which case Jones' appeal still falls short because he cannot satisfy his burden of showing that the act he describes as error actually occurred.

IV

After Jones was sentenced, the U.S. Sentencing Commission "lower[ed] the Sentencing Guidelines ranges for certain categories of offenses involving crack cocaine and permit[ted] district courts to apply the lower ranges retroactively." *United States v. Pettiford*, 517 F.3d 584, 594 (D.C. Cir. 2008) (citing Notice of Final Action Regarding Amendments to Policy Statement § 1B1.10, Effective March 3, 2008, 73 Fed. Reg. 217 (Jan. 2, 2008), and Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 72 Fed. Reg. 28,558 (May 21, 2007)). Jones asks us to remand his case to the district court so that he can request a lower sentence based on the amended Guidelines. The government agrees that Jones may petition the district court for a reduced sentence, but it contends that "[t]he proper procedural mechanism" under these circumstances is for us simply to affirm and leave it to Jones to file a petition with the district court pursuant to 18 U.S.C. § 3582(c)(2). Appellee's Br. 30 n.25. That section provides:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 944(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

Both Jones and the government agree that Jones will be entitled to ask the district court for a reduced sentence under § 3582(c)(2) regardless of which course we follow, and both agree that no collateral consequences will attend our decision. Oral Arg. Recording at 13:27-32, 24:53-25:12; *see also Pettiford*, 517 F.3d at 594.[1] Curiously, this dispute has occasioned a circuit split. Nearly all courts of appeals that have considered the issue have decided to remand to save the defendant the "additional step" of petitioning the district court for a sentencing modification. *United States v. Wales*, 977 F.2d 1323, 1328 n.3 (9th Cir. 1992); *see United States v. Ursery*, 109 F.3d 1129, 1137-38 (6th Cir. 1997); *United States v. Vazquez*, 53 F.3d 1216, 1227-28 (11th Cir. 1995); *United States v. Marcello*, 13 F.3d 752, 756 n.3 (3d Cir. 1994); *United States v. Coohey*, 11 F.3d 97, 101 & n.3 (8th Cir. 1993); *United States v. Connell*,

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[1]In *Pettiford*, we declined a defendant's request to remand. 517 F.3d at 594. But we did so in that case because -- unlike here -- the effective date of the Guidelines amendment had not yet arrived, and the defendant therefore was not yet entitled to request a lower sentence.

960 F.2d 191, 197 n.10 (1st Cir. 1992). The Fourth Circuit, by contrast, has simply affirmed "without prejudice to [the defendant's] right to pursue . . . relief in the sentencing court" under § 3582(c)(2). *United States v. Brewer*, 520 F.3d 367, 373 (4th Cir. 2008). Other than the potential time savings, no circuit has articulated a substantive difference between these two options with respect to the relief available to a defendant.

We join the majority of our sister circuits and remand to give Jones an opportunity to request a reduced sentence. This course has a small advantage in terms of administrative efficiency, as it will put the issue in front of the sentencing court most directly and expeditiously. Whether to grant a reduction remains within the discretion of the district court. *See* 18 U.S.C. § 3582(c)(2) (providing that the court "*may* reduce the term of imprisonment" (emphasis added)); *Ursery*, 109 F.3d at 1137-38.

V

For the foregoing reasons, we affirm Jones' convictions and remand the case to the district court.

Affirmed and remanded.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1013 **September Term 2008**

IRS-14344-08L

Filed On: June 8, 2009

Thomas G. Brenner,

Appellant

v.

Commissioner of Internal Revenue Service,

Appellee

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, or in the alternative, to transfer the appeal to the Eleventh Circuit; and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987). Because appellant's claims are frivolous, the Tax Court properly granted the motion to dismiss for failure to state a claim and to impose a penalty.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1051 **September Term 2008**

FERC-IN08-3-002

Filed On: June 8, 2009

American Public Power Association and
National Rural Electric Cooperative
Association,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

PJM Industrial Customer Coalition, et al.,
Intervenors

Consolidated with 09-1052, 09-1054, 09-1055

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, the response thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. Petitioners concede that the court lacks jurisdiction to review the order approving the settlement agreement between Edison Mission Energy and the Federal Energy Regulatory Commission. See Heckler v. Chaney, 470 U.S. 821 (1985); Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001); New York State Dept. of Law v. FCC, 984 F.2d 1209 (D.C. Cir. 1993). Moreover, Petitioners have failed to show they have a right to intervene in the agency's investigation. See 18 C.F.R. § 1b.11 ("There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part.").

Thus, the agency's denial of their motions to intervene is not judicially reviewable. See Action on Safety & Health v. Federal Trade Comm'n, 498 F.2d 757, 762-63 (D.C. Cir. 1974) (holding that the decision to grant or deny intervention in agency enforcement proceedings "is an agency action committed to agency discretion and therefore is specifically exempt from judicial review ....").

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Per Curiam

United States Court of Appeals

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Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 26, 2009 Decided June 5, 2009

No. 08-5148

ENTERPRISE NATIONAL BANK,
APPELLANT

v.

THOMAS J. VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cv-01344)

John J. Richard argued the cause for the appellant.

Heather Graham-Oliver, Assistant United States Attorney, argued the cause for the appellee. *Jeffrey A. Taylor*, United States Attorney at the time the brief was filed, and *R. Craig Lawrence*, Assistant United States Attorney, were on brief.

Before: HENDERSON, TATEL and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Enterprise National Bank n/k/a Enterprise Bank of Florida (Enterprise)

made a loan guaranteed in part by the United States Department of Agriculture (Agriculture). When the borrower defaulted, Agriculture declined to honor its guarantee based on Enterprise's allegedly negligent loan servicing. After Enterprise obtained a favorable decision *via* Agriculture's administrative appeals process, Agriculture paid a portion of Enterprise's loss claim. Enterprise filed suit in district court seeking an order compelling payment of its loss claim in full. On cross-motions for declaratory judgment, the district court granted Agriculture's motion. *Enter. Nat'l Bank v. Johanns*, 539 F. Supp. 2d 343, 347 (D.D.C. 2008). For the reasons set forth below, we affirm the district court's judgment.

I.

Agriculture's Rural Business-Cooperative Service (RBS) administers the Business and Industry Guaranteed Loan Program (B&I Program). *See* Business and Industrial Loan Program, 61 Fed. Reg. 67,624 (Dec. 23, 1996).[1] Under the B&I Program, Agriculture guarantees loans made by private lenders to rural businesses "to improve, develop, or finance business,

[1]Agriculture has many subparts, some of which Agriculture classifies as "agencies." For example, RBS is referred to as an "agency" in the regulations setting forth Agriculture's appeals procedure. 7 C.F.R. § 11.1. To avoid confusion, we refer to each agency within Agriculture by name. The Agriculture Secretary established RBS pursuant to 7 U.S.C. § 6944(a) ("[T]he Secretary is authorized to establish and maintain within the Department the Rural Business and Cooperative Development Service . . . ."). *See* 7 C.F.R. § 2003.26. RBS's Administrator operates under the direction of the Under Secretary for Rural Economic and Community Development, *id.* § 2.48, and is authorized to "[c]ollect, service, and liquidate loans made, insured, or guaranteed by [RBS]." *Id.* § 2.48(a)(14). RBS administers the B&I Program through a Rural Development State Director in each state, *id.* § 1980.401(d), including, in this case, the State Director for Georgia.

industry, and employment and improve the economic and environmental climate in rural communities." 7 C.F.R. § 4279.101(b); *see also* 61 Fed. Reg. at 67,624. The private lender is responsible "to ascertain that all requirements for making, securing, servicing, and collecting the loan are complied with." 7 C.F.R. § 4279.1(b). Agriculture guarantees payment to the lender of "[a]ny loss sustained by the lender on the guaranteed portion [of the loan], including principal and interest" or "[t]he guaranteed principal advanced to or assumed by the borrower and any interest due thereon," whichever is less. *Id.* § 4279.72(a)(2)(i) & (ii). To receive payment, the lender must submit a final report of loss to Agriculture with supporting documentation. *Id.* § 4287.158(c). Agriculture reviews the report and, upon approval, makes a loss payment to the lender within 60 days. *Id.* § 4287.158(c)(6), (g). Under the B&I Program, Agriculture's guarantee is "unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security." *Id.* § 4279.72(a).[2]

On July 19, 1999, Enterprise entered into a $5 million loan agreement with Catfish, INT., Inc. (Catfish) as the borrower and

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[2]7 C.F.R. § 4279.72(a) provides in part:

> Full faith and credit. A guarantee under this part constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones. . . . In addition, the guarantee will be unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge thereof.

Erwin David Rabhan, president of Catfish, as the guarantor. Catfish was obligated to use the loan proceeds for the development of a catfish processing and distribution facility in Georgia. Agriculture, acting through its Georgia State Director, guaranteed 75% of the loan ($3.75 million) under the B&I Program.[3] The Loan Note Guarantee incorporated the language of 7 C.F.R. § 4279.72(a), *supra* note 2. Loan Note Guarantee at 2, Joint Appendix (JA) 63 (Oct. 1, 1999) (Loan Note Guarantee). It also defined "negligent servicing" as "the failure to perform those services which a reasonably prudent lender would perform in servicing . . . its own portfolio of loans that are not guaranteed." *Id.* Catfish subsequently defaulted. Agriculture's Office of Inspector General (OIG) investigated Catfish's president and its general contractor and discovered that they had "conspire[d] to defraud [Agriculture and Enterprise] out of a $5 million guaranteed B&I loan they were not entitled to receive." OIG Report of Investigation at 1, JA 755 (Feb. 4, 2003) (OIG Report). Catfish's president as well as the general contractor both pleaded guilty to one count of conspiracy and were both sentenced to a term of imprisonment.

In November 2002, Enterprise reported a $4,213,434 loss to the State Director and requested $3,160,075 (75% of the loss) under the guarantee. On May 22, 2003, the State Director denied Enterprise's claim in full based on Enterprise's allegedly negligent servicing. He relied on the OIG Report's finding that Enterprise's "lack of due diligence and negligence allowed for fraudulent actions by [Catfish]" and that Enterprise "did not comply with several conditions" of the guarantee. Letter from F. Stone Workman, State Director, USDA Rural Development, to R. Penny Rodgers, Vice President, Enterprise Bank, at 2, JA 208 (May 22, 2003).

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[3]Agriculture initially guaranteed 70% of the loan but later increased the guarantee to 75% of the loan.

Enterprise appealed the State Director's decision to the National Appeals Division (Division). *See* 7 U.S.C. § 6996(a) (right to appeal adverse decision to Division); 7 C.F.R. § 11.1(6) (adverse decision includes Rural Business-Cooperative Service decision).[4] After a hearing, the Division hearing officer upheld the State Director's decision. Enterprise sought the Division director's review. The director may uphold, reverse or modify the hearing officer's determination or remand all or a portion of the determination for further proceedings if the hearing record is inadequate or new evidence has been submitted. 7 C.F.R. § 11.9(d)(1). The Division director remanded Enterprise's case because the hearing officer had not complied with certain procedural regulations. On December 2, 2005, another hearing officer issued a fifteen-page Remand Appeal Determination (RAD) containing, *inter alia*, the following findings of fact. First, "[Enterprise] failed to ensure that its borrower contributed $2,950,000 to the project, and this occasioned a loss of $2,950,000." Remand Appeal Determination at 13, *Enter. Nat'l Bank*, No. 2004S000154 (Dec. 2, 2005) (RAD). Second, "[Enterprise] did not ensure that its borrower built [a maintenance shed and guardhouse valued at $80,000 and] . . . the absence of the facilities occasioned a loss of $80,000." *Id.*

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[4]The Division is "an organization within the Department [of Agriculture] . . . which is independent from all other agencies and offices of the Department." 7 C.F.R. § 11.2(a). The Division is headed by a director who "reports directly to the [Agriculture] Secretary." *Id.*; *see also id.* § 11.22(a). The Division hears appeals from "adverse decisions" by Agriculture "agencies." *Id.* § 11.6(b)(1); *see id.* § 11.1. An adverse decision is "an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant." *Id.* § 11.1. The Division director assigns an appeal to a Division hearing officer, *id.* § 11.8(b)(2), who conducts a hearing and issues a "determination," *id.* § 11.8(f). Both the participant and Agriculture may seek the Division director's review of the hearing officer's determination. *Id.* § 11.9(a).

at 12. The hearing officer concluded the Discussion portion of the RAD as follows: "RBS's decision is erroneous because RBS has not correctly calculated the extent to which the alleged negligence and other factors occasioned a loss." *Id.* at 15. The Determination section of the RAD concluded:

> Under 7 C.F.R. § 11.8(e), [Enterprise] has the burden of proving the adverse decision is erroneous by a preponderance of the evidence. [Enterprise] has proven that [Agriculture's] decision is erroneous.
>
> This is a final determination of the Department of Agriculture unless a party to the appeal files a timely request for review.

Id. Neither party appealed the RAD and it became the Division's final determination. *See* 7 C.F.R. § 11.8(f) (hearing officer's determination final if not appealed); 7 C.F.R. § 11.9(a)(1) (participant must appeal hearing officer determination within 30 days after receipt), (2) (agency must appeal hearing officer determination within 15 days after receipt). "On the return of a case to an agency pursuant to the final determination of the Division, the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination." *Id.* § 11.12(a). "Implement" is defined as "the taking of action by an agency of the Department in order fully and promptly to effectuate a final determination of the Division." *Id.* § 11.1.

On January 12, 2006, Enterprise's counsel contacted Agriculture's Office of General Counsel by telephone regarding the loss claim. Letter from John J. Richard, Attorney, Powell Goldstein LLP, to Mark Lee Stevens, USDA Office of General Counsel, JA 26-27 (Jan. 12, 2006) (memorializing telephone conversation). According to Enterprise's counsel, he "discussed [with the General Counsel's office] . . . that [Agriculture was] currently processing [Enterprise's] loss claim for payment in full

plus accrued interest." *Id.* at 1, JA 26. On March 3, 2006, however, the State Director notified Enterprise that Agriculture would pay only $956,252.19 under the guarantee. He explained that Enterprise's loss claim had been reduced by $3,030,000 based on Enterprise's negligent servicing, citing the hearing officer's findings that Enterprise had caused a loss of $2,950,000 based on Catfish's failure to make the required equity injection and another $80,000 loss based on Catfish's failure to build the maintenance shed and guardhouse.

On July 28, 2006, Enterprise filed a complaint in the district court pursuant to 7 U.S.C. § 6999[5] seeking a declaratory judgment and an order compelling Agriculture to "process[] the remainder of [Enterprise]'s loss claim for payment in full plus accrued interest without delay." Compl. at 19, *Enter. Nat'l Bank*, 539 F. Supp. 2d 343 (No. 06-cv-1344). Enterprise alleged that the State Director had "refused to comply with the [Division's] final determination," which, Enterprise claimed, required Agriculture to pay the full loss claim. *Id.* The parties filed cross-motions for declaratory judgment and the district court granted Agriculture's cross-motion. *Enter. Nat'l Bank*, 539 F. Supp. 2d at 347. Enterprise timely appealed pursuant to 28 U.S.C. § 1291.

II.

"In reviewing *de novo* the district court's grant of summary judgment on [an agency's] administrative decisions, we directly review those decisions." *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 753 (D.C. Cir. 2007) (citing *Castlewood Prods., LLC v. Norton*, 365 F.3d 1076, 1082 (D.C.

[5]"A final determination of the Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5." 7 U.S.C. § 6999; *see also* 7 C.F.R. § 11.13 (tracking statute).

Cir. 2004)). As noted earlier, we review a Division final determination under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06. *See Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1213 (D.C. Cir. 1998) ("[Section] 6999 mandates that the District Court review . . . the final determination of the [Division] under the APA's 'arbitrary and capricious' standard of review."). Because neither side appealed the RAD, it constitutes the "final determination of the Division" and thus falls within 7 U.S.C. § 6999.

Enterprise seeks relief "compelling agency action unlawfully withheld" under 5 U.S.C. § 706(1), Compl. at 1, arguing that the RAD required full payment of its loss claim, not the partial payment Agriculture offered. Under section 706(1), the plaintiff must "'assert[] that an agency failed to take a *discrete* agency action that it is *required to take*.'" *Kaufman v. Mukasey*, 524 F.3d 1334, 1338 (D.C. Cir. 2008) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)) (emphases in *S. Utah Wilderness Alliance*). "[W]hen an agency is compelled by law to act, but the manner of its action is left to the agency's discretion, the 'court can compel the agency to act, [although it] has no power to specify what th[at] action must be.'" *Id.* (quoting *S. Utah Wilderness Alliance*, 542 U.S. at 65) (alterations in *Kaufman*); *see also Am. Ass'n of Retired Pers. v. EEOC*, 823 F.2d 600, 605 (D.C. Cir. 1987) ("Section 706(1) does not provide a court with a license to substitute its discretion for that of an agency merely because the agency is charged with having unreasonably withheld action."). Because the RAD did not expressly order the performance of a discrete action, however, we must review Agriculture's implementation of the RAD as action taken within its discretion.[6]

[6]Indeed, the hearing officer *may* not be empowered to order any action. According to the regulations, only the Division director is explicitly given the "authority to grant equitable relief." 7 C.F.R.

The RAD determined that the State Director's decision to "reduce[] [Enterprise's] . . . loss claim to zero" was "erroneous." RAD at 15. Nevertheless, that conclusion was preceded by the hearing officer's detailed discussion of how Enterprise's negligent loan servicing caused $3,030,000 of the loss. Under the Conditional Commitment, Rabhan was required "to contribute $2,950,000 from personal funds . . . to secure the guaranteed loan." *Id.* at 13; *see* Conditional Commitment at 1, JA 109 (June 24, 1998) ("[Agriculture] . . . will execute [the Loan Note Guarantee,] subject to the conditions and requirements specified in the regulations and herein."). Enterprise was required to ensure that Rabhan made the equity injection. RAD at 13. Although both Rabhan and the general contractor averred in affidavits that Rabhan made the equity injection, he had not in fact done so. *Id.* at 13-14. According to the hearing officer, Enterprise "did not check . . . bank records or perform other due diligence to ensure" that Rabhan made the equity injection, which failure "occasioned a loss of

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§ 11.9(e). "Equitable relief" is defined as "relief which is authorized under . . . laws administered by the agency." *Id.* § 11.1. Moreover, the National Appeal Division Guide states that the hearing officer "has no authority . . . to order any action by the agency." National Appeal Division Guide at 48 (2004), *available at* http://www.nad.usda.gov/nadguide.pdf (Guide). The Guide gives the following example: "[I]f the Hearing Officer determines that a real estate appraisal was not performed in a manner consistent with applicable regulations, the errors in the appraisal will be noted, but the determination will not direct the agency on how a new appraisal is to be performed." *Id.* The Guide states that a hearing officer "does not have the authority to grant equitable relief." *Id.* at 49. A hearing officer may determine whether an agency erred in denying equitable relief but a determination that an agency erred "is not itself a grant of relief by the [h]earing [o]fficer." *Id.* We need not decide the deference, if any, we owe the Guide because, regardless whether the hearing officer can order relief, he did not do so.

$2,950,000." *Id.* The hearing officer also found that Catfish's "plans for the project included a maintenance shed and guardhouse valued at $80,000," which it was obligated to build but, again, did not do. *Id.* at 5, 12. Enterprise likewise failed "to ensure that [Catfish] buil[d] these structures," which "occasioned a loss of $80,000." *Id.* at 12. As noted earlier, Agriculture was not required to honor the guarantee "to the extent any loss is occasioned by . . . negligent servicing." Loan Note Guarantee at 2, JA 63. Although the hearing officer did not include in the Determination section of the RAD the precise amount that he concluded Agriculture owed Enterprise under the Loan Note Guarantee, we believe the State Director reasonably interpreted the RAD in reducing the loss claim by $3,030,000.[7] And, accordingly, the district court correctly upheld Agriculture's interpretation of the RAD and concluded—again correctly—that its implementation thereof was neither arbitrary nor capricious. *See Purepac Pharm. Co. v. Thompson*, 354 F.3d

[7]Enterprise asserts, however, that the State Director may not look beyond the Determination section of the RAD. It relies on the Guide, which provides that "[t]he appeal determination is limited to whether the agency erred or did not err in the adverse decision." Division Guide at 48. The Guide also states, however, that the hearing officer's "[f]indings of fact and conclusions constitute the essentials of the appeal determination," *id.* at 47, indicating that the State Director *can* look beyond the Determination section. Further, even if we accept Enterprise's assertion, the State Director's action is consistent with the Determination section. In that section, the hearing officer found that Agriculture's "decision is erroneous." RAD at 15. The "decision" referred to is the State Director's initial decision to reduce the loss claim to zero. *Id.* Construing only the Determination section, then, the State Director could calculate the loss claim in an amount other than zero. His decision to reduce the loss claim by $3,030,000—the loss caused by Enterprise's negligent loan servicing—reasonably implements the Determination section.

877, 883 (D.C. Cir. 2004) (upholding FDA's denial of exclusive right to sell generic drug under APA review).

Enterprise makes two additional arguments that we find without merit. First, it argues that no evidence supported Agriculture's decision to reduce the loss claim to $956,252.19. Agriculture had relied on the OIG Report in initially reducing the loss claim to zero. The hearing officer on remand, however, *see supra* p. 5, excluded the OIG Report from evidence because Agriculture had submitted it to him ex parte. RAD at 7-8. He found that Enterprise's negligence had caused $3,030,000 in losses based on evidence other than the excluded OIG Report, including the testimony of Enterprise employees themselves. *Id.* at 5, 12-13. Once the hearing officer issued the RAD, Agriculture relied on his detailed findings of fact to calculate Enterprise's loss.

Second, Enterprise argues that the district court erred in failing to consider evidence that Agriculture acted in bad faith both in entering into the loan guarantee and during the administrative appeal process.[8] The hearing officer found that Agriculture did not disclose to Enterprise that Rabhan had attempted to defraud another lender as well as Agriculture in 1995. In its complaint, Enterprise alleged that Agriculture officials had taken kickbacks from borrowers, including Rabhan, in exchange for loan guarantees. The hearing officer found that the RBS's "failure to warn [Enterprise] did not cause the losses in question," a finding that Enterprise does not challenge. RAD at 14. Instead of claiming that Agriculture's bad faith conduct led to an erroneous RAD, Enterprise argues only that

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[8]The district court concluded that "[Enterprise's] many arguments regarding [Agriculture's] bad faith in its participation in the [Division] review cannot be considered here, as this court looks only to the final [Division] determination." *Enter. Nat'l Bank*, 539 F. Supp. 2d at 345 n.1.

Agriculture *interpreted* the RAD in bad faith. Specifically, in its brief to us, Enterprise maintains—without elaboration—that Agriculture's bad faith "goes directly to the context in which the Agency made its decision to ignore the [RAD's] operative holding and . . . deny the Bank's loss claim." Appellant's Br. at 21. As thus framed, Enterprise's bad faith argument hinges on our concluding that Agriculture "ignore[d]" the RAD in reducing the loss claim to $956,252.19. *See also* Oral Argument at 10:28, *Enter. Nat'l Bank v. Vilsack*, No. 08-5148 (argued Mar. 26, 2009) (Enterprise's counsel: "[I]n a further example of the bad faith that pervaded [Agriculture's] treatment of [Enterprise] throughout the entire process . . . they decided . . . they were simply going to ignore what the [hearing officer] said."). But because we conclude that—far from ignoring the RAD—Agriculture used the detailed findings included therein to reduce Enterprise's claim to $956,252.19, Enterprise's bad faith claim fails. Agriculture showed no bad faith in interpreting the RAD to mean what it said.

For the foregoing reasons, we affirm the district court's judgment.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7010 **September Term 2008**

1:98-cv-02780-PLF

Filed On: June 4, 2009

Winfred L. Stanley, et al.,

Appellants

v.

Sonya Proctor, et al.,

Appellees

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; and the motion for summary reversal, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellants did not obtain court-ordered relief from the district court and therefore are not "prevailing parties." Buckhannon Board & Care Home, Inc. v. West Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001); Select Milk Producers, Inc. v. Johanns, 400 F.3d 939, 947 (D.C. Cir. 2005).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5099 **September Term 2008**

1:07-cv-00477-RCL

Filed On: June 3, 2009

Craig Devon Thompson,

Appellant

v.

District of Columbia Department of Corrections
and United States Parole Commission,

Appellees

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the District of Columbia Department of Corrections' motion to dismiss the appeal for lack of a certificate of appealability or for summary affirmance, the response thereto, the court's order to show cause filed February 23, 2009, the response thereto, and the supplement to the response, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed in its entirety for lack of a certificate of appealability. See 28 U.S.C. § 2253(c)(1)(A). Because appellant has not made "a substantial showing of the denial of a constitutional right," id. § 2253(c)(2); see, e.g., United States v. Vargas, 393 F.3d 172, 175 (D.C. Cir. 2004); see also United States v. DiFrancesco, 449 U.S. 117, 137 (1980); United States Parole Commission v. Noble, 693 A.2d 1084, 1094-1104 (D.C. 1997), op. adopted, 711 A.2d 85 (D.C. 1998) (en banc) (per curiam), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5227 **September Term 2008**

1:07-cv-01303-RJL

Filed On: June 3, 2009

John T. Pickering-George,

Appellant

v.

Drug Enforcement Administration, Registration Unit and Chemical Operations, a Section Office of Diversion Control and United States Department of Justice,

Appellees

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the notice of appeal, the motion to dismiss or in the alternative for summary affirmance, the opposition thereto and motion for summary reversal, the reply to the opposition to the motion to dismiss or for summary affirmance and opposition to the motion for summary reversal, and the district court's order filed April 23, 2009, treating appellant's filings as a motion for an extension of time to file his notice of appeal under Fed. R. App. P. 4(a)(5) and granting that motion, it is

ORDERED that the motion for summary reversal be denied and that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court properly granted summary judgment for the appellees. The court correctly held that appellant was required to exhaust administrative remedies before filing suit under the Freedom of Information Act, see, e.g., 5 U.S.C. § 552(a)(6); Hidalgo v. FBI, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003), but that he did not provide any basis for questioning paralegal specialist Leila I. Wassom's sworn representation that a search of the agency's files did not locate any request for documents filed by appellant.

No. 08-5227 **September Term 2008**

Rather, he proffered only evidence suggesting that he may have mailed such a request to the agency, but see 28 C.F.R. § 16.3(a) & Appendix I (specifying mailing address other than one used by appellant), not that the agency actually received it, and his claim of perjury is completely unsubstantiated. The court also correctly held that appellant failed to state a constitutional claim upon which relief could be granted. Thus, the court did not err in granting summary judgment for the appellees.

Nor did the court abuse its discretion in denying as futile appellant's motion to amend his complaint. Appellant was not entitled to mandamus relief, given the availability of relief under the Freedom of Information Act, see generally Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam), and he was not entitled to attorney's fees, given his pro se status and the fact that he did not "substantially prevail[ ]" in this litigation. See, e.g., Burka v. United States Department of Health and Human Services, 142 F.3d 1286, 1288-90 (D.C. Cir. 1998); 5 U.S.C. § 552(a)(4)(E)(i).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1167 **September Term 2008**

STB-42088

Filed On: June 3, 2009

Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc.,

Petitioners

v.

Surface Transportation Board and United States of America,

Respondents

BNSF Railway Company,
Intervenor

Consolidated with 09-1092

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to govern future proceedings, the responses thereto, and the reply; and the motion to dismiss in No. 08-1167, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss be granted as conceded, and No. 08-1167 is hereby dismissed. It is

FURTHER ORDERED that No. 09-1092 remain held in abeyance pending resolution of the ongoing agency proceedings. The parties are directed to file motions to govern future proceedings within 30 days after resolution of the agency proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1167 **September Term 2008**

is directed to withhold issuance of the mandate in No. 08-1167 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 20, 2009 Decided May 26, 2009

No. 08-5189

PHILOMENA AFFUM,
DOING BUSINESS AS ASAFO MARKET,
APPELLANT

v.

UNITED STATES OF AMERICA AND
THOMAS J. VILSACK, SECRETARY OF AGRICULTURE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-00300)

Charles B. Wayne argued the cause and filed the briefs for appellant.

R. Craig Lawrence, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were *Jeffrey A. Taylor*, U.S. Attorney, and *Harry B. Roback*, Assistant U.S. Attorney.

Before: SENTELLE, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: The Food Stamp Act ("Act") prohibits retail stores from "trafficking" in food stamp benefits, or exchanging these benefits for cash. *See* 7 U.S.C. § 2021(b)(3)(B). The penalty for a first-time trafficking offense is permanent disqualification from the food stamp program. However, under the Act, the Secretary of Agriculture ("Secretary") has the discretion to impose a civil money penalty in lieu of disqualification when an offending store produces "substantial evidence" that it had an "effective policy and program" to prevent the trafficking violations. *Id.* Regulations promulgated by the Secretary set forth criteria for eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. *See* 7 C.F.R. § 278.6(i).

In early 2007, a part-time employee working alone at appellant Philomena Affum's store exchanged a total of $30 in cash for $30 in electronic food stamp benefits offered by an undercover agent. The Department of Agriculture's Food and Nutrition Service ("FNS") then charged Affum with illegal trafficking. Affum requested that she be assessed a civil money penalty in lieu of permanent disqualification from the program. In November 2007, the FNS determined that Affum did not meet the regulatory criteria for the civil money penalty and permanently disqualified her store from the program. Affum then filed suit in the District Court, challenging the validity of the applicable regulations and seeking a "trial de novo" of the Secretary's penalty determination. *See* 7 U.S.C. § 2023(a)(15) ("The suit in the United States district court . . . shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue."). Affum submitted an affidavit affirming that her "store employee had been trained and that the employee knew that it was prohibited to . . . exchange cash for food stamp benefits," *Affum*

v. United States, 550 F. Supp. 2d 63, 67 (D.D.C. 2008), and sought a preliminary injunction to bar the permanent disqualification. In May 2008, the District Court denied Affum's request for injunctive relief on the ground that her "affidavit alone cannot be sufficient under the statute" to require the Secretary to impose a civil money penalty in lieu of disqualification. *Id.* The District Court further held that Affum lacked Article III standing to challenge the regulations. *Id.* at 68. At the parties' request, the District Court converted its denial of the injunction to a final judgment in the Secretary's favor. Affum then appealed.

We hold that the District Court was mistaken in its ruling that Affum lacked standing. The Secretary explicitly relied on the regulations to disqualify Affum from the food stamp program and to deny her request for the lesser civil money penalty. Therefore, Affum plainly has standing to challenge the regulations and their application to her case. Accordingly, we vacate the District Court's judgment and remand the case for further proceedings. The District Court must conduct a trial *de novo* on Affum's claim that the Secretary abused his discretion in denying her request for a civil money penalty in lieu of disqualification.

I. BACKGROUND

A. *Statutory and Regulatory Framework*

Congress created the food stamp program in 1964 to "permit those households with low incomes to receive a greater share of the Nation's food abundance." The Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703, 703. Retail stores authorized to participate in the program may accept food stamp benefits instead of cash for designated food items. 7 U.S.C. § 2013(a). The stores then redeem these benefits with the government for face value. *Id.* Today, the government delivers food stamp benefits via electronic benefit transfer cards. *Id.*

§ 2016(h). In 2008, Congress amended the Food Stamp Act, renaming it the Food and Nutrition Act and renaming the "food stamp program" the "supplemental nutrition assistance program," but it did not substantively change the statutory provisions at issue in this case. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4001, 122 Stat. 1651, 1853. We use the terms that the parties used in briefing this case.

Congress prohibits participating retail stores from "trafficking" in food stamp benefits, or trading these benefits for cash. Prior to 1988, the Act mandated permanent disqualification even for first-time trafficking offenders. *See* 7 U.S.C. § 2021(b)(3) (1982). Because of the severity of the sanction, the courts divided over whether "innocent" store owners could be held liable when their employees committed trafficking violations without their knowledge. *See Ghattas v. United States*, 40 F.3d 281, 283 (8th Cir. 1994) (describing circuit split). In 1988, Congress amended the Act to give the Secretary "the discretion to impose a civil money penalty" in lieu of permanent disqualification if the Secretary determined that there was "substantial evidence" that the store had "an effective policy and program in effect to prevent violations of the Act and the regulations." Hunger Prevention Act of 1988, Pub. L. No. 100-435, § 344, 102 Stat. 1645, 1664 (codified as amended at 7 U.S.C. § 2021(b)(3)(B)); *see also* H.R. REP. NO. 100-828, pt. 1, at 28 (1988) (noting that "[u]nder current law, no discretion is provided to the Secretary of Agriculture to evaluate a store's actions to prevent [trafficking] violations" and the amended Act "provides this discretion"). In 1990, Congress amended the Act again to permit the Secretary to consider evidence that the store's ownership was not in any way involved in the trafficking. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1743, 104 Stat. 3359, 3795 (codified as amended at 7 U.S.C. § 2021(b)(3)(B)).

With these and other amendments, § 2021(b)(3)(B) of the Act now provides for permanent disqualification upon the first instance of trafficking, "except that the Secretary shall have the discretion to impose a civil penalty" in lieu of disqualification in appropriate circumstances. 7 U.S.C. § 2021(b)(3)(B) (the statutory provision is reprinted in a Statutory Appendix at the end of this opinion). The Act further mandates that a store owner who sells a store that was previously disqualified by the Secretary will remain personally disqualified from the program. *Id.* § 2021(e)(1). Finally, the Act permits a store owner who is aggrieved by the Secretary's decision in a food stamp trafficking case to file suit in district court. *Id.* § 2023(a)(13). The statute provides that such a suit "shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." *Id.* § 2023(a)(15); *see also id.* § 2021(c)(2) ("The action of disqualification or the imposition of a civil penalty shall be subject to review as provided in section 2023 of this title.").

The Act gives the Secretary the authority to "issue such regulations . . . as . . . deem[ed] necessary or appropriate for the effective and efficient administration" of the food stamp program. 7 U.S.C. § 2013(c); *see also id.* § 2021(a)(2). Pursuant to this directive, the Secretary has promulgated regulations that amplify the Act's requirements and penalties relating to trafficking violations. *See* 7 C.F.R. § 278.6. The current regulations contain four criteria that the FNS considers in determining whether to impose a civil money penalty in lieu of permanent disqualification. *See id.* § 278.6(i). *First*, the store "shall have developed an effective compliance policy." *Id. Second*, the store "shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred *prior* to the occurrence of violations cited in the charge letter sent to the firm." *Id. Third*, the store must show that it "had developed and instituted an effective personnel training program." *Id. Fourth*, the store's ownership must show

that it was "not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of" the trafficking violations. *Id.* The regulations state that, to qualify for the alternative civil money penalty, a store "shall, at a minimum, establish by substantial evidence its fulfillment of" each criterion. *Id.*

The regulations also specify that, "in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent" with the regulations. *Id.* § 278.6(i)(1). The regulations further direct that a store "shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted." *Id.* § 278.6(i)(2). "In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP [Food Stamp Program] compliance and to prevent FSP [Food Stamp Program] violations, FNS may consider . . . [a]ny other information the firm may present to FNS for consideration." *Id.* § 278.6(i)(1)(vi).

B. *Facts and Proceedings Below*

From 2006 to 2008, Affum owned and operated the Asafo Market, a small grocery store located in Northeast Washington, D.C. She ran the store with the help of one part-time employee. In August 2006, the FNS authorized the Asafo Market to accept food stamp benefits. *See* Store Contact Record, *reprinted in* Joint Appendix ("J.A.") 126-27. At the time of the authorization, the FNS advised Affum that trafficking was prohibited and provided her with a training brochure for participating retailers as well as 70 pages from the Code of Federal Regulations that described the rules of the food stamp program. *See id.*; *see also* Affum Aff. ¶¶ 6-7 (Mar. 20, 2008), J.A. 70-71.

On October 10, 2007, the FNS sent Affum a letter charging her with trafficking in food stamp benefits. Letter from Sarah Duncan, Officer-in-Charge, Towson Field Office, to Philomena Affum 1 (Oct. 10, 2007) [hereinafter Charge Letter], J.A. 72. The Charge Letter and the enclosed investigative report stated that on two occasions between February and April 2007, an FNS investigator entered the Asafo Market and exchanged a total of $30 in electronic food stamp benefits for $30 in cash. *Id.*; *see also* Report of Positive Investigation (Apr. 30, 2007), J.A. 76. The Charge Letter also warned Affum that the penalty for this conduct was permanent disqualification from the food stamp program or, if appropriate, a civil money penalty. Charge Letter at 1-2, J.A. 72-73. Referencing § 278.6(i) of the regulations, the Charge Letter further informed Affum that she had 10 days in which to request the lesser sanction and that she "must meet each of the four (04) criteria listed [in § 278.6(i)] and . . . provide the documentation as specified" in order to be eligible for the civil money penalty. *Id.* at 2, J.A. 73.

On November 5, 2007, Affum met with Sarah Duncan, the Officer-in-Charge in the FNS's Towson Field Office, to discuss the charges. Affum explained that her employee had conducted the prohibited transactions without her knowledge and "knew this was against the rules." Memorandum from Sally Duncan, Officer-in-Charge, Towson Field Office, to File (Nov. 5, 2007), J.A. 175.

On November 14, 2007, the FNS informed Affum by letter of its finding that the trafficking violations had occurred. Letter from Sarah Duncan, Officer-in-Charge, Towson Field Office, to Philomena Affum 1 (Nov. 14, 2007) [hereinafter Decision Letter], J.A. 112. The Decision Letter further stated that Affum was ineligible for the alternative civil money penalty under § 278.6(i) of the regulations, because she "failed to submit sufficient evidence to demonstrate that [her] firm had established and implemented an effective compliance policy and

program to prevent violations of the Food Stamp Program." *Id.* Pursuant to this finding, the FNS permanently disqualified the Asafo Market from the program. *Id.* (citing 7 C.F.R. § 278.6(c), (e)(1)).

Affum sought review of the disqualification decision and advised the agency's Administrative Review Branch that the employee "who was responsible for this great error was informed from the very beginning that [electronic food stamp benefits were] strictly for use with food items only and nothing else." Letter from Philomena Affum to Jerry A. Masefield, FNS, Administrative Review Branch 1 (Dec. 26, 2007), J.A. 116. On January 22, 2008, an Administrative Review Officer within the FNS concluded that the "violations at issue did, in fact, occur as charged" and "sustained" the permanent disqualification. *Asafo Market v. Towson, Md. Field Office*, Case No. C0113519 at 4 (Jan. 22, 2008) [hereinafter Final Agency Decision], J.A. 122. The Final Agency Decision did not specifically address Affum's request for a civil money penalty in lieu of disqualification, so the Decision Letter is the agency's last word on this issue.

On February 21, 2008, Affum filed suit in the District Court against the Secretary and the United States. She did not dispute that the trafficking violations occurred, but she requested a "trial de novo" of the Secretary's penalty determination pursuant to § 2023(a)(15) of the Act. Compl. ¶¶ 33, 40. In addition, she argued that the permanent disqualification should be overturned because the Secretary failed to give her and other small store owners fair notice of his interpretation of the eligibility criteria for the civil money penalty contained in § 278.6(i) of the regulations and because these regulations are contrary to the language of the Act, arbitrary and capricious, and violative of her Fifth Amendment substantive due process rights. *Id.* ¶¶ 43-45.

On March 20, 2008, Affum filed a motion for a preliminary injunction to bar the permanent disqualification. She attached an affidavit to her motion affirming that she had told the FNS Officer-in-Charge that the employee who committed the trafficking "had been trained and that the employee knew that it was prohibited to . . . exchange cash for food stamp benefits." Affum Aff. ¶ 4 (Mar. 20, 2008), J.A. 70.

On May 7, 2008, the District Court denied Affum's request for injunctive relief. *Affum*, 550 F. Supp. 2d at 64. The District Court found that Affum could not succeed on the merits of her suit because she had not submitted "substantial evidence" of an effective anti-trafficking program as required by § 2021(b)(3)(B) of the Act. *Id.* at 67-68. On this point, the District Court concluded that Affum's "affidavit alone cannot be sufficient under the statute because [s]tore owners cannot simply attest to having effective antifraud programs; rather they must prove it." *Id.* at 67 (alteration in original) (internal quotation marks and citation omitted).

The District Court then went on to hold that Affum had no standing to challenge the regulations, because the statute was the cause of her injury. *Id.* at 68. The District Court explained that,

> [a]ssuming arguendo that the regulations did suffer from one or more of th[e] deficiencies [alleged by Affum], plaintiff would have no standing to challenge them because they inflict no redressable injury upon her. Regardless of whether the regulations are enforceable, the statute itself, which plaintiff does not challenge, inflicts the injury upon plaintiff of which she complains. Hence, plaintiff has no standing to assert her challenge to the Secretary's regulations and she has virtually no likelihood of success on the merits of such a claim.

Id. (internal citations and footnote omitted).

Following the District Court's denial of Affum's motion for a preliminary injunction, the parties jointly moved to have the District Court convert its May 7 opinion into a final judgment. On June 12, 2008, the District Court granted the parties' joint motion. *Affum v. United States*, No. 1:08-cv-00300 (D.D.C. June 12, 2008) (Order), J.A. 41.

Affum appealed the District Court's judgment on June 19, 2008. Shortly thereafter, she closed the Asafo Market due to loss of revenue from the food stamp program. Affum Aff. ¶ 3 (Nov. 22, 2008). The case is not moot, however, because the Government maintains that Affum remains personally disqualified from the food stamp program. *See* Appellees' Br. at 12 n.2.

II. ANALYSIS

Affum raises several challenges to the District Court's decision. She argues first that the District Court erred in holding that she had no Article III standing to challenge the Secretary's regulations and their application to her case. In addition, she contends that she should not face permanent disqualification from the program because (1) her affidavit was "substantial evidence" of the anti-trafficking program at the Asafo Market; (2) the Secretary did not give fair notice to her and other small store owners of his construction of the eligibility criteria in the regulations governing the imposition of a civil money penalty in lieu of disqualification; and (3) § 278.6(i) of the regulations is contrary to the Act, arbitrary and capricious, and violative of her Fifth Amendment substantive due process rights.

A. *Standing*

In its brief, the Government urged this court to affirm the District Court's decision that Affum lacked Article III standing to challenge the Secretary's regulations. Appellees' Br. at 26; *Affum*, 550 F. Supp. 2d at 68. However, when pressed on this issue at oral argument, counsel for the Government stated,

"That's not the argument we're advancing here today." Recording of Oral Argument 20:37-20:40 (Feb. 20, 2009). The Government's change in position was hardly surprising, because Affum plainly has standing to pursue her challenge to the disputed regulations and their application to her case.

We review *de novo* the District Court's decision on standing. *See Tooley v. Napolitano*, 556 F.3d 836, 838-39 (D.C. Cir. 2009). The "irreducible constitutional minimum of standing contains three elements": (1) injury-in-fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As we explained in *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002), "[i]n many if not most cases the petitioner's standing to seek review of administrative action is self-evident," particularly where "the complainant is 'an object of the action (or forgone action) at issue.'" *Id.* at 899-900 (quoting *Defenders of Wildlife*, 504 U.S. at 561). Affum's standing to challenge the regulations is self-evident in this case. By relying on § 278.6(i) to disqualify the Asafo Market from the revenue-producing food stamp program, the Secretary inflicted a concrete injury on Affum that could be remedied by an invalidation of the regulations and a reduction in penalty to the alternative civil money sanction. *See* Decision Letter at 1 (citing 7 C.F.R. § 278.6(i) to conclude that Affum was not "e[l]igible for the CMP [Civil Money Penalty] because [she] failed to submit sufficient evidence that [her] firm had established and implemented an effective compliance policy and program"), J.A. 112.

When an agency enforces its regulations to disqualify an individual from a government program, it is commonplace that the agency's enforcement action gives rise to an Article III injury sufficient to permit the regulated party to challenge the regulations at issue. *See, e.g.*, *Gorman v. NTSB*, 558 F.3d 580, 587-91 (D.C. Cir. 2009) (reviewing challenge to regulations relied on by the National Transportation Safety Board and the

Federal Aviation Administration to revoke petitioner's commercial pilot certificate); *PMD Produce Brokerage Corp. v. USDA*, 234 F.3d 48, 50, 51-54 (D.C. Cir. 2000) (reviewing fair notice challenge to procedural regulations relied on by the Secretary to revoke petitioner's license as a dealer of perishable agricultural products). Affum likewise has standing to pursue her challenge to the regulations at issue here and to the Secretary's application of them to permanently disqualify her from the food stamp program.

B. *The District Court's Judgment Must Be Vacated and the Case Remanded for a Trial* De Novo

When the District Court ruled that Affum lacked standing to challenge the Secretary's regulatory scheme, it foreclosed Affum's statutory right to have "a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." 7 U.S.C. § 2023(a)(15). The District Court made two mistakes. First, the court decided that Affum was entitled to no relief because she failed to comply with "the *statutory* language governing eligibility for a civil monetary penalty." *Affum*, 550 F. Supp. 2d at 67 (emphasis added). As noted above, however, the agency rested on the Secretary's *regulations* in declining to impose a civil money penalty in lieu of disqualification. The agency's Decision Letter specifically stated that Affum was ineligible for the alternative civil money penalty because she failed to comply with § 278.6(i) of the regulations. Decision Letter at 1, J.A. 112. The District Court was required to "judge the propriety of [the agency's] action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Second, the statute plainly says that a claimant is entitled to a "trial de novo" on "the validity of the questioned administrative action in issue." 7 U.S.C. § 2023(a)(15). The District Court never conducted the required trial *de novo* once it ruled that Affum lacked standing. The District Court simply ruled that Affum had no claim on the

merits because, in the trial court's view, her "affidavit alone cannot be sufficient *under the statute*" to avoid permanent disqualification. *Affum*, 550 F. Supp. 2d at 67 (emphasis added). However, this ruling does not join with the regulatory challenges raised by Affum.

Because of its mistaken view on standing, the District Court never addressed the principal issues in this case which concern the Secretary's regulations and their disputed application to Affum. Accordingly, we must vacate the District Court's judgment and remand the case for the District Court to consider the propriety of the Secretary's choice of sanction and to permit Affum to pursue her challenges to the validity of the regulations as applied to her.

C. *Issues on Remand*

The parties have raised several additional issues – relating to the applicable standard controlling the trial court's review of the agency's action, the substantial evidence requirement, and fair notice – all of which must be addressed by the District Court on remand. "Although we recognize that factual determinations must be made by the District Court, 'we can provide some guidance for the task to be tackled on remand.'" *Berry v. District of Columbia*, 833 F.2d 1031, 1034 (D.C. Cir. 1987) (quoting *Nat'l Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987)). We address these additional issues only to ensure that the District Court will "apply the correct legal standard[s] in its factfinding on remand." *In re Sealed Case*, 552 F.3d 841, 845 (D.C. Cir. 2009).

1. *The Applicable Standards Governing Judicial Review of the Secretary's Actions*

The relevant statutory provisions governing judicial review of actions taken by the Secretary are both unusual and complicated. The controlling provisions, which are reprinted in the attached Statutory Appendix, are found in 7 U.S.C. § 2021

and 7 U.S.C. § 2023. The Government contends that, under the relevant provisions of the Act, the Secretary's determination whether to impose permanent disqualification or a civil money penalty is subject to only limited review under the deferential arbitrary and capricious standard. Appellees' Br. at 12-16; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining arbitrary and capricious review).

As can be seen from the terms of the statute reprinted in the Statutory Appendix, when the District Court reviews actions taken by the Secretary in a trafficking case, there "shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." 7 U.S.C. § 2023(a)(15). However, the statute also provides that the Secretary "shall have the discretion to impose a civil penalty . . . in lieu of disqualification . . . if the Secretary determines that there is substantial evidence that such store or food concern had an effective policy and program in effect to prevent violations of the chapter and the regulations." *Id.* § 2021(b)(3)(B). The question here is whether the trial *de novo* provided for by § 2023(a)(15) applies only to the Secretary's conclusion that a trafficking violation occurred, or whether it applies as well to the Secretary's choice of the appropriate penalty for that violation.

Reading the statute as a whole, it is inescapable that the trial court is required to conduct a trial *de novo* in all regulatory enforcement cases involving charges of trafficking violations. Section 2021(c) is entitled "Civil penalty and review of disqualification and penalty determinations," and it states that judicial review may address either "[t]he action of disqualification or the imposition of a civil penalty . . . as provided in section 2023." *Id.* § 2021(c)(2). Section 2023(a)(15), in turn, states that "[t]he suit in the United States district court . . . shall be a trial de novo by the court in which

the court shall determine the validity of the questioned administrative action in issue." *Id.* § 2023(a)(15). There is nothing in the Act to suggest that trials *de novo* relating to "administrative action[s] in issue" are limited solely to review of determinations that a trafficking violation occurred.

"A trial de novo is a trial which is not limited to the administrative record – the plaintiff 'may offer any relevant evidence available to support his case, whether or not it has been previously submitted to the agency.'" *Kim v. United States*, 121 F.3d 1269, 1272 (9th Cir. 1997) (quoting *Redmond v. United States*, 507 F.2d 1007, 1011-12 (5th Cir. 1975)); *see also Freedman v. USDA*, 926 F.2d 252, 261 (3d Cir. 1991) ("The court must reach its own factual and legal conclusions and is not limited to matters considered in the administrative proceedings."). The trial *de novo* provision of the Act "is clearly broader than the review standard provided for under the Administrative Procedure Act. It requires the district court to examine the entire range of issues raised, and not merely to determine whether the administrative findings are supported by substantial evidence." *Modica v. United States*, 518 F.2d 374, 376 (5th Cir. 1975). However, the statutory requirement of a trial *de novo* "is compatible with a summary judgment disposition if there are no material facts in dispute." *Freedman*, 926 F.2d at 261.

There is a question here as to whether "trial de novo" under § 2023(a)(15) always means "*de novo* review." We think not. Reading § 2021(b)(3)(B), § 2021(c)(2), and § 2023(a)(15) together, and considering the statutory scheme as a whole, we think that Congress meant to impose different standards of review for a judicial action challenging the agency's finding of a violation as opposed to a judicial action challenging the Secretary's choice of penalty. It seems clear under the statute that Congress intended district courts to conduct a trial *de novo* and engage in *de novo* review to determine whether a trafficking

violation occurred. The parties do not dispute this point. But the situation is different when an aggrieved party challenges the Secretary's failure to impose a civil money penalty in lieu of disqualification. In this latter situation, the trial court must still conduct a trial *de novo* as required by § 2023(a)(15) to determine the facts on which the sanction was predicated. However, the terms of the Act indicate that a trial court may only overturn the agency's choice of penalty if, on the *de novo* factual record, it is determined that the Secretary abused his discretion in declining to impose a civil money penalty in lieu of disqualification.

As noted above, Congress amended the Act in 1988 to give the Secretary "the discretion to impose a civil money penalty" on certain store owners innocent of their employees' trafficking offenses. Hunger Prevention Act of 1988, Pub. L. No. 100-435, § 344, 102 Stat. 1645, 1664 (codified as amended at 7 U.S.C. § 2021(b)(3)(B)); *see also* H.R. REP. NO. 100-828, pt. 1, at 28 (1988). Because we must presume that "[w]hen Congress acts to amend a statute, . . . it intends its amendment to have real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), Congress' insertion of the "discretion" provision into § 2021(b) indicates that it intended for trial courts to assess whether the Secretary abused this "discretion" in selecting the appropriate penalty. Had Congress intended instead for trial courts to choose anew an appropriate penalty in trafficking cases, it would have made little sense for it to amend the Act to place this decision within the Secretary's discretion. To give full effect to § 2021(b)(3)(B), we hold that *review* of the Secretary's choice of penalty is subject to the abuse of discretion standard. A complaining party is still entitled to a trial *de novo* to create a factual record on the Secretary's determination not to a impose a civil money penalty in lieu of disqualification, and judicial review of the Secretary's choice of penalty is based on that *de novo* record. But the controlling standard of review is abuse of discretion.

Under the applicable standard of review, the Secretary abuses his discretion in his choice of a penalty if his decision is either "unwarranted in law" or "without justification in fact," *Coosemans Specialties, Inc. v. USDA*, 482 F.3d 560, 566 (D.C. Cir. 2007) (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973)) (other citation omitted), or is "arbitrary" or "capricious," *see Norinsberg Corp. v. USDA*, 47 F.3d 1224, 1228 (D.C. Cir. 1995). A court will not lightly disturb an agency's choice of penalty under a statute committed to its enforcement. *See, e.g., Kleiman & Hochberg, Inc. v. USDA*, 497 F.3d 681, 690 (D.C. Cir. 2007) (explaining that a court must respect the agency's superior knowledge of the industry that it regulates). However, an agency's choice of sanction will not survive review even under a deferential arbitrary and capricious or abuse of discretion standard if it is not justified. *See, e.g., Morall v. DEA*, 412 F.3d 165, 181-84 (D.C. Cir. 2005). Thus, in a case such as this, the District Court obviously must consider, *inter alia*, whether the Secretary reasonably weighed the statutory factors listed in § 2021(b)(3)(B), (B)(i), (B)(ii)(I), and (B)(ii)(II) and reasonably applied any lawful regulations adopted pursuant to § 2013(c) and § 2021(a)(2) ("[r]egulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store") in denying Affum's request for a civil money penalty in lieu of disqualification.

In reviewing challenges under the Act, a number of our sister circuits also distinguish between challenges to a finding of a violation and challenges to the severity of the penalty. These circuits subscribe to the view that we have enunciated here, *i.e.*, that judicial review of the agency's choice of penalty is focused on whether the Secretary has abused his discretion. *See, e.g., Cross v. United States*, 512 F.2d 1212, 1218 (4th Cir. 1975) (en banc) (holding that "only in those instances in which it may be fairly said on the *de novo* record as a whole that the Secretary,

acting through his designates, has abused his discretion by acting arbitrarily or capriciously, would the district court be warranted in exercising its authority to modify the penalty"); *see also Vasudeva v. United States*, 214 F.3d 1155, 1159-61 (9th Cir. 2000); *Corder v. United States*, 107 F.3d 595, 598 (8th Cir. 1997); *Carlson v. United States*, 879 F.2d 261, 263 (7th Cir. 1989); *Wong v. United States*, 859 F.2d 129, 132 (9th Cir. 1988). *But see Bakal Bros., Inc. v. United States*, 105 F.3d 1085, 1089 (6th Cir. 1997) (suggesting that the agency's determination of the appropriate sanction is not open to judicial review). It appears that only the Eighth Circuit has held that the Secretary's choice of sanction is subject to *de novo* review. *Ghattas*, 40 F.3d at 286-87. In *Ghattas*, however, the Eighth Circuit based its analysis exclusively on § 2023(a)(15) and thus gave no effect to the language added to § 2021(b) by the 1988 amendment that vested the Secretary with the "discretion to impose a civil money penalty." Hunger Prevention Act of 1988, Pub. L. No. 100-435, § 344, 102 Stat. 1645, 1664 (codified as amended at 7 U.S.C. § 2021(b)(3)(B)); *Ghattas*, 40 F.3d at 286-87. But reading the provisions together, as we must, makes clear that § 2021(b)(3)(B) is best understood as reflecting Congress' expectation that, after conducting a trial *de novo*, trial courts would assess whether the Secretary abused this "discretion" in selecting the appropriate sanction.

2. *The Substantial Evidence Requirement and Fair Notice*

Affum contends that the District Court erred in holding that her affidavit was not "substantial evidence" of an effective anti-trafficking program under § 2021(b)(3)(B) of the Act. We agree that the District Court appears to have rested its analysis on a misconception of the term "substantial evidence."

The District Court held that Affum's "affidavit alone" was not substantial evidence of an effective anti-trafficking program "under the statute because [s]tore owners cannot simply attest to having effective antifraud programs; rather they must prove it."

Affum, 550 F. Supp. 2d at 67 (alteration in original) (internal quotation marks and citation omitted). The District Court went on to explain that an affidavit could not qualify as sufficient evidence of an effective program because "then all store owners would simply declare that they had told their employees that trafficking was prohibited, and all owners would be eligible for a civil money penalty." *Id.* In other words, the District Court was apparently of the view that a store owner's affidavit, without "any additional proof," could *never* amount to substantial evidence of an effective anti-trafficking program. *Id.* The problem with this analysis is that it confuses the form of evidence necessary to show an effective compliance program with the content of that evidence.

As we have explained, "[s]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Butler v. Barnhart*, 353 F.3d 992, 999 (D.C. Cir. 2004) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The term "means more than a 'scintilla,' but less than a preponderance of the evidence." *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 461 (D.C. Cir. 2004) (quoting *Burns v. Dir., Office of Workers' Comp. Programs*, 41 F.3d 1555, 1562 n.10 (D.C. Cir. 1994)). In its common usage, the term "substantial evidence" in § 2021(b)(3)(B) thus says nothing about the particular forms of evidence that a store owner may use to demonstrate her eligibility for a civil money penalty.

Furthermore, as counsel for the Government conceded at oral argument, the regulations implementing the statute are "flexibl[e]" and similarly do not limit a store owner in the forms of evidence that she may submit to the agency. Recording of Oral Argument 28:27; *see also id.* at 28:29-28:39 ("[The regulations] are not so rigid that unless you file . . . something that is explicitly one, two, three, four, and no variance, you lose."); *id.* at 33:54-33:58 ("I don't think, for example, that the program has to be written."). A store owner such as Affum may

thus attempt to show that she qualifies for the alternative sanction via an affidavit, oral testimony, documents, or other forms of evidence as may be appropriate in a given case.

As to the content of the evidence, the heart of Affum's claim is that, because the Secretary failed to give her and other small store owners fair notice of his interpretation of the eligibility criteria in § 278.6(i) of the regulations, she had no reason to assume that she was required to maintain a written policy and contemporaneous written documentation of her training. We have held that "'[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.'" *PMD Produce Brokerage Corp.*, 234 F.3d at 52 (quoting *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)). We "thus ask whether 'by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.'" *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)). Here, the question is whether the Secretary's regulations and other statements about the rules of the food stamp program gave Affum fair warning that she was required to submit any further evidence than her letter, Letter from Philomena Affum to Jerry A. Masefield, FNS, Administrative Review Branch 1 (Dec. 26, 2007), J.A. 116, and affidavit affirming that her "employee had been trained and that the employee knew that it was prohibited to . . . exchange cash for food stamp benefits," Affum Aff. ¶ 4 (Mar. 20, 2008), J.A. 70.

We leave the resolution of the fair notice issue to the District Court in the first instance. We note, however, that the existing record raises serious issues as to the adequacy of the notice provided to Affum. The Government argued in its brief that the

regulations *require* that store owners maintain a written policy and contemporaneous written documentation of training given to employees. Appellees' Br. at 26-30. But the regulations do not appear to support these assertions, for they do not say that store owners *must* have a written policy or maintain contemporaneous written documentation of training activity. And the agency's training brochure provided to store owners does not say that a written policy or contemporaneous written documentation of a training program is required. The brochure simply instructs owners that "[i]t is a good idea to document the training you provide for your employees." FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., THE FOOD STAMP PROGRAM: TRAINING GUIDE FOR RETAILERS 8 (2005), J.A. 91. Moreover, at oral argument, counsel for the Government acknowledged that the regulations are "flexibl[e]" and do not require owners to maintain "written" materials. Recording of Oral Argument 28:27, 33:54-33:58.

The Government suggests that allowing a store owner to obtain the civil money penalty without a written policy or contemporaneous written documentation of training activity might lead to abuse by regulated parties. Even if this is true, it does not justify the agency's failure to give notice to regulated parties that a written policy and contemporaneous written documentation are required. The agency's confused and poorly drafted regulations do not appear to give such notice. Furthermore, the agency need not accept a store owner's claim that it had an oral policy and training if, for example, the agency reasonably concludes that a store owner is not telling the truth. Here, if the agency had concluded that Affum was lying about having instructed her store clerk not to exchange cash for food stamp benefits, there would be little basis for finding that the agency abused its discretion in denying her the civil money penalty.

As this case illustrates, it is surely better as a practical matter for a store owner to maintain a written policy and written

documentation of training. A written policy will strengthen an owner's evidentiary presentation and allow her to more convincingly argue for a civil money penalty instead of disqualification. Indeed, the regulations appear to create something of a safe harbor for store owners with a written policy and contemporaneous written documentation of training activity. *See* 7 C.F.R. § 278.6(i)(1), (2). But the Government has pointed to nothing in the existing regulations that require those steps as a necessary condition for obtaining a civil money penalty.

To be sure, in one place the regulations say that the store owner "shall document" its training activity by submitting to the FNS a record of the employee's dates of employment and the dates of training. *Id.* § 278.6(i)(2). But contrary to the Government's argument, this regulation merely requires a store owner's creation of a written document during the agency's inquiry into a possible violation, not contemporaneously with any training. And Affum of course produced such a written document in the form of a letter to the agency and later an affidavit to the District Court. *See* Letter from Philomena Affum to Jerry A. Masefield, FNS, Administrative Review Branch 1 (Dec. 26, 2007), J.A. 116; Affum Aff. (Mar. 20, 2008), J.A. 69-71.

We do not mean to suggest that the Secretary cannot impose rigorous requirements on store owners seeking a civil money penalty. Indeed, as one of our sister circuits has noted:

> That Congress amended the Act in 1988 to provide for sanctions less severe than permanent disqualification for innocent store owners who have in place an effective policy to prevent trafficking violations leads ineluctably to the conclusion that innocent store owners whose stores lack such a policy remain subject to permanent disqualification. Every court that has addressed the issue has so held.

Kim, 121 F.3d at 1273. But Affum does not contest that innocent store owners whose stores lack an effective compliance policy and training program remain subject to permanent disqualification. Rather, she has made one principal argument in this case. She says she expressly told the store clerk from the beginning that it was impermissible to exchange cash for food stamp benefits. She submitted a written letter to the agency (and later an affidavit to the District Court) setting forth this account. If Affum's account is truthful, then it would appear that she maintained an effective policy and training program as required by the existing regulations. The Government has never suggested that Affum's account is false. Rather, the Government's argument rests on the ground that Affum did not maintain a written policy or contemporaneous written documentation of training activity – requirements that the regulations do not appear to impose.

On remand, the District Court must conduct the required trial *de novo*. The District Court must then determine whether, on the basis of the *de novo* factual record, the agency's disqualification of Affum was an abuse of discretion. In deciding this issue, the District Court must determine whether the regulations gave Affum fair notice that she was required to maintain a written policy and contemporaneous written documentation of her training, and, if not, whether the agency offered any legitimate alternative ground for denying Affum the civil money penalty instead of disqualification.

III. CONCLUSION

The District Court's judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

STATUTORY APPENDIX

7 U.S.C. § 2021

(a) Disqualification

(1) In general

An approved retail food store or wholesale food concern that violates a provision of this chapter or a regulation under this chapter may be–

(A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;

(B) assessed a civil penalty of up to $100,000 for each violation; or

(C) both.

(2) Regulations

Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system.

(b) Period of disqualification

. . . a disqualification under subsection (a) of this section shall be–

. . . .

(3) permanent upon–

. . . .

(B) the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards, except that the Secretary shall have the discretion to impose a civil penalty of up to $20,000 for each violation . . . in lieu of disqualification . . . if the Secretary determines that there is substantial evidence that such store or food concern had an effective policy and program in effect to prevent violations of the chapter and the regulations, including evidence that–

(i) the ownership of the store or food concern was not aware of, did not approve of, did not benefit from, and was not involved in the conduct of the violation; and

(ii) (I) the management of the store or food concern was not aware of, did not approve of, did not benefit from, and was not involved in the conduct of the violation; or

(II) the management was aware of, approved of, benefited from, or was involved in the conduct of no more than 1 previous violation by the store or food concern; . . .

. . . .

(c) Civil penalty and review of disqualification and penalty determinations

(1) Civil penalty

In addition to a disqualification under this section, the Secretary may assess a civil penalty in an amount not to exceed $100,000 for each violation.

(2) Review

The action of disqualification or the imposition of a civil penalty shall be subject to review as provided in section 2023 of this title.

7 U.S.C. § 2023

(a)(1) Whenever . . . a retail food store or wholesale food concern is disqualified or subjected to a civil money penalty under the provisions of section 2021 of this title . . . .

. . . .

(13) If the store . . . feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business . . . .

. . . .

(15) The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue, except that judicial review of determinations regarding claims made pursuant to section 2025(c) of this title shall be a review on the administrative record.

(16) If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1145 **September Term 2008**

NLRB-28CA22299

Filed On: May 22, 2009

In re: The M Resort, LLC, M Resort Spa Casino,

Petitioner

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not demonstrated that its right to the writ is "clear and indisputable." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 26, 2009 Decided May 15, 2009

No. 08-1264

BNSF RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
RESPONDENT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS,
INTERVENOR

Consolidated with 08-1276, 08-1338, 08-1342, 08-1361, 08-1362, 08-1378

On Petitions for Review of a Final Rule
issued by the Department of Transportation

Donald J. Munro argued the cause for petitioners. With him on the briefs were *William F. Sheehan, Jeffrey A. Bartos, Harold A. Ross, Mitchell M. Kraus, Clinton J. Miller, III, Daniel R. Elliott, III, William A. Bon, Michael S. Wolly, Roland P. Wilder, Jr., Lawrence Mann, Larry I. Willis,*

Bradley T. Raymond, *James McCall*, *James W. Johnson*, and *Suzanne L. Kalfus*.

Louis P. Warchot and *Michael J. Rush* were on the brief for *amicus curiae* Association of American Railroads in support of petitioners.

Mark W. Pennak, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were *Gregory G. Katsas*, Assistant Attorney General, and *Leonard Schaitman*, Attorney. *Lowell V. Sturgill, Jr.*, Attorney, entered an appearance.

Before: HENDERSON, TATEL, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Under Department of Transportation regulations, employees in the aviation, rail, motor carrier, mass transit, maritime and pipeline industries who either fail or refuse to take a drug test must successfully complete a drug treatment program and pass a series of urine tests as a condition of performing any safety-sensitive duties. To prevent cheating, the Department modified its regulations in 2008 to require that such tests be conducted under direct observation. Petitioners, a railway company and several transportation unions, challenge the revised regulation, arguing that it violates both the Administrative Procedure Act and the Fourth Amendment. For the reasons set forth in this opinion, we find the Department's considered justification for its policy neither arbitrary nor capricious, and although we recognize the highly intrusive nature of direct observation testing, we conclude that the regulation complies with the Fourth Amendment.

I.

Acting pursuant to the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, tit. V, 105 Stat. 917, the Department of Transportation promulgated regulations requiring pre-employment, random, and post-accident drug and alcohol tests for employees throughout the transportation industry. 49 C.F.R. pt. 40. Employees who fail or refuse to take drug tests are barred from performing safety-sensitive duties until they complete a treatment program under the supervision of a substance abuse professional. 49 C.F.R. § 40.285. Employees who successfully complete the program must then pass a "return-to-duty" urine test before resuming safety-sensitive duties. 49 C.F.R. §§ 40.285, .305. During the next twelve months, the employees must also pass at least six unannounced "follow-up" urine tests. 49 C.F.R. §§ 40.307(d), .309.

Prior to the rulemaking at issue in this case, employers had the option of conducting return-to-duty and follow-up tests using so-called "direct observation," a procedure that requires a same-gender observer to "watch the urine go from the employee's body into the collection container." 49 C.F.R. § 40.67(i) (2007). Concerned that employers were underutilizing this option, especially in light of evidence of a growing proliferation of products that facilitate cheating on drug tests, the Department solicited comment on additional procedures to strengthen testing integrity. In 2008, the Department promulgated a regulation requiring transportation industry employers to use direct observation for all return-to-duty and follow-up testing. Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 Fed. Reg. 62,910, 62,918 (Oct. 22, 2008) ("Direct Observation Rule"). The regulation also requires that immediately prior to all

direct observation tests, employees must raise their shirts above the waist and lower their lower clothing so as to expose their genitals and allow the observers to verify the absence of any cheating devices. 49 C.F.R. § 40.67(i) (2008).

Several transportation industry unions and the BNSF Railway Company, supported by amicus Association of American Railroads, petition for review. Although the partial disrobing requirement became effective on August 27, 2008, we stayed the direct observation requirement pending our resolution of these consolidated petitions. *BNSF Ry. Co. v. DOT*, No. 08-1264 (D.C. Cir. Nov. 12, 2008). Petitioners argue that the Department's decision to impose these requirements violates the Administrative Procedure Act's (APA) prohibition on arbitrary and capricious agency action and the Fourth Amendment's protection against unreasonable searches. We consider each argument in turn.

II.

Under the Hobbs Administrative Orders Review Act, we evaluate Department of Transportation orders using the familiar standards set forth in the APA. *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987); 28 U.S.C. § 2342(3)(A). Under that framework, agencies must provide a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Petitioners argue that the Department's promulgation of the revised regulation was arbitrary and capricious under this standard. We disagree.

The Department marshaled and carefully considered voluminous evidence of the increasing availability of a variety of products designed to defeat drug tests. It cited congressional testimony describing the ready availability,

through Internet sales, of hundreds of different cheating products, Direct Observation Rule, 73 Fed. Reg. at 62,912, the most elaborate of which is a "prosthetic device that looks like real human anatomy, color-matched," that can be used to deliver synthetic or drug-free urine, *id.* at 62,911. The Department also relied on a Government Accountability Office (GAO) report indicating that existing drug testing protocols were inadequate to prevent cheating. According to the report, GAO undercover investigators were able to adulterate their urine specimens even at testing sites that followed then-existing procedures. *Id.* at 62,912. Based on this and similar evidence, the Department determined it was "not practicable" to ignore the cheating problem. *Id.* at 62,916.

Petitioners dispute none of this evidence. Instead, they fault the Department for failing to provide direct evidence that employees are actually using cheating devices. Acknowledging that it had no statistics on the rates of actual use of such devices, the Department inferred their use from the anecdotal evidence of their availability. *Id.* at 62,913. As any successful use of cheating devices would not show up in statistics, the Department reasoned, it was "illogical" to require statistical evidence of cheating. *Id.* Given that people presumably buy cheating devices to use them, we think this approach quite reasonable. As the Supreme Court said just over two weeks ago, "It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable." *FCC v. Fox Television Stations, Inc.*, No. 07–582, 2009 WL 1118715, at *11 (U.S. Apr. 28, 2009) (citation omitted).

Petitioners devote most of their effort to a separate argument—that whether or not cheating is a problem

generally, the Department acted arbitrarily and capriciously in concluding that returning employees are more likely to cheat than employees not subject to direct observation testing. But the Department's approach was sound. Acknowledging the intrusiveness of direct observation testing, the Department sought to limit it to situations posing a high risk of cheating, *id.* at 62,911, and then concluded—reasonably in our view—that returning employees have a heightened incentive to cheat, and that this incentive, coupled with the increased availability of cheating devices, creates such a high risk, *id.* at 62,916.

The Department's conclusion that returning employees have a heightened incentive to cheat rested in part upon the heavy sanctions reserved for repeat violations. The Department noted that many employers have adopted "two strikes and out" policies that require termination upon a second drug violation, *id.* at 62,914, and that in the aviation industry second offenders are subject to a statutory permanent bar on aviation-related employment, *id.*; *see* 49 U.S.C. § 45103(c). Petitioners object that the Department's reasoning is inconsistent with its treatment of post-accident testing. As petitioners point out, although employees involved in accidents are subject to mandatory testing immediately after the event, *see, e.g.*, 49 C.F.R. §§ 199.105(b); 219.201(a); 382.303(b); 655.44(a), that testing is not directly observed, § 40.67(a)–(c). According to petitioners, treating post-accident and returning employees differently is irrational because the former, subject as they are to civil or criminal liability, have just as great an incentive to cheat as the latter.

Petitioners' argument might have had some force had the Department relied solely on this theory. But it didn't. Substantial additional evidence supports the Department's conclusion that returning employees are particularly likely to cheat. Specifically, several substance abuse professionals

submitted comments supporting the direct observation requirement, and the Department reasonably put "a great deal of weight" on their assessments, stressing their expertise and first-hand experience in administering the treatment programs and planning the follow-up testing. *Id.* at 62,914. To be sure, several substance abuse professionals spoke only generally about the cheating problem, but others expressly stated that returning employees in particular have a heightened motive to cheat. One said that "[p]ersons who have broken trust with the traveling public by testing positive for a prohibited substance, although they knew they would be drug tested, are high risk for using that substance again and motivated to conceal their conduct." Comments of Evan M. Peterson, Dep't of Transp. Docket No. OST-2003-15245 (Sept. 9, 2008). [J.A. 272.] Another said that "those who have tested positive in the past, and who continue to abuse drugs, are motivated by their addiction to adulterate, substitute, or use prosthetic-type devices to provide a 'clean' specimen at the collection site." Comments of Susan L. Clark, Dep't of Transp. Docket No. OST-2003-15245 (Sept. 26, 2008). [J.A. 323.] Given the experience possessed by these substance abuse professionals, such assessments provide substantial evidence supporting the Department's conclusion that returning employees are particularly likely to cheat on drug tests.

Moreover, the Department supplemented its conclusion about returning employees' motivations with evidence of their actual behavior. To rebut the argument—offered by several commenters and echoed here by petitioners—that returning employees are lower risk because they have successfully completed drug treatment programs, the Department emphasized data showing that "the violation rate for return-to-duty and follow-up testing is two to four times higher than that of random testing." Direct Observation Rule, 73 Fed.

Reg. at 62,916. Petitioners point out that these statistics measure only failure, not cheating. Indeed, petitioners claim that data showing returning employees' higher recidivism rates may simply indicate that they are less likely to cheat on drug tests. Theoretically we suppose it might. But the Department was surely entitled to take the contrary view. We can hardly fault the Department for inferring that the reason for higher failure rates is not that returning employees are more honest, but that they are more likely to use drugs. And given that employees who never use drugs are—to say the least—much less likely to cheat on drug tests than those who do, we think it quite reasonable for the Department to see a higher underlying rate of drug use as evidence of a higher risk of cheating.

Finally, petitioners complain that the Department failed to consider less intrusive alternatives. They point out that some commenters suggested that the Department test hair and saliva rather than urine. As the Department explained, however, the Omnibus Testing Act required it to use only testing methods approved by the Department of Health and Human Services, which "ha[d] not approved any specimen testing except urine." *Id.* at 62,917; *see also* 105 Stat. 917, 955, 957, 959, 963. And although commenters suggested other safeguards such as further training of collection personnel and pursuit of additional legislative authority, the Department responded—again reasonably in our view—that it was pursuing these approaches as well but that they could not substitute for the efficacy of direct observation. Direct Observation Rule, 73 Fed. Reg. at 62,916–17.

In their brief, petitioners suggest some additional less intrusive alternatives, pointing out for example that the government has successfully prosecuted makers of one prominent prosthetic device, the "Whizzinator," for

conspiring to defeat federal drug tests. Petrs.' Reply Br. 11. But the mere fact that the government can occasionally prosecute makers of some cheating devices hardly renders irrational the Department's decision to address the risks posed by the host of similar devices still on the market. Petitioners also suggest that the existing regulations, permitting but not requiring direct observation for returning employees, represent an alternative means of adequately ensuring transportation safety. But the Department found that employers, concerned about the effects on "labor-management agreements" and fearing "upsetting employees," rarely exercise this option. Direct Observation Rule, 73 Fed. Reg. at 62,917. Indeed, amicus Association of American Railroads confirms that direct observation tests "generate resentment and ill will towards management," Amicus Br. 8, further supporting the Department's conclusion that the status quo was untenable.

Thus, the Department acted neither arbitrarily nor capriciously in concluding that the growth of an industry devoted to circumventing drug tests, coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the mandatory use of direct observation. We thus turn to petitioners' argument that the Department's suspicionless use of direct observation for returning employees, as well as the partial disrobing requirement, runs afoul of the Fourth Amendment.

III.

Compelled urine tests are searches for the purposes of the Fourth Amendment's prohibition on "unreasonable searches and seizures," U.S. CONST. amend. IV. *See Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 617 (1989). Although warrantless searches are, "subject only to a few specifically

established and well-delineated exceptions," *Arizona v. Gant*, No. 07-542, 2009 WL 1045962, at *5 (U.S. Apr. 21, 2009), generally unreasonable, drug tests for transportation safety fall into the "special needs" exception to the warrant requirement. *Skinner*, 489 U.S. at 619–20. Under this framework, we may uphold a warrantless search serving "special needs, beyond the normal need for law enforcement," *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (internal quotation marks omitted), if, upon conducting a balancing test, we find that the government's interest in conducting the search outweighs the individual's privacy interest, *id.* at 652–53.

The government's interest in transportation safety is "compelling," to say the least. *Skinner*, 489 U.S. at 628. "Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* Petitioners dispute the extent of the cheating problem, but as discussed above, the Department permissibly found it to be great indeed. *Cf. Vernonia*, 515 U.S. at 662–63 (reviewing for clear error district court findings of fact regarding the extent of a school's drug problem). And although the effectiveness of a search compared to available alternatives may be relevant to the government's interest in conducting the search, *see Delaware v. Prouse*, 440 U.S. 648, 659 (1979), there is no per se requirement that the government use the least intrusive practicable means, *Vernonia*, 515 U.S. at 663. Given the proliferation of cheating devices, we have little difficulty concluding that direct observation furthers the government's interest in effective drug testing.

Petitioners argue that the unannounced nature of follow-up tests diminishes the need for direct observation testing. We think the Department's contrary assessment was

reasonable. *See Skinner*, 489 U.S. at 629 n.9 (deferring to agency's rejection of less intrusive alternatives). Though the precise dates of follow-up tests are unannounced, returning employees know they will have to face at least six such tests over the first year of their return to work. § 40.307(d). Armed with such foreknowledge, returning employees can easily obtain and conceal cheating devices, keeping them handy even for unannounced follow-up tests. *See* Direct Observation Rule, 73 Fed. Reg. at 62,912 (noting concealability of cheating products). The government thus has a strong interest in conducting direct observation testing to ensure transportation safety.

The other side of the balance is trickier. Individuals ordinarily have extremely strong interests in freedom from searches as intrusive as direct observation urine testing. In this case, however, those interests are diminished because the airline, railroad, and other transportation employees subject to direct observation perform safety-sensitive duties in an industry that is "regulated pervasively to ensure safety." *Skinner*, 489 U.S. at 627. That said, when the Supreme Court recognized the diminished nature of transportation employees' privacy interests and found suspicionless drug testing permissible, it stressed that the tests at issue in that case required no direct observation. *Id.* at 626; *see also NTEU v. Von Raab*, 489 U.S. 656, 672 n.2 (1989) (similar regarding testing of armed customs officers). The Court thus had no occasion to decide whether merely performing safety-sensitive duties in an industry pervasively regulated for safety diminishes employee privacy interests so drastically as to allow direct observation urine testing.

According to the Department, returning employees have diminished privacy interests for reasons over and above their performance of safety-sensitive duties in a pervasively

regulated industry. It claims that their privacy interests are diminished by the existing drug testing regulations, which currently permit employers to use direct observation on return-to-duty and follow-up examinations. *See supra* at 3. To avoid circularity, of course, one's privacy interests can only be diminished by a valid regulation. True, as the Department points out, petitioners don't challenge the existing regulations, but petitioners contend that under those regulations discretionary direct observation is employed only in cases of reasonable suspicion, a claim the Department never rebuts. Petrs.' Opening Br. 9; Petrs.' Reply Br. 17. For our purposes, then, the existing regulations are of limited relevance to the employees' interests in freedom from the *suspicionless* direct observation searches required by the challenged regulation.

We see more merit in the Department's second reason for suggesting that returning employees' privacy interests are diminished, namely that all have violated the Department's drug regulations by either refusing to take a test or testing positive. As petitioners make no claim that the drug tests suffer from a false positive problem, the violations were, for the purposes of this case, actual and intentional, and in this sense the Department is correct. By choosing to violate the Department's perfectly legitimate—and hardly onerous—drug regulations, returning employees have placed themselves in a very different position from their coworkers. Of course, this does not mean, as the Department claims, that returning employees are akin to convicted offenders on probation or parole; after all, the latter are subject to penal sanctions imposed after criminal process. *Cf. Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." (internal quotation marks omitted)). Nor is the privacy diminution occasioned by

the intentional violation of a drug regulation either everlasting or dispositive—even following a fully informed violation, some searches might still be so disproportionate to government interests as to be unreasonable. That said, we have little trouble concluding that employees who have intentionally violated a valid drug regulation, at least in the relatively recent past, *see* § 40.307 (providing a five-year time limit on follow-up tests), have less of a legitimate interest in resisting a search intended to prevent future violations of that regulation than do employees who never violated the rule.

We turn, then, to balancing the individuals' interest with the government's. Although weighing the strength of each is necessarily imprecise, we think that the employees' prior misconduct is particularly salient, especially compared to their choice to work in a pervasively regulated industry. It's one thing to ask individuals seeking to avoid intrusive testing to forgo a certain career entirely; it's a rather lesser thing to ask them to comply with regulations forbidding drug use. True, direct observation is extremely invasive, but that intrusion is mitigated by the fact that employees can avoid it altogether by simply complying with the drug regulations. On the other side of the balance, the Department has reasonably concluded that the proliferation of cheating devices makes direct observation necessary to render these drug tests—needed to protect the traveling public from lethal hazards—effective. Weighing these factors, we strike the balance in favor of permitting direct observation testing in these circumstances.

Petitioners insist that we reached a different result in *NTEU v. Yeutter*, 918 F.2d 968, 976 (D.C. Cir. 1990). There we held unconstitutional a regulation requiring direct observation for drug tests that rested on reasonable suspicion of drug use but no suspicion of cheating. *Id.* at 976; *see also*

Piroglu v. Coleman, 25 F.3d 1098, 1101 (D.C. Cir. 1994) (citing to *Yeutter*'s holding without further analysis). In *Yeutter*, however, we expressly left open the question whether direct observation could ever be permissible, instead relying solely on our conclusion that the direct observation procedures at issue "d[id] not significantly improve testing accuracy." *Yeutter*, 918 F.2d at 976. That conclusion in turn rested largely on the premise, supported by the record in that case, that standard monitoring procedures—"collecting outer-garments, dying toilet water, listening for urination"—were adequate to detect cheating. *Id.* But that was before the Whizzinator and its like. Given the proliferation of such cheating devices, here we have a very different record, one that fully supports the Department's finding that standard monitoring procedures are inadequate. We thus conclude that here, unlike in *Yeutter*, direct observation testing will "significantly improve testing accuracy," *id.*

Petitioners also claim that the partial disrobing requirement amounts to a strip search. As they acknowledge, however, the balancing inquiry remains the same regardless of how one characterizes the search. *See Bell v. Wolfish*, 441 U.S. 520, 559–60 (1979) (analyzing cavity search by balancing interests); *Stanley v. Henson*, 337 F.3d 961, 964 (7th Cir. 2003) ("Whether we . . . label the process a 'strip search' or merely a 'search' is unimportant, as the analysis remains the same."). Applying that analysis, we recognize the intrusiveness of the partial disrobing requirement, but find it only somewhat more invasive than direct observation, which already requires employees to expose their genitals to some degree. Because of this, and because the Department has permissibly found the requirement necessary to detect certain widely-available prosthetic devices, we conclude that it represents a reasonable procedure for situations posing such a

heightened risk of cheating as to justify direct observation in the first place.

At oral argument petitioners claimed that no court has ever upheld suspicionless direct observation testing of non-incarcerated civilians. Maybe so, but they cite no case presenting facts similar to those we face here. Given the combination of the vital importance of transportation safety, the employees' participation in a pervasively regulated industry, their prior violations of the drug regulations, and the ease of obtaining cheating devices capable of defeating standard testing procedures, we find the challenged regulations facially valid under the Fourth Amendment.

We emphasize the limited nature of our holding. Because petitioners bring a facial challenge, we consider only "whether the tests contemplated by the regulations can *ever* be conducted." *Skinner*, 489 U.S. at 632 n.10. We thus express no view on either the merits of any as-applied challenge to this rule or the constitutionality of any other rule.

IV.

For the reasons stated above, we deny the petitions for review.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3064 **September Term, 2008**

UNITED STATES OF AMERICA,
APPELLEE

FILED ON: MAY 15, 2009

V.

KEVIN QUATTLEBAUM,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cr-00235-JDB-1)

Before: GINSBURG and KAVANAUGH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments by the parties. Upon consideration of the foregoing, it is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

Kevin Quattlebaum was arrested after police officers found crack cocaine in a truck in which he was a passenger. The district court denied his motion to suppress the crack cocaine, finding that the police had probable cause to stop the truck for making a left turn without signaling and probable cause to search the truck after they detected the odor of marijuana coming from inside the vehicle.

The Federal Rules of Criminal Procedure require a party to make any "defense, objection, or request" relating to suppression before trial begins; failure to do so constitutes waiver. Fed. R. Crim. P. 12(b)(3)(C), 12(e). Quattlebaum raises two arguments on appeal that he failed to raise at the suppression hearing. He first contends that the police lacked probable cause to stop his truck for violating the District of Columbia's turn signal regulation because the regulation only requires a signal "if any other traffic may be affected by the movement." D.C. Mun. Regs. tit. 18 § 2204.3. Merely raising the larger issue whether the police had probable cause, as Quattlebaum did, did not preserve this issue. A criminal defendant must "make clear the basis of [his] objections" so that the district court can "consider [his] particular argument" before appeal. *United States v. Mitchell*, 951 F.2d 1291, 1296–97 (D.C. Cir. 1991) (quoting *United States v. Bailey*, 675 F.2d 1292, 1294 (D.C. Cir. 1982)); *see also United States v. Hewlett*, 395 F.3d 458, 460 (D.C. Cir. 2005). Quattlebaum failed to meet this requirement.

Appellate courts generally do not review waived arguments unless there was "good cause" for the failure to raise the argument. *See, e.g.*, *United States v. Gonzales*, 927 F.2d 139, 143–44 (3rd Cir. 1991). There was no good cause here. Even if there were, we would reject Quattlebaum's argument. The broad language of D.C. Mun. Regs. tit. 18 § 2204.3 suggests that a driver violates the law if he fails to signal a turn when other vehicles – including police cars – are close enough to his vehicle that they might have to alter their driving in any way due to the turn. Courts interpreting identical statutes have held that a driver violates the law by failing to signal when trailed by a police car, *United States v. Burkley*, 513 F.3d 1183, 1187 (10th Cir. 2008); *State v. Williamson*, 650 A.2d 348, 349 (N.J. 1994); *People v. Miranda*, 17 Cal. App. 4th 917, 930 (Cal. Ct. App. 1993), or where other traffic is present, *State v. Moss*, 649 A.2d 1349, 1350 (N.J. Super. Ct. App. Div. 1994). Here, one police car was directly behind Quattlebaum's vehicle when it made the left turn and another was traveling towards the vehicle from the opposite direction. Either could have been affected by the turn.

Quattlebaum also argues that the tactics used during the traffic stop – the police handcuffed him when he exited his vehicle – converted the stop into an unlawful arrest. Not only did Quattlebaum fail to raise this issue in his motion to suppress, he expressly waived it. The motion conceded that "[i]t does not appear that [the] Defendant was arrested at the time of the stop." As a result, the facts relevant to the question whether Quattlebaum was arrested before or after the police found the crack

cocaine were not developed at the suppression hearing. The waiver provisions of the Federal Rules of Criminal Procedure must apply in such a situation.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5226 **September Term, 2008**

Filed On: May 8, 2009

CHARLES C. APPLEBY,
APPELLANT

v.

PETE GEREN, SECRETARY OF THE ARMY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 06-cv-0193-RBW)

Before: GINSBURG, HENDERSON and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed for the reasons given in the attached memorandum opinion.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

MEMORANDUM OPINION

In 2003 Charles Appleby, believing that prior to his retirement he had been unlawfully denied an opportunity for a promotion within the Florida Army National Guard, sought retroactive promotion from the Army Board for the Correction of Military Records. When the Board denied his application, Appleby challenged its decision in the district court pursuant to the Administrative Procedure Act. The district court granted summary judgment to the Army with respect to the three claims at issue in this appeal. The relevant facts, which are canvassed in the opinions of the Board and of the district court, are undisputed. Reviewing the matter *de novo*, *see Kreis v. Sec'y of Air Force*, 406 F.3d 684, 685 (D.C. Cir. 2005), we affirm the judgment of the district court because the Board reasonably exercised its discretion not to grant Appleby's application.

The Secretary of the Army, acting through a board of correction, "may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Because the Secretary has the discretion not to correct a record if he does not "consider[] it necessary" to do so, *id.*, we apply an "unusually deferential" version of the "'arbitrary or capricious' standard" of the APA to the Board's denial of Appleby's application. *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989). Even in the face of an "undisputed error" or "conceded injustice," we must deny the petition for review if the Board offered an adequate explanation "that a court can measure." *Id.*

Appleby first claims the Board should have granted his application because the Army violated 10 U.S.C. § 14311(c) when it failed to give him adequate notification that the Secretary of Defense had decided to ask the Senate to withhold consideration of his nomination pending resolution of an investigation into Appleby's alleged reprisal against a whistleblower. His

argument raises two issues. First, § 14311(c)(1) requires the Army to "give[] written notice of the grounds for the delay" of a promotion. Appleby, whose nomination was then pending before the Senate, received two telephone calls in October 2000 informing him of the whistleblower complaint and of the delay. The Board concluded Appleby had not shown "evidence of any harm that resulted from his telephonic notification vice written notification." Appleby gives us no cause to disturb that reasonable judgment as to the medium of notification.

Second, Appleby challenges the adequacy of the message he received, citing § 14311(c)(2) of the statute, which provides, "An officer whose promotion is delayed ... shall be given an opportunity to make a written statement to the Secretary of the military department concerned in response to the action taken. The Secretary shall give consideration to any such statement." Appleby argues the Army's failure to notify him of his right to respond in writing to the Secretary of the Army robbed him of the opportunity to obtain and submit evidence with which to refute or mitigate the allegations against him. The Board found there was no "evidence of any harm" caused by "telephonic notification vice written notification"; in other words, having been informed of the delay, Appleby had an adequate opportunity to respond to it. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (court must defer to Board if its "path may reasonably be discerned" from its order (internal quotation marks omitted)).

Be that as it may, we note the Board's assessment was consistent with the statute. Section 14311(c)(1) specifies the requisite notice must communicate "the grounds for the delay." 10 U.S.C. § 14311(c)(1). Section 14311(c)(2) says nothing further about notice but instead requires the Secretary of the Army to "give[] [the officer] an opportunity" to respond to the delay and to consider the officer's response.

On November 3, 2000 Appleby sent a memorandum to the Assistant Adjutant General of the Florida Army National Guard requesting a review of attached documents detailing the conduct that was the subject of the pending investigation. Appleby, who may not then have known the source of the complaint, nonetheless had an opportunity to submit evidence regarding the subject matter of the investigation that triggered the delay. The Assistant Adjutant General responded on December 4, 2000 and included with his response a memorandum naming one of Appleby's subordinates as a possible complainant against him. In the light of this evidence, we cannot say the Board was unreasonable in concluding any error in notification was harmless.

After it decided the initial allegations could not be substantiated, the Army pursued a new investigation from January to June 2001, but that did not prejudice Appleby's cause because the Senate had on December 15, 2000 returned Appleby's nomination to the President pursuant to Senate Rule XXXI(6) ("if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President"). Therefore, Appleby's name was removed from the promotion list by operation of law. *See* 10 U.S.C. § 14310(b). Because Appleby's nomination was not pending after December 2000, the 2001 investigation did not "delay" his promotion within the meaning of 10 U.S.C. § 14311. Consequently, we need not consider whether Appleby had adequate notice of the new allegations.

Appleby also argues the Secretary of Defense improperly delayed his promotion when the Secretary asked the Senate in October 2000 to withhold action pending completion of the original investigation. Section 14311(d) of the statute prohibits a delay of an "appointment of an officer to a higher grade ... for more than six months after the date on which the officer would

otherwise have been promoted unless the Secretary concerned specifies a further period of delay," *id.* § 14311(d). Because the Army could have delayed Appleby's promotion for six months without secretarial authorization, Appleby cannot show the statute was violated by the two-and-a-half month delay that occurred before the Senate returned his nomination to the President without having acted upon it.

We believe, moreover, the Board reasonably declined to correct any error by the Army after concluding the delay was not "undue" or "unnecessary." Although the statute indicates the Secretary of the Army, as the "Secretary concerned," should have been the one to authorize the delay, *see id.*; *id.* § 101(a)(9)(A), he answers to the Secretary of Defense, and Appleby has given us no reason to think the Secretary of the Army would have taken a position different from that of his superior. Therefore, even if the Board was incorrect in concluding the delay was lawful in all respects, any error was harmless. *See Air Canada v. DOT*, 148 F.3d 1142, 1156–57 (D.C. Cir. 1998).

Appleby also contends the statute prohibits the Secretary from delaying a promotion for an open-ended period, that is, one measured not by a calendar date but by a future condition or event. As to this issue, the Board correctly concluded "the evidence suggests that his nomination was properly withheld from the Senate in accordance with" Instruction 1320.4, Military Officer Actions Requiring Approval of the Secretary of Defense or the President, or Confirmation by the Senate (Dep't of Def. Mar. 14, 1995), which implements Title 10 of the United States Code. The evidence before the Board, upon which it implicitly relied, included advisory opinions by the General Officer Management Office and by the National Guard, both of which determined the Secretary's action was lawful. The key statutory text -- "a further period of delay," 10 U.S.C. § 14311(d) -- does not foreclose the reasonable interpretation of the Secretary of Defense that the

statute permits the Army to measure a "period" by a condition or event, and to institute a delay without specifying a further period once the statutory limit of six months has been reached. Therefore, the Board did not err in determining the period of the delay was lawful.

Appleby's final argument is that he was not lawfully retired pursuant to 10 U.S.C. § 14507(b) because his name was never removed from the promotion list under 10 U.S.C. § 14310. If, however, after the President nominates an officer whose name is on the promotion list to the Senate, the Senate returns that nomination to the President, then the officer's name is removed from the promotion list by operation of law, which occurred here. Hence, the Board reasonably concluded the "clock simply ran out on" Appleby's hope for a promotion when he was lawfully retired from the National Guard on July 31, 2001.

For the foregoing reasons, we affirm the judgment of the district court in favor of the Army.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5527 **September Term 2008**

1:08-cv-00086-ESH

Filed On: May 8, 2009

Benoit Otis Brookens, II,

Appellant

v.

Hilda L. Solis, Secretary, U.S. Department of Labor,

Appellee

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has failed to demonstrate a genuine issue of material fact that the appellee's proffered reasons for not promoting him were pretextual or that he was denied the promotions because of discriminatory or retaliatory animus. See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives, 520 F.3d 490, 494 (D.C. Cir. 2008). The district court did not abuse its discretion in denying appellant's Fed. R. Civ. P. 56(f) request for discovery, because any information pertaining to his qualifications under the delegated examining authority would have been irrelevant, and the remainder of the request lacked the requisite specificity. See Messina v. Krakower, 439 F.3d 755, 762 (D.C. Cir. 2006) ("A party making a Rule 56(f) request must state concretely why additional discovery is needed to oppose a motion for summary judgment. We will not find an abuse of discretion where the requesting party has offered only a conclusory assertion without any supporting facts to justify the proposition that the discovery sought will produce the evidence required.") (internal quotations and citations omitted). The district court properly dismissed appellant's 42 U.S.C. § 1981 claim with prejudice. See Hohri v. United States, 782 F.2d 227, 245 n.43 (D.C. Cir. 1986), vacated on other grounds, 482

U.S. 64 (1987) (stating that § 1981 does "not apply to actions against the United States").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5349 **September Term 2008**

1:02-cv-01743-RMC

Filed On: May 7, 2009

Oscar L. Thomas,

Appellant

v.

Eric K. Shinseki, Secretary, Department of Veterans Affairs, et al.,

Appellees

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to appoint counsel or amicus curiae; the motion for summary affirmance, the opposition thereto and motion for summary reversal, the response thereto and reply in support of summary affirmance, and the reply in support of summary reversal, which contains a request for judicial notice, it is

ORDERED that the motion for appointment of counsel or amicus curiae be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly reviewed this case under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, because appellant's amended complaint did not sue any federal employees in their individual capacities. The amended complaint's reference to "et al." was not sufficient to name all of the defendants from appellant's original complaint. See Fed. R. Civ. P. 10(a).

The district court properly concluded that the majority of appellant's FTCA claims were either time-barred or not properly presented to the agency. See Simpkins v. District of Columbia Government, 108 F.3d 366, 371 (D.C. Cir. 1997); Bembenista v. United States, 866 F.2d 493, 499 (D.C. Cir. 1989). The doctrine of equitable estoppel is not applicable to appellant's case, because he presented no evidence that some extraordinary circumstances prevented him from filing his claims before the statute of limitations had run out. See Pace v. DiGuglielmo, 544 U.S. 408, 418 (2008).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5349 **September Term 2008**

With respect to the only claim appellant properly exhausted, the district court correctly determined that he failed to present expert testimony, as required by Tennessee law, see Tarpeh-Doe v. U.S., 28 F.3d 120, 123 (D.C. Cir. 1994), to establish the proper standard of care and demonstrate that appellee's actions fell below that standard. See Norris v. East Tn. Children's Hosp., 195 S.W.3d 78, 86-87 (Tenn. Ct. App. 2005). Aside from being improperly raised, see Singelton v. Wulf, 428 U.S. 106, 120 (1976) ("It is the general rule...that a federal appellate court does not consider an issue not passed upon below."), appellant's contention that under the doctrines of res ipsa loquitur and common knowledge his claims do not require expert testimony fails because even if these doctrines were applicable, expert testimony would still be necessary to prove that the alleged medical malpractice on the part of the appellee was the proximate cause of appellant's injury. See Meek v. HealthSouth Rehab. Ctr., 2006 WL 2106001, at *3 (Tenn. Ct. App. July 28, 2006).

Finally, the district court did not abuse its discretion when it dismissed the John Does from appellant's complaint, because appellant did not serve the summons upon the individuals designated as "John Doe" within the appropriate time frame. See Fed. R. Civ. P. 4(m). Nor has appellant shown that he suffered any prejudice from the various other rulings of the district court that he challenges on appeal. See United States v. Microsoft Corp., 253 F.3d 34, 100 (D.C. Cir. 2001) (circuit court will not disturb district court's management of its docket "except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant"). It is

FURTHER ORDERED that appellant's request for judicial notice be denied. See Fed. R. Evid. 201(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5464 **September Term 2008**

1:07-cv-01286-HHK

Filed On: May 7, 2009

Norman A. Thomas,

Appellant

v.

District of Columbia Government, et al.,

Appellees

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance, and the oppositions thereto, which include a request for remand to the district court, it is

ORDERED that the request for remand be denied and the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant failed to allege an official municipal policy or custom that caused him to be deprived of a constitutional right, as is necessary to hold the District of Columbia liable under 42 U.S.C. § 1983. See Carter v. Dist. of Columbia, 795 F.2d 116, 122 (D.C. Cir. 1986). The district court lacked jurisdiction over Appellant's claim against the Department of Homeland Security. See 8 U.S.C. § 1252(g). The district court order of October 30, 2008, dismissing New York as a defendant is not before the court because Appellant did not amend his notice of appeal to include that order. See Fed. R. App. P. 3(c)(1)(B) (providing that the "notice of appeal must . . . designate the judgment, order, or part thereof being appealed").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5169 **September Term 2008**

1:08-cv-00691-JDB

Filed On: May 7, 2009

Heriberto Morales,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's orders filed June 12, 2008, and January 22, 2009, directing appellant to either pay the $455 appellate docketing and filing fees or file a motion for leave to proceed in forma pauperis, and the response thereto, it is

ORDERED, on the court's own motion, that this appeal be dismissed for lack of prosecution. See D.C. Cir. Rule 38. Appellant has not paid the docketing and filing fees, nor moved for leave to proceed in forma pauperis on appeal, despite the court's orders warning him that failure to do so would result in dismissal of the appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1023 **September Term 2008**

SEC-Rel34-59141

Filed On: May 7, 2009

Salvatore F. Sodano,

Petitioner

v.

Securities and Exchange Commission,

Respondent

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The court of appeals has jurisdiction over final orders of the Securities and Exchange Commission ("SEC"). See 15 U.S.C. § 78y(a)(1). As a general matter, agency orders remanding a matter for further administrative proceedings are interlocutory orders, because they do not meet the requirements of finality. See Meredith v. Federal Mine Safety and Health Review Commission, 177 F.3d 1042, 1047 (D.C. Cir. 1999). The SEC's remand order here does not fall within the exception to the final judgment rule under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7008 **September Term 2008**

1:08-cv-01796-RBW

Filed On: May 7, 2009

David Kissi,

Appellant

v.

EMC Mortgage Corporation, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; the Clerk's order filed February 18, 2009, directing appellant to show cause why this appeal should not be dismissed for lack of a final order; and the response thereto, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated any likelihood of success on the merits. It is

FURTHER ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed for lack of jurisdiction. Appellant seeks to appeal the district court's December 11, 2008 order, granting the motions for a protective order. Protective orders like the one here, however, that "only regulate materials exchanged between the parties incident to litigation . . . are neither final orders, appealable under 28 U.S.C. § 1291 . . . nor injunctions, appealable under 28 U.S.C. § 1292(a)(1)." United States v. Pappas, 94 F.3d 795, 798 (2d Cir. 1996); see also McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 353 (D.C. Cir. 1995) ("Discovery orders are not usually appealable until the litigation has finally ended."). This court can effectively review the protective order when it considers the appeal from the final judgment in the action. See Periodical Publishers Serv. Bureau, Inc. v. Keys, 981 F.2d 215, 218 (5th Cir. 1993).

As for appellant's argument concerning Fed. R. App. P. 5, "filing a notice of appeal in the district court," which is all that appellant did here, "does not comply with

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7008 **September Term 2008**

the requirement of Rule 5(a)(1) & (2) that a permission to appeal be filed with the circuit clerk within the time specified in the authorizing statute for the discretionary appeal." Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007). Moreover, the district court has not certified the protective order issue for appeal pursuant to 28 U.S.C. § 1292(b).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5151 **September Term 2008**

1:03-cv-01951

Filed On: April 30, 2009

In re: Gilbert M. Graham,

Petitioner

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus and the motion for stay of the district court order, it is

ORDERED that the petition for writ of mandamus be denied. Petitioner has failed to show "how the remedy afforded by direct appeal will be 'clearly inadequate' to correct the perceived wrong." U.S. v. Poindexter, 859 F.2d 216, 222 (D.C. Cir. 1988). It is

FURTHER ORDERED that the motion for stay be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5487 **September Term 2008**

05cv01509
05cv01602

Filed On: April 7, 2009

Jamal Kiyemba, Next Friend, et al.,

Appellees

v.

Barack Obama, President of the United States, et al.,

Appellants

Consolidated with 05-5488, 05-5489, 05-5490

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed July 31, 2008, and cross-appellants' response thereto in Nos. 05-5488 and 05-5490, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that Nos. 05-5488 and 05-5490 be dismissed as moot in light of the district court's order lifting the stays in the habeas cases. In Re Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (D.D.C. July 29, 2008). It is

FURTHER ORDERED that the consolidation of Nos. 05-5488 and 05-5490 with Nos. 05-5487, et al., be terminated.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate in Nos. 05-5488 and 05-5490.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1336 **September Term 2008**

FERC-EL05-148-000
FERC-ER05-1410-002
FERC-ER05-1410-005

Filed On: March 4, 2009

Public Service Electric & Gas Company, et al.,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

PJM Interconnection, L.L.C., et al.,
Intervenors

Consolidated with 07-1414, 08-1008

BEFORE: Kavanaugh, *Circuit Judge*, and Edwards and Williams, *Senior Circuit Judges*

O R D E R

Upon consideration of the joint petitioners' motion to withdraw petitions for review in Nos. 07-1414 and 08-1008, it is

ORDERED that the motion be granted and these cases are hereby dismissed. The Clerk is directed to transmit a certified copy of this order to respondent in lieu of a formal mandate in 07-1414 and 08-1008 only.

Oral argument shall remain scheduled for Friday, March 6, 2009 in No. 07-1336.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1336 **September Term 2008**

FERC-EL05-148-000
FERC-ER05-1410-002
FERC-ER05-1410-005

Filed On: March 4, 2009

Public Service Electric & Gas Company, et al.,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

PJM Interconnection, L.L.C., et al.,
Intervenors

Consolidated with 07-1414, 08-1008

BEFORE: Kavanaugh, *Circuit Judge*, and Edwards and Williams, *Senior Circuit Judges*

O R D E R

Upon consideration of the joint petitioners' motion to withdraw petitions for review in Nos. 07-1414 and 08-1008, it is

ORDERED that the motion be granted and these cases are hereby dismissed. The Clerk is directed to transmit a certified copy of this order to respondent in lieu of a formal mandate in 07-1414 and 08-1008 only.

Oral argument shall remain scheduled for Friday, March 6, 2009 in No. 07-1336.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1287 **September Term 2008**

IRS-7/31/08

Filed On: February 2, 2009

William R. Tinnerman,

Petitioner

v.

Commissioner of Internal Revenue Service,

Respondent

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed on October 20, 2008, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed for lack of jurisdiction. Review of an Internal Revenue Service decision under 26 U.S.C. § 6330 must be sought in the first instance through a petition for redetermination filed with the United States Tax Court. See 26 U.S.C. § 6330(d)(1).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1189 **September Term 2008**

NLRB-22CA24770

Filed On: January 30, 2009

Essex Valley Visiting Nurses Association, et al.,
Petitioners

v.

National Labor Relations Board,
Respondent

Consolidated with 08-1238

No. 08-1334

Essex Valley Visiting Nurses Association,
Petitioner

v.

National Labor Relations Board,
Respondent

Consolidated with 08-1364

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order issued October 7, 2008, directing the parties to show cause why No. 08-1189 should not be dismissed as incurably premature, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1189 **September Term 2008**

FURTHER ORDERED that the petition for review in No. 08-1189 be dismissed as incurably premature. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002) (holding that a petition for review is incurably premature when a party seeks simultaneous agency reconsideration, and the jurisdictional defect cannot be cured by subsequent agency action). It is

FURTHER ORDERED that No. 08-1238 be consolidated with No. 08-1334, et al.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 08-1189 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1289 **September Term 2008**

FCC-07-57

Filed On: January 30, 2009

Michael Hartleib,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

Sirius XM Radio Inc.,
Intervenor

Consolidated with 08-1290

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the responses thereto, and the reply; and the motion to consolidate, and the responses thereto, it is

ORDERED that the motion to dismiss for lack of jurisdiction be granted. Whether these cases are appeals or petitions for review, Michael Hartlieb and U.S. Electronics both have failed to establish that they have suffered injuries-in-fact, caused by the challenged Federal Communications Commission's orders, and redressable by this court's actions. See Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 102-04 (1998); Sierra Club v. EPA, 292 F.3d 895, 899 (D.C. Cir. 2002). Hartlieb offers no evidence that he was a shareholder at the time Sirius Satellite Radio and XM Satellite Radio agreed to merge or if he was that his stock decreased in value as a result of the merger. Hartlieb claims the FCC's orders harmed his interest in securing competitiveness in the market for satellite radio receivers, but this alleged harm is general to all consumers, and Hartlieb does not show how he would benefit directly from relief. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). As to Hartlieb's contention that he is harmed by Sirius XM's failure to create an interoperable radio, Hartlieb does not explain why the FCC's order requiring Sirius XM to make such

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1289 **September Term 2008**

a radio available mitigates his injury, or how this court can redress this alleged, speculative harm. Hartlieb's claim of procedural injury based on the processing of his administrative petition also is unavailing because he has not shown a particularized, personal injury. See Int'l Bhd. of Teamsters v. TSA, 429 F.3d 1130, 1135 (D.C. Cir. 2005). Finally, Hartlieb fails to shown a "substantial probability" that the consent decrees will affect the future value of his stock. Nat. Resources Def. Council v. EPA, 464 F.3d 1, 6 (D.C. Cir. 2006). U.S. Electronics' claim that it is economically and competitively harmed by the FCC's orders fails because U.S. Electronics has not provided any evidence of the alleged harm, or shown causation between the challenged orders and the alleged injuries. U.S. Electronics' bare allegations are insufficient to establish standing, especially because the court is "particularly disinclined to find that the requirements of standing are satisfied" in cases such as this where the petitioner is challenging administrative orders to which it is not subject. KERM, Inc. v. FCC, 353 F.3d 57, 59 (D.C. Cir. 2004). It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1289 **September Term 2008**

FCC-07-57

Filed On: January 30, 2009

Michael Hartleib,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

Sirius XM Radio Inc.,
Intervenor

Consolidated with 08-1290

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the responses thereto, and the reply; and the motion to consolidate, and the responses thereto, it is

ORDERED that the motion to dismiss for lack of jurisdiction be granted. Whether these cases are appeals or petitions for review, Michael Hartlieb and U.S. Electronics both have failed to establish that they have suffered injuries-in-fact, caused by the challenged Federal Communications Commission's orders, and redressable by this court's actions. See Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 102-04 (1998); Sierra Club v. EPA, 292 F.3d 895, 899 (D.C. Cir. 2002). Hartlieb offers no evidence that he was a shareholder at the time Sirius Satellite Radio and XM Satellite Radio agreed to merge or if he was that his stock decreased in value as a result of the merger. Hartlieb claims the FCC's orders harmed his interest in securing competitiveness in the market for satellite radio receivers, but this alleged harm is general to all consumers, and Hartlieb does not show how he would benefit directly from relief. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). As to Hartlieb's contention that he is harmed by Sirius XM's failure to create an interoperable radio, Hartlieb does not explain why the FCC's order requiring Sirius XM to make such

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1289 **September Term 2008**

a radio available mitigates his injury, or how this court can redress this alleged, speculative harm. Hartlieb's claim of procedural injury based on the processing of his administrative petition also is unavailing because he has not shown a particularized, personal injury. See Int'l Bhd. of Teamsters v. TSA, 429 F.3d 1130, 1135 (D.C. Cir. 2005). Finally, Hartlieb fails to shown a "substantial probability" that the consent decrees will affect the future value of his stock. Nat. Resources Def. Council v. EPA, 464 F.3d 1, 6 (D.C. Cir. 2006). U.S. Electronics' claim that it is economically and competitively harmed by the FCC's orders fails because U.S. Electronics has not provided any evidence of the alleged harm, or shown causation between the challenged orders and the alleged injuries. U.S. Electronics' bare allegations are insufficient to establish standing, especially because the court is "particularly disinclined to find that the requirements of standing are satisfied" in cases such as this where the petitioner is challenging administrative orders to which it is not subject. KERM, Inc. v. FCC, 353 F.3d 57, 59 (D.C. Cir. 2004). It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1323 **September Term 2008**

FCC-E/B-06-SE-148

Filed On: January 30, 2009

US Electronics, Inc.,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to consolidate and the responses thereto; and the order to show cause filed on October 22, 2008, the responses thereto, and the reply, it is

ORDERED that the order to show cause be discharged, and, on the court's own motion, this case be dismissed for lack of jurisdiction. U.S. Electronics' notice of appeal was untimely filed. See 47 U.S.C. § 402(b). It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7086 **September Term 2008**

1:06-cv-01143-GK

Filed On: January 29, 2009

Joseph Slovinec,

Appellant

v.

American University,

Appellee

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the response, with supplements, thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly granted summary judgment on appellant's First Amendment claims, because appellant has not established that any government entity effectively controls American University's operations. See Williams v. Howard University, 528 F.2d 658, 660 (D.C. Cir.), cert. denied 429 U.S. 850 (1976). With respect to appellant's defamation claims, his claims fail because the barring notice does not contain false or defamatory statements about appellant. See Howard Univ. v. Best, 484 A.2d 958, 989 (D.C. Cir. 1984).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5103 **September Term 2008**

1:07-cv-01052-RWR

Filed On: January 27, 2009

Luis Humberto Barbosa,

Appellant

v.

Department of Justice, et al.,

Appellees

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; and the motion for summary affirmance, the opposition thereto, and the reply; and the motion for summary reversal, the opposition thereto, and the reply; it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Based on the declaration submitted by the Drug Enforcement Agency, the district court properly determined the agency had adequately justified its refusal to confirm or deny the existence of records because that information would be protected under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C). Any responsive records, if they existed, would be law enforcement records. To balance against the privacy interests protected by Exemption 7(C), appellant has failed to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" – which is the standard set by the Supreme Court for evaluating Exemption 7(C) claims. National Archives and Records Admin. v. Favish, 541 U.S. 157, 174 (2004). Appellant's unsubstantiated assertions of government wrongdoing do not establish a meaningful evidentiary showing that can overcome the presumption of legitimacy accorded to the government's official conduct. See Oguaju v. U.S., 288 F.3d 448 (D.C.

Cir. 2002), vacated, 541 U.S. 970, judgment reinstated, 378 F.3d 1115 (D.C. Cir.), amended, 386 F.3d 273 (D.C. Cir. 2004). Accordingly, we affirm the grant of summary judgment in favor of the government.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5423 **September Term 2008**

1:08-mc-00298

Filed On: January 26, 2009

Julie K. McCammon, also known as Julie K. McCammon, MD., Inc., also known as Julie McCammon, also known as Julie Samet, also known as Julie McCammon, MD, also known as Julie McCammon, MD, Inc.,

Appellant

v.

United States of America, et al.,

Appellees

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to withdraw notice of appeal, which includes a request for a refund of the $455 filing fee; and the response thereto, it is

ORDERED that the appeal be dismissed as moot. A case becomes moot when, by virtue of an intervening event, the court can no longer grant effective relief to the appellant. See United States v. Chrysler Corp., 158 F.3d 1350, 1353 (D.C. Cir. 1998). This case has become moot by virtue of the Internal Revenue Service's withdrawal of the summonses, and there is nothing further appellant could achieve through success on her appeal. See Pacific Fisheries Inc. v. U.S., 484 F.3d 1103, 1111 (9th Cir. 2007) (noting that, after the IRS withdrew summonses, petition to quash was moot). It is

FURTHER ORDERED that the district court's order be vacated, and the case remanded to the district court with instructions to dismiss the complaint as moot. See United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950). It is

FURTHER ORDERED that the request for a refund of the filing fee be denied. This case does not present any circumstance that warrants refunding the filing fee.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5423 **September Term 2008**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5432 **September Term 2008**

Filed On: January 23, 2009

In re: Christopher T. James,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, the petition for writ of mandamus, and the motion for appointment of counsel, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner seeks a writ of mandamus to vacate his conviction and remand for resentencing. Petitioner has failed to demonstrate that he has "no other adequate means to attain the relief he desires" or that his right to relief is "clear and indisputable." Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). Petitioner has another avenue available to seek the requested relief – he may and, in fact has, filed a petition for a writ of habeas corpus in the appropriate court. See Chatman-Bey v. Thornburgh, 864 F.2d 804, 806 n.2 (D.C. Cir. 1988) (noting that because mandamus is a drastic remedy, mandamus would be available only if the complaint fell outside the reach of habeas or if habeas was inefficacious); James v. Jackson, No. 06cv0998 (M.D.N.C. petition for habeas corpus filed by petitioner on November 15, 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3039 **September Term 2008**

1:07-cr-00287-JR-1

Filed On: January 23, 2009

United States of America,

Appellee

v.

Adrian D. Webb,

Appellant

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the unopposed motion to vacate appellant's sentence and remand for resentencing, it is

ORDERED that the motion be granted, and that appellant's sentence be vacated and the case remanded for resentencing.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5421 **September Term 2008**

1:06-cv-00879-RJL

Filed On: January 23, 2009

Vincent Demartino,

Appellant

v.

Federal Bureau of Investigation, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed October 17, 2008, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed for lack of jurisdiction. The district court's order filed September 15, 2008, did not adjudicate all the claims against all the parties, and the district court did not direct the entry of final judgment pursuant to Fed. R. Civ. P. 54(b); therefore, the order is not final and appealable. See Fed. R. Civ. P. 54(b); Building Indus. Ass'n v. Babbitt, 161 F.3d 740, 742-43 (D.C. Cir. 1998). Appellant has not demonstrated that the order otherwise qualifies for immediate appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1269 **September Term 2008**

FERC-IS05-82-002

Filed On: January 22, 2009

BP Pipeline (Alaska) Inc.,
Petitioner

v.

Federal Energy Regulatory Commission and
United States of America,
Respondents

Consolidated with 08-1272, 08-1273, 08-1274, 08-1275

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's orders to show cause filed September 24, 2008, September 25, 2008, September 26, 2008, and September 29, 2008, and the responses thereto, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, these consolidated petitions for review be dismissed. Petitioners' requests for agency rehearing renders these petitions for review incurably premature. See Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980, 980-81 (D.C. Cir. 1993) (per curiam); see also Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994). Once the Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petitions. See Tennessee Gas Pipeline, 9 F.3d at 981.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1269 **September Term 2008**

FERC-IS05-82-002

Filed On: January 22, 2009

BP Pipeline (Alaska) Inc.,
Petitioner

v.

Federal Energy Regulatory Commission and
United States of America,
Respondents

Consolidated with 08-1272, 08-1273, 08-1274, 08-1275

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's orders to show cause filed September 24, 2008, September 25, 2008, September 26, 2008, and September 29, 2008, and the responses thereto, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, these consolidated petitions for review be dismissed. Petitioners' requests for agency rehearing renders these petitions for review incurably premature. See Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980, 980-81 (D.C. Cir. 1993) (per curiam); see also Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994). Once the Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petitions. See Tennessee Gas Pipeline, 9 F.3d at 981.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1269 **September Term 2008**

FERC-IS05-82-002

Filed On: January 22, 2009

BP Pipeline (Alaska) Inc.,
Petitioner

v.

Federal Energy Regulatory Commission and
United States of America,
Respondents

Consolidated with 08-1272, 08-1273, 08-1274, 08-1275

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's orders to show cause filed September 24, 2008, September 25, 2008, September 26, 2008, and September 29, 2008, and the responses thereto, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, these consolidated petitions for review be dismissed. Petitioners' requests for agency rehearing renders these petitions for review incurably premature. See Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980, 980-81 (D.C. Cir. 1993) (per curiam); see also Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994). Once the Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petitions. See Tennessee Gas Pipeline, 9 F.3d at 981.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1269 **September Term 2008**

FERC-IS05-82-002

Filed On: January 22, 2009

BP Pipeline (Alaska) Inc.,
Petitioner

v.

Federal Energy Regulatory Commission and
United States of America,
Respondents

Consolidated with 08-1272, 08-1273, 08-1274, 08-1275

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's orders to show cause filed September 24, 2008, September 25, 2008, September 26, 2008, and September 29, 2008, and the responses thereto, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, these consolidated petitions for review be dismissed. Petitioners' requests for agency rehearing renders these petitions for review incurably premature. See Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980, 980-81 (D.C. Cir. 1993) (per curiam); see also Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994). Once the Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petitions. See Tennessee Gas Pipeline, 9 F.3d at 981.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1269 **September Term 2008**

FERC-IS05-82-002

Filed On: January 22, 2009

BP Pipeline (Alaska) Inc.,
Petitioner

v.

Federal Energy Regulatory Commission and
United States of America,
Respondents

Consolidated with 08-1272, 08-1273, 08-1274, 08-1275

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's orders to show cause filed September 24, 2008, September 25, 2008, September 26, 2008, and September 29, 2008, and the responses thereto, it is

ORDERED that the orders to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, these consolidated petitions for review be dismissed. Petitioners' requests for agency rehearing renders these petitions for review incurably premature. See Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980, 980-81 (D.C. Cir. 1993) (per curiam); see also Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994). Once the Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petitions. See Tennessee Gas Pipeline, 9 F.3d at 981.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5142 **September Term 2008**

1:06cv02048

Filed On: January 7, 2009

Demetrius McLaughlin,

Appellant

v.

Department of Justice, Drug Enforcement Administration,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, and the response thereto; and the motion for summary reversal, it is

ORDERED that the motion for summary affirmance be granted in part and the motion for summary reversal be denied with respect to the adequacy of the appellee's search. As to this aspect of the appeal, the merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly held that the appellee satisfied its obligation under the Freedom of Information Act, 5 U.S.C. § 552, to search for records responsive to appellant's requests. The appellee's search for material responsive to appellant's FOIA requests was adequate. See Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). It is

FURTHER ORDERED that the motion for summary affirmance be granted in part and the motion for summary reversal be denied with regard to the district court's denial of the motions for joinder, and reconsideration. Appellant has not shown that, absent the joinder of the EOUSA, he would be deprived of complete relief with respect to his claims against the appellee. See Fed. R. Civ. P. 19(a). Further, it was not inappropriate for the district court to treat appellant's motion for reconsideration as an objection to the declaration of William Little; nor did appellant provide grounds to revisit the district court's grant of partial summary judgment. It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5142 **September Term 2008**

FURTHER ORDERED that the district court's order be vacated in part and the case be remanded for a determination whether any portion of the 18 pages of partially withheld documents or the 13 pages of documents withheld in full may be reasonably segregated and released. See Morley v. CIA, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (district court's failure to address the issue of segregability is reversible error).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. See Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 10, 2008 Decided January 6, 2009

No. 08-5014

IN RE: FANNIE MAE SECURITIES LITIGATION,

Appeal from the United States District Court
for the District of Columbia
(No. 04cv01639)

Nicholas J. Bagley, Attorney, U.S. Department of Justice, argued the cause for appellant. With him on the briefs were *Gregory G. Katsas*, Assistant Attorney General, *Jeffrey A. Taylor*, U.S. Attorney, *R. Craig Lawrence* and *John C. Truong*, Assistant U.S. Attorneys, and *Mark B. Stern* and *Michael S. Raab*, Attorneys. *Sarang V. Damle* and *Mark R. Freeman*, Attorneys, entered appearances.

Alex G. Romain argued the cause for appellees. With him on the brief were *Kevin M. Downey*, *Steven M. Salky*, *Eric R. Delinsky*, and *David S. Krakoff*.

Before: TATEL and KAVANAUGH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: The Office of Federal Housing Enterprise Oversight (OFHEO) appeals a district court order

holding it in contempt for failing to comply with a discovery deadline to which it agreed. Though we appreciate OFHEO's efforts to comply, we conclude that it ultimately failed to do so and find no abuse of discretion in the district court's contempt finding or choice of sanction.

I.

Appellant Office of Federal Housing Enterprise Oversight regulates the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation (for some reason "Freddie Mac")—both government-sponsored enterprises participating in the secondary mortgage market. This case concerns OFHEO's responsibilities for Fannie Mae.

In 2003 OFHEO opened a special review of Fannie Mae's accounting and financial practices, ultimately concluding that the enterprise had departed from generally accepted accounting principles in order to manipulate its reported earnings and inflate executive compensation. Although OFHEO has since closed its investigation and concluded its enforcement actions, its preliminary investigation report prompted several private civil actions against Fannie Mae, its senior executives, and others. These actions have been consolidated into multidistrict litigation in the United States District Court for the District of Columbia.

Although OFHEO is not itself a party to the multidistrict litigation, the parties have subpoenaed records it collected in performing its oversight functions and preparing its investigation report. This appeal concerns a dispute over subpoenas issued by appellees, three individual defendants in the multidistrict litigation who were senior executives at Fannie Mae: former chairman and CEO Franklin Raines,

former CFO J. Timothy Howard, and former senior vice president and controller Leanne Spencer.

In the summer of 2006, Howard and Raines subpoenaed over thirty categories of documents from OFHEO. *See* Fed. R. Civ. P. 45(c)(2)(B)(ii) (governing subpoenas to non-parties). They claimed that the documents would aid their defense by showing that they "had been completely transparent with OFHEO," Appellees' Br. 5; that "OFHEO had approved Fannie Mae's accounting and compensation practices," *id.*; and that OFHEO's investigation "was politically motivated and biased," *id.* at 6. Arguing that Howard and Raines should have instead sought these documents pursuant to its disclosure regulations, OFHEO moved to quash the subpoenas, and the individual defendants moved to compel compliance. On November 6, 2006, the district court ruled for the individual defendants and directed OFHEO to comply during the next four months.

Although OFHEO began producing documents, it asked Howard and Raines (now joined by Spencer, the third appellee) to limit their requests for electronically stored information in order to minimize the burden on OFHEO. Responding by letter dated February 18, 2007, the individual defendants revised their initial requests for such information, limiting them for the time being to certain email communications stored on OFHEO's network and backup tapes. Shortly thereafter, OFHEO filed a motion with the district court seeking an approximately one-month extension of the time to comply. Representing that the parties had "agreed that the Court's November 6, 2006 Order did not apply to the ESI [i.e., electronically stored information]," OFHEO's motion proposed extending the deadline only for paper documents. OFHEO's Mot. for Extension 4, Mar. 9, 2007. OFHEO explained that it was providing electronically

stored information voluntarily and not pursuant to the court's order.

The court granted OFHEO's motion, but the individual defendants objected, claiming that they had never agreed that the order left out electronically stored information. At an April 2007 status conference, the district court confirmed that its November 6, 2006 order covered such information and that, in approving OFHEO's proposed extension order, it hadn't intended to limit the new deadline to paper documents. It granted OFHEO's request for a further one-month extension to produce the outstanding information.

During the summer of 2007, OFHEO reported to the court that it had produced all documents requested by the February letter. But skeptical of the limited production, the individual defendants sought and obtained a Rule 30(b)(6) deposition, which confirmed that OFHEO had failed to search all of its off-site disaster-recovery backup tapes. *See* Fed. R. Civ. P. 30(b)(6) (providing for depositions of organizations through designated representatives). According to OFHEO, it never understood the February letter's request for communications on backup tapes to apply to its disaster-recovery backup tapes, but nonetheless voluntarily undertook to search them for certain of the requested documents.

In August of 2007, the individual defendants moved to hold OFHEO in contempt. In response, the district court, stating that it had "no doubt" that the OFHEO disaster-recovery backup tapes were "going to be looked at," scheduled a contempt hearing in order to assess the burden that examination of such tapes would impose on OFHEO. Hr'g Tr. at 76 (Sept. 19, 2007). Following the first day of the hearing, OFHEO and the individual defendants entered into a stipulated order that held the contempt motions in abeyance

and required OFHEO to conduct searches of its disaster-recovery backup tapes and provide all responsive documents and privilege logs by January 4, 2008. In language central to the issue before us, the stipulated order's fifth paragraph states:

> OFHEO will work with the Individual Defendants to provide the necessary information (without individual document review) to develop appropriate search terms. By October 19, 2007, the Individual Defendants will specify the search terms to be used.

Stipulated Order ¶ 5, Sept. 27, 2007.

Pursuant to the stipulated order, the individual defendants submitted over 400 search terms, which covered approximately 660,000 documents. OFHEO objected on the grounds that the stipulated order limited the individual defendants to "appropriate search terms," but the district court disagreed, ruling on November 2, 2007 that the stipulated order gave the individual defendants sole discretion to specify search terms and imposed no limits on permissible terms. Although the district court made this ruling in an off-the-record chambers conference, the parties agree on its meaning.

OFHEO undertook extensive efforts to comply with the stipulated order, hiring 50 contract attorneys solely for that purpose. The total amount OFHEO spent on the individual defendants' discovery requests eventually reached over $6 million, more than 9 percent of the agency's entire annual budget.

On November 29, 2007, the day before an interim deadline for production of several categories of material, OFHEO informed the district court that it would be unable to

meet that deadline and moved for an extension until December 21, assuring the court that it could meet that extended deadline. The court granted the motion, but two days before the extended deadline, OFHEO informed the court not only that its previous assurances had been based on insufficient data, but also that it had only recently hired the necessary number of contract attorneys. OFHEO told the court that it would be unable to comply with the extended interim deadline, and that although it could produce all non-privileged documents by the ultimate January 4, 2008 deadline, it would be unable to produce all the required privilege logs until February 29.

The individual defendants renewed their motions to hold OFHEO in contempt. On January 22, the district court granted the motions. The court recognized OFHEO's efforts at compliance, but deemed them "not only legally insufficient, but too little too late," stating:

> [T]he Court is cognizant of the large number of attorneys, contract attorneys, and OFHEO personnel working to comply with the subpoenas and the resulting costs of this compliance. Nevertheless, OFHEO has treated its Court-ordered deadlines as movable goal posts and has repeatedly miscalculated the efforts required for compliance and sought thereafter to move them.

Hr'g Tr. at 19 (Jan. 22, 2008). As a sanction, the court ordered production of all documents withheld on the sole basis of the qualified deliberative process privilege and not logged by the January 4, 2008 deadline. Contrary to the individual defendants' requests, however, the court made clear that production was to be made only to counsel and would not waive the privilege. Although OFHEO says that it

provided the non-privileged documents by January 4 and the privilege logs by the end of February, the individual defendants claim that approximately 20,000 documents remain unaccounted for.

OFHEO appeals the contempt finding, arguing that the stipulated order limited the individual defendants to specifying "appropriate" search terms and did not unambiguously compel it to process inappropriate terms. In the alternative, OFHEO argues that it substantially complied with the stipulated order, rendering a finding of contempt inappropriate, and that in any event the district court abused its discretion by compelling compliance with the subpoenas in the first place. OFHEO also appeals the district court's choice of sanction, which this court stayed pending appeal. Exercising our appellate jurisdiction due to the finding of contempt, *see U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988), we review both the contempt finding and the sanction for abuse of discretion, *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1016 (D.C. Cir. 1997).

II.

We begin with OFHEO's principal argument: that paragraph five of the stipulated order limits the individual defendants to specifying only "appropriate" search terms, and that by transgressing this limitation, the individual defendants relieved OFHEO of its obligation to process the search terms and to produce the corresponding documents and privilege logs by the stipulated order's deadline. We disagree.

Although OFHEO characterizes paragraph five's use of the phrase "appropriate search terms" as a protection it bargained for, it presented no extrinsic evidence for this claim. As a consequence, we interpret the meaning of the

stipulated order based on the document itself. *See Segar v. Mukasey*, 508 F.3d 16, 22 (D.C. Cir. 2007) ("[C]onstruction of a consent decree is essentially a matter of contract law." (internal quotation marks omitted)). On its face, paragraph five's first sentence uses the phrase "appropriate search terms" to describe an obligation on OFHEO, not the individual defendants, and its second reserves full discretion to the individual defendants to specify search terms:

> OFHEO will work with the Individual Defendants to provide the necessary information (without individual document review) to develop appropriate search terms. By October 19, 2007, the Individual Defendants will specify the search terms to be used.

Stipulated Order ¶ 5. OFHEO describes paragraph five as "[c]onfining defendants to 'appropriate search terms,'" Appellant's Opening Br. 23, but it quotes neither sentence in full and its opening brief never so much as mentions the second sentence. This omission is striking given that on its face the second sentence imposes no limitation on the terms the individual defendants may specify. To defeat such a clear statement, the remainder of the stipulated order would need to provide a correspondingly persuasive indication that the individual defendants are somehow limited in their choice of search terms. It does not.

Paragraph five's reference to "appropriate search terms," on which OFHEO exclusively relies, imposes no limitation on the individual defendants. The paragraph directs OFHEO and the individual defendants to work together, but only to facilitate OFHEO's provision of information to assist in developing search terms. The phrase "to develop appropriate search terms" indisputably modifies "the necessary information"; it is not an independent obligation on the

parties. *See* Stipulated Order ¶ 5 ("OFHEO will work with the Individual Defendants to provide the necessary information . . . to develop appropriate search terms."). That is, the phrase serves only to define the type of information OFHEO must provide—that information necessary for the development of appropriate search terms. Nothing in paragraph five's text gives OFHEO any role in actually developing those search terms.

Although paragraph five defines the information OFHEO must provide, it nowhere limits the search terms the individual defendants ultimately specify to those based on this information. If the individual defendants wished to specify search terms based on information obtained from other sources at their disposal, nothing in the paragraph precludes that. Nor is there any logical reason why it would—after all, the individual defendants undoubtedly acquired voluminous information from the parties to the multidistrict litigation during discovery, and it's quite unlikely that they and OFHEO would have ruled out search terms based on this wholly independent source of information. Thus the phrase "appropriate search terms," which relates only to the information OFHEO must provide, imposes no restrictions on the search terms the individual defendants end up *specifying*, which may be based on wholly independent information.

OFHEO argues that reading the stipulated order to allow the individual defendants full discretion to specify search terms would render the phrase "to develop appropriate search terms" surplusage. Again, we disagree. Clearly the whole phrase isn't surplusage: without it, the agreement would only impose the maddeningly nebulous requirement that OFHEO "provide the necessary information," giving no hint as to what type of information that might be.

Even if some variant of the *phrase* is essential, might the *word* "appropriate" still be surplusage under our plain reading? We think not. The word plays a valuable role: it sharpens OFHEO's obligations to the individual defendants. Without that word, the "necessary information . . . to develop search terms" might consist of nothing more than minimally useful information, such as the technical specifications of OFHEO's data retrieval software. But paragraph five requires OFHEO to provide more: it must furnish that information necessary to formulate search terms that are not just minimally sufficient, but actually appropriate to the task of retrieving relevant documents. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 106 (1993) (defining "appropriate" as "specially suitable"). The inclusion of such detail is understandable given the difficulties OFHEO and the individual defendants experienced resolving their discovery disputes up to that point.

The word "appropriate" would be surplusage only if the information necessary to develop appropriate search terms was of no value whatsoever to the individual defendants. In that case it would have made no sense for paragraph five to obligate OFHEO to do something that the individual defendants couldn't possibly want. But of course such information is quite valuable to the individual defendants. They want to retrieve the relevant documents as efficiently as possible, and appropriate search terms, by definition, do so better than minimally adequate search terms. Since the first sentence's requirement that OFHEO do something valuable for the individual defendants is hardly remarkable, we create no surplusage when we take at face value its plain text, which sets forth only OFHEO's obligation to provide information at the outset, not any limitation on the individual defendants' discretion to choose search terms.

The language surrounding paragraph five strongly supports this straightforward reading. Unlike paragraph five, the remainder of the stipulated order includes several provisions that unmistakably protect OFHEO. For example, paragraph six protects OFHEO from having to produce certain categories of documents by stating simply, "OFHEO will not produce the following documents," and enumerating in detail three protected categories. Stipulated Order ¶ 6. Other provisions in the stipulated order expressly limit the individual defendants to identifying fifteen backup tape sets to restore out of over 1,000 backup tapes in OFHEO's possession, *id.* ¶ 1; cap the number of OFHEO record custodians subject to the requests, *id.* ¶ 2; specify the relevant time period for the individual defendants' requests, *id.* ¶ 3; and provide deadlines that effectively extend OFHEO's time to comply by several months, *id.* ¶¶ 8–9. Tellingly, even the very sentence in paragraph five that contains the word "appropriate" unambiguously includes a specific protection for OFHEO: its obligation to provide information does not extend to "individual document review." *See id.* ¶ 5 ("OFHEO will work with the Individual Defendants to provide the necessary information (without individual document review) to develop appropriate search terms."). Each of these protections is specifically set forth in the stipulated order and each clearly protects OFHEO. The contrast to the word "appropriate"—appearing without elaboration in a sentence defining OFHEO's obligations—is revealing.

Urging us to find some contractual limitation on the individual defendants' discretion, OFHEO argues that allowing the individual defendants to specify every word in the dictionary as a search term would be absurd. Indeed it would. But OFHEO's protection against such an abusive list of search terms comes not from the word "appropriate" but

from the general contractual duty of good faith and fair dealing. *See United States v. Jones*, 58 F.3d 688, 692 (D.C. Cir. 1995) (noting that all contracts "include[] an implied obligation of good faith and fair dealing"). We have no doubt that even given the full discretion paragraph five affords the individual defendants, a request for every word in the dictionary would have been in bad faith and invalid. *See id.* at 690, 692 (holding that a prosecutor's decision whether to move for leniency could be reviewed for bad faith even where the plea agreement stated that the government "retain[ed] its discretion" regarding whether to make such a motion).

OFHEO insists that the individual defendants' list of search terms was tantamount to a request for the dictionary, resulting as it did in the retrieval of approximately 80 percent of the office's emails. Oral Arg. at 30:20–:40. But far from showing bad faith, that figure may simply indicate that most of the emails actually bear some relevance, or at least include language captured by reasonable search terms. More fundamentally, OFHEO does not argue that the individual defendants exercised their contractual rights in bad faith; it argues only that they violated a textual limitation on those rights. As described above, however, that limitation appears nowhere in the stipulated order.

As a fallback defense to contempt, OFHEO insists that the stipulated order is at least ambiguous, rightly emphasizing that contempt is appropriate only for violation of a "clear and unambiguous" order. *Armstrong v. Executive Office of the President, Office of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (internal quotation marks omitted). To be sure, there may be some issues as to which the order might be ambiguous. For example, had OFHEO withheld some information on the ground that it was unnecessary for the development of appropriate search terms, the text might not

have unambiguously resolved *that* dispute. But paragraph five unambiguously resolves the dispute that *is* before us: its second sentence reserves to the individual defendants unrestricted discretion to "specify the search terms to be used," Stipulated Order ¶ 5, and its first sentence unambiguously applies the phrase "appropriate search terms" only to OFHEO's obligation to provide the individual defendants with information at the outset. Thus, whatever other ambiguities may lurk in the stipulated order, it unambiguously requires OFHEO to process the search terms the individual defendants specify.

In sum, the stipulated order obligated OFHEO to process the search terms the individual defendants specified and to meet the corresponding deadlines, and the office violated the order by failing to produce privilege logs on time.

III.

OFHEO makes two additional challenges to the district court's contempt finding: it argues that the district court abused its discretion by compelling compliance with the subpoenas in the first place, and that in any event it substantially complied with the stipulated order in good faith. We address each argument in turn.

Federal Rule of Civil Procedure 45 requires courts to safeguard non-party subpoena recipients from significant expense resulting from compliance. *See Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007). According to OFHEO, the district court violated Rule 45 by compelling compliance without considering cost-shifting, narrowing the scope of the requests, or "find[ing] that defendants demonstrated good cause for forcing OFHEO to retrieve its inaccessible data." Appellant's Opening Br. 31–32. Whatever the merits of these claims, OFHEO abandoned them by entering into the

stipulated order. Indeed, OFHEO's trial counsel agreed to the stipulation in the middle of a hearing scheduled for the very purpose of considering OFHEO's objections to the subpoenas. Had OFHEO wanted review of the district court's initial order to compel compliance with the subpoenas, it could have completed the hearing and attempted to convince the court to reconsider. Failing that, it could have defied the adverse ruling and appealed any ensuing contempt finding. *See U.S. Catholic Conference*, 487 U.S. at 76. Instead, it chose to sign the stipulated order, which ended the hearing and unquestionably settled the discovery dispute. Having stipulated to a schedule for complying with the subpoenas, OFHEO can hardly complain now about being held to its agreement.

Seeking to revive the dispute it settled, OFHEO objects to the district court's off-the-record November 2, 2007 ruling interpreting the stipulated order. As OFHEO sees it, this ruling amounts to a second order compelling compliance with the subpoenas and shares the same flaws as the first. But in this ruling, the district court merely restated the obligations imposed by the stipulation. It didn't determine anew that OFHEO had to provide documents; *OFHEO* already determined that by stipulating to do so.

Alternatively, OFHEO insists that even if it was properly subject to the stipulated order, it substantially complied in good faith. The parties agree that contempt may be inappropriate when a party in good faith substantially complies with a court order. *See Food Lion*, 103 F.3d at 1017. Here OFHEO undeniably made extensive efforts to produce the documents and privilege logs in accordance with the timetable set forth in the stipulated order. It hired 50 contract attorneys, eventually spending a substantial portion of its budget attempting to comply with the subpoenas.

Were we deciding this matter in the first instance, we might not have held OFHEO in contempt. But our review is for abuse of discretion, and OFHEO has given us no basis for concluding that the district court abused its discretion by finding it in contempt for failing to comply with the stipulated order's deadlines. As the district court explained, even two and a half weeks after the final deadline set forth in the stipulated order, OFHEO had produced just six of the required thirty-one privilege logs. Not until after the district court held OFHEO in contempt did it provide the remaining logs, and according to the individual defendants even these are incomplete.

District judges must have authority to manage their dockets, especially during massive litigation such as this, and we owe deference to their decisions whether and how to enforce the deadlines they impose. *See Berry v. District of Columbia*, 833 F.2d 1031, 1037 n.24 (D.C. Cir. 1987). Though we recognize OFHEO's strenuous efforts to comply, the district court found them to be "too little too late," Hr'g Tr. at 19 (Jan. 22, 2008), and determined that the office's compliance was inadequate, *id.* at 21. In making this assessment, the court placed great weight on the long history of the discovery dispute and on OFHEO's repeated requests for extensions, ultimately concluding that OFHEO had requested one extension too many and that strict enforcement of its deadline was warranted. Given the district court's intimate familiarity with the details of the discovery dispute, the scale of the production requested, and the progress of the multidistrict litigation as a whole, we are ill-positioned to second-guess that assessment. Were we on this record to overturn the district court's fact-bound conclusion that OFHEO dragged its feet until the eleventh hour, we would

risk undermining the authority of district courts to enforce the deadlines they impose.

IV.

This brings us to OFHEO's final argument: that even if contempt is appropriate, the district court abused its discretion in its choice of sanction. After finding that OFHEO's failure to meet the deadline placed it in contempt of the stipulated order, the district court directed the office to provide the actual documents withheld on the basis of the deliberative process privilege and not logged by the deadline. The district court described the sanction as "designed to move the [d]iscovery process forward and to allow for [a] more targeted, and therefore more truncated, privilege litigation process." Hr'g Tr. at 26 (Jan. 22, 2008). The district court therefore specified that the compulsory disclosure would not waive the privilege with respect to further disclosure; directed that the documents be provided only to individual defendants' counsel; and created a mechanism for OFHEO to recover documents found to be privileged.

The parties dispute whether the district court imposed the sanction pursuant to its contempt power or its inherent authority to levy discovery sanctions. This distinction matters because unlike discovery sanctions, civil contempt sanctions may not be punitive—they must be calibrated to coerce compliance or compensate a complainant for losses sustained. *Compare Cobell v. Norton*, 334 F.3d 1128, 1145 (D.C. Cir. 2003) (civil contempt sanctions), *with Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (discovery sanctions).

In our view, even though the district court mentioned that the individual defendants had filed *motions* for discovery sanctions that were independent of their motions for

contempt, Hr'g Tr. at 21–22 (Jan. 22, 2008), the structure of the order makes clear that the *sanction* functioned as a contempt sanction. The district court's consideration of the appropriate sanction followed hot on the heels of its contempt finding, making clear that it imposed the sanction for the contempt it found, not simply as a non sequitur. *Id.* at 21 ("Thus, based on the foregoing, the Court finds that OFHEO is in civil contempt of the September 27th, 2007, stipulated order. What sanctions are appropriate?"). Perhaps the sanction served as both a contempt sanction and a discovery sanction, but the parties nowhere advance this interpretation. In any event, we have no need to consider it given that the district court had ample authority to impose the sanction under its contempt power alone.

The sanction was a proper exercise of the district court's contempt power because it coerced compliance with the stipulated order and compensated the individual defendants for the delay they suffered. The stipulated order required OFHEO to disclose all documents not in fact privileged and, as the district court pointed out, the non-disclosure of the logs prevented the individual defendants from challenging OFHEO's privilege claims. *Id.* at 23. Accordingly, OFHEO's tardiness in turning over the logs has delayed the resolution of disputes over its ultimate compliance with its obligation to produce all unprivileged documents. The district court found that it could mitigate this delay by requiring OFHEO to provide certain of the privileged documents themselves, but solely for the purpose of resolving whether they were in fact privileged. That is, by facilitating faster resolution of outstanding privilege disputes, the sanction not only coerced OFHEO's compliance with its obligation to provide all documents not in fact privileged, but also compensated the individual defendants by ameliorating OFHEO's delay in disclosing the privilege logs. As it did not

require wholesale waiver of the privilege, the sanction was non-punitive and fit comfortably within the district court's civil contempt power.

Though it imposes some burden on OFHEO, the sanction is not so disproportionate or unreasonable as to constitute an abuse of discretion. The district court considered various possible sanctions, ranging from OFHEO's insistence on no sanction at all to the individual defendants' request for a fine and wholesale waiver of the deliberative process privilege. Recognizing that it could not let OFHEO's contempt go unaddressed, the district court nonetheless rejected fines on the grounds that they would ultimately be paid by Fannie Mae, a bystander to the discovery dispute. *See* 12 U.S.C. § 4516(a) (providing funding for OFHEO through assessments on regulated entities). It also rejected wholesale waiver, choosing instead a middle ground calculated to facilitate prompt resolution of the dispute without impairing OFHEO's ability to protect privileged communications from general disclosure.

OFHEO gives us no reason to question the district court's choice of sanction. Indeed, although insisting that the sanction amounted to an abuse of discretion, it has steadfastly refused—both in its briefs and at oral argument—to identify a single permissible sanction. And although OFHEO claims that the district court's sanction "effectively" waives the deliberative process privilege, Appellant's Opening Br. 37, its counsel conceded at oral argument that the court-ordered non-waiver disclosure will allow OFHEO to assert privilege with respect to those documents in the future, Oral Arg. at 31:40–32:09; *cf.* Fed. R. Civ. P. 26(b)(5)(B) (setting forth procedure for parties to retrieve inadvertently disclosed privileged material without allowing its use). Any documents disclosed to the individual defendants' attorneys that turn out to be

privileged will remain privileged and presumably will be returned to OFHEO. The district court thus took pains to ensure that the important governmental interests guarded by the deliberative process privilege remain fully protected.

V.

Seeing no abuse of discretion in the district court's finding of contempt or choice of sanction, we affirm.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 2008 Decided December 30, 2008

No. 07-5065

RUSSELL KAEMMERLING,
APPELLANT

v.

HARLEY G. LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS AND MICHAEL B. MUKASEY,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 06cv01389)

Jeff Kosseff, Student Counsel, argued the cause as *amicus curiae* in support of petitioner. With him on the briefs were *Steven H. Goldblatt*, appointed by the court, and *Cecily E. Baskir*, *Damon C. Elder*, and *Elizabeth A. Rose*, Student Counsel.

Russell Kaemmerling, pro se, was on the brief for appellant.

Oliver W. McDaniel, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Jeffrey A. Taylor*, U.S. Attorney, and *R. Craig Lawrence* and *Michael J. Ryan*, Assistant U.S. Attorneys.

Before: SENTELLE, *Chief Judge*, and HENDERSON and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

SENTELLE, *Chief Judge*: Russell Kaemmerling, a federal prisoner, appeals from the district court's dismissal of his action seeking to enjoin application of the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act" or "the Act"), 42 U.S.C. §§ 14135–14135e. Kaemmerling alleged that the Act violated his rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4, and the First, Fourth, and Fifth Amendments of the United States Constitution. The district court denied his request for a preliminary injunction and then dismissed the action for his failure to exhaust administrative remedies pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. Although we conclude that the PLRA does not require Kaemmerling to exhaust administrative remedies on his challenge to the DNA Act, we nevertheless affirm the dismissal of the case because his complaint fails to state a claim.

I

Pursuant to congressional authorization, the Federal Bureau of Investigation ("FBI") established the Combined DNA Index System ("CODIS"), a national database containing electronic DNA profiles of convicted offenders from the state and federal systems, evidence from crime scenes, and unidentified human remains that allows government officials to match an electronic DNA profile to its donor's identity for "law enforcement identification purposes," "judicial proceedings," and "criminal defense purposes." 42 U.S.C. § 14132(a), (b)(3). Law enforcement officers use the CODIS to match one forensic crime scene sample to another, thereby connecting unsolved

crimes through a common perpetrator, and to match evidence from the scene of a crime to a particular offender's profile, thereby solving crimes committed by known offenders. *See United States v. Kincade*, 379 F.3d 813, 819 (9th Cir. 2004). Unauthorized uses or disclosures of DNA information stored in the database are punishable by fines and imprisonment. 42 U.S.C. § 14133(c).

To facilitate the efficacy of the CODIS, the DNA Act directs the Federal Bureau of Prisons ("BOP") to collect "a tissue, fluid, or other bodily sample . . . on which a[n] . . . analysis of the deoxyribonucleic acid (DNA) identification information" can be carried out, *id.* § 14135a(c), from "each individual in the custody of the [BOP] who is, or has been, convicted of a qualifying Federal offense," which includes all felonies, sexual abuse, and crimes of violence, *id.* § 14135a(a)(1)(B), (d). Failure to cooperate in the collection of a sample is a misdemeanor offense. *Id.* § 14135a(a)(5). The BOP turns an offender's sample over to the FBI, where an analyst extracts the DNA from cells in the sample and then uses short tandem repeat ("STR") technology to identify non-genic variants known as alleles at thirteen specific loci on the DNA. *See Banks v. United States*, 490 F.3d 1178, 1180 (10th Cir. 2007); *Kincade*, 379 F.3d at 818. After creating the donor's unique DNA profile, the FBI then records a copy of the profile in the CODIS. *See Johnson v. Quander*, 440 F.3d 489, 498 (D.C. Cir. 2006).

Kaemmerling was convicted of conspiring to commit wire fraud, a felony offense, and is currently incarcerated at the Federal Correctional Institution in Seagoville, Texas. Because he has committed a qualifying offense, the DNA Act requires the BOP to take a fluid or tissue sample from Kaemmerling for DNA analysis and inclusion in the CODIS. In August 2006, Kaemmerling brought suit against the Director of the BOP and

the Attorney General, seeking a declaratory judgment and injunctive relief against enforcement of the DNA Act. He alleged that, as an "Evangelical Christian," submitting to DNA "sampling, collection and storage with no clear limitations of use" is repugnant to his strongly held religious beliefs about the proper use of "the building blocks of life." According to his religious beliefs, the collection and retention of his DNA information is "tantamount to laying the foundation for the rise of the anti-Christ." Kaemmerling protested that enforcing the DNA Act against him would violate his rights under the RFRA and the First Amendment, as well as under the Fourth and Fifth Amendments.

Four other plaintiffs joined Kaemmerling in his suit and filed, along with their joint complaint, a motion for class certification and a motion for a temporary restraining order and preliminary injunction to prevent the BOP from collecting their DNA samples while the action was pending. The district court denied the plaintiffs' motion for a temporary restraining order and a preliminary injunction, discerning no imminent irreparable injury.

The district court subsequently dismissed the case without prejudice for failure to exhaust administrative remedies under the PLRA. The plaintiffs objected that the BOP "lacks any authority to provide any relief or take any action whatsoever" in response to their challenges to the DNA Act, leaving them with no administrative remedy to exhaust. The district court disagreed, concluding that the plaintiffs must comply with PLRA procedures even if pursuing administrative remedies might be futile, because collection of their DNA samples is a prison circumstance or occurrence. In its final order, the court denied all other pending motions as moot, including the motion for class certification.

Kaemmerling timely appealed the dismissal, and we dismissed the plaintiffs' earlier interlocutory appeal from denial of the motion for a temporary restraining order. Although all five plaintiffs pursued the interlocutory appeal, only Kaemmerling seeks review in the present proceeding. *See* December 28, 2007 Order, Case No. 07-5065 (denying plaintiff Daniel Siler's motion for injunction because he "failed to note an appeal in this action"). On appeal, Kaemmerling argues that the district court erred in dismissing his case because the PLRA's exhaustion requirement does not apply and that it erred in denying his motion for a preliminary injunction. The BOP defends the district court's PLRA decision and further argues that, even if Kaemmerling is not required to exhaust administrative remedies, we should dismiss his complaint for failure to state a claim.

II

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement affords prison officials time and opportunity to resolve complaints concerning the exercise of their responsibilities before allowing the initiation of a federal case. Exhaustion thus "has the potential to reduce the number of inmate suits" by resolving problems at the administrative level and "to improve the quality of suits that are filed by producing a useful administrative record." *Jones v. Bock*, 549 U.S. 199 (2007); *see Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

Exhaustion is the "general rule" for litigation within Section 1997e(a)'s compass. *Porter*, 534 U.S. at 525 n.4.[1] Even if an inmate believes that seeking administrative relief from the prison would be futile and even if the grievance system cannot offer the particular form of relief sought, the prisoner nevertheless must exhaust the available administrative process. *Booth v. Churner*, 532 U.S. 731, 739, 741 & n.6 (2001). But a prisoner must exhaust only "such administrative remedies as are available," 42 U.S.C. § 1997e(a), that is, those prison grievance procedures that provide "the possibility of some relief for the action complained of," *Booth*, 532 U.S. at 738. The statutory requirement of an available remedy presupposes authority to take some action in response to a complaint. *Booth*, 532 U.S. at 736. Thus, if "the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint," then a prisoner is left with nothing to exhaust and the PLRA does not prevent the prisoner from bringing his or her claim directly to the district court. *Id.*; *see Larkin v. Galloway*, 266 F.3d 718, 723 (7th Cir. 2001) (prisoner must exhaust any prison administrative process that "was empowered to consider his complaint and . . . could take *some* action in response to it"); *Snider v. Melindez*, 199 F.3d 108, 113 n.2 (2d Cir. 1999) ("If . . . the inmate's suit complains that he was beaten by prison guards, and the institution provides a grievance proceeding for inmate complaints about food . . . but none for complaints about beatings," the inmate would not be required to pursue the grievance procedure having "no application whatsoever to the subject matter of his complaint.").

This case is the rare one in which there is no administrative process to exhaust because the BOP lacks authority to provide

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[1]Footnote 4 of *Porter* makes it plain that the exhaustion requirement of § 1997e(a) is quite encompassing enough to include the litigation at bar.

Kaemmerling any relief or to take any action whatsoever in response to his complaint challenging enforcement of the DNA Act. The BOP has no discretion not to collect Kaemmerling's DNA, as the statute's mandatory language indicates and as the BOP conceded at oral argument. *See* 42 U.S.C. § 14135a(a)(1)(B) ("[t]he Director of the [BOP] shall collect a DNA sample from each individual" in BOP custody who has been convicted of a qualifying offense), (b) ("the Director of the Bureau of Prisons . . . shall furnish each DNA sample collected . . . to the [FBI], who shall carry out a DNA analysis"); *see also United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (the BOP "flouts the multiple layers of legal obligations placed upon it" if it does not collect a DNA sample from felons while in custody). Even under questioning from this court, counsel for the BOP could not articulate a single possible way the prison's administrative system could provide relief or take any action at all in response to Kaemmerling's claim that collecting his DNA would violate his statutory and constitutional rights. The BOP has failed to carry its burden of showing an administrative remedy available for Kaemmerling to exhaust. *See Jones*, 549 U.S. at 215-16 (failure to exhaust is an affirmative defense under the PLRA).

This is not a situation like that in *Booth*, where the prison grievance process cannot grant the exact type of relief the inmate seeks or where the inmate believes pursuing the process would be futile because it is unlikely to resolve his complaint. Although the administrative process in *Booth* could not offer money damages—the exclusive form of redress the inmate sought—it did authorize at least some responsive action on the inmate's complaint of abuse, such as reassigning the abusive guard. *See Booth*, 532 U.S. at 735-36. Here, the prison grievance process cannot authorize any action on the subject of Kaemmerling's complaint because he challenges the statute's command that BOP collect his DNA sample. Kaemmerling

does not complain about the method or timing of collecting the sample, which counsel for the BOP suggested the prison might have authority to change; he complains only about the fact that the BOP will collect his DNA at all, a complaint for which the BOP can offer no possible relief.

Requiring an inmate to exhaust an administrative grievance process that cannot address the subject of his or her complaint would serve none of the purposes of exhaustion of administrative remedies. When the BOP cannot take any action at all in response to a complaint, it has nothing to offer that could possibly satisfy the prisoner and obviate the need for litigation. *See Porter*, 534 U.S. at 525. Requiring exhaustion when no relief is available "is more likely to inflame than to mollify passions, and thus is unlikely to 'filter out some frivolous claims.'" *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005) (quoting *Porter*, 534 U.S. at 525) (first quotation omitted). And prison administrators are unlikely to spend resources developing an administrative record when that process cannot possibly lead to relief, nor would there be much record to develop when the prisoner is challenging, as here, the enforceability of a statute rather than the prison's method of enforcement. *See Porter*, 534 U.S. at 525; *Brown*, 422 F.3d at 936. Finally, requiring exhaustion in these circumstances is not necessary for protection of administrative agency authority from judicial interference, because no administrative program or mistake is at issue, nor can an administrative solution resolve the complaint.[2] *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

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[2]We reject the suggestion of the BOP that our holding conflicts with *United States v. Carmichael*, 343 F.3d 756 (5th Cir. 2003). There, the Fifth Circuit decided that the collection of a federal offender's DNA sample during incarceration was not part of the offender's sentence, subject to challenge on direct appeal, but instead was a prison condition that must be challenged through a separate civil

III

We now turn to the BOP's alternative ground for dismissal, that the complaint fails to state a claim upon which relief can be granted. The BOP raised this alternative basis for dismissal in the district court, and both parties have fully briefed the merits of the issue before us. We consider the sufficiency of a complaint under Federal Rule of Civil Procedure 12(b)(6) *de novo*; therefore, we may independently assess the complaint and need not remand at this stage for the district court to evaluate its sufficiency in the first instance. *Henthorn v. Dep't of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Dismissal of Kaemmerling's *pro se* complaint at this stage is proper only "if, after construing the complaint liberally in [Kaemmerling's] favor and granting [him] the benefit of all reasonable inferences to be derived from the facts alleged, he could prove no set of facts in support of his claim that would entitle him to relief." *Henthorn*, 29 F.3d at 684. Even given the special liberality with which we consider *pro se* complaints, we need not accept inferences unsupported by the facts alleged in the complaint or "legal conclusions cast in the form of factual allegations." *Id.* (quotation omitted). Kaemmerling's complaint alleges violations of his rights under the RFRA and the First, Fourth, and Fifth Amendments. After thoroughly considering each of these challenges, we conclude that none of them state a claim upon which relief can be granted.

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action in accordance with the strictures of the PLRA. *See id.* at 761. The court had no occasion to consider, and did not consider, the availability of administrative remedies on Carmichael's challenge to the collection of his DNA sample pursuant to the DNA Act. *See id.* at 759-61.

A

We begin with Kaemmerling's religious claim, which fails to allege a violation of the Free Exercise Clause. Kaemmerling contends that mandatory collection and analysis of his DNA under the DNA Act burdens the free exercise of his religious belief that "DNA sampling, collection and storage" "defile[s] God's temple." Even assuming this is true, it does not rise to the level of a constitutional violation. The right of free exercise protected by the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quotation omitted). Kaemmerling does not suggest that the DNA Act is not, in theory or practice, a religion-neutral, generally applicable law, therefore he alleges no Free Exercise violation, even if the Act incidentally affects religiously motivated action. *See id.* at 878-81; *Shaffer v. Saffle*, 148 F.3d 1180, 1181-82 (10th Cir. 1998) (holding plaintiff failed to state a claim for denial of First Amendment rights when he did not contend that the DNA Act was not neutral or generally applicable or that it was applied to him differently because of his religious beliefs).

B

But the First Amendment is not the only potential refuge for Kaemmerling's religious claim—the RFRA offers religious exercise greater protection from intrusion by religion-neutral federal laws. The RFRA prohibits the federal government from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate that "application of the burden to the person– (1) is in furtherance of a compelling

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *see id.* § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief."). Congress instructs us that, in analyzing a claim under the RFRA, we must return to "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1).

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To apply this test, we first must determine if Kaemmerling alleges a substantial burden on his religious exercise. The RFRA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7). A litigant's claimed beliefs "must be sincere and the practice[] at issue must be of a religious nature." *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002). Because the burdened practice need not be compelled by the adherent's religion to merit statutory protection, we focus not on the centrality of the particular activity to the adherent's religion but rather on whether the adherent's sincere religious exercise is substantially burdened. *See id.* at 1321. A substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981), as in *Sherbert*, where the denial of unemployment benefits to a Sabbatarian who could not find suitable non-Saturday employment forced her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," *Sherbert*, 374 U.S. at 404. An inconsequential or *de minimis*

burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme. *See Levitan*, 281 F.3d at 1320-21.

In his complaint, Kaemmerling alleges that it is his sincere religious belief that DNA is "a foundational aspect . . . of God's creative work" and that "DNA sampling, collection and storage with no clear limitations of use, merely to satisfy the broadly overreaching efforts of secular authorities, politicians and their representatives" "defile[s] God's temple, as represented by one's mortal body, filled with the Holy Spirit." His complaint further alleges harms arising from government possession and storage of his DNA profile, including the potential that he could become an unwilling participant in future activities that violate his religious beliefs—including cloning experiments and stem-cell research—and use of his DNA profile by the anti-Christ, who according to Kaemmerling's religious beliefs will in the future rule the world and "make war against the saints," "forc[ing] everyone . . . to receive a mark . . . which is the . . . number of his name."

As a preliminary matter, we pause to discern Kaemmerling's alleged religious beliefs. Kaemmerling makes abundantly clear that he does not challenge the collection of any particular DNA carrier—such as blood, saliva, skin, or hair—but rather that, regardless of the medium by which the government acquires access to his DNA, he objects to the government collecting his DNA information from any fluid or tissue sample they may recover. At oral argument, counsel emphasized that Kaemmerling objects to any collection of his DNA profile at all, even collecting DNA information from hair and skin that he naturally shed onto his clothes then turned over to prison officials for washing. (Indeed, the fact that he does not object to the means of the DNA collection is the very reason that the BOP can offer no remedy for purposes of exhaustion.) These

representations make clear that Kaemmerling does not object to DNA collection on the basis of bodily violation. He also certainly does not object to the BOP sweeping up his hair after a haircut or wiping up dust that contains particles of his skin, even though those are acts of collecting bodily specimens containing DNA, if the BOP does not extract the DNA information contained in those specimens. His objection to "DNA sampling and collection," then, must be a more specific objection to collection of the DNA information contained within any sample. It is not penetrating the body or collecting bodily material that Kaemmerling alleges violates his beliefs but rather collecting the "building block of life" specifically. Given these representations, we understand Kaemmerling's objection to "DNA sampling and collection" not to be an objection to the BOP collecting any bodily specimen that contains DNA material such as blood, saliva, skin, or hair, but rather an objection to the government extracting DNA information from the specimen.

Accepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened—we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise because he cannot identify any "exercise" which is the subject of the burden to which he objects. The extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object). The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue

sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [him] to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718.

Kaemmerling alleges no religious observance that the DNA Act impedes, or acts in violation of his religious beliefs that it pressures him to perform. Religious exercise necessarily involves an action or practice, as in *Sherbert*, where the denial of unemployment benefits "impede[d] the observance" of the plaintiff's religion by pressuring her to work on Saturday in violation of the tenets of her religion, 374 U.S. at 404, or in *Yoder*, where the compulsory education law compelled the Amish to "perform acts undeniably at odds with fundamental tenets of their religious beliefs," 406 U.S. at 218. Kaemmerling, in contrast, alleges that the DNA Act's requirement that the federal government collect and store his DNA information requires the government to act in ways that violate his religious beliefs, but he suggests no way in which these governmental acts pressure him to modify his own behavior in any way that would violate his beliefs. *See* Appellant's Br. at 21 (describing alleged substantial burden as "knowing [his] strongly held beliefs had been violated by a[n] unholy act of an oppressive regime").

Nor does the criminal penalty for "fail[ure] to cooperate," 42 U.S.C. § 14135a(a)(5), in the collection of "a tissue, fluid, or other bodily sample . . . on which a DNA analysis can be carried out," *id.* § 14135a(c)(1), substantially burden Kaemmerling's exercise of religion. He objects only to the collection of the DNA information from his tissue or fluid sample, a process the criminal statute does not address, and he does not allege that his religion requires him not to cooperate with collection of a fluid or tissue sample. Moreover, he alleges that even "involuntary and/or forced collection" of his DNA would "violate[] [his]

convictions." The criminal statute is therefore no inducement for Kaemmerling to cooperate and potentially violate his beliefs, because he alleges that collection of his DNA sample would violate his convictions whether or not he acquiesces in the process. Thus, Kaemmerling does not allege that he is put to a choice like the plaintiffs in *Yoder*, between criminal sanction and personally violating his own religious beliefs. *See Yoder*, 406 U.S. at 218.

This case is instead more analogous to *Bowen v. Roy*, 476 U.S. 693 (1986), where the Supreme Court held that the state's use of a Native American child's Social Security number in determining eligibility for federal welfare benefit programs did not impair her parents' freedom to exercise their religious beliefs, a tenet of which was that use of the number beyond her control would "rob [her] spirit." *Id.* at 696; *see id.* at 697, 699. The parents objected to a statutory requirement that state agencies "shall utilize" Social Security numbers "not because it place[d] any restriction on what [they could] believe or what [they could] do," but because they believed use of the number, an entirely governmental act, would harm the child's spirit. *Id.* at 699. The Court concluded that the government's use of the child's Social Security number did not "in any degree" impair her parents' freedom to believe, express, or exercise their religion, emphasizing that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . [A]ppellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter." *Id.* at 699-700.

Similarly, Kaemmerling's objection to the DNA Act centers on the government's act of extracting and analyzing his DNA to collect its information and store an electronic DNA profile,

without suggesting that the Act imposes any restriction on what Kaemmerling can believe or do. Like the parents in *Bowen*, Kaemmerling's opposition to government collection and storage of his DNA profile does not contend that any act of the government pressures him to change his behavior and violate his religion, but only seeks to require the government itself to conduct its affairs in conformance with his religion. Kaemmerling thus fails to allege a substantial burden on his religious exercise that would be cognizable under the RFRA.

To the extent that Kaemmerling challenges storage of his DNA profile or retention of the DNA sample itself based on fear of specific future misuses that would conflict with his religious beliefs, we emphasize that we must consider the statute as it exists and is applied today, complete with its protections against misuse, *see* 42 U.S.C. §§ 14132(b)(3) (limiting the permissible uses of DNA profiles and stored samples), 14133(c) & 14135e (providing criminal penalties for those who improperly disclose or receive DNA information or samples), and we cannot pass on hypothetical future harms. *See Johnson*, 440 F.3d at 499; *Kincade*, 379 F.3d at 837-38.

2

Even if Kaemmerling did allege a substantial burden on his exercise of religion, his complaint would still fail to state a claim for relief because the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that . . . interest," satisfying the RFRA exception. 42 U.S.C. § 2000bb-1(b).

The DNA Act serves the compelling governmental interest in accurately and expeditiously solving past and future crimes in order to protect the public and ensure conviction of the guilty and exoneration of the innocent. *See Schall v. Martin*, 467 U.S.

253, 264 (1984) ("The legitimate and compelling state interest in protecting the community from crime cannot be doubted.") (quotation omitted); *United States v. Weston*, 255 F.3d 873, 880-81 (D.C. Cir. 2001) ("The [Supreme] Court has repeatedly adverted to the government's 'compelling interest in finding, convicting, and punishing those who violate the law.' *Moran v. Burbine*, 475 U.S. 412, 426 (1986); *accord Texas v. Cobb*, 532 U.S. 162, [172-73] (2001); . . . *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991); *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)."); *United States v. Amerson*, 483 F.3d 73, 87 (2d Cir. 2007) ("There can be little doubt that the government has a compelling interest in rapidly and accurately solving crimes and that having DNA-based records of the identity of . . . past offenders . . . effectuates this interest."). Courts have consistently held that the Act furthers these compelling interests. *See Banks v. United States*, 490 F.3d 1178, 1188-89 (10th Cir. 2007) (DNA Act provides "dramatically effective tool" for solving crime and exonerating the innocent); *United States v. Conley*, 453 F.3d 674, 678 (6th Cir. 2006) (Act serves governmental interests in solving past and future crimes and protecting communities where felons are released); *Johnson*, 440 F.3d at 497 (Act helps "solve past and future crimes," in furtherance of government's "*duty* . . . to protect the public"); *United States v. Sczubelek*, 402 F.3d 175, 185-86 (3d Cir. 2005) ("The interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance," along with "protecting society from future criminal violations."); *Kincade*, 379 F.3d at 838-39 & n.38 (Act furthers the "undeniably compelling" interests of ensuring parolee complies with requirements of release, solving past crimes, sheltering society from future victimization, prosecuting crimes accurately, and absolving the innocent expeditiously); *see also* 42 U.S.C. § 14135 Note(a)(1)-(3) (DNA testing is "the most reliable forensic technique for identifying criminals when biological material is left at a crime scene" and

"can, in some cases, conclusively establish . . . guilt or innocence" and in others can "have significant probative value"); *id.* (a)(6)-(7) ("DNA testing can and has resulted in the post-conviction exoneration" of innocent people and in some of those cases "also enhanced public safety by providing evidence that led to the apprehension of the actual perpetrator").

Fundamental to the Act is the government's compelling interest in accurately identifying convicted offenders. *Banks*, 490 F.3d at 1188 ("It is well settled that once an individual has been convicted, his or her identity becomes a matter of compelling interest to the government.") (quotation and alteration omitted); *see Conley*, 453 F.3d at 678 (government interest in collecting DNA includes "the creation of a permanent record of the identities of convicted felons"); *Johnson*, 440 F.3d at 497 ("[T]he government is 'quite justified' in taking steps to keep tabs on ex-convicts."); *Sczubelek*, 402 F.3d at 185 ("[T]he government . . . has a compelling interest in the collection of identifying information of criminal offenders."). DNA profiling furthers this interest in a way no other identifying feature can, because DNA is unique to each individual (excepting identical twins) and cannot, within current scientific knowledge, be altered or disguised. *See Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992).

Finally, courts also agree that the deterrent effect of compulsory DNA profiling under the Act serves "society's enormous interest in reducing recidivism." *Kincade*, 379 F.3d at 838; *see Johnson*, 440 F.3d at 497 ("[T]he government is 'quite justified' in taking steps[, namely enforcing the DNA Act,] . . . to deter recidivism."); *Banks*, 490 F.3d at 1189 ("[C]ollecting DNA combats recidivism by solving crimes and removing criminals from the streets and by deterring future criminal acts by felons on release, presumably because the felons know that they are more easily identifiable when the

authorities have their DNA."); *Conley*, 453 F.3d at 678 (government interest in collecting DNA for "deterrence of future criminal acts by felons on release"); *Sczubelek*, 402 F.3d at 186 ("[C]ollection of [DNA] will indirectly promote the rehabilitation of criminal offenders by deterring them from committing crimes in the future.").

Kaemmerling argues that the government has not shown—and cannot show, at this pre-evidentiary stage of the case—that the DNA Act serves a compelling interest as applied to him, "a first-time offender convicted of a non-violent crime that did not turn on DNA evidence." The RFRA demands that "the compelling interest test [be] satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal ("UDV")*, 546 U.S. 418, 430-31 (2006) (quoting 42 U.S.C. § 2000bb-1(b)). We must look beyond the "broadly formulated interests justifying the general applicability" of the statute to examine the interests the government seeks to promote as applied to Kaemmerling "and the impediment to those objectives" that would flow from granting him a specific exemption. *Id.* at 431; *see Yoder*, 406 U.S. at 213.

We first note that Congress specifically amended the DNA Act in 2004 to expand the qualifying federal offenses that subject an offender to DNA sampling to include "[a]ny felony." 42 U.S.C. § 14135a(d)(1) (as amended by the Justice for All Act of 2004, Pub. L. 108-405, 118 Stat. 2260, at 2270). The Act previously only affected felons who had committed violent crimes such as murder, sexual abuse, and kidnaping. *See* DNA Analysis Backlog Elimination Act of 2000, Pub. L. 106-546, 114 Stat. 2726, at 2729-30. This amendment is definitive evidence that nonviolent offenders were in fact the intended object of the compelling interests Congress sought to advance

through the Act.

Indeed, the interests served by the DNA Act are compelling as to nonviolent first-time felons and violent recidivists alike. Kaemmerling's status as a nonviolent felon or first-time offender in no way undermines DNA profiling as an effective way to identify and "keep tabs on" him. *See Banks*, 490 F.3d at 1190. As unchangeable personal identifiers, DNA profiles can do more than verify a suspect's presence at the scene of a crime. They can, for example, be used to identify a felon "who has attempted to alter or conceal his or her identity." *See Jones*, 962 F.2d at 308. The identification purpose therefore serves interests aside from catching repeat offenders.

The government's compelling interest in accurately and expeditiously solving crime, by matching DNA evidence to an offender profile and by quickly excluding innocent offenders, also applies to felons previously convicted of nonviolent crimes and those who are first-time offenders. DNA exists in numerous parts of the body that even nonviolent criminals leave behind, including hair, saliva, and skin cells, and modern technology can generate a DNA profile from just thirty to fifty cells. *See Banks*, 490 F.3d at 1190 (citing studies documenting "identifiable quantities of human DNA on doorknobs, coffee cups, and other common items"); *Kincade*, 379 F.3d at 838 n.37 ("[A] new crime lab planned for New York City expects to generate profiles culled from as little as 6 cells' worth of genetic material collected at the scene of nearly every crime committed in the city—including . . . property offenses like home burglaries and auto thefts." (citing Shalia K. Dewan, *As Police Extend Use of DNA, a Smudge Could Trap a Thief*, N.Y. Times, May 26, 2004)). Although it may be true that law enforcement officers currently use DNA evidence more often in solving violent crimes than nonviolent ones, the even stronger interest in collecting the DNA of violent offenders does not diminish the

connection between taking and storing the DNA of nonviolent offenders and the government's crime-solving interest. *See Amerson*, 483 F.3d at 88 n.15 ("DNA can be, and is increasingly, being used to solve non-violent crimes.").

In addition, Kaemmerling's status as a first-time offender does not diminish the government's crime-solving interest as related to him. Even if Kaemmerling never re-offends, his DNA profile would still further this purpose because law enforcement uses the CODIS not only to identify a perpetrator but also to swiftly and efficiently eliminate countless potential suspects. Of course, all recidivists were once first-time offenders, so the government also has an interest in determining if Kaemmerling will be such a case, given that he has already demonstrated a willingness to commit a crime meriting imprisonment. Other courts addressing this issue have observed that nonviolent offenders not only have a higher recidivism rate than the general population, but certain groups—such as property offenders—have an even higher recidivism rate than violent offenders, and a large percentage of the crimes nonviolent recidivists later commit are violent. *Ewing v. California*, 538 U.S. 11, 26 (2003) (citing U.S. Dept. of Justice, Bureau of Justice Statistics, P. Langan & D. Levin, *Special Report: Recidivism of Prisoners Released in 1994*, p.1 (June 2002)); *Banks*, 490 F.3d at 1191; *see Amerson*, 483 F.3d at 89 n.15 ("[E]xperience indicates that samples collected on the basis of convictions for nonviolent offenses are actually among the most useful in solving crimes, including violent crimes." (quoting H.R. Rep. No. 106-900(I), at *29 (letter from Dept. of Justice))). Even white-collar criminals like Kaemmerling appear to show a high level of recidivism, with fraud and larceny offenders demonstrating only slightly lower rates of recidivism than other offenders. *Amerson*, 483 F.3d at 88 n.15 (citing U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines*, at 30, Exh. 11 (May 2004),

and U.S. Dep't of Justice, *Profile of Nonviolent Offenders Exiting State Prisons*, at 2 (Oct. 2004)); *see Conley*, 453 F.3d at 679 ("[R]ecidivism in certain groups of white-collar criminals is very close to the rate of recidivism in firearm offenders, and is only slightly lower than felons convicted of robbery." (citation omitted)).

Finally, because law enforcement officials can find usable DNA evidence related to both violent and nonviolent crimes, the Act's compelling interest in deterring recidivism applies undiminished to Kaemmerling, who has already displayed his need for a deterrent in his willingness, as mentioned before, to commit a felony meriting imprisonment. Regardless of whether a felon has been convicted of one or many offenses and regardless of whether he is tempted to commit a violent or nonviolent crime in the future, his knowledge that the government has stored an unchangeable aspect of his identity that can be used to ferret out his best attempts at concealing future crime certainly furthers the government's deterrence interest.

Having concluded that the government has a compelling interest in extracting and storing Kaemmerling's DNA information for identification, we have no trouble concluding that application of the DNA Act to Kaemmerling "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). A statute or regulation is the least restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Sherbert*, 374 U.S. at 407. While we acknowledge the government's argument that an intrusion like drawing blood might be considered an acceptably minimal invasion of privacy interests under the Fourth Amendment, it

does not necessarily follow that it is the means least restrictive of religious exercise under the RFRA.

It is not the method of collecting the tissue or fluid sample for DNA analysis which Kaemmerling alleges burdens his religious exercise, so this is not a case like *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007), in which the religious adherent's beliefs prohibited him from giving blood, but the court considered whether other methods of obtaining a DNA sample would intrude less on his beliefs. Because Kaemmerling alleges that collecting his DNA information at all is what impedes his religious exercise, a less restrictive alternative would exist only if some means of identification other than DNA would accomplish the government's compelling purposes.

No less restrictive alternative exists. As Congress stated, DNA profiling is currently "the most reliable forensic technique for identifying criminals when biological material is left at a crime scene." 42 U.S.C. § 14135 Note(a)(1). Perhaps more importantly, it is the one identifying characteristic that criminals cannot change, disguise, or hide to avoid detection. As the Fourth Circuit explained,

> It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features. Traditional methods of identification by photographs, historical records, and fingerprints often prove inadequate. The DNA, however, is claimed to be unique to each individual and cannot, within current scientific knowledge, be altered. The individuality of the DNA provides a dramatic new tool for the law enforcement

> effort to match suspects and criminal conduct. Even a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank, or left at the scene of a crime within samples of blood, skin, semen or hair follicles. The governmental justification for this form of identification, therefore, relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods.

Jones, 962 F.2d at 307. Any alternative method of identification would be less effective in identifying offenders and much more easily capable of evasion, thus "adversely affect[ing]" the government's compelling interests. *Yoder*, 406 U.S. at 236 (asking how the state's "admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish"); *see UDV*, 546 U.S. at 431 (discussing *Yoder*); *cf. Sherbert*, 374 U.S. at 408-09 (explaining that providing Sabbatarian business owners an exception to Sunday closing laws was not an adequate less restrictive alternative in *Braunfeld v. Brown*, 366 U.S. 599 (1961), because the exception appeared to present an administrative problem or to afford the exempted class a competitive advantage rendering the Sunday closing scheme unworkable).

C

Kaemmerling's complaint also alleges violations of his Fifth Amendment rights to equal protection and against self-incrimination and his Fourth Amendment right to be free from unreasonable searches and seizures.

Kaemmerling argues that the DNA Act violates the equal protection component of the Due Process Clause because it requires collection of DNA from felons who are incarcerated or on supervised release but does not mandate collection of DNA from "free" felons, who are no longer under the supervision of the BOP. Because prisoners are not a suspect class, we must sustain the statute's classification "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Tucker v. Branker*, 142 F.3d 1294, 1300 (D.C. Cir. 1998) (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)). Even if Congress has not articulated the purpose supporting the distinction, we must uphold it "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller*, 509 U.S. at 320. The DNA Act certainly passes the rational basis test. The BOP exerts a measure of control over incarcerated felons and felons on supervised release that it does not exert over felons who are now out of the prison system, making it significantly easier for the BOP to collect DNA samples from incarcerated and supervised felons than from free felons. *See Tucker*, 142 F.3d at 1300 (control over prisoner funds as compared to indigents at large is rational basis for treating prisoners and non-prisoners differently with respect to filing fees). Moreover, the statute's alleged underinclusiveness is not a basis for invalidating it, because under rational basis review Congress may choose to proceed "one step at a time," applying remedies to "one phase of one field [while] . . . neglecting the others." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955); *see United States v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987); *see also Roe v. Carcotte*, 193 F.3d 72, 82 (2d Cir. 1999) (concluding state DNA statute does not violate equal protection by targeting incarcerated sex offenders but not prior sex offenders currently residing in the community).

Regarding the privilege against compelled self-incrimination, Kaemmerling argues that the DNA Act is unconstitutional because it requires him to give the government potentially incriminating evidence for later use against him in court. The Fifth Amendment privilege bars only compelling testimonial communications from an accused, not making the accused a source of physical evidence. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966). So the forced extraction of a blood sample, to be chemically analyzed for alcohol content and used against the accused, was not compelled self-incrimination because "the blood test evidence, although an incriminating product of compulsion, was neither [the accused's] testimony nor evidence relating to some communicative act or writing by the [accused]." *Id.* at 765. For the same reason, a DNA sample is not a testimonial communication subject to the protections of the Fifth Amendment. *See Wilson v. Collins*, 517 F.3d 421, 431 (6th Cir. 2008) (extraction of DNA does not implicate the privilege because DNA samples are physical, not testimonial, evidence); *United States v. Reynard*, 473 F.3d 1008, 1021 (9th Cir. 2007) (same); *United States v. Hook*, 471 F.3d 766, 773-74 (7th Cir. 2006) (same); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) (same).

Kaemmerling's complaint also asserts that collecting a sample of his DNA pursuant to the Act violates his Fourth Amendment right to be free from unreasonable searches and seizures because the Act unconstitutionally authorizes a blanket, suspicionless search for general law enforcement purposes. But we have already held, in a previous challenge to the DNA Act, that "the Fourth Amendment . . . certainly permits the collection of a blood sample [for DNA analysis] from a *convicted* felon . . . while he is still on probation," much less from a currently incarcerated felon. *Johnson*, 440 F.3d at 497; *see id.* ("[T]he Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from

incarcerated felons for the purpose of identifying them." (quotation omitted)); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (no reasonable expectation of privacy in prison cell); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (body cavity inspections after contact visits in prison are not unreasonable under the Fourth Amendment). That decision, which accords with the opinion of every court of appeals to consider the issue, forecloses Kaemmerling's claim. *See Johnson*, 440 F.3d at 496 (listing cases from the Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits); *United States v. Weikert*, 504 F.3d 1, 14 (1st Cir. 2007); *United States v. Conley*, 453 F.3d 674, 680-81 (6th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006).

IV

For the foregoing reasons, we conclude that Kaemmerling's complaint fails to state a claim upon which relief can be granted and therefore should be dismissed. Dismissal of the case moots Kaemmerling's appeal from the district court's denial of his motion for a preliminary injunction, as he no longer has a potential claim or continuing litigation and we have adjudged him unsuccessful on the merits of his case. We affirm the district court's judgment dismissing Kaemmerling's complaint, but order that the dismissal be with prejudice.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5124 **September Term, 2008**

FILED ON: DECEMBER 30, 2008

JILL THOMPSON,

APPELLANT

v.

CONDOLEEZZA RICE, SECRETARY OF STATE,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 03cv02022)

Before: ROGERS, TATEL and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the court, and briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. For the reasons presented in the accompanying memorandum opinion, it is

ORDERED AND ADJUDGED that the grant of summary judgment be affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

No. 06-5124 **September Term, 2008**

MEMORANDUM

Appellant contends that the district court erred in granting summary judgment on the grounds that she was neither disabled nor regarded as disabled within the meaning of the Rehabilitation Act of 1973 ("the Act"), 29 U.S.C. § 705(20)(B), and that she did not request a reasonable accommodation from her employer. She does not challenge summary judgment on her claim that the State Department intentionally discriminated against her on the basis of disability by failing to appoint her to postings in Paris and Frankfurt. Assuming that appellant suffered from a qualifying disability under the Act, we affirm upon *de novo* review. *See Wilburn v. Robinson*, 480 F.3d 1140, 1148-49 (D.C. Cir. 2007).

Section 501(b) of the Act requires agencies to take affirmative steps to make accommodations for qualified persons with disabilities. 29 U.S.C. § 791(b); *see Carr v. Reno*, 23 F.3d 525, 528 (D.C. Cir. 1994); 29 C.F.R. § 1630.9(a). To survive summary judgment on a reasonable accommodation claim under the Act, a plaintiff must proffer evidence from which a reasonable fact finder could find that (1) she had a qualifying disability, (2) her employer had notice of the disability, (3) with reasonable accommodation she could perform the essential functions of the position, and (4) she requested an accommodation but the employer denied her request. *See Barth v. Gelb*, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993); *Flemmings v. Howard Univ.*, 198 F.3d 857, 861 (D.C. Cir. 1999). We will assume that appellant met her burden on the first two elements.

As evidence of a request for an accommodation due to a qualifying disability, appellant relies on letters from her lawyer and neurologist to the State Department and a medical questionnaire she completed after she suffered a Grade 1 subarachnoid hemorrhage ("SAH"). The evidence, taken in the light most favorable to appellant, showed that she had spent two days in the hospital and taken several weeks of sick leave as a result of the SAH. Around the time that she returned to work in early November 2001, appellant's lawyer and neurologist wrote to the State Department regarding her SAH. However, those letters do not mention that appellant was suffering from fatigue as would affect her ability to work or carry on major life activities. Rather, the letters claimed that appellant could suffer another hemorrhage or other serious health problems if she were subjected to "undue stress" or a "hostile work environment." Letter from William T. Irelan, Freidman, Irelan, Ward & Lamberton, P.C., to Larry J. Eisenhart, Deputy CFO, Dep't of State, at 1 (Oct. 24, 2001) ("Irelan Letter"); Letter from Sam Oraee, M.D., Neurological Ctr. of N. Va., to Grant S. Green, Under Sec'y of Mgmt., Dep't of State (Nov. 16, 2001). Her lawyer's letter specifies that the source of the stress and hostility for which appellant required an accommodation was the harassment she had allegedly suffered from her colleagues in the Internal Financial Services ("IFS") in the Bureau of Financial Management Policy and a resulting internal investigation of the alleged misconduct. Appellant's lawyer also claimed that assigning her on detail and asking staff to refrain from discussing an on-going investigation would not satisfy the department's obligation "to accommodate [appellant's] medical condition." Irelan Letter at 2. Indeed, at her deposition, appellant described the letters sent in October and November 2001 as requests to resolve the hostile work environment. *See* Thompson

Dep. 34, 37, Sept. 3, 2004.

As to the questionnaire, after she returned to work, appellant was placed on a temporary work detail in the Human Resources office that continued until she was posted to Berlin for six weeks in May 2002. Prior to her posting in Berlin, she had sought assistance in resolving her work assignment issues, *see* Letter from Barbara Pope, Assistant Sec'y, Office of Civil Rights, to Jill Thompson (Mar. 15, 2002), and submitted the questionnaire. In the questionnaire appellant stated, "[m]y difficulties do not relate in any way to assigned duties in my Work Requirements Statement" because she was working without such a statement; she also explained that she was not requesting a change in her job. Medical Questionnaire at 1, Mar. 21, 2002. Rather, she advised that she was in the process of bidding for "another foreign service assignment," and stated, "[i]n the bidding process, I would like the State Department's support in following my doctor's instructions [noted] below." *Id.* Her neurologist advised that appellant reported suffering from "excessive fatigue" and "occasional headaches," and opined that "[i]f the fatigue she is now experiencing is not a secondary effect of the SAH, [appellant] should be able to effect a full recovery and pursue a normal work routine." *Id.* at 2. He further advised that:

> She should be able to continue working a 40-hour week at the State Department in any position for which she is qualified. I recommend that she be given a certain amount of discretion in managing her workload. If possible, she should be placed in an office, which is "employee friendly" and does not in its circumstances represent the appearance or perception of any directed hostility against her.

Id. at 3.

Assuming without deciding that appellant is disabled under the Act because she suffers from chronic fatigue that substantially limits her ability to sleep, work, and live independently, *see Desmond v. Mukasey*, 530 F.3d 944, 958-59 (D.C. Cir. 2008), this evidence is insufficient to raise a genuine issue as to whether she requested a reasonable accommodation that the department rejected. "An underlying assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation which the defendant-employer has denied." *Flemmings*, 198 F.3d at 861. This means that the employer must know that the employee has a disability that prevents her from performing the essential functions of her present or desired position, *see Smith v. Midland Brake Inc.*, 180 F.3d 1154, 1171-72 (10th Cir. 1999); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996); *Adams v. Rice*, 531 F.3d 936, 953-54 (D.C. Cir. 2008) (dictum); 29 C.F.R. § 1630.2(o)(1)(ii), and that the employee is seeking assistance from the employer, *see Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999).

Appellant's purported requests for an accommodation in October and November 2001 refer to a different claimed limitation (inability to handle stress) and a different claimed disability (the SAH). While appellant maintains that the SAH and her fatigue collectively constitute a qualifying disability, other than noting that she became fatigued in the months after she suffered the SAH, she

proffered no evidence to link her fatigue to the SAH. Rather, as the district court noted, appellant's neurologist indicated that fatigue was not generally an effect of a SAH and never suggested that he believed that appellant's SAH caused her fatigue. Nor is there any evidence that appellant's fatigue was caused by her chosen treatment regimen for the SAH. *Cf. Adams*, 531 F.3d at 950. Moreover, during discovery, appellant ascribed her fatigue in large measure to work-related stress. And while a very serious medical event, the evidence showed that the SAH was a relatively temporary impairment without a permanent or long-term impact, and therefore does not qualify as disability under the Rehabilitation Act. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

Appellant's request in March 2002 for "support" in finding a suitable posting and her conversations with Barbara Pope may have put the department on notice that she wanted some sort of assistance but no reasonable fact finder could conclude that the questionnaire indicated that her *fatigue* prevented her from performing the duties of her position on detail to the Human Resources office, her prior position as a financial management specialist in IFS, or the duties of "any position for which she [was] qualified." Medical Questionnaire at 3. In the district court appellant offered that the reasonable accommodation she requested in March 2002 was "reassignment to a comparable position to the one from which [she] had been removed in IFS." Thompson Decl. ¶ 7, May 27, 2005. However, there is no evidence that appellant's departure from IFS was related to her claimed disability, and a reasonable fact finder could not find from the proffered evidence that she asked for a reassignment specifically to address that disability.

Rather, appellant proffered evidence that after suffering a SAH, she was unable to remain in a work environment poisoned by gossip particularly during an internal investigation, and that she sought the department's support in obtaining a posting away from the turmoil. She did not proffer evidence that she suffered from a qualifying disability that substantially affected her ability to do her job and that she therefore requested an accommodation under the Act. Accordingly, appellant has failed to show that summary judgment was inappropriate and we affirm.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5201 **September Term 2008**

1:05-cv-01034-RMU

Filed On: December 30, 2008

George A. Short,

Appellant

v.

Michael Chertoff, U.S. Department of Homeland Security,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the Clerk's order to show to cause, filed September 17, 2008, and the response thereto; and the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed appellant's constructive discharge claim because he failed to exhaust his administrative remedies with regard to that claim. See 29 C.F.R. § 1614.105. It was also proper for the district court to grant summary judgment for appellee on appellant's Title VII and Age Discrimination in Employment Act discrimination and retaliation claims, as well as on appellant's Equal Pay Act claim. Because appellant did not "show that a reasonable jury could conclude from all the evidence that the adverse employment decision[s] w[ere] made for a discriminatory [or retaliatory] reason," he was unable to survive summary judgment. Lathram v. Snow, 336 F.3d 1085, 1088 (D.C. Cir. 2003); see Czekalski v. Peters, 475 F.3d 360, 363 (D.C. Cir. 2007).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5201 **September Term 2008**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5096 **September Term 2008**

1:05-cv-02353-RCL

Filed On: December 30, 2008

Sam L. Clemmons,

Appellant

v.

U.S. Army Crime Records Center,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for relief concerning the fees; and this court's orders filed June 18, 2008, and September 30, 2008, directing appellant to either pay the $455 docketing and filing fees or file an application for leave to proceed in forma pauperis within 30 days, or face dismissal for lack of prosecution; and appellant's failure to pay the fee or file an application for leave to proceed in forma pauperis; it is

ORDERED that the case be dismissed for lack of prosecution. See D.C. Cir. Rule 38.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7051 **September Term 2008**

1:06-cv-00195-RCL

Filed On: December 30, 2008

Sam L. Clemmons,

Appellant

v.

Mid-America Apartment Communities,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for relief concerning the fees; and this court's orders filed June 18, 2008, and October 9, 2008, directing appellant to either pay the $455 docketing and filing fees or file an application for leave to proceed in forma pauperis within 30 days, or face dismissal for lack of prosecution; and appellant's failure to pay the fee or file an application for leave to proceed in forma pauperis; it is

ORDERED that the case be dismissed for lack of prosecution. See D.C. Cir. Rule 38.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7143 **September Term 2008**

03cv02365

Filed On: December 23, 2008

Joyce Burnett,

Appellant

v.

Amar Sharma, et al.,

Appellees

Consolidated with 07-7144, 07-7149, 07-7150

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance, amicus' response thereto, the replies, and appellant's letter; and the motion for leave to file reply out of time, it is

ORDERED that the motion for leave to file reply out of time be granted. The Clerk is directed to file Loewinger & Brand's lodged reply. It is

FURTHER ORDERED that the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in denying appellant's motion for extension of time and treating as conceded the discrimination and malicious prosecution claims against Loewinger & Brand, the tort claims against Amar Sharma, and Jennifer Renton's motion to dismiss. Hussain v. Nicholson, 435 F.3d 359, 363 (D.C. Cir. 2006) (stating that this court is "especially reluctant to interfere with district court decisions regarding their own day-to-day operations"); see also United States v. Microsoft Corp., 253 F.3d 34, 100 (D.C. Cir. 2001) ("'[A]n appellate court will not interfere with the trial court's exercise of its discretion to control its docket and dispatch its business ... except

upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.'" (quoting Eli Lilly & Co., Inc. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1105 (5th Cir. 1972))). Nor has appellant demonstrated that there was excusable neglect for her failure to raise the discrimination claims against the Sharmas in the state court proceedings or that the statute of limitations should be tolled. See Washington v. WMATA, 160 F.3d 750, 753 (D.C. Cir. 1998) (applying the court's equitable power to toll the statute of limitations "only in extraordinary and carefully circumscribed instances"); Smith-Haynie v. District of Columbia, 155 F.3d 575, 579-80 (D.C. Cir. 1998). Neither appellant nor amicus has presented any argument why summary affirmance should not be granted as to the remaining claims.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5210 **September Term 2008**

1:06-cv-01137

Filed On: December 23, 2008

Margaret R. Brantley,

Appellant

v.

Dirk Kempthorne,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). In light of the fact that appellant first contacted her Equal Employment Opportunity counselor on March 26, 2003, the district court properly determined that appellant's discrimination and retaliation claims concerning discrete acts of discrimination or retaliation arising more than 45 days earlier than that date were not timely exhausted. See 29 C.F.R. § 1614.105(a)(1); Steele v. Schafer, 535 F.3d 689, 693 (D.C. Cir. 2008). Additionally, the district court correctly concluded that the request that appellant pack her office, and the denial of a private office, a key, and a partition wall were not adverse employment actions upon which appellant may base a claim of discrimination. See Taylor v. Small, 350 F.3d 1286, 1293 (D.C. Cir. 2003); Forkkio v. Powell, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002). The district court also properly determined that appellant failed to rebut appellee's legitimate, non-discriminatory reason for cancelling the vacancy announcement. See Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008). As for the retaliation claims concerning the request that appellant pack her office, and the denial of a private office, a key, and a partition wall, the district court correctly concluded that no reasonable juror could find that these workplace grievances would deter a reasonable employee from making a charge of discrimination. See

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). The district court also properly determined that appellant failed to produce evidence that would permit a reasonable jury to infer that the cancellation of the vacancy announcement was a response to her protected activity rather than a result of the legitimate, non-discriminatory reason offered by appellee. See Patterson v. Johnson, 505 F.3d 1296, 1299 (D.C. Cir. 2007). Finally, the district court correctly concluded that appellant failed to establish an actionable hostile work environment claim because the incidents alleged by appellant were not "sufficiently severe or pervasive to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998) (citation omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5211 **September Term 2008**

1:03-cv-01123

Filed On: December 23, 2008

W. Jean Simpson,

Appellant

v.

Michael O. Leavitt, Secretary of Health and Human Services,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The district court did not err in granting summary judgment for appellee on appellant's race discrimination claim or in entering judgment for appellee on appellant's age discrimination claim after a three-day bench trial. See, e.g., Jackson v. Gonzales, 496 F.3d 703, 707-10 (D.C. Cir. 2007). The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5094 **September Term 2008**

1:06-cv-00305-RCL

Filed On: December 23, 2008

Sam L. Clemmons,

Appellant

v.

Department of Justice, et al.,

Appellees

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for relief concerning the fees; and this court's orders filed June 18, 2008, and September 26, 2008, directing appellant to either pay the $455 docketing and filing fees or file an application for leave to proceed in forma pauperis within 30 days, or face dismissal for lack of prosecution; and appellant's failure to pay the fee or file an application for leave to proceed in forma pauperis; it is

ORDERED that the case be dismissed for lack of prosecution. See D.C. Cir. Rule 38.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7050 **September Term 2008**

1:06-cv-00194-RCL

Filed On: December 23, 2008

Sam L. Clemmons,

Appellant

v.

Stein Mart, Incorporate,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for relief concerning the fees; and this court's orders filed June 18, 2008, and October 9, 2008, directing appellant to either pay the $455 docketing and filing fees or file an application for leave to proceed in forma pauperis within 30 days, or face dismissal for lack of prosecution; and appellant's failure to pay the fee or file an application for leave to proceed in forma pauperis; it is

ORDERED that the case be dismissed for lack of prosecution. See D.C. Cir. Rule 38.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5152 **September Term 2008**

1:06-cv-02214

Filed On: December 12, 2008

Robert Solomon,

Appellant

v.

Office of the Architect of the Capitol, et al.,

Appellees

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). "The essential requirements of due process ... are notice and an opportunity to respond." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). Appellant was provided adequate notice of the reasons for his termination and an opportunity to respond both in writing and at an administrative hearing where he was represented by counsel. Appellant has also failed to state a substantive due process claim. See Estate of Phillips v. District of Columbia, 455 F.3d 397, 403 (D.C. Cir. 2006) ("To constitute a substantive due process violation, the defendant official's behavior must be 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998))).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5352 **September Term 2008**

1:07-cv-01431

Filed On: December 12, 2008

James H. Pickett,

Appellant

v.

John E. Potter, Postmaster General, U.S. Postal Service,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to appoint counsel; and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion to appoint counsel be denied. With the exception of defendants appealing or defending criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly determined that venue in this judicial district is improper. See 42 U.S.C. § 2000e-5(f)(3).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5311 **September Term 2008**

05cv00910

Filed On: December 12, 2008

Derrin A. Perkins,

Appellant

v.

United States of America,

Appellee

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for a certificate of appealability ("COA") and the motion to extend the briefing schedule, it is

ORDERED that the motion for a COA be denied and the appeal be dismissed for lack of a COA. See 28 U.S.C. § 2253(c). Appellant has not shown that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. See Slack v. McDaniel, 529 U.S. 473, 478 (2000). The district court properly determined that it lacked jurisdiction over appellant's action without certification by this court. See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); see also 28 U.S.C. § 2255(h). It is

FURTHER ORDERED that the motion to extend the briefing schedule be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no COA has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1251 **September Term 2008**

EPA-DC0021199

Filed On: December 12, 2008

DC Water and Sewer Authority,

Petitioner

v.

Stephen L. Johnson, Administrator, EPA, et al.,

Respondents

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to intervene by Chesapeake Bay Foundation and by Sierra Club and Friends of the Earth, the responses thereto, and the replies; the joint motion to establish an extended briefing schedule; and the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Because the challenged nitrogen limit cannot be enforced until the Regional Administrator establishes a compliance schedule, the order under review lacks finality. See Bennett v. Spear, 520 U.S. 154, 178 (1997) (holding that "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'" to meet the second prong of the finality test). It is

FURTHER ORDERED that the motions to intervene and the joint motion to establish an extended briefing schedule be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1242 **September Term 2008**

NLRB-8CA33352

Filed On: December 11, 2008

American Standard Companies Inc. and
American Standard Inc., doing business as
American Standard,

Petitioners

v.

National Labor Relations Board,

Respondent

Glass, Molders, Pottery, Plastics and Allied
Workers International, AFL-CIO, CLC and
Glass, Molders, Pottery, Plastics and Allied
Workers International, AFL-CIO, CLC, Local
Union No. 7A,
Intervenors

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed September 9, 2008, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the petition for review be dismissed. Petitioner's request for agency reconsideration, pending when this petition for review was filed, renders this petition incurably premature. It is well-settled that "[a] request for administrative reconsideration renders an agency's otherwise final action non-final with respect to the requesting party," Clifton Power v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002) (citing United Transp. Union v. ICC, 871 F.2d 1114, 1116 (D.C. Cir. 1989)), and "'subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction,'" Clifton Power, 294 F.3d at 110 (quoting TeleSTAR, Inc. v. FCC, 888 F.2d 132, 134 (D.C. Cir. 1989)).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1242 **September Term 2008**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5454 **September Term 2008**

1:05-cv-02353

Filed On: December 11, 2008

In re: Sam L. Clemmons,

Petitioner

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the pleadings filed October 20, October 27, and November 17, 2008, seeking relief concerning fifteen district court cases, which this court has construed as a petition for writ of mandamus and supplements thereto, it is

ORDERED that the district court refund petitioner's payment of $455 for Case No. 07-7106, an appeal from Civil Action No. 06cv196. It is

FURTHER ORDERED that the petition for writ of mandamus be denied in all other respects. Petitioner has not demonstrated that his right to the writ is "clear and indisputable." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

The Clerk is directed to transmit a copy of this order to the Clerk of the District Court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Elizabeth V. Scott
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5049 **September Term 2008**

03cv01793

Filed On: November 17, 2008

Steven J. Hatfill, M.D.,

Appellee

v.

Michael B. Mukasey, Attorney General, et al.,

Appellees

Toni Locy,

Appellant

Michael Isikoff, et al.,

Appellees

BEFORE: Ginsburg, Rogers, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the stipulation of dismissal entered by the district court on August 29, 2008, the appellee's motion for leave to file a motion to dismiss and the lodged motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion for leave to file be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that the motion to dismiss be granted. This appeal raised close questions under Fed. R. Evid. 501 and the First Amendment, including whether the appellant had a defense, which required analysis of the appellee's efforts to obtain the information from alternate sources and need for disclosure of the appellant's sources, as compared to the appellant's interest in concealing her sources in order to protect the workings of the press. Because the underlying case has been settled, however, there is no longer a "pending trial in which" the appellee's request for disclosure "can be used." *In re City of El Paso*, 887 F.2d 1103, 1106 (D.C. Cir. 1989). Moreover, in light of our order of March 11, 2008, staying the district court's contempt

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5049 **September Term 2008**

order pending appeal, the appellant has suffered no sanction that would preserve her appeal for review. Therefore, the appeal is moot. It is

FURTHER ORDERED that the contempt order issued by the district court against the appellant be vacated pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–41 (1950).

The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1122 **September Term 2008**

NLRB-28CA20387
NLRB-28CA23087

Filed On: November 17, 2008

San Luis Trucking, Inc. and Factor Sales, Inc.,

Petitioners

v.

National Labor Relations Board,

Respondent

Consolidated with 08-1176, 08-1181

BEFORE: Henderson, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for voluntary dismissal of No. 08-1122, the opposition thereto, the reply, the motion for leave to file a surreply, and the lodged surreply, it is

ORDERED that the motion for leave to file a surreply be granted. The Clerk is directed to file the lodged surreply. It is

FURTHER ORDERED that the motion for voluntary dismissal of No. 08-1122 be granted and that No. 08-1122 be dismissed. It is

FURTHER ORDERED that the following briefing schedule apply to the remaining consolidated cases, Nos. 08-1176 and 08-1181:

Brief of San Luis Trucking, et al.	December 19, 2008
Brief of NLRB	January 21, 2009
Reply Brief of San Luis Trucking, et al.	February 4, 2009
Appendix	February 11, 2009
Final Briefs	February 18, 2009

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1122 **September Term 2008**

See Fed. R. App. P. 15.1 ("In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise."). The parties shall address in their briefs whether the court has jurisdiction over the NLRB's cross-application and application for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 08-1122 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7028 **September Term, 2008**

FILED ON: OCTOBER 14, 2008

WANDA Y. DICKENS,
APPELLANT

v.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS AND LINDA ARGO, INTERIM DIRECTOR, DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,
APPELLEES

Consolidated with 06-7029

Appeals from the United States District Court
for the District of Columbia
(No. 98cv01278)

Before: SENTELLE, *Chief Judge*, and BROWN and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the judgment of the District Court granting summary judgment to defendants is affirmed.

Plaintiffs Glenn and Dickens brought a discrimination suit. But Glenn's disparate treatment sex discrimination and retaliation claims are time-barred, as the District Court correctly concluded. As to plaintiffs' hostile work environment claims, plaintiffs have not shown that any "act contributing to the claim" occurred within the relevant filing period. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002).

Plaintiffs attempt to circumvent the time bar by raising a continuing violation claim. But that theory is foreclosed by *Morgan*, which establishes that for statute-of-limitations purposes there are only two kinds of Title VII violations: "discrete acts" and "hostile work environments." *See* 536 U.S. at 114-15. To be actionable, a discrete act an event that "takes place at a

particular point in time" must occur within the filing period, while a hostile work environment must extend into the filing period. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007) (citing *Morgan*, 536 U.S. at 110-11). Plaintiffs' allegations based on a continuing violation theory fail to meet these requirements and therefore are unavailing.

Plaintiffs also invoke principles of constructive discharge, but constructive discharge is not a cause of action in its own right. "Constructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly." *Simpson v. Fed. Mine Safety & Health Review Comm'n*, 842 F.2d 453, 461 (D.C. Cir. 1988); *see also Pa. State Police v. Suders*, 542 U.S. 129, 141-43 (2004). Plaintiffs have failed to produce sufficient evidence to support a constructive discharge theory.

Plaintiffs separately argue that their constructive discharge claim should be understood as a claim of fraud or negligent misrepresentation. But this argument strays far beyond the complaint.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5022 **September Term 2008**

07cv00912

Filed On: October 6, 2008

Raphael Sylvester Trice,

Appellant

v.

United States Parole Commission,

Appellee

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; the motion for summary reversal and the opposition thereto; and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). In appellant's suit for damages under the Privacy Act, 5 U.S.C. § 552a(e)(5), the district court correctly held that the United States Parole Commission did not intentionally or willfully rely upon inaccurate records because it gave the appellant an opportunity to challenge the disputed information during his parole revocation hearing. See Deters v. United States Parole Commission, 85 F.3d 655, 660 (D.C. Cir. 1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5022 **September Term 2008**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5187 **September Term 2008**

1:91cr00559-01

Filed On: September 25, 2008

In re: Kevin Williams-Davis,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED, on the court's own motion, that the petition be transmitted to the district court for consideration as a motion to reopen the time to file an appeal of the court's March 6, 2008, order in No. 91-cr-559 under Federal Rule of Civil Procedure 4(a)(6). The Clerk is directed to transmit to the district court a copy of this order along with the original petition for writ of mandamus.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5104 **September Term 2008**

1:07-cv-02013-ESH

Filed On: September 18, 2008

Richard Campbell,

Appellant

v.

United States Parole Commission and Devon Brown, DC Detention Facility Director,

Appellees

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the notice of appeal, construed as including a request for a certificate of appealability; the motion to dismiss for lack of a certificate of appealability, and the opposition thereto; the motion for summary reversal; and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the request for a certificate of appealability be denied and the motion to dismiss be granted. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). It is

FURTHER ORDERED that the motion for summary reversal be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5104 **September Term 2008**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1069 **September Term 2008**

FCC-73FR8617

Filed On: September 17, 2008

Rural Cellular Association and T-Mobile USA, Inc.,

Petitioners

v.

Federal Communications Commission and United States of America,

Respondents

Consolidated with 08-1070, 08-1075, 08-1076

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed July 1, 2008, and the response thereto; and the motion for voluntary remand and vacatur and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for voluntary remand and vacatur be granted. The FCC's order in Wireless E911 Location Accuracy Requirements, 73 Fed. Reg. 8617 (Feb. 14, 2008) is hereby vacated and the case is remanded for further proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the agency a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1069 **September Term 2008**

FCC-73FR8617

Filed On: September 17, 2008

Rural Cellular Association and T-Mobile USA, Inc.,

Petitioners

v.

Federal Communications Commission and United States of America,

Respondents

Consolidated with 08-1070, 08-1075, 08-1076

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed July 1, 2008, and the response thereto; and the motion for voluntary remand and vacatur and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for voluntary remand and vacatur be granted. The FCC's order in Wireless E911 Location Accuracy Requirements, 73 Fed. Reg. 8617 (Feb. 14, 2008) is hereby vacated and the case is remanded for further proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the agency a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1069 **September Term 2008**

FCC-73FR8617

Filed On: September 17, 2008

Rural Cellular Association and T-Mobile USA, Inc.,

Petitioners

v.

Federal Communications Commission and United States of America,

Respondents

Consolidated with 08-1070, 08-1075, 08-1076

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed July 1, 2008, and the response thereto; and the motion for voluntary remand and vacatur and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for voluntary remand and vacatur be granted. The FCC's order in Wireless E911 Location Accuracy Requirements, 73 Fed. Reg. 8617 (Feb. 14, 2008) is hereby vacated and the case is remanded for further proceedings.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the agency a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3078 **September Term 2008**

90-132-cr-T-17

Filed On: September 16, 2008

In re: Reginald McCoy,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has failed to demonstrate his right to relief is "clear and indisputable," and there is "no other adequate means to attain the relief" he seeks. In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (internal quotations omitted). The petition represents a collateral attack on petitioner's sentence that he must pursue through a motion, filed in the sentencing court, to vacate his sentence pursuant to 28 U.S.C. § 2255, unless the remedy under § 2255 would be "inadequate or ineffective." 28 U.S.C. § 2255(a), (e). The § 2255 remedy is not inadequate or ineffective simply because § 2255 relief has already been denied, or because the appellant has been denied permission to file a second or successive § 2255 motion. See Charles v. Chandler, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (collecting cases).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5209 **September Term 2008**

1:08cv00454

Filed On: September 16, 2008

In re: Omar Demetrious Pearson,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, and the memorandum of law and fact and supplement in support thereof; the motion for leave to proceed in forma pauperis; and the motion for injunction, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for injunction be denied. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5217 **September Term 2008**

1:87cr00094

Filed On: September 16, 2008

In re: Kellis D. Jackson,

Petitioner

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not demonstrated that his ordinary remedy is inadequate, see In re GTE Serv. Corp., 762 F.2d 1024, 1026 (D.C. Cir. 1985), or that his right to the writ is "clear and indisputable," see Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). The district court has directed the United States to respond to petitioner's Rule 60(b) motion by October 24, 2008.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3088 **September Term 2008**

02cr00117-02

Filed On: September 16, 2008

United States of America,

Appellee

v.

Marvin A. Wilson,

Appellant

BEFORE: Sentelle, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the unopposed motion to dismiss appeal as moot, it is

ORDERED that the motion be granted. Appellant challenges only his sentence, as opposed to the revocation of his supervised release. He has not alleged any collateral consequences resulting from his sentence, which he has now completed. See Spencer v. Kemna, 523 U.S. 1, 8-9 (1998).

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1184 **September Term 2008**

FERC-ER07-799-002

Filed On: September 11, 2008

Norwalk Power, LLC,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the response thereto, it is

ORDERED that the motion to dismiss be granted. Petitioner seeks review of orders that are not final and do not meet the criteria for immediate review. See Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 238-41 (D.C. Cir. 1980). The dismissal is without prejudice to filing another petition for review upon issuance by FERC of a final appealable order.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5204 **September Term 2008**

1:08cv00777

Filed On: September 10, 2008

In re: James Aggrey-Kweggyir Arunga,

Petitioner

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a "clear and indisputable" right to mandamus relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U. S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5213 **September Term 2008**

-

Filed On: September 10, 2008

In re: Carlos Juan Silva Galindo,

Petitioner

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Mandamus does not lie unless the petitioner's right to relief is "clear and indisputable," and there is "no other adequate means" by which the petitioner may attain the relief sought. In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998). Because petitioner's claims sound in habeas, they must be filed in the judicial district that has jurisdiction over petitioner's custodian. See 28 U.S.C. §§ 2241, 2254.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5292 **September Term 2008**

06cv00978

Filed On: September 8, 2008

Michael Trupei,

Appellant

v.

Department of Navy,

Appellee

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance; this court's order filed March 14, 2008, and the response thereto; and the motion for reconsideration and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly determined that the Department of the Navy conducted an adequate search for documents responsive to the appellant's Freedom of Information Act request. See Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Appellant has not provided sufficient evidence to raise "substantial doubt" concerning the adequacy of the search. See Iturralde v. Comptroller of the Currency, 315 F.3d 311, 314 (D.C. Cir. 2003) (internal quotation omitted). It is

FURTHER ORDERED that the motion for reconsideration be denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1169 **September Term 2008**

NLRB-5-CB-9981

Filed On: September 5, 2008

National Labor Relations Board,

Petitioner

v.

National Association of Special Police and Security Officers,

Respondent

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the application for summary entry of a judgment enforcing an order of the National Labor Relations Board, and the lack of response thereto, it is

ORDERED that the application be granted. The Clerk is directed to enter the judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5224 **September Term 2008**

04cv01144 04cv01194 04cv01254
04cv02035 04cv02215 05cv00023
05cv00247 05cv00270 05cv00280
05cv00301 05cv00329 05cv00359
05cv00392 05cv00492 05cv00520
05cv00526 05cv00569 05cv00634
05cv00723 05cv00877 05cv00881
05cv00887 05cv00993 05cv00998
05cv01001 05cv01048 05cv01189
05cv01220 05cv01236 05cv01429
05cv01555 05cv01645 05cv01649
05cv01666 05cv01806 05cv01983
05cv02185 05cv02186 05cv02379

Filed On: September 3, 2008

Mahmoad Abdah, Detainee, Camp Delta, et al.,

Appellees

v.

George W. Bush, President of the United States, et al.,

Appellants

Consolidated with 05-5225, 05-5227, 05-5228, 05-5229, 05-5230, 05-5231, 05-5232, 05-5235, 05-5236, 05-5237, 05-5238, 05-5239, 05-5242, 05-5243, 05-5244, 05-5246, 05-5247, 05-5248, 05-5337, 05-5338, 05-5339, 05-5353, 05-5374, 05-5390, 05-5398, 05-5478, 05-5479, 05-5484, 05-5486, 06-5037, 06-5039, 06-5041, 06-5043, 06-5062, 06-5064, 06-5065, 06-5067, 06-5094

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5224 **September Term 2008**

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellants' motion to govern further proceedings, which includes a motion to dismiss Nos. 05-5228, 05-5231, 05-5247, 05-5339, 06-5039, 06-5064, and 06-5067, and a motion to hold the remaining cases in abeyance; appellees' motion to govern future proceedings, which includes an opposition to the motion to hold in abeyance; and the reply, it is

ORDERED that the unopposed motion to dismiss Nos. 05-5228, 05-5231, 05-5247, 05-5339, 06-5039, 06-5064, and 06-5067 be granted, and the consolidation of these cases with No. 05-5224, et al. be terminated. It is

FURTHER ORDERED that the motion to hold in abeyance be granted. These consolidated cases are hereby held in abeyance pending further order of the court. The parties are directed to file motions to govern future proceedings within 14 days of this court's disposition of Kiyemba v. Bush, No. 05-5487, scheduled for oral argument September 25, 2008.

The Clerk is directed to transmit forthwith to the Clerk of the district court a certified copy of this order in lieu of formal mandate in Nos. 05-5228, 05-5231, 05-5247, 05-5339, 06-5039, 06-5064, and 06-5067.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5324 **September Term 2008**

06cv01455

Filed On: September 2, 2008

Mohammad Munaf and Maisoon Mohammed,
as Next Friend of Mohammad Munaf,

Appellants

v.

Pete Geren, Secretary of the U.S. Army, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Randolph and Kavanaugh, Circuit Judges

J U D G M E N T

It is **ORDERED** on the court's own motion that in light of the Supreme Court's decision in Munaf v. Geren, 128 S. Ct. 2207 (2008), vacating this court's judgment filed April 6, 2007, this case be remanded to the district court for further proceedings consistent with the Supreme Court's opinion. The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5040 **September Term 2007**

05cv02386, 05cv2479

Filed On: August 29, 2008

Sharaf Al Sanani, Detainee, Guantanamo Bay Naval Station, et al.,

Appellees

Abdul Razak Ali, Detainee,

Appellant

v.

Mike Bumgarner, Army Col. Commander, Joint Detention Operations Group, JTF-GRMO, et al.,

Appellees

Consolidated with 07-5043, 07-5052

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the government's motion to govern further proceedings in the above-captioned cases; Appellant Ali's response thereto in No. 07-5040, renewing his motion for immediate injunction pending appeal, and the reply; Appellant Al-Sanani's unopposed motion to dismiss the appeal without prejudice and response in opposition to the government's motion to govern in No. 07-5043; and appellants' unopposed motion to vacate and remand in No. 07-5052, it is

ORDERED that No. 07-5040 be remanded to the district court. It is

FURTHER ORDERED that Appellant Ali's motion for immediate injunction pending appeal be dismissed as moot. It is

FURTHER ORDERED that Appellant Al-Sanani's motion to dismiss the appeal without prejudice be granted. No. 07-5043 is hereby dismissed without prejudice. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5040 **September Term 2007**

FURTHER ORDERED that the motion to vacate and remand in No. 07-5052 be granted. In Civil Action No. 05-2479 (D.D.C.), the district court's order filed January 31, 2007, denying petitioners' motion for order requiring respondents to provide counsel for petitioners with factual returns, is hereby vacated, and No. 07-5052 is remanded to the district court.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5040 **September Term 2007**

05cv02386, 05cv2479

Filed On: August 29, 2008

Sharaf Al Sanani, Detainee, Guantanamo Bay Naval Station, et al.,

Appellees

Abdul Razak Ali, Detainee,

Appellant

v.

Mike Bumgarner, Army Col. Commander, Joint Detention Operations Group, JTF-GRMO, et al.,

Appellees

Consolidated with 07-5043, 07-5052

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the government's motion to govern further proceedings in the above-captioned cases; Appellant Ali's response thereto in No. 07-5040, renewing his motion for immediate injunction pending appeal, and the reply; Appellant Al-Sanani's unopposed motion to dismiss the appeal without prejudice and response in opposition to the government's motion to govern in No. 07-5043; and appellants' unopposed motion to vacate and remand in No. 07-5052, it is

ORDERED that No. 07-5040 be remanded to the district court. It is

FURTHER ORDERED that Appellant Ali's motion for immediate injunction pending appeal be dismissed as moot. It is

FURTHER ORDERED that Appellant Al-Sanani's motion to dismiss the appeal without prejudice be granted. No. 07-5043 is hereby dismissed without prejudice. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5040 **September Term 2007**

FURTHER ORDERED that the motion to vacate and remand in No. 07-5052 be granted. In Civil Action No. 05-2479 (D.D.C.), the district court's order filed January 31, 2007, denying petitioners' motion for order requiring respondents to provide counsel for petitioners with factual returns, is hereby vacated, and No. 07-5052 is remanded to the district court.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5040 **September Term 2007**

05cv02386, 05cv2479

Filed On: August 29, 2008

Sharaf Al Sanani, Detainee, Guantanamo Bay Naval Station, et al.,

Appellees

Abdul Razak Ali, Detainee,

Appellant

v.

Mike Bumgarner, Army Col. Commander, Joint Detention Operations Group, JTF-GRMO, et al.,

Appellees

Consolidated with 07-5043, 07-5052

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the government's motion to govern further proceedings in the above-captioned cases; Appellant Ali's response thereto in No. 07-5040, renewing his motion for immediate injunction pending appeal, and the reply; Appellant Al-Sanani's unopposed motion to dismiss the appeal without prejudice and response in opposition to the government's motion to govern in No. 07-5043; and appellants' unopposed motion to vacate and remand in No. 07-5052, it is

ORDERED that No. 07-5040 be remanded to the district court. It is

FURTHER ORDERED that Appellant Ali's motion for immediate injunction pending appeal be dismissed as moot. It is

FURTHER ORDERED that Appellant Al-Sanani's motion to dismiss the appeal without prejudice be granted. No. 07-5043 is hereby dismissed without prejudice. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5040 **September Term 2007**

FURTHER ORDERED that the motion to vacate and remand in No. 07-5052 be granted. In Civil Action No. 05-2479 (D.D.C.), the district court's order filed January 31, 2007, denying petitioners' motion for order requiring respondents to provide counsel for petitioners with factual returns, is hereby vacated, and No. 07-5052 is remanded to the district court.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1130 **September Term 2007**

CSRT ISN # 10025

Filed On: August 25, 2008

Mohamed Abdulmalik and Salim Juma Khamisi, as Next Friend,

Petitioners

v.

Robert M. Gates, U.S. Secretary of Defense,

Respondent

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; the motion to dismiss for lack of jurisdiction, the opposition thereto, and the reply; and the motion for entry of a protective order and the response thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to dismiss be granted. Because no Combatant Status Review Tribunal ("CSRT") hearing has been conducted and the CSRT has not issued a final decision, this court lacks jurisdiction over petitioner's Detainee Treatment Act petition. See Section 1005(e)(2)(A)-(B) of the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005). To the extent petitioner is seeking relief in the nature of habeas, such claims are properly brought in the district court in the first instance. See Fed. R. App. P. 22(a); Felker v. Turpin, 518 U.S. 651, 660-61 (1996). It is

FURTHER ORDERED that the motion for entry of a protective order be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1130 **September Term 2007**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1243 **September Term 2008**

EPA-57FR32250
EPA-71FR75422

Filed On: October 6, 2008

Sierra Club, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

American Petroleum Institute, et al.,
Intervenors

Consolidated with 07-1039

BEFORE: Sentelle, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of respondent's unopposed motion to extend time to file a petition for rehearing and/or petition for rehearing en banc, it is

ORDERED that the motion be granted. Any petition for rehearing and/or rehearing en banc is now due November 3, 2008.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5129 **September Term 2007**

05cv01220

Filed On: August 18, 2008

Abu Abdul Rauf Zalita,

Appellant

v.

George W. Bush,

Appellee

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to govern further proceedings, it is

ORDERED that in light of the Supreme Court's judgment, granting appellant's petition for writ of certiorari, vacating this court's judgment, and remanding the case, Zalita v. Bush, et al., No. 07-416 (U.S. July 25, 2008), the district court's order filed April 19, 2007, denying appellant's motion for a preliminary injunction, be vacated. It is

FURTHER ORDERED that the case be remanded to the district court.

The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5100 **September Term 2007**

04cv00302

Filed On: August 8, 2008

Securities and Exchange Commission,

Appellee

v.

Lines Overseas Management, LTD. and Scott Lines,

Appellants

BEFORE: Sentelle, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss the appeal as moot and vacate, styled as "suggestion of mootness and motion to show cause," the response thereto, and the reply, it is

ORDERED that the motion to dismiss as moot be granted. The court takes no position on the parties' arguments regarding vacatur of the district court's order. It is

FURTHER ORDERED that the case be remanded to the district court with instructions to consider the motion for vacatur as a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7029 **September Term 2007**

02cv02026

Filed On: August 1, 2008

Robert L. Pugh, Individually on his own behalf and as Executor of the Estates of Bonnie Barnes Pugh and Malcolm R. Pugh, et al.,

Appellees

v.

Socialist People's Libyan Arab Jamahiriya, et al.,

Appellees

Abdallah Senoussi, et al.,

Appellants

Consolidated with 08-7035, 08-7036

BEFORE: Ginsburg, Randolph, and Kavanaugh Circuit Judges

O R D E R

Upon consideration of the motion to vacate the judgment and remand for further proceedings, the opposition thereto, and the reply, it is

ORDERED, on the court's own motion, that the district court's February 7, 2008 judgment be vacated and the cases remanded to the district court. The district court is directed to re-enter or amend the judgment as needed following its disposition of the plaintiffs' "motion to 'give effect' to judgment as if entered under 28 U.S.C. § 1605A."

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of a formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
MaryAnne McMain
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5362 **September Term 2007**

06cv02202

Filed On: July 16, 2008

Wayne Brunsilius,

Appellant

v.

Department of Energy,

Appellee

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; the motion for summary affirmance; and the motion for summary reversal, the opposition thereto, and the reply, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). In reviewing an agency's decision to deny a fee waiver for a Freedom of Information Act ("FOIA") request, the court is limited to the record that existed before the agency. 5 U.S.C. § 552(a)(4)(A)(vii). Appellant did not adequately demonstrate his ability to disseminate the requested information to the general public in the record before the agency, and therefore, he was not entitled to a fee waiver. See Larson v. Central Intelligence Agency, 843 F.2d 1481, 1482-83 (D.C. Cir. 1988). Appellant's indigence and his private litigation interest are not valid bases for waiving fees under FOIA. See Ely v. United States Postal Service, 753 F.2d 163, 165 (D.C. Cir.), cert. denied, 471 U.S. 1106 (1985); McClain v. Department of Justice, 13 F.3d 220, 221 (7th Cir. 1993); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1287 (9th Cir. 1987).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5362 **September Term 2007**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7052 **September Term 2008**

1:07-cv-01999-HHK

Filed On: September 10, 2008

James G. King, Jr.,

Appellant

v.

Wells Fargo Bank, N.A.,

Appellee

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5121 **September Term, 2007**

FILED ON: JULY 15, 2008

LARRY W. BRYANT,
APPELLANT

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
APPELLEES

Consolidated with 07-5180

Appeals from the United States District Court
for the District of Columbia
(No. 05cv00064)

Before: GINSBURG, BROWN and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: July 15, 2008

Opinion for the court filed by Circuit Judge Ginsburg.
Concurring opinion filed by Circuit Judge Kavanaugh.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1435 **September Term 2007**

FAA-3017-0022-91

Filed On: July 14, 2008

St. John's United Church of Christ, et al.,

Petitioners

v.

Federal Aviation Administration and Robert A. Sturgell, Acting Administrator, Federal Aviation Administration,

Respondents

City of Chicago,
Intervenor

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply; the motion to hold case in abeyance, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Petitioners lack standing, because they have not shown that the single $28.4 million grant is the cause of their injuries, or that those injuries are redressable. Like the previously challenged $29.3 million grant, the $28.4 million grant "reimburses Chicago for completed work that did not affect the petitioners ...." St. John's United Church of Christ v. FAA, 520 F.3d 460, 462 (D.C. Cir. 2008). This court has already determined that "vacating the $337 million in the [FAA's Letter of Intent] would not redress petitioners' injuries because federal money plays a 'minor role' and Chicago could replace it with other sources of funding." Id. at 463; see also Village of Bensenville v. FAA, 457 F.3d 52, 70 (D.C. Cir. 2006). It is

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1435 **September Term 2007**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3097 **September Term 2007**

05cr00412-01

Filed On: July 11, 2008

United States of America,

Appellee

v.

Joseph A. Washington, Jr.,

Appellant

Consolidated with 07-3102

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the brief filed by appellant and the motion for summary affirmance filed by appellee, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly denied appellant's motion to suppress evidence that the police found a shotgun in his car, because the shotgun was discovered as the result of plain-view observations that occurred independently of any contact between appellant and the police. See Segura v. United States, 468 U.S. 796, 814 (1984).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3029 **September Term 2007**

87cr00446-03

Filed On: July 11, 2008

United States of America,

Appellee

v.

Michael Williams,

Appellant

Consolidated with 07-3030, 07-3031

BEFORE: Sentelle, Chief Judge, and Randolph and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the response thereto, it is

ORDERED that the motion to dismiss be granted and that these consolidated appeals be dismissed as untimely. The notice of appeal was filed eighteen years after expiration of the ten-day appeal period (extendable by thirty days for excusable neglect or good cause), see Fed. R. App. P. 4(b), and appellant's counsel acknowledges that he "is unable to advance an argument against the government's motion to dismiss." Response at 6.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41(b).

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3029 **September Term 2007**

87cr00446-03

Filed On: July 11, 2008

United States of America,

Appellee

v.

Michael Williams,

Appellant

Consolidated with 07-3030, 07-3031

BEFORE: Sentelle, Chief Judge, and Randolph and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and the response thereto, it is

ORDERED that the motion to dismiss be granted and that these consolidated appeals be dismissed as untimely. The notice of appeal was filed eighteen years after expiration of the ten-day appeal period (extendable by thirty days for excusable neglect or good cause), see Fed. R. App. P. 4(b), and appellant's counsel acknowledges that he "is unable to advance an argument against the government's motion to dismiss." Response at 6.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41(b).

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5417 **September Term 2007**

06cv00575

Filed On: July 11, 2008

Rodney Doggett, et al.,

Appellants

v.

Michael B. Mukasey, U.S. Attorney General, et al.,

Appellees

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed January 10, 2008, and re-sent April 15, 2008, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed as untimely. The order appealed from was entered on September 29, 2007. Although appellant Doggett "believes the notice of appeal was placed in the institutional mailbox before the expiration of the 60 day deadline" established in Fed. R. App. P. 4(a)(1)(B), the notice of appeal states that it was placed in the prison's legal mail receptacle on November 29, 2007 – 61 days after entry of the challenged order. The appeal must therefore be dismissed as untimely.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1051 **September Term 2007**

FCC-66FR9039

Filed On: July 10, 2008

In re: Sinclair Broadcast Group, Inc., et al.,

Petitioners

National Association of Broadcasters,
Intervenor

BEFORE: Ginsburg and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the consolidation order of the Judicial Panel on Multidistrict Litigation filed March 11, 2008, the petition for a writ of mandamus, the amicus briefs in support of the petition, the opposition to the petition, the reply, the motion to transfer the petition, the opposition thereto, the reply, the Rule 28(j) letter, and the response thereto, it is

ORDERED that the motion to transfer the petition for a writ of mandamus be granted and that the petition be transferred to the United States Court of Appeal for the Ninth Circuit pursuant to 28 U.S.C. § 2112(a)(3), (5). Despite its caption, the petition for a writ of mandamus is a petition for review of the 2006 Quadrennial Regulatory Review Order for purposes of § 2112(a), and the possibility of exclusive jurisdiction under 47 U.S.C. § 402(b) or any other provision or doctrine does not override the statute's transfer provision. See Valley Vision, Inc. v. FCC, 383 F.2d 218, 219 (D.C. Cir. 1967).

The Clerk is directed to send the original file and a certified copy of this order to the United States Court of Appeals for the Ninth Circuit.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7041 **September Term 2007**

1:07-cv-01236

Filed On: July 7, 2008

Allegra Hemphill,

Appellant

v.

Kimberly-Clark Corporation and Procter & Gamble Company,

Appellees

BEFORE: Randolph and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, including a request for sanctions, and the response thereto, it is

ORDERED, on the court's own motion, that this case, including appellees' request for sanctions, be transferred to the United States Court of Appeals for the Federal Circuit. See 28 U.S.C. § 1631. This court lacks jurisdiction, because the appeal derives from a patent infringement complaint over which the Federal Circuit has exclusive jurisdiction. See 28 U.S.C. § 1338 (Patents, copyrights); 28 U.S.C. § 1295 (Federal Circuit jurisdiction); see generally In re Innotron Diagnostics, 800 F.2d 1077, 1080 (Fed. Cir. 1986).

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Federal Circuit.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5047 **September Term 2007**

06cv01834

Filed On: July 1, 2008

Joseph P. Carson,

Appellant

v.

United States Office of Special Counsel,

Appellee

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; the motion for summary reversal; the motion to discipline appellee's attorney, styled as "motion to show cause"; and the motion to expedite a response to a Freedom of Information Act (FOIA) request pending at the Office of Special Counsel (OSC), styled as "motion to compel," it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). FOIA requires an agency to disclose only information in its possession or control. See Reporters Committee for Freedom of the Press v. Kissinger, 445 U.S. 136, 151-52 (1980). An agency is not required to create documents in response to a FOIA request. Id. It is

FURTHER ORDERED that the motion to discipline appellee's attorney be denied. Appellant has not provided any reason to believe appellee's counsel may have failed in her duty of candor to the court. It is

FURTHER ORDERED that the motion to order an expedited response to appellee's pending FOIA request be denied. Appellee's response to the pending request is not at issue in this case.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5047 **September Term 2007**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5039 **September Term 2007**

05cv02386

Filed On: July 1, 2008

Sharaf Al Sanani, Detainee, Guantanamo Bay Naval Station, et al.,

Appellees

Maher El Falesteny, Detainee,

Appellant

v.

Mike Bumgarner, Army Col. Commander, Joint Detention Operations Group, JTF-GTMO, et al.,

Appellees

Consolidated with 07-5040, 07-5043, 07-5050, 07-5051, 07-5052

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal in No. 07-5039 and the response thereto; and the Supreme Court's decision in Boumediene v. Bush, Nos. 06-1195 and 06-1196 (U.S. Jun. 12, 2008), it is

ORDERED that this case (No. 07-5039) be remanded to the district court for proceedings consistent with Boumediene. It is

FURTHER ORDERED that consolidation of No. 07-5039 with Nos. 07-5040, -5043, -5050, -5051, and -5052 be terminated.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate in No. 07-5039.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5178 **September Term 2007**

1:08-cv-00395-RCL

Filed On: June 30, 2008

Teva Pharmaceuticals, USA, Inc.,

Appellee

Apotex, Inc.,

Appellant

v.

Michael O. Leavitt, in his official capacity as Secretary of Health and Human Services, et al.,

Appellees

08-5141 **1:08-cv-00395-RCL**

Teva Pharmaceuticals, USA, Inc.,

Appellee

v.

Michael O. Leavitt, in his official capacity as Secretary of Health and Human Services, et al.,

Appellants

Mylan Pharmaceuticals, Inc.,

Appellee

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5178 **September Term 2007**

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of this court's order to show cause filed June 11, 2008, Apotex's response thereto, and Teva Pharmaceutical's reply; the unopposed motion to consolidate the above captioned cases; and the motion to stay, the responses thereto, and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that in case No. 08-5178, the district court's order filed June 3, 2008 be summarily affirmed. The district court did not abuse its discretion in denying Apotex's motion to intervene as untimely. See Acree v Republic of Iraq, 370 F.3d 41, 49 (D.C. Cir. 2004). It is

FURTHER ORDERED that the pending motions to consolidate and for stay be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in case No. 08-5178 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne McMain
Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5042 **September Term 2007**

04cv01519

Filed On: June 26, 2008

Salim Ahmed Hamdan,

Appellant

v.

Robert M. Gates,

Appellee

BEFORE: Ginsburg, Randolph, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the joint expedited motion to vacate and remand, it is

ORDERED that the motion be granted. The district court's order filed December 13, 2006, granting the government's motion to dismiss appellant's petition for a writ of habeas corpus, Civil Action No. 04-1519 (D.D.C.), is hereby vacated, and this case is remanded to the district court for proceedings consistent with Boumediene v. Bush, Nos. 06-1195 and 06-1196 (U.S. Jun. 12, 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Elizabeth V. Scott
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3091 **September Term, 2007**

FILED ON: JUNE 13, 2008

UNITED STATES OF AMERICA,
APPELLEE

v.

NATHANIEL LAW,
APPELLANT

Consolidated with 05-3092, 05-3120

Appeals from the United States District Court
for the District of Columbia
(No. 03cr00311-01)
(No. 03cr00311-02)
(No. 03cr00311-04)

Before: GINSBURG, BROWN and KAVANAUGH, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgments of the District Court appealed from in these causes are hereby affirmed in all respects except that Farrell's conviction for conspiring to launder money, one of Law's convictions for distributing cocaine base, and Fletcher's conviction for maintaining a drug residence are reversed; the cases are remanded to the district court for re-sentencing in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: June 13, 2008
Opinion Per Curiam.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7092 **September Term, 2007**

FILED ON: MAY 6, 2008

ESTATE OF FRANCISCO COLL-MONGE, BY FRANCISCO D. COLL, ADMINISTRATOR, ET AL.,
APPELLANTS

v.

INNER PEACE MOVEMENT, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv00271)

Before: HENDERSON, TATEL and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed in part, and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: May 6, 2008

Opinion for the court filed by Circuit Judge Henderson.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3058 **September Term 2007**

05cr00018-01

Filed On: April 30, 2008

United States of America,

Appellee

v.

Robert E. Quinn,

Appellant

BEFORE: Griffith and Kavanaugh, *Circuit Judges*, and Edwards, *Senior Circuit Judge*

O R D E R

Upon consideration of appellant's motion for remand, and it appearing that the district court is inclined to grant appellant a new trial until Fed. R. Crim. P. 33, it is

ORDERED that the motion be granted and this case is hereby remanded to the district court for further proceedings consistent with appellant's motion.

The Clerk is directed to transmit a certified copy of this order to the Clerk of the district court in lieu of a formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5358 **September Term, 2007**

FILED ON: APRIL 29, 2008

IN RE: SUBPOENA IN COLLINS ET AL.

DAVID VOYLES,
APPELLEE

V.

SMITHKLINE BEECHAM CORPORATION, *D/B/A* GLAXOSMITHKLINE INC.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 07ms00333)

Before: HENDERSON, BROWN and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded to the district court for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: April 29, 2008

Opinion for the court filed by Circuit Judge Brown.
Circuit Judge Henderson concurs in the judgment.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1491 **September Term 2007**

FERC-IN07-26-000

Filed On: April 23, 2008

Amaranth Advisors L.L.C., et al.,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

Commodity Futures Trading Commission,
Intervenor

Consolidated with 07-1504

BEFORE: Henderson, Rogers, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for leave to intervene and the responses thereto; the motion for a schedule establishing a sixty-day briefing period for respondent and the opposition thereto; the motion to dismiss No. 07-1504 and the opposition thereto; and the motion to suspend filing of the agency record and the opposition thereto, it is

ORDERED that the motion for leave to intervene be granted. The Commodity Futures Trading Commission has a significant interest at stake in this review proceeding. See Fed. R. App. P. 15(d); Rio Grande Pipeline Co. v. FERC, 178 F.3d 533, 539 (D.C. Cir. 1999). It is

FURTHER ORDERED that the motion to dismiss No. 07-1504 be granted. A party may not simultaneously seek agency rehearing and judicial review of the same

agency order. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002). The rehearing request was not denied by operation of law, because the Federal Energy Regulatory Commission issued an order to toll the time within which it could consider the request. See California Co. v. Fed. Power Comm'n, 411 F.2d 720 (D.C. Cir. 1969). The petition is not reviewable merely because the agency has issued an order on the same issue that may be final as to another party. See Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party."). A petitioner may seek judicial review of the agency's orders after the agency has resolved the pending rehearing request. See Tennessee Gas Pipeline v. FERC, 9 F.3d 980, 981 (D.C. Cir. 1993). The Clerk is directed to withhold issuance of the mandate in No. 07-1504 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. It is

FURTHER ORDERED, on the court's own motion, that petitioners show cause, within 30 days of the date of this order, why the petition for review in No. 07-1491 should not be dismissed for lack of finality as to the orders under review. See Bennet v. Spear, 520 U.S. 154, 177-78 (1997) (establishing the test for finality of agency orders); Pub. Utils. Comm'n of Cal. v. FERC, 894 F.2d 1372, 1377 (D.C. Cir. 1990) (holding that the Natural Gas Act requires finality for review of FERC orders). The response to the order to show cause may not exceed 20 pages. Petitioners' failure to comply with this order will result in dismissal of the petition for lack of prosecution. See D.C. Cir. Rule 38. It is

FURTHER ORDERED that consideration of the motion for a schedule establishing a sixty-day briefing period for respondent and the motion to suspend filing of the agency record be deferred pending further order of the court.

The Clerk is directed to send a copy of this order to petitioners in No. 07-1491 both by certified mail, return receipt requested, and by first class mail.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5282 **September Term 2007**

07ms00020

Filed On: April 22, 2008

J. Timothy Howard,

Appellant

v.

James B. Lockhart, III,

Appellee

BEFORE: Tatel, Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the unopposed joint motion to remove oral argument from the court's calendar and for a 30-day abeyance, and appellant's motion to dismiss appeal as moot, it is

ORDERED that the motion to dismiss appeal as moot be granted. It is

FURTHER ORDERED that the joint motion to remove oral argument from the court's calendar and for a 30-day abeyance be dismissed as moot.

The Clerk is directed to transmit a certified copy of this order to the District Court in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Linda Jones
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7108 **September Term 2007**

02cv01455

Filed On: April 8, 2008

Cynthia G. Wilcox,

Appellee

v.

Charles Sisson and Charles Sisson Revocable Living Trust,

Appellants

Consolidated with 07-7130

BEFORE: Henderson, Rogers, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in setting the attorney fee award, see Copeland v. Marshall, 641 F.2d 880, 901 (D.C. Cir. 1980), or in denying an evidentiary hearing on the "payment for testimony" allegations made in support of the Fed. R. Civ. P. 60(b) motion. See Steverson v. GlobalSantaFe Corp., 508 F.3d 300, 305-06 (5th Cir. 2007) (setting out abuse-of-discretion standard); Cano v. Baker, 435 F.3d 1337, 1342-43 (11th Cir. 2006); see also Hall v. CIA, 437 F.3d 94, 99 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5184 **September Term, 2007**

04cv01824

Filed On: March 17, 2008

Woody Voinche,
Appellant

v.

Federal Bureau of Investigation,
Appellee

BEFORE: Henderson, Rogers, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to appoint counsel, and the motion for summary affirmance, and the opposition thereto, it is

ORDERED that the motion to appoint counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not shown that his claims against the Federal Bureau of Investigation can be brought pursuant to 18 U.S.C. § 2520(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b), D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5304 **September Term, 2007**

05cv02118

Filed On: March 17, 2008

James T. Walker,
Appellant

v.

Stephen L. Johnson, Administrator, US Environmental Protection Agency,
Appellee

BEFORE: Henderson, Rogers, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the cross-motions for summary disposition, the responses thereto, the supplements, and the replies, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Contrary to appellant's assertions, the district court's comprehensive 35-page opinion addressed appellant's claim that his employer maintained a pervasive retaliatory policy, and it applied the appropriate standards in light of the arguments presented by appellant in opposition to summary judgment. Further, appellant has not demonstrated that the reasons proffered for the selection of another candidate for an environmental scientist position were pretextual, or that a reasonable trier of fact could infer intentional discrimination or retaliation based on the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1151 (D.C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5369 **September Term, 2007**

06cv01887

Filed On: March 17, 2008

Robert Andrew Spelke,
Appellant

v.

Michael B. Mukasey,
Appellee

BEFORE: Henderson, Rogers, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, which includes a motion to issue a briefing schedule and set a date for oral argument, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant does not address the district court's reasons for dismissing the retaliation claim or granting summary judgment for the appellee on the disability discrimination claim. Appellant, therefore, has not preserved these issues on appeal. See Terry v. Reno, 101 F.3d 1412, 1415 (D.C. Cir. 1996). As for the claim of age discrimination, appellant does not demonstrate that the reason proffered by the government for denying his job application was a pretext for discrimination, or that a reasonable trier of fact could infer discrimination based on the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Hall v. Giant Food, Inc., 175 F.3d 1074, 1077 (D. C. Cir. 1999). Finally, the district court acted within its discretion in ruling on the motion to dismiss or for summary judgment without allowing discovery. See Strang v. United States Arms Control and Disarmament Agency, 864 F.2d 859, 861 (D.C. Cir. 1989). Appellant did not specify what evidence he hoped to discover or provide any specific reason to doubt the truthfulness of the affidavits submitted by the appellee in support of the motion. See id. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5369 **September Term, 2007**

FURTHER ORDERED that the motion to issue a briefing schedule and set a date for oral argument be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5473 **September Term, 2007**

04cv02269

Filed On: March 17, 2008

Terence K. Bethea,
Appellant

v.

Bureau of Prisons, et al.,
Appellees

BEFORE: Henderson, Rogers, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; and the application for a certificate of appealability, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the request for a certificate of appealability be denied. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 23, 2008 Decided February 29, 2008

No. 07-7053

DEREK T. WILSON,
APPELLANT

v.

CARCO GROUP, INCORPORATED,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 03cv02313)

Kevin L. Chapple argued the cause and filed the briefs for appellant.

James P. Steele argued the cause for appellee. With him on the brief was *Mariana D. Bravo.* *William J. Carter* entered an appearance.

Before: TATEL, BROWN and KAVANAUGH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: Derek T. Wilson appeals the district court's order granting summary judgment in favor of CARCO

Group, Inc. We conclude the Fair Credit Reporting Act does not always require a plaintiff alleging a violation of 15 U.S.C. § 1681e(b) to present expert testimony on the issue of whether the defendant's procedures were reasonable. Thus, we reverse the district court's order.

I

Viewed in the light most favorable to Wilson, the facts are as follows. In 2002, Prudential Insurance offered Wilson a job, contingent upon the satisfactory completion of a background check. Wilson accepted, and was scheduled to begin on August 12. Around August 1, Prudential retained CARCO to complete Wilson's criminal background check in Oklahoma. CARCO subcontracted with Search & Find to conduct the background check, and Search & Find retained an outside researcher to undertake the task.

By August 9, the researcher's scattershot approach yielded thirteen "hits," each apparently corresponding to an individual. Four days later, Search & Find sent CARCO thirteen "I.D. pages" with a note saying it was "at a loss." Prudential then told Wilson he had criminal charges in Oklahoma—an allegation Wilson denied. Almost three weeks after being retained, Search & Find faxed CARCO information on thirteen individuals, six of whom couldn't have been Wilson, because their names, birthdates, and/or races differed from his.

On September 3, Prudential withdrew Wilson's job offer because it had "not received a complete and satisfactory background verification in a reasonable amount of time." Along with its withdrawal letter, Prudential enclosed a copy of a CARCO report which stated, "A criminal record search for convictions and arrests, where prosecution is pending, was [initiated] . . . on the subject as follows." Below this statement,

a chart listed "Pending" next to the Oklahoma entry for "Wilson, Derek."

On the day Prudential withdrew its offer, Wilson began his own investigation. He contacted the Oklahoma State Bureau of Investigation and the Oklahoma State Courts Network, both of which concluded he had no criminal history in the state. Wilson sent CARCO a letter detailing the results of his investigation. On September 6, CARCO finally concluded Wilson had no criminal history in Oklahoma, but Prudential never hired Wilson. By the time the dust settled, CARCO had taken 36 days to complete its task. In contrast, Wilson's own investigation took ten minutes, spread across 2-3 days.

Wilson sued CARCO in federal court for negligent violation of the Fair Credit Reporting Act. The district court held a plaintiff in a 15 U.S.C. § 1681e(b) case always must present expert testimony; therefore, it granted CARCO's summary judgment motion. Wilson appealed.

II

We review summary judgment decisions *de novo*. *See Czekalski v. Peters*, 475 F.3d 360, 362 (D.C. Cir. 2007). Summary judgment is only proper if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). We "view the evidence in the light most favorable to [Wilson and] draw all reasonable inferences in [his] favor." *Czekalski*, 475 F.3d at 363.

Under the Fair Credit Reporting Act ("FCRA"), "[w]henever a consumer reporting agency prepares a consumer report it shall follow *reasonable procedures* to assure maximum possible accuracy of the information concerning the individual

about whom the report relates." 15 U.S.C. § 1681e(b) (emphasis added).[1] The standard for judging the reasonableness of procedures "is what a reasonably prudent person would do under the circumstances." *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984) (per curiam). Applying this standard "involves weighing the potential harm from inaccuracy against the burden of safeguarding such accuracy." *Id.* Where the potential harm is great and the burden small, a consumer reporting agency's duty to clarify inaccurate or incomplete information is at its apogee. *See Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 42 (D.C. Cir. 1984). Congress explicitly established a private cause of action for negligent FCRA violations in 15 U.S.C. § 1681o(a). Wilson sued under § 1681o, alleging CARCO negligently failed to use reasonable procedures as required by § 1681e(b).

Federal law governs whether the FCRA requires a plaintiff alleging a violation of § 1681e(b) to present expert testimony as to the reasonableness of the defendant's procedures. This court has previously applied federal law to describe an FCRA plaintiff's burden at summary judgment, and we do so again today. *See, e.g., Stewart*, 734 F.2d at 51–56 (establishing a plaintiff's burden in a § 1681e(b) case without relying on state law); *cf. Koropoulos*, 734 F.2d at 42–45 (holding, as a matter of federal law, that § 1681e(b) at least sometimes "covers . . .

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[1] The FCRA sometimes requires "strict procedures" in the employment context. *See* 15 U.S.C. § 1681k(a). However, we need not address this issue, because Wilson did not raise a "strict procedures" claim in the district court. *See Holcomb v. Powell*, 433 F.3d 889, 903 (D.C. Cir. 2006) (noting we "normally do[] not give consideration to issues that were neither raised nor decided below" (quotation marks omitted)).

incomplete information" as well as technically inaccurate information).[2]

Our analysis begins—and ends—with *Stewart*, which established "the showing a plaintiff must make for his claim to survive summary judgment on the issue of the reasonableness of [defendant's] procedures." *Stewart*, 734 F.2d at 49. *Stewart* held an FCRA plaintiff must only "minimally present *some* evidence from which a trier of fact can infer that the consumer reporting agency failed to follow reasonable procedures in preparing a credit report." *Id.* at 51 (emphasis added). In fact, "a plaintiff need not introduce direct evidence of unreasonableness of procedures: [i]n certain instances, inaccurate credit reports by themselves can fairly be read as evidencing unreasonable procedures, and [an absence of] direct evidence will not be fatal." *Id.* at 52. Applying this precedent, we conclude the FCRA does not always require a plaintiff alleging a violation of § 1681e(b) to present expert testimony on the issue of whether the defendant's procedures were reasonable. *Stewart* is the standard a plaintiff in a § 1681e(b) case must satisfy at the summary judgment stage; there is not an additional expert testimony requirement. Expert testimony will undoubtedly prove helpful in some § 1681e(b) cases. Indeed, as a practical matter, expert testimony might sometimes be

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[2] CARCO's summary judgment motion, Wilson's opposition motion, and the district court's opinion treated Wilson's claim as an FCRA claim—not a common law negligence claim. Indeed, the FCRA expressly preempts state-law negligence claims brought against "consumer reporting agenc[ies] . . . based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action" unless the agency acted "with malice or willful intent to injure [the] consumer." *See* 15 U.S.C. § 1681h(e). Thus, the district court's citation of a diversity jurisdiction case to support its conclusion that District of Columbia law applies was simply incorrect.

necessary to satisfy *Stewart*. But it is certainly not required in all § 1681e(b) cases. Holding otherwise would flatly contradict *Stewart*'s conclusion that direct evidence of unreasonableness is not always required.

The district court granted CARCO's summary judgment motion because it held a plaintiff in a § 1681e(b) case always must present expert testimony; we reverse, because that holding was erroneous. The issue of whether Wilson carried his burden under *Stewart* is not before us. But if CARCO moves for summary judgment on that ground, the district court should consider that Wilson must "minimally present *some* evidence from which a trier of fact can infer [a] fail[ure] to follow reasonable procedures," *see Stewart*, 734 F.2d at 51 (emphasis added), and all "reasonable inferences" must be resolved in Wilson's favor, *Czekalski*, 475 F.3d at 363.

III

We reverse the district court's order granting CARCO's summary judgment motion and remand for further proceedings consistent with this opinion.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5209 **September Term, 2007**

92cr00110-01

Filed On: January 8, 2008 [1090753]

In re: Bernard Sheldon Levi,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner seeks to compel the district court to rule on two motions challenging his criminal conviction and sentence. Such relief can only be obtained by filing a motion pursuant to 28 U.S.C. § 2255. Because petitioner has previously filed a Section 2255 motion, he cannot file a second or successive such motion without obtaining leave of this court. See 28 U.S.C. § 2255. Petitioner has not obtained leave of court to file a successive Section 2255 motion regarding the issues presented in the two motions, and therefore has shown no "clear and indisputable right" to a ruling by the district court on the motions. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). See also United States v. Levi, No. 97-3052 (D.C. Cir. Jul. 29, 1997) (district court lacks jurisdiction to consider "successive collateral challenges to appellant's conviction and sentence").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5022 **September Term, 2007**

FILED ON: NOVEMBER 26, 2007

[1082171]
TONYA ROGERS,

APPELLANT

v.

MICHAEL J. ASTRUE,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(Civ.A. No. 05-2092)

Before: GINSBURG, *Chief Judge*, and KAVANAUGH, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the Social Security Administration and United States District Court for the District of Columbia as well as the briefs and oral arguments of counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the judgment of the District Court be affirmed. The Administrative Law Judge was reasonable in assessing the appellant's residual functional capacity and in formulating the disputed question he posed to the vocational expert.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing en banc. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7196 **September Term, 2007**

05cv01058

Filed On: November 13, 2007

[1080008]
Samuel Franco,
Appellee

Nathan Franco, et al.,
Appellants

v.

District of Columbia, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellants' petition for panel rehearing, it is

ORDERED that the petition be granted. The district court's orders entered March 22, 2006, and October 10, 2006, are hereby vacated and the case is remanded to the district court for further consideration in light of Rumber v. D.C., 487 F.3d 941 (D.C. Cir. 2007), and Franco v. Nat'l Capital Revitalization Corp., No. 06-CV-645 (D.C. 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5108 **September Term, 2007**

07cv00514

Filed On: October 25, 2007

[1075773]
Antoine Gomis,
Appellant

v.

Department of Justice, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for reconsideration of the briefing schedule and to remand the record, which also contains requests for leave to appeal in forma pauperis, to hold the appeal in abeyance pending remand, and to stay "removal" and issuance of the mandate, it is

ORDERED that the request for leave to proceed in forma pauperis be dismissed as moot. This court's order filed June 6, 2007, stated that appellant's in forma pauperis status in district court is effective for proceedings in this court. It is

FURTHER ORDERED that the motion for reconsideration of the briefing schedule, the motion for remand, and all other requested relief be denied. It is

FURTHER ORDERED, on the court's own motion, that the district court's dismissal order filed March 19, 2007, be summarily affirmed. Appellant's filing of a motion for remand placed the merits of this appeal before the court. Because the appropriate disposition is so clear, summary action is warranted. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in dismissing appellant's complaint without prejudice on the ground that it did not meet the requirements of Federal Rule of Civil Procedure 8(a), as the complaint failed to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). See also Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 n.3 (2007) ("Rule 8(a) 'contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented' and does not authorize a pleader's 'bare averment that he wants relief and is entitled to it.'") (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure § 1202, at 94, 95 (3d ed. 2004)).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5108 **September Term, 2007**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1270 **September Term, 2007**

Filed On: October 25, 2007

[1075756]
Richard Blumenthal, Attorney General for the State of Connecticut,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Connecticut Department of Public Utility Control, et al.,
Intervenors

BEFORE: Ginsburg, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss or hold in abeyance, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110-11 (D.C. Cir. 2002); see also Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5267 **September Term, 2007**

Filed On: October 24, 2007

[1075579]
In re: Robert Fernicola, et al.,
Petitioners

BEFORE: Ginsburg, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for leave to proceed in forma pauperis, the motion for stay, and the petition for writ of mandamus or for review, it is

ORDERED that the motions for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion for stay be denied. Petitioners have not satisfied the stringent standards required for a stay pending court review. See Washington Metro. Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 32-33 (2007). It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioners have failed to show a clear and indisputable right to the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). It is

FURTHER ORDERED that the petition for review be denied. Petitioners have identified no final agency order over which this court has jurisdiction.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5270 **September Term, 2007**

07cr00153

Filed On: October 24, 2007

[1075582]
In re: Herbert F. Young,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a clear and indisputable right to the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Petitioner has failed to demonstrate that, if he is convicted, the remedy afforded by direct appeal is clearly inadequate to correct the perceived errors by the district court. See United States v. Poindexter, 859 F.2d 216, 222 (D.C. Cir. 1988) (per curiam). Petitioner also has not shown any grounds for issuance of mandamus based upon his claim of judicial bias; adverse rulings almost never warrant recusal but rather are grounds for appeal. See Liteky v. United States, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5082 **September Term, 2007**

04cv01113

Filed On: October 23, 2007

[1075101]
Damon Elliott,
Appellant

v.

Department of Justice,
Appellee

BEFORE: Ginsburg, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Non-attorney pro se litigants may not recover attorney's fees under the Freedom of Information Act ("FOIA"). See Benavides v. BOP, 993 F.2d 257, 258-60 (D.C. Cir. 1993). Assuming without deciding that a pro se litigant can recover litigation costs under the FOIA's fee-shifting provision, appellant is not eligible for an award of litigation costs. Because the district court granted the Department of Justice's ("DOJ") motion to dismiss or for summary judgment, appellant did not substantially prevail in his FOIA action. See 5 U.S.C. § 552(a)(4)(E); Judicial Watch, Inc. v. Dep't of Commerce, 470 F.3d 363, 368 (D.C. Cir. 2006) ("A FOIA plaintiff is eligible for fees if it has substantially prevailed on the merits of its claim. And in order to 'substantially prevail,' a party must obtain court-ordered relief on the merits of its FOIA claim.") (citations omitted). Moreover, appellant's notice of appeal, filed more than two years after the entry of the district court's order granting DOJ's motion to dismiss or for summary judgment, was untimely as to that order. See Fed. R. App. P. 4(a)(1)(B). Appellant provides no grounds for the imposition of sanctions against DOJ.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5082 **September Term, 2007**

is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5210 **September Term, 2007**

Filed On: October 23, 2007

[1075053]
In re: Christopher Orloski,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus; the motion for appointment of counsel; the motions for injunctive relief; and the response to the court's orders filed June 21, 2007, and July 25, 2007, construed as a motion for leave to file in forma pauperis, it is

ORDERED that the motion for leave to file in forma pauperis be granted. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motions for injunctive relief be denied. Petitioner presents no basis for the relief requested. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Mandamus does not lie unless the petitioner's right to relief is "clear and indisputable," and there is "no other adequate means" by which the petitioner may attain the relief he seeks. See In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998). Petitioner has failed to demonstrate his entitlement to the extraordinary writ.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5249 **September Term, 2007**

Filed On: October 23, 2007

[1075076]
In re: Henk Visser,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; and the petition for writ of mandamus and supplements thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not shown a clear and indisputable right to the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5266 **September Term, 2007**

07ms00306

Filed On: October 23, 2007

[1075049]
In re: John Paul Turner,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Tatel and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court has construed as a petition for writ of mandamus, and the supplement thereto; and the motion for leave to file in forma pauperis, it is

ORDERED that the motion for leave to file in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has failed to show that the district court's refusal to accept his meritless complaint for filing was improper, given the district court's order barring him from filing any further complaints without leave of court; and has set forth no other basis for the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Mandamus does not lie unless the petitioner's right to relief is "clear and indisputable," and there is "no other adequate means" by which the petitioner may attain the relief he seeks. See In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5156 **September Term, 2007**

07cv00579

Filed On: October 23, 2007

[1075037]

Mylan Laboratories, Inc. and Mylan Pharmaceuticals, Inc.,

Appellants

v.

Michael O. Leavitt, Secretary of Health and Human Services, et al.,

Appellees

BEFORE: Tatel, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss the appeal as moot, the opposition thereto, and the reply, and the motions for summary affirmance, the oppositions thereto, and the reply, it is

ORDERED that the motion to dismiss as moot be granted. Events occurring during the pendency of the appeal make meaningful relief impossible. See McBryde v. Comm. to Review Circuit Council Conduct, 264 F.3d 52, 55 (D.C. Cir. 2001). Moreover, because of the unique circumstance underlying this matter, the appeal does not fall into the exception to the mootness doctrine for cases that are capable of repetition yet evading review. See People for the Ethical Treatment of Animals, Inc. v. Gittens, 396 F.3d 416, 424 (D.C. Cir. 2005). It is

FURTHER ORDERED that the motions for summary affirmance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5280 **September Term, 2007**

06cv02190
06cv2142

Filed On: October 17, 2007

[1074021]
In re: Mihretu Bulti Dasisa,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis, and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court's delay in ruling on petitioner's pending motions does not warrant the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). We anticipate that the district court will act upon the pending motions as promptly as its docket permits. Petitioner has not shown that his right to mandamus relief as to the motion submitted to the district court on June 22, 2007 in No. 06-cv-2190 is clear and indisputable. See id.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3052 **September Term, 2007**

05cr00187-01

Filed On: October 10, 2007

[1072568]
United States of America,
Appellee

v.

Mark L. Callaham,
Appellant

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, and the motion for summary affirmance, and the response thereto; it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's counsel failed to adequately present the claim for review by making nothing more than a conclusory assertion. See S.E.C. v. Banner Fund Intern., 211 F.3d 602, 613-614 (D.C. Cir. 2000). Therefore appellant has failed to demonstrate that the district court's credibility determination was clearly erroneous. See United States v. Broadie, 452 F.3d 875, 880 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold the issuance of the mandate herein until seven days after the resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-3081 **September Term, 2007**

03cr00440-01

Filed On: October 10, 2007

[1072564]
In re: Tony Herrion,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus; and the motion for clarification of the record, it is

ORDERED that the motion for clarification of the record be denied. The "notice of appeal" from the district court's denial of leave to file a motion and notice of appeal was properly construed as a petition for writ of mandamus. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has conceded that he cannot meet the standard for mandamus relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3028 **September Term, 2007**

00cr00216-01

Filed On: October 10, 2007

[1072650]
United States of America,
Appellee

v.

Warren L. Pindell,
Appellant

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to govern, which includes a renewed motion to dismiss; the order to show cause filed June 19, 2007, and the response thereto, which includes a renewed request for a certificate of appealability on the Sixth Amendment claim; and the motion for appointment of counsel, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to dismiss be granted and the motion for a certificate of appealability be denied. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). The Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), does not apply retroactively to cases on collateral review. See In re Fashina, 486 F.3d 1300, 1306 (D.C. Cir. 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1212 **September Term, 2007**

Filed On: October 9, 2007 [1072182]

Nuclear Information and Resource Service, et al.,
Petitioners

v.

Nuclear Regulatory Commission, et al.,
Respondents

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The Nuclear Regulatory Commission's ("NRC") denial of the petition filed pursuant to 10 C.F.R. § 2.206 is presumptively unreviewable. Safe Energy Coal. of Mich. v. United States Nuclear Regulatory Comm'n, 866 F.2d 1473, 1477 (D.C. Cir. 1989); Arnow v. United States Nuclear Regulatory Comm'n, 868 F.2d 223, 235-36 (7th Cir. 1989); Massachusetts Public Interest Research Group, Inc. v. U.S. Nuclear Regulatory Comm'n, 852 F.2d 9 (1st Cir. 1988). Petitioners have not demonstrated that the NRC, by denying petitioners' § 2.206 petition, "has 'consciously and expressly adopted a general policy [of non-enforcement] that is so extreme as to amount to an abdication of its statutory responsibilities.'" Safe Energy Coal., 866 F.2d at 1477 (quoting Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985)). Nor have they rebutted the presumption of unreviewability by establishing that "'the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,'" Safe Energy Coal., 866 F.2d at 1477-78 (quoting Chaney, 470 U.S. at 833).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3165 **September Term, 2007**

05cr00113-01

Filed On: October 5, 2007 [1071991]

United States of America,
Appellee

v.

Latisha Sinclair,
Appellant

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's sentence, which undisputedly is within the range recommended by the United States Sentencing Guidelines, is reasonable in light of the factors set out in 18 U.S.C. § 3553(a). See United States v. Olivares, 473 F.3d 1224, 1226 (D.C. Cir. 2006); see also United States v. Williams, 425 F.3d 478, 481-82 (7th Cir. 2005).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1355 **September Term, 2007**

Filed On: October 2, 2007 [1070911]

Owner-Operator Independent Drivers Assn., Inc.,
Petitioner

v.

Federal Motor Carrier Safety Administration, et al.,
Respondents

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the emergency motion to withdraw petitioner's opposition to the motion to transfer, it is

ORDERED that the motion to withdraw be granted. It is

FURTHER ORDERED that this case be transferred to the Court of Appeals for the Ninth Circuit.

The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Ninth Circuit.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3165 **September Term, 2007**

04cr00050-01

Filed On: October 1, 2007 [1070479]

United States of America,
Appellee

v.

Douglas Cleveland,
Appellant

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to vacate and remand, the response thereto, the reply, and the lodged sur-reply; and the motion for leave to file a sur-reply, it is

ORDERED that the motion for leave be granted. The Clerk is directed to file the sur-reply lodged by appellant on July 18, 2007. It is

FURTHER ORDERED that appellant's sentence be vacated and the case be remanded to the district court for resentencing. Upon remand, the district court shall determine the appropriate remedy for the government's breach of the plea agreement. In so determining, the court shall consider the remedial measures that have been suggested to this court, including reassignment to a different judge, exclusion of certain information from materials submitted to the sentencing court, and recomputation of appellant's offense level without an enhancement under U.S.S.G. § 3C1.1. See United States v. Wolff, 127 F.3d 84, 87, 89 (D.C. Cir. 1997) (describing district court's broad discretion in fashioning remedy for breach of plea agreement).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5104 **September Term, 2007**

06cv01019

Filed On: October 1, 2007 [1070432]

Gwendolyn T. Applewhaite,
Appellant

v.

John E. Potter, Postmaster General and United States Postal Service,
Appellees

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed June 21, 2007, and the answer thereto; and the motion for summary affirmance and the opposition thereto; it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion by dismissing appellant's action without prejudice for failure to comply with the service requirements of Fed. R. Civ. P. 4(m) and by denying reconsideration of that decision. See Pellegrin & Levine, Chartered v. Antoine, 961 F.2d 277, 283 (D.C. Cir. 1992); Troxell v. Fedders of North America, Inc., 160 F.3d 381, 383 (7th Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5118 **September Term, 2007**

06cv01187

Filed On: October 1, 2007 [1070498]

Latchmie Toolasprashad,
Appellant

v.

Bureau of Prisons,
Appellee

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel, and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly held that appellant's Privacy Act claims are barred by the doctrine of res judicata in light of the dismissal with prejudice of Toolasprashad v. Bureau of Prisons, Civil Action No. 04-3219, slip op. (D.N.J. Apr. 4, 2005). See Taylor v. Blakey, 490 F.3d 965, 969 (D.C. Cir. 2007) (citation omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5132 **September Term, 2006**

06cv01010

Filed On: September 27, 2007

[1069706]
Gerald L. Rogers,
Appellant

R. D. Ryno, Jr.,
Appellee

v.

United States District Court for the District of Colorado, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing and the "motion for suspension of rules to grant judgment pursuant to circuit's doctrine of stare decisis," it is

ORDERED that the motion for suspension of rules be denied. It is

FURTHER ORDERED AND ADJUDGED that the district court's order, filed April 10, 2007, granting a motion for leave to file second amended complaint and sua sponte dismissing the case with prejudice for failure to state a claim upon which relief can be granted, be affirmed. Because a sua sponte dismissal is appropriate where it is clear "the claimant cannot possibly win relief," see Best v, Kelly, 39 F.3d 328, 331 (D.C. Cir. 1994) (citing Baker v Director, United States Parole Comm'n, 916 F.2d 725, 727 (D.C.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5132 **September Term, 2006**

Cir. 1990) (per curiam)), the district court did not abuse its discretion in dismissing the complaint.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1142 **September Term, 2006**

Filed On: September 26, 2007

[1069539]

Alaska Airlines, Inc., et al.,
Petitioners

v.

Department of Transportation,
Respondent

City of Los Angeles and Air Transport Association of America,
Intervenors

Consolidated with 07-1209, 07-1223, 07-1273, 07-1276

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss No. 07-1142, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. As petitioners concede, the petition for review in No. 07-1142 is premature. See International Telecard Ass'n v. FCC, 166 F.3d 387, 388 (D.C. Cir. 1999) (ongoing agency review renders an order nonfinal for purposes of judicial review, and a petition for review of the order is incurably premature). Now that respondent has issued its final decision and petitioners have filed petitions for review from the final agency action, they can address the issues in the final order, as well as those in the prior order. See Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980, 981 (D.C. Cir. 1993) (per curiam).

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1142 **September Term, 2006**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 07-1142 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1322 September Term, 2007

Filed On: September 24, 2007

[1068502]
State of New York, et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

Utility Air Regulatory Group, et al.,
Intervenors

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of petitioners' motion to govern further proceedings; EPA's motion to govern further proceedings filed May 2, 2007, which includes a request for an extension of time to file motions to govern further proceedings, and the response thereto; EPA's motion for an extension of time for EPA and intervenors to respond to petitioners' motion to govern, and the response thereto; EPA's lodged combined motion to govern further proceedings and response to petitioners' motion to govern; intervenors' lodged combined motion to govern further proceedings and response to petitioners' motion to govern; and petitioners' lodged combined response and reply, it is

ORDERED that EPA's requests for extensions of time be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that this case be remanded to EPA for further proceedings in light of Massachusetts v. EPA, 127 S. Ct. 1438 (2007). It is

FURTHER ORDERED that petitioners' request for vacatur and summary reversal of EPA's decision be denied. Petitioners have not shown that vacatur is warranted, see A.L. Pharma, Inc., v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995); and the merits of the parties' positions are not so clear as to warrant summary action, see Cascade Broadcasting Group, Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1322 **September Term, 2007**

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7125 **September Term, 2007**

89cv01222
92cv01868

ARGUED: 05/11/07

Filed On: September 24, 2007

[1068612]
Thomas P. Athridge, Jr., Individually and as Father and Next Friend of Thomas P. Athridge, Minor,
Appellant

v.

Jorge Iglesias, et al.,
Appellees

Consolidated with 05-7126, 06-7048, 06-7049

BEFORE: Sentelle, Garland and Kavanaugh, *Circuit Judges*

O R D E R

Upon consideration of the joint motion to govern future proceedings and to voluntarily dismiss these consolidated cases, it is

ORDERED that the motion be granted, and these cases are hereby dismissed.

The Clerk is directed to transmit forthwith to the Clerk of the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Cheri Carter
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7125 **September Term, 2007**

89cv01222
92cv01868

ARGUED: 05/11/07

Filed On: September 24, 2007

[1068612]
Thomas P. Athridge, Jr., Individually and as Father and Next Friend of Thomas P. Athridge, Minor,
Appellant

v.

Jorge Iglesias, et al.,
Appellees

Consolidated with 05-7126, 06-7048, 06-7049

BEFORE: Sentelle, Garland and Kavanaugh, *Circuit Judges*

O R D E R

Upon consideration of the joint motion to govern future proceedings and to voluntarily dismiss these consolidated cases, it is

ORDERED that the motion be granted, and these cases are hereby dismissed.

The Clerk is directed to transmit forthwith to the Clerk of the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Cheri Carter
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5021 **September Term, 2007**

01cv01418

Filed On: September 17, 2007

[1067356]
Willie Jefferson,
Appellant

v.

Department of Justice, Office of the Inspector General
and Bonnie L. Gay,
Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel, and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Assuming without deciding that a pro se litigant can recover litigation costs under the Freedom of Information Act's ("FOIA") fee-shifting provision, 5 U.S.C. § 552(a)(4)(E), appellant is not eligible for an award of litigation costs because he did not substantially prevail in his FOIA action. See 5 U.S.C. § 552(a)(4)(E); Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy, 288 F.3d 452, 458-59 (D.C. Cir. 2002); see also Davy v. CIA, 456 F.3d 162, 165 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5027 **September Term, 2007**

01cv02195
02cv02546
03cv01928

Filed On: September 17, 2007

[1067402]
Steven M. Spiegel,
Appellant

v.

Stephen L. Johnson, Administrator, Environmental Protection Agency,
Appellee

Consolidated with 07-5028, 07-5057

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion by denying appellant's motions to compel and for sanctions or by granting appellee's motion to strike. See Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996). The district court correctly granted summary judgment in favor of appellee on appellant's religious discrimination and retaliation claims because appellant has not demonstrated that the reasons proffered for appellee's actions were pretextual, or that a reasonable trier of fact could infer intentional discrimination based on the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1151 (D.C. Cir. 2004). Summary judgment on appellant's hostile work environment claim was also proper because he failed to demonstrate that his workplace was "'permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Vickers v. Powell, – F.3d –, 2007 WL 1952369, at *8 (D.C. Cir. July 6, 2007) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5027 **September Term, 2007**

is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5006 **September Term, 2007**

06cv00591

Filed On: September 14, 2007

[1066986]
Joe Louie Mendoza,
Appellant

v.

Drug Enforcement Administration,
Appellee

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the opposition thereto; the court's order to show cause filed May 10, 2007, and the response thereto; and the motion for appointment of counsel, it is,

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly determined that the Drug Enforcement Administration ("DEA") properly withheld Geographical Drug Enforcement Program (G-DEP) codes, Narcotics and Dangerous Drug Information System (NADDIS) numbers, and confidential informant numbers pursuant to Freedom of Information Act ("FOIA") Exemption 2. See Schiller v. Nat'l Labor Relations Bd., 964 F.2d 1205, 1207-08 (D.C. Cir. 1992). The court also correctly held that information obtained by a wiretap is exempt under FOIA Exemption 3, see Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1280 (D.C. Cir. 1992), and that information related to an open DEA investigation was properly withheld pursuant to FOIA Exemption 7(A), see Boyd v. Criminal Div. of U.S. Dep't of Justice, 475 F.3d 381, 386 (D.C. Cir. 2007). The district court also properly concluded that the names and personal information of law enforcement, government employees, and third parties involved in the investigation were permissibly redacted according to FOIA Exemption 7(C). See Computer Prof'ls for Social Responsibility v.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5006 **September Term, 2007**

U.S. Secret Service, 72 F.3d 897, 904 (D.C. Cir. 1996). The court also correctly determined that information from and about confidential informants was properly withheld pursuant to FOIA Exemption 7(D). See Mays v. Drug Enforcement Admin., 234 F.3d 1324, 1328-31 (D.C. Cir. 2001). In addition, the district court did not abuse its discretion by not conducting an in camera review of the records when it determined that all reasonably segregable information had been released on the basis of the government's evidence, see Armstrong v. Executive Office of the President, 97 F.3d 575, 578 (D.C. Cir. 1996), and it correctly denied appellant's motion for costs because he had not substantially prevailed within the meaning of 5 U.S.C. § 552(a)(4)(E), see Judicial Watch, Inc. v. Dep't of Commerce, 470 F.3d 363, 368 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5059 **September Term, 2006**

06cv00691

Filed On: September 13, 2007

[1066597]
Eddie S. Cheris,
Appellant

v.

Department of State,
Appellee

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the responses thereto; the motion to stay proceedings and remand to district court and the memorandum of points and authorities in support thereof, and the response thereto; the motion for leave to file appellee's response to appellant's memorandum of points and authorities in support of motion to stay proceedings and remand to district court, and the response thereto; and the motion for hearing on the motion for stay and remand, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in refusing to accept for filing an untimely amended complaint, in granting the motion to dismiss, or in denying the motion for reconsideration thereof. See Smalls v. U.S., 471 F.3d 186, 191-92 (D.C. Cir. 2006); Fox v. American Airlines, Inc., 389 F.3d 1291, 1294-95 (D.C. Cir. 2004). It is

FURTHER ORDERED that the motion for leave to file appellee's response to appellant's memorandum of points and authorities be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motion to stay proceedings and remand to district court, and the motion for hearing on the motion for stay and remand be dismissed as moot in light of the grant of summary affirmance.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5059 **September Term, 2006**

is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5061 **September Term, 2006**

07cv00088

Filed On: September 13, 2007

[1066604]
Nathaniel Resper, Jr.,
Appellant

v.

Jonathan Miner, Warden,
Appellee

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the request for a certificate of appealability, it is

ORDERED that the request for a certificate of appealability be denied. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant may not challenge his District of Columbia conviction and sentence in federal court unless his remedy under D.C. Code § 23-110 is inadequate or ineffective to test the legality of his detention. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998). The § 23-110 remedy is not considered inadequate or ineffective, however, simply because the requested relief has been denied. See Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5315 **September Term, 06-5315**

06cv01160

Filed On: September 12, 2007

[1066420]

Lester Jon Ruston,
Appellant

v.

Alberto Gonzales,
Appellee

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's motion to dismiss, including a request to investigate and to provide him a copy of the record, it is

ORDERED that the motion to dismiss be granted as to appellant's request to dismiss his appeal. It is

FURTHER ORDERED that the request to investigate and to provide a copy of the record be denied. Appellant lacks standing to compel an investigation. See Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (private party lacks judicially cognizable interest in prosecution of another person). Further, appellant proffers no justification for providing him with a copy of all documents in the record.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7196 **September Term, 2006**

05cv01058

Filed On: September 11, 2007

[1065966]
Samuel Franco,
Appellee

Nathan Franco, et al.,
Appellants

v.

District of Columbia, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the joint motion to vacate and remand to the district court, in light of this court's recent decision in Rumber v. D.C., 487 F.3d 941 (D.C. Cir. 2007), and the District of Columbia Court of Appeals's recent decision in Franco v. Nat'l Capital Revitalization Corp., No. 06-CV-645 (D.C. 2007), it is

ORDERED that the joint motion to remand to the district court be granted and that the question of vacatur be directed to the district court in the first instance, to consider any requests the parties may file for post-judgment relief, pursuant to Fed. R. Civ. P. 60(b). See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994) (a court of appeals presented with a request for vacatur of a district court judgment may remand the case with instructions that the district court consider the request, pursuant to Fed. R. Civ. P. 60(b)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7070 **September Term, 2007**

05cv01733

Filed On: September 11, 2007

[1066022]

E. C., a minor, by his parents and next friends, Adalberto Catalan and Patricia Catalan, et al.,
Appellants

v.

District of Columbia and Clifford B. Janey, Dr., in his official capacity as Superintendent of D.C. Public Schools,
Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the response thereto, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellants cannot prevail on their claim that appellees violated the Individuals with Disabilities Education Act by modifying appellant E.C.'s individualized educational program without notice or consultation, because they have not demonstrated that appellees' actions impaired E.C.'s right to a free appropriate public education. See Kingsmore v. Dist. of Columbia, 466 F.3d 118, 119 (D.C. Cir. 2006) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3039 **September Term, 2006**

98cr00071-01

Filed On: September 11, 2007

[1066069]
United States of America,
Appellee

v.

Thomas Fields,
Appellant

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellee's motion to govern further proceedings and to dismiss case for lack of a certificate of appealability ("COA"), the Clerk's order to show cause, filed June 13, 2007, why the dispositive motion should not be considered and decided without a response, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to dismiss for lack of a COA be granted. As this court recently decided in In re Fashina, 486 F.3d 1300, 1303 (D.C. Cir. 2007), the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005) (applying the principles of Blakely v. Washington, 542 U.S. 296 (2004), to the U.S. Sentencing Guidelines, under which appellant was sentenced), is not applicable retroactively to cases on collateral review. Given that appellant's sentence became final prior to issuance of the decision in Booker, appellant cannot rely on the holding in Booker to support his motion to vacate, set aside, or correct the sentence, pursuant to 28 U.S.C. § 2255. And because appellant has not "made a substantial showing of the denial of a constitutional right," he is not entitled to a COA.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no COA has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7040 **September Term, 2007**

03cv01507

Filed On: September 11, 2007

[1066013]
Donald Wright Sigmund,
Appellant

v.

Starwood Urban Investments, LLC, et al.,
Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss filed by Starwood Urban Investments, LLC, et al. and the opposition thereto; the motion to dismiss filed by the District of Columbia Metropolitan Police Department; the motion for leave to seek relief pursuant to Fed. R. Civ. P. 60(a) and the response thereto; and the motion for leave to seek relief pursuant to 28 U.S.C. § 1292(b), it is

ORDERED that the motions to dismiss be granted. The district court has yet to dispose of appellant's claims against Prescott Sigmund or issue a certification pursuant to Fed. R. Civ. P. 54(b). Therefore, this court lacks jurisdiction over the appeal. See Haynesworth v. Miller, 820 F.2d 1245, 1252-53 (D.C. Cir. 1987). It is

FURTHER ORDERED that the motion for leave to seek relief pursuant to Fed. R. Civ. P. 60(a) and the motion for leave to seek relief pursuant to 28 U.S.C. § 1292(b) be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7061 **September Term, 2006**

06cv00144

Filed On: August 2, 2007 [1058199]

Barbara Gray, as next friend of minor child, D.E., et al.,
Appellants

v.

District of Columbia Government,
Appellee

BEFORE: Randolph, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellants challenge the validity of section 327 of the District of Columbia Appropriations Act of 2005, Pub L. No. 108-335, 118 Stat. 1322, 1344 (2004), capping at $4000 the amount of attorneys' fees that the District of Columbia is authorized to pay. Appellants urge the court to reverse a consistent body of case law striking down challenges to the fee cap, because many changes have occurred with respect to litigation under the IDEA and because, they contend, Congress's intent in imposing the cap has not been realized. Those changes and that contention do not alter the constitutionality of the fee cap. The district court properly dismissed their action for failure to state a claim. See Calloway v. D.C., 216 F.3d 1 (D.C. Cir. 2000); see also Whately v. D.C., 447 F.3d 814, 820 (D.C. Cir. 2006); Kaseman v. D.C., 444 F.3d 637, 642 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1190 **September Term, 2006**

Filed On: June 18, 2007 [1047425]

Roy J. Stallard,
Appellant

v.

Commissioner of Internal Revenue Service,
Appellee

ON APPEAL FROM THE UNITED STATES TAX COURT

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States Tax Court and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the Tax Court's order entered on March 17, 2006, dismissing appellee's petition for failure to state a claim and imposing sanctions, be affirmed. Under Tax Court Rules 34(b)(4) and 34(b)(5), a petition seeking redetermination of a deficiency must present clear and concise assignments of error and statements of fact. A petition lacking such clear and concise assignments of error and statements of fact is subject to dismissal for failure to state a claim. See Sochia v. C.I.R., 23 F.3d 941, 943-44 (5th Cir. 1994). In this case, appellant has identified no error in the Commissioner's determination that he received $191,869 in wages during 2002, or presented facts to indicate those wages were not subject to federal income tax. Nor did the Tax Court abuse its discretion in imposing sanctions after cautioning appellant that it would be inclined to sanction him if he continued to present frivolous and groundless arguments, especially in light of the fact that its previous imposition of lesser sanctions did not deter appellant from persisting in such conduct. See Stallard v. Commissioner, T.C. Memo. 1992-593.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 12, 2006 Decided May 29, 2007

No. 05-1382

CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

James H. Holt argued the cause for petitioner Canadian Association of Petroleum Producers. With him on the briefs was *Jill M. Barker*.

Lona T. Perry, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were *R. Hewitt Pate*, Assistant Attorney General, U.S. Department of Justice, *John J. Powers, III*, and *Robert J. Wiggers*, Attorneys, *John S. Moot*, General Counsel, Federal Energy Regulatory Commission, and *Robert H. Solomon*, Solicitor. *Robert B. Nicholson*, Attorney, U.S. Department of Justice, entered an appearance.

Before: SENTELLE, GRIFFITH and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: The Canadian Association of Petroleum Producers ("CAPP") has petitioned for review of the Federal Energy Regulatory Commission's Policy Statement on Income Tax Allowances. *Policy Statement on Income Tax Allowances*, 111 FERC ¶ 61,139 (2005). Petitioners assert that the Policy Statement is arbitrary and capricious and contrary to our decision in *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004).

Petitioners have brought a facial challenge to the Policy Statement. They do not seek review of FERC's income tax allowance policy as applied to any individual pipeline's rates. The Commission argues that the petition should be dismissed on either standing or ripeness grounds. Since the Policy Statement does not grant an income tax allowance to any specific pipeline, the Commission argues that petitioners have not suffered Article III injury-in-fact as a result of the promulgation of the statement. Along similar lines, the Commission contends that the Policy Statement is not ripe for review because the statement, standing alone, will not have an "immediate and significant" impact on any party to this case.

We acknowledge that CAPP's facial challenge to the Policy Statement raises substantial issues of both standing and ripeness. We need not address these threshold issues, however, because we have resolved the merits arguments raised by CAPP in our decision in the related case of *ExxonMobil v. FERC*, No. 04-1102, *et al.* (May 29, 2007). We thus dismiss CAPP's petition for review as moot in light of our subsequent holding.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3014 **September Term, 2006**

98cr00264-09

Filed On: May 17, 2007 [1041196]

United States of America,
Appellee

v.

Marwin Mosley, *a/k/a* Funky,
Appellant

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the suggestion of death; and the court's February 23, 2007 order to show cause why this case should not be dismissed as moot, the judgment of conviction vacated, and the case remanded for dismissal of the indictment, and the response thereto, it is

ORDERED, on the court's own motion, that, in light of appellant's death on December 26, 2006, this appeal be dismissed and the case remanded for vacatur of appellant's conviction and dismissal of the indictment against him. See Durham v. United States, 401 U.S. 481, 483 (1971) (defendant's death pending direct appeal of conviction abates prosecution); United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994) (per curiam) (same).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith a certified copy of this order to the district court in lieu of formal mandate.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7043 **September Term, 2006**

07cv00310

Filed On: May 17, 2007 [1041202]

Kareemah Yasmina Bell,
Appellant

v.

Sun Glass Hut International,
Appellee

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which seeks review of an order of the district court transferring appellant's civil action to another district court; and appellant's brief and appendix, it is

ORDERED that the notice of appeal be construed as a petition for writ of mandamus, and appellant's brief and appendix be construed as a memorandum of law and fact in support of the petition. Because a district court order transferring a case to another district is not an appealable order, the proper means for contesting such an order is a petition for writ of mandamus filed in this court. See Hill v. Henderson, 195 F.3d 671, 676 (D.C. Cir. 1999); D.C. Circuit Handbook of Practice and Internal Procedure at 18 (2007). It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. The petition was filed after all the papers filed in the district court were electronically transferred to the United States District Court for the Eastern District of Virginia. In these circumstances, the transfer of the case file to another district where jurisdiction would lie deprives this court of jurisdiction to review the transfer. See In re Asemani, 455 F.3d 296, 299-300 (D.C. Cir. 2006); Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1018 **September Term, 2006**

Filed On: May 16, 2007 [1041568]

BP West Coast Products LLC,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Consolidated with 07-1028, 07-1030

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of motion to dismiss and to suspend the requirement to file the certified index to the record, and the response thereto, it is

ORDERED that the motion to dismiss be granted. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110-11 (D.C. Cir. 2002); Wade v. FCC, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (petition for review must be dismissed as incurably premature where party seeks agency reconsideration after filing for judicial review). A petition for review is incurably premature even though the rehearing petition may raise issues different from those raised by the petition for review. See Bellsouth v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party.") (citations omitted). Once the Federal Energy Regulatory Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petition. See Tennessee Gas Pipeline v. FERC, 9 F.3d 980, 981 (D.C. Cir. 1993). It is

FURTHER ORDERED that the motion suspend the requirement to file the certified index to the record be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1018 **September Term, 2006**

Filed On: May 16, 2007 [1041568]

BP West Coast Products LLC,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Consolidated with 07-1028, 07-1030

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of motion to dismiss and to suspend the requirement to file the certified index to the record, and the response thereto, it is

ORDERED that the motion to dismiss be granted. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110-11 (D.C. Cir. 2002); Wade v. FCC, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (petition for review must be dismissed as incurably premature where party seeks agency reconsideration after filing for judicial review). A petition for review is incurably premature even though the rehearing petition may raise issues different from those raised by the petition for review. See Bellsouth v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party.") (citations omitted). Once the Federal Energy Regulatory Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petition. See Tennessee Gas Pipeline v. FERC, 9 F.3d 980, 981 (D.C. Cir. 1993). It is

FURTHER ORDERED that the motion suspend the requirement to file the certified index to the record be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5094 **September Term, 2006**

06cv2127/06cv2142

Filed On: May 16, 2007 [1041042]

In re: Mihretu Bulti Dasisa,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the Motion for an Order Request, which is construed as a petition for writ of mandamus; and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed as moot. Petitioner seeks to compel the district court to file and process his complaint submitted on November 27, 2006. The district court, however, filed such complaint in No. 06cv2142 and No. 06cv2127 on December 14, 2006, and dismissed both cases on that same date.

To the extent petitioner seeks to challenge the district court's December 14, 2006 dismissal orders, mandamus cannot be used as a substitute for appeal. See In re GTE Service Corp., 762 F.2d 1024, 1026-27 (D.C. Cir. 1985).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1018 **September Term, 2006**

Filed On: May 16, 2007 [1041568]

BP West Coast Products LLC,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Consolidated with 07-1028, 07-1030

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of motion to dismiss and to suspend the requirement to file the certified index to the record, and the response thereto, it is

ORDERED that the motion to dismiss be granted. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110-11 (D.C. Cir. 2002); Wade v. FCC, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (petition for review must be dismissed as incurably premature where party seeks agency reconsideration after filing for judicial review). A petition for review is incurably premature even though the rehearing petition may raise issues different from those raised by the petition for review. See Bellsouth v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party.") (citations omitted). Once the Federal Energy Regulatory Commission has resolved the pending requests for rehearing, petitioners may seek judicial review of that order, as well as the order they sought to have reviewed in the instant petition. See Tennessee Gas Pipeline v. FERC, 9 F.3d 980, 981 (D.C. Cir. 1993). It is

FURTHER ORDERED that the motion suspend the requirement to file the certified index to the record be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5009 **September Term, 2006**

06cv00107

Filed On: May 15, 2007 [1040801]

Montgomery Blair Sibley,
Appellant

v.

Stephen G. Breyer, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly determined that appellant's claims against the federal judges and Justices of the Supreme Court are barred by judicial immunity. See Mirales v. Waco, 502 U.S. 9, 10 (1991); Stump v. Sparkman, 435 U.S. 349 (1978). Judicial immunity extends to all judicial actions except those taken outside of official capacity or in the "clear absence of all jurisdiction," and "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority . . . ." Stump, 435 U.S. at 356-57 (citing Bradley v. Fisher, 13 Wall. 335, 351 (1872)).

Appellant's claim that the judges and Justices acted in the absence of jurisdiction upon not disqualifying themselves pursuant to 28 U.S.C. § 455 and the Ninth Amendment is insufficient to deprive the judges and Justices of immunity, as the decision whether to recuse is in itself a judicial act. See, e.g., Corliss v. O'Brien, 200 Fed. Appx. 80, 83 (3d Cir. 2006) ("[A] judge's decision not to recuse himself from a case in which he holds a personal interest is itself an exercise of judicial authority protected by the doctrine of absolute immunity."); Barrett v. Harrinton, 130 F.3d 246, 258 (6th Cir. 1997) (stating that "recusal is undoubtedly an act that concerns judicial decision-making"); Sato v. Plunkett, 154 F.R.D. 189, 191 (N.D. Ill. 1994) (holding the failure to recuse oneself is a judicial act and thus an error in deciding whether to recuse remains an exercise of judicial authority which may not lead to damages); Shepherdon v. Nigro, 5 F. Supp. 2d 305, 312 (E.D. Pa. 1998) ("Every court to address the question in a

reported opinion has readily concluded that a refusal or failure of a judge to recuse himself in a case which he otherwise has jurisdiction to adjudicate is clearly a judicial action for which he is entitled to absolute immunity from suit for damages."). Cf. Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1420 n.13 (Fed. Cir. 1989) (noting that "Congress did not intend that a violation of § 455 should in itself and automatically deprive the judge of jurisdiction"). As the complained-of acts were rulings the judges and Justices made in the adjudication of civil suits, and there is no indication they acted outside the scope of their respective jurisdictions, the district court correctly concluded that judicial immunity is applicable in this case and bars appellant's claims.

Furthermore, the district court did not abuse its discretion in denying appellant's motion for reconsideration of the dismissal of the case. See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Finally, the district court adequately explained its reasons for dismissing appellant's claims.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5070 **September Term, 2006**

99cv00644

Filed On: April 30, 2007 [1037544]

In re: James Dunnington,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED, on the court's own motion, that to the extent petitioner seeks to challenge the district court's order in No. 06-cv-925, granting the government's motion to dismiss, the petition for a writ of mandamus be construed as a notice of appeal. See Smith v. Barry, 502 U.S. 244, 248-49 (1992). The Clerk is directed to transmit a copy of the mandamus petition to the district court for entry of a notice of appeal of the district court's order entered January 8, 2007. It is

FURTHER ORDERED that to the extent the mandamus petition is not construed as a notice of appeal, the petition be denied. Petitioner has not shown a clear and indisputable right to the extraordinary remedy of mandamus. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Petitioner's claims arising from the Army Board for Correction of Military Records' 1994 determination regarding his request for correction of his records are barred by the doctrine of res judicata. See Apotex v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004); Page v. United States, 729 F.2d 818, 820 (D.C.Cir. 1984); Dunnington v. Caldera, No. 00-5417 (D.C. Cir. Mar. 16, 2001) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3102 **September Term, 2006**

92cr00213-01

Filed On: April 30, 2007 [1037499]

United States of America,
Appellee

v.

Paul B. Campbell,
Appellant

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed November 20, 2006, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the district court's order filed June 6, 2006, denying appellant's motion for relief pursuant to Fed. R. Civ. P. 60(b), be affirmed with regard to appellant's argument that his 1996 motion for a new trial pursuant to Fed. R. Crim. P. 33 was improperly construed as a motion under 28 U.S.C. § 2255. This issue was resolved in United States v. Campbell, 463 F.3d 1 (D.C. Cir. 2006), and that decision is the law of the case. See Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir. 1995). Appellant has not demonstrated that the decision in his prior appeal "is clearly erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. 605, 619 n.8 (1983). It is

FURTHER ORDERED that the remainder of this appeal be dismissed for lack of a certificate of appealability. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See United States v. Vargas, 393 F.3d 172, 174-75 (D.C. Cir. 2004). It is

FURTHER ORDERED that the motion for appointment of counsel be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3102 **September Term, 2006**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5160 **September Term, 2006**

05cv01634

Filed On: April 30, 2007 [1037479]

Milton Joseph Taylor,
Appellant

v.

Eleanor Holmes Norton, Congress-Woman for D.C., et al.,
Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which is construed as including a request for a certificate of appealability, see Fed. R. App. P. 22(b); the motion for appointment of counsel; the motion for injunction pending appeal and the supplements thereto; the motion to expedite and the supplement thereto; the motion to govern future proceedings; the government's motion to dismiss appeal for lack of certificate of appealability and omnibus response to appellant's pending motions, the response thereto and the supplement to the response; the supplements styled as "Judicial Notice for the Panel Judges," "Appellant's Motion to Supplement New Facts that Will Cause this Court to Expedite this Case," and "Motion to Amend Appellant's Appendix, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(2)(B). It is

FURTHER ORDERED that the motion to dismiss for lack of a certificate of appealability be granted with respect to those of appellant's claims as to which success would necessarily imply the invalidity of his term of supervised release. See Wilkinson v. Dotson, 544 U.S. 74 (2005); Preiser v. Rodriguez, 411 U.S. 475, 489 (1973). Those claims sound in habeas, and a certificate of appealability is therefore required as to them. See 28 U.S.C. 2253(c); Madley v. United States Parole Commission, 278 F.3d 1306, 1308-10 (D.C. Cir. 2002). Appellant has not, however, made the requisite substantial showing of the denial of a constitutional right. See 28 U.S.C. 2253(c)(2). It is

FURTHER ORDERED, on the court's own motion, that the district court's rejection of appellant's challenge to the taking of a DNA sample be affirmed. Appellant

No. 06-5160 September Term, 2006

has not demonstrated the taking of the sample violated his rights under either the Fourth Amendment, see Johnson v. Quander, 440 F.3d 489, 496 (D.C. Cir.), cert. denied, 127 S. Ct. 103 (2006); or the Fifth Amendment, see, e.g., United States v. Reynard, 473 F.3d 108, 1021 (9th Cir. 2007); United States v. Hook, 471 F.3d 766, 773-74 (7th Cir. 2006). It is

FURTHER ORDERED, on the court's own motion, that the claims challenging appellant's current confinement, which are contained in his various motions and supplements filed in this court, be dismissed without prejudice to refiling in the district court for the district in which appellant is confined. The claims presented in those pleadings must be brought by way of a habeas petition in the district with personal jurisdiction over appellant's immediate custodian. See Padilla v. Rumsfeld, 542 U.S. 426, 437 (2004). This court lacks original habeas jurisdiction. See Felker v. Turpin, 518 U.S. 651, 660-61 (1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7154 **September Term, 2006**

05cv02225

Filed On: April 30, 2007 [1037432]

Vaughn L. Bennett,
Appellant

v.

United States of America Chess Federation, (USCF), et al.,
Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel, the opposition thereto, and the reply; and the motions for summary affirmance, the oppositions and the supplemental oppositions thereto, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court properly dismissed for lack of standing the claims purporting to have been brought on behalf of others. See Clifton Terrace Association v. United Technologies Corp., 929 F.2d 714, 721 (D.C. Cir. 1991). Also appropriate was the dismissal on issue preclusion and claim preclusion grounds of the claims against the United States Chess Federation, David Mehler, and Ralph Mikell. Those claims, which arise from the same cause of action as those at issue in appellant's district court complaint, either were, see The Government of Rwanda v. Johnson, 409 F.3d 368, 374 (2005), or should have been, see Apotex v. Food and Drug Administration, 393 F.3d 210, 217 (2004), litigated and resolved in the context of appellant's Superior Court complaint. See Allen v. McCurry, 449 U.S. 90, 94 (1980).

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7154 **September Term, 2006**

The district court also properly dismissed the claims against the University of Maryland at Baltimore County on the ground of state immunity, because the University is an arm of the state of Maryland. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). The claims against the University's officers were correctly dismissed on that ground, as well as on statutory immunity grounds. See Ex Parte Young, 209 U.S. 123 (1908). Moreover, appellant's complaint contained nothing specifically linking the officers in question with appellant's general allegations, and appellant lacks standing to raise claims on behalf of students who were denied chess scholarships

The district court also properly dismissed for failure to state a claim appellant's claims contained in Counts I (42 U.S.C. § 1981); II (42 U.S.C. § 1983 and First Amendment), III (42 U.S.C. § 1982 and Fourteenth Amendment), IV (42 U.S.C. § 1983 and Fourth Amendment), V (Retaliation), VI (Defamation), VII (False Imprisonment), VIII (42 U.S.C. § 1985 and Thirteenth Amendment), IX (42 U.S.C. § 1986 and Thirteenth Amendment), and X (Intentional Infliction of Emotional Distress).

Finally, the district court did not abuse its discretion, see Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988), in its denial of appellant's motion to alter or amend the judgment, as that motion presented no argument warranting reconsideration. See Murray v. District of Columbia, 52 F.3d 353, 355 (D.C. Cir. 1995) (to obtain relief pursuant to Fed. R. Civ. P. 60(b), the movant must demonstrate a meritorious claim or defense so that granting reconsideration would not be a useless gesture). The motion was captioned as having been filed pursuant to Fed. R. Civ. P. 59(e), but it was not filed within 10 days of the date on which the final dismissal order was entered, as required. It should be treated, therefore, as having been filed pursuant to Fed. R. Civ. P. 60(b). See Hoai v. Vo, 935 F.2d 308, 312 n.3 (D.C. Cir. 1991).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5078 **September Term, 2006**

07cv00297

Filed On: April 30, 2007 [1037526]

Taha Yassin Ramadan, Civilian Detained in U.S. Military Custody in, or near, Baghdad, Iraq,
Appellant

v.

George W. Bush, President of the United States, et al.,
Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of suggestion of death, it is

ORDERED, on the court's own motion, that this appeal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5390 **September Term, 2006**

06cv00362

Filed On: April 26, 2007 [1036771]

Anthony James Moore,
Appellant

v.

National DNA Index System, et al.,
Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for remand and brief, the opposition thereto, and the reply; the motion for summary affirmance and the opposition thereto; the letter from appellant to the court, dated February 22, 2007; the letter from appellant to the court, dated March 1, 2007, construed as a motion to expedite; and the letter from appellant to the court, dated March 28, 2007, it is

ORDERED that the motion for summary affirmance be denied. It is

FURTHER ORDERED, on the court's own motion, that the district court's order filed November 7, 2006, dismissing without prejudice, be vacated. It is

FURTHER ORDERED that the motion for remand be granted. After appellant filed the motion which appellees and the district court construed as a request for voluntary dismissal, he filed an amended complaint, a reply in support of his motion for an order for sanctions and disciplinary action, and a motion for judgment by default, all of which clearly reflected appellant's intent to go forward with his complaint. It is

FURTHER ORDERED that the motion for expedition be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7201 **September Term, 2006**

05cv00107

Filed On: April 26, 2007 [1036758]

Sharon Mavity,
Appellant

v.

Phillip L. Fraas and Hogan & Hartson, Jointly and Severally,
Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; and the motion for judicial notice of all previous court records regarding the appellant, it is

ORDERED that the motion for judicial notice be dismissed as moot. The previous court records cited by the appellant are already a part of the record in this case. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). In a legal malpractice or breach of fiduciary duty case, the applicable standard of care and its violation must be proven by expert testimony, unless the attorney's breach of the standard is so evident as to be a matter of common knowledge. Athridge v. Aetna Cas. & Sur. Co., 351 F.3d 1166, 1174 (D.C. Cir. 2003) (citation omitted); Mills v. Cooter, 647 A.2d 1118, 1120 n.6 (D.C. 1994). Appellant's claims do not fall into this exception.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5245 **September Term, 2006**

05cv01800

Filed On: April 25, 2007 [1036607]

Percy Newby, Trustee,
Appellant

v.

Department of Transportation and Mary E. Peters,
Official Bond of the Secretary of Transportation,
Appellees

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed January 31, 2007, and the response thereto; and the motion for summary affirmance and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court correctly dismissed appellant's Administrative Procedures Act claim – arising from appellee's purported refusal to register the Cessna – for lack of subject matter jurisdiction. The district court also correctly dismissed appellant's Fifth Amendment "takings clause" claim for lack of subject matter jurisdiction. United States District Courts do not have jurisdiction over takings claims for compensation in excess of $10,000. Under the Tucker Act, 28 U.S.C. § 1491(a), the United States Court of Federal Claims has exclusive original jurisdiction. See Railway Labor Executives' Ass'n v. U.S., 987 F.2d 806, 816 (D.C. Cir. 1993).

Finally, appellant failed to state a claim against the former Secretary of Transportation. Appellant made no allegations concerning the former Secretary's personal involvement in committing any constitutional torts. See Simpkins v. D.C. Government, 108 F.3d 366, 369 (D.C. Cir. 1997) (citation omitted). Liability under Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics, 403 U.S. 388

(1971), cannot be based on a theory of *respondeat superior.* See Cameron v. Thornburgh, 983 F.2d 253, 258 (D.C. Cir. 1993) (citing Monell v. Dep't of Social Services, 436 U.S. 658, 691 (1978)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5375 **September Term, 2006**

04cv02241

Filed On: April 25, 2007 [1036602]

Mattie Young,
Appellant

v.

Lurita Alexis Doan, Administrator, U.S. General Services Administration,
Appellee

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not demonstrated that the proffered reasons for appellee's actions were pretextual, or that a reasonable trier of fact could otherwise infer intentional discrimination based on the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139 1151 (D. C. Cir. 2004).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5054 **September Term, 2006**

00cv00426

Filed On: April 25, 2007 [1036616]

In re: Michael R. McCray,
Petitioner

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition be denied. Mandamus may not be used as a substitute for appeal, and petitioner has not shown a clear and indisputable right to the extraordinary relief requested. See generally Doe v. Exxon Mobil Corp., 473 F.3d 345, 353 (D.C. Cir. 2007).

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5129 **September Term, 2006**

05cv01220

Filed On: April 25, 2007 [1036423]

Abu Abdul Rauf Zalita,
Appellant

v.

George W. Bush,
Appellee

BEFORE: Rogers, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the emergency motion for injunctive relief and the response thereto, it is

ORDERED that the motion be denied and the case be dismissed for lack of subject matter jurisdiction. See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007); Kiyemba v. Bush, Nos. 05-5487, et al., 2007 WL 964612 (D.C. Cir. Mar. 22, 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5293 **September Term, 2006**

06cv01415

Filed On: April 12, 2007 [1034392]

Montez Salamasina Tuia Ottley,
Appellant

v.

John Rathman, Warden,
Appellee

BEFORE: Ginsburg, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of this court's order filed February 23, 2007, and the response thereto, it is

ORDERED that this action be dismissed for lack of prosecution. The order instructed petitioner to file, within 30 days, a memorandum of law and fact in support of her challenge to the district court's orders filed August 21 and August 30, 2006; and either pay the $450 docketing fee or file a motion for leave to proceed in forma pauperis. Petitioner has not paid the docketing fee, nor moved for leave to proceed in forma pauperis, despite this court's order warning her that failure to do so would result in dismissal of the case.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5029 **September Term, 2006**

99cv01658

Filed On: April 12, 2007 [1034408]

Clyde Lacy Rattler,
Appellant

v.

Department of Labor, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed February 12, 2007, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed. Appellant seeks to appeal an order entered November 28, 2000, granting in part appellee's motion to dismiss the complaint. By order entered on the civil docket on March 5, 2001, the district court entered a stipulation of settlement disposing of appellant's remaining claims. Appellant filed a notice of appeal on January 16, 2007, more than 60 days after entry of that order in the civil docket. See Fed. R. App. P. 4(a)(1)(B). On February 12, 2007, this court ordered appellant to show cause why the appeal should not be dismissed as untimely, to which appellant has responded. Appellant's argument that the stipulation of settlement granted him unlimited time to appeal the November 28, 2000, order results from an erroneous reading of the stipulation. In fact, the stipulation provided that the district court "shall have jurisdiction to reinstate this action on motion . . . to resolve a claim of noncompliance with the terms of this Stipulation." Appellant has not raised such a claim, which must be presented to the district court in the first instance. Appellant has provided no other reason why this appeal, filed almost six years after the stipulation of settlement, should not be dismissed. See Fed. R. App. P. 4(a)(5), 4(a)(6).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5029 **September Term, 2006**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5312 **September Term, 2006**

01cv02635

Filed On: April 9, 2007 [1033622]

Harrison B. Sherwood,
Appellant

v.

Carlos Gutierrez, Secretary, United States Department Commerce,
Appellee

BEFORE: Ginsburg, Chief Judge, and Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause issued October 20, 2006, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed. By order entered on the civil docket on March 17, 2006, the district court granted appellee's motion for summary judgment and dismissed appellant's complaint with prejudice. Appellant filed a notice of appeal on September 26, 2006, more than 60 days after entry of that order in the civil docket. See Fed. R. App. P. 4(a)(1)(B). On October 20, 2006, this court ordered appellant to show cause why the appeal should not be dismissed as untimely, to which appellant has responded. Appellant's response fails to address the issue of timeliness. Moreover, it appears that his notice of appeal was filed too late to qualify for relief pursuant to Fed. R. App. P. 4(a)(5), and appellant has not alleged that he did not receive notice of the district court's order within 21 days, as required for relief pursuant to Fed. R. App. P. 4(a)(6).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5324 **September Term 2008**

06cv01455

Filed On: September 2, 2008

Mohammad Munaf and Maisoon Mohammed,
as Next Friend of Mohammad Munaf,

Appellants

v.

Pete Geren, Secretary of the U.S. Army, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Randolph and Kavanaugh, Circuit Judges

J U D G M E N T

It is **ORDERED** on the court's own motion that in light of the Supreme Court's decision in Munaf v. Geren, 128 S. Ct. 2207 (2008), vacating this court's judgment filed April 6, 2007, this case be remanded to the district court for further proceedings consistent with the Supreme Court's opinion. The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7167 **September Term, 2006**

02cv02026

Filed On: April 3, 2007 [1032756]

Robert L. Pugh, Individually on his own behalf and as Executor of the Estates of Bonnie Barnes Pugh and Malcolm R. Pugh, et al.,
Appellees

v.

Socialist People's Libyan Arab Jamahiriya, et al.,
Appellants

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal, the opposition thereto, and the reply; and the motion for summary affirmance, which includes a request for costs, and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly denied the motion to dismiss for lack of subject-matter jurisdiction. Because Libya was designated as a state sponsor of terrorism at the time the alleged acts occurred, it is not entitled to sovereign immunity, even though it was later removed from the list of state sponsors of terrorism. See 28 U.S.C. § 1605(a)(7); Acree v. Republic of Iraq, 370 F.3d 41, 56 (D.C. Cir. 2004); Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1126-27, 1133 (D.C. Cir. 2004); Kilburn v. Islamic Republic of Iran, No. 06-7127 (D.C. Cir. Oct. 19, 2006); see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 221(c), 110 Stat. 1214, 1243; Republic of Austria v. Altmann, 541 U.S. 677, 697-700 (2004). It is

FURTHER ORDERED that the request for costs be denied. There are no allowable costs taxable against appellants in this case. See D.C. Cir. Rule 39(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D. C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7208 **September Term, 2006**

02cv02271

Filed On: April 3, 2007 [1032747]

Betty Gene Ali,
Appellee

v.

Mid-Atlantic Settlement Services, Inc. and Richard L. Tolbert,
Appellees

Anthony G. Noble,
Appellant

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss the appeal and for sanctions, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Because appellant will have the opportunity to challenge the district court's sanctions order after final judgment is entered, the order is not reviewable prior to final judgment. See Cunningham v. Hamilton County, 527 U.S. 198, 206-07 (1999) (holding that party's former attorney could not rely on collateral order doctrine to file immediate appeal of sanctions order because party would not be barred from seeking post-judgment review and attorney's interests were congruent with party's interests); cf. Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985) (permitting immediate review of sanctions order under collateral order doctrine because individual subject to sanctions was non-party witness). It is

FURTHER ORDERED that the motion for sanctions be denied. The record does not establish that the current appeal was filed for an improper purpose. See D.C. Cir. Rule 38.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5147 **September Term, 2006**

FILED ON: APRIL 2, 2007 [1032513]

AMERICAN CARGO TRANSPORT, INC.,
APPELLANT

v.

RANDALL L. TOBIAS,
ADMINISTRATOR UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT AND
SEAN CONNAUGHTON, MARITIME ADMINISTRATOR DEPARTMENT OF TRANSPORTATION,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 05cv01452)

Before: RANDOLPH and KAVANAUGH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the briefs and appendix filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed. American Cargo Transport, Inc. (ACT) appeals from the District Court's grant of summary judgment in favor of the United States Agency for International Development (USAID). ACT, a U.S.-flag shipper, asserted that it was entitled to a preference over a foreign shipper in bidding on a contract for transportation of emergency food supplies to Somalia. USAID asserted that under its emergency authority it could select a foreign shipper, and it did so. *See* 7 U.S.C. § 1722(a). ACT contends that USAID's action was arbitrary, capricious, and contrary to federal law favoring U.S.-flag shippers in cargo carriage. *See* 5 U.S.C § 706(2)(A).

In *Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281 (D.C. Cir. 1989), this Court rejected a disappointed shipper's challenge to USAID's conduct under similar emergency authority. The statute examined there gave USAID emergency authority to arrange

international disaster relief notwithstanding *any* other provision of law – including, we decided, cargo preference law. *Id.* at 1282-83. Because 7 U.S.C. § 1722(a) has a "[n]otwithstanding any other provision of law" clause materially identical to the one examined in *Crowley*, our decision in that case squarely forecloses ACT's claim here. The District Court's grant of summary judgment was therefore proper.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

PER CURIAM
FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3125 **September Term, 2006**

96cr00428-01

Filed On: April 2, 2007 [1032278]

In re: Rodney W. Gordon,
Petitioner

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to file a successive § 2255 motion, the supplement thereto, the response, and the reply, it is

ORDERED that petitioner's motion to modify sentence pursuant to 18 U.S.C. § 3582(c)(2), which was transferred to this court as a motion for leave to file a successive § 2255 motion, be remanded to the district court for consideration in the first instance. Petitioner's claim that his sentence should be reduced in light of Amendment 591 to the United States Sentencing Guidelines is properly brought under § 3582(c)(2), and thus petitioner does not require this court's permission to file the motion under 28 U.S.C. § 2255. See United States v. Yanez, No. 06-2653, 2006 WL 2990269 (7th Cir. Oct. 19, 2006). It is

FURTHER ORDERED that the motion for leave to file a successive § 2255 motion be denied to the extent petitioner seeks directly to raise a claim that his sentence was imposed in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). Such a claim is not cognizable under § 3582(c)(2) and thus constitutes a successive motion under § 2255. See, e.g., United States v. McBride, 283 F.3d 612, 615 (3d Cir. 2002). Petitioner, however, may not pursue a second or successive § 2255 motion based on Apprendi, because it is not a new rule of constitutional law "made retroactive to cases on collateral review by the Supreme Court" within the meaning of 28 U.S.C. § 2255. See In re Zambrano, 433 F.3d 886, 888 (D.C. Cir. 2006).

The Clerk is directed to transmit a certified copy of this order to the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1381 **September Term, 2006**

Filed On: March 29, 2007 [1031622]

David Edward Smith, et al.,
Appellants

v.

Federal Communications Commission,
Appellee

Emmis Communications Corporation and Emmis Radio License, LLC,
Intervenors

BEFORE: Randolph, Brown and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and to defer filing of record and briefing schedule, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The decision of the Federal Communications Commission to enter into the consent decree is a nonreviewable exercise of agency discretion. See Heckler v. Chaney, 470 U.S. 821 (1985). Furthermore, the appellants lack standing to challenge the orders approving the consent decree. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Branton v. FCC, 993 F.2d 906, 909 (D.C. Cir. 1993). It is

FURTHER ORDERED that the motion to defer filing of record and briefing schedule be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5314 **September Term, 2006**

05cv02334

Filed On: March 27, 2007 [1031073]

Michael L. Buesgens,
Appellant

v.

Marcia H. Coates, In her Official Capacity as Director Office of Equal Opportunity Program, Department of Treasury, et al.,
Appellees

07-5011 06cv01558

Michael L. Buesgens,
Appellant

v.

Henry M. Paulson, Jr., Secretary of the Treasury,
Appellee

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance in No. 06-5314, the oppositions thereto, and the supplemental opposition; the petition for a writ of mandamus and memorandum of law and fact in No. 06-5314; the motion for appointment of counsel in No. 06-5314; the motion for records in No. 06-5314; and the motion to consolidate, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See

No. 06-5314 **September Term, 2006**

Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly dismissed appellant's claims against National Treasury Employees Union President Colleen Kelley. See Patent Office Professional Ass'n v. Federal Labor Relations Authority, 128 F.3d 751, 753 (D.C. Cir. 1997); Steadman v. Governor, U.S. Soldiers' and Airmen's Home, 918 F.2d 963, 966 (D.C. Cir. 1990). It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. The district court did not abuse its discretion in transferring Buesgens' claims against the federal appellees to the Western District of Texas. See 42 U.S.C. § 2000e-5(f)(3); 28 U.S.C. § 1406(a). It is

FURTHER ORDERED that the motion for records be denied. It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 06-5314 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5321 **September Term, 2006**

05cv01751

Filed On: March 26, 2007 [1030774]

Ellen L. Delaine,
Appellant

v.

United States Postal Service, et al.,
Appellees

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance and the oppositions thereto; and the court's order to show cause filed January 29, 2007, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motions for summary affirmance filed by the federal and District of Columbia appellees be granted and that, on the court's own motion, the district court's order filed September 19, 2006 be summarily affirmed as to appellees William Fralin, Thomas DeLaine, and Franklin DeLaine as well. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court did not err in dismissing appellant's slander claim based on sovereign immunity because the Federal Tort Claims Act specifically prohibits claims for slander. See 28 U.S.C. § 2680(h). The district court correctly dismissed appellant's conspiracy claim as being the type of "bizarre conspiracy theor[y]" that is "patently insubstantial, presenting no federal question suitable for decision." Best v. Kelly, 39 F.3d 328, 330 (D.C. Cir. 1991) (internal quotations omitted). The district court also properly dismissed appellant's intentional infliction of emotional distress claim because the alleged conduct was not "extreme and outrageous" enough to support the claim. See Browning v. Clinton, 292 F.3d 235, 248 (D.C. Cir. 2002).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5321 **September Term, 2006**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7195 **September Term, 2006**

02cv01503

Filed On: March 26, 2007 [1030764]

Melaine Small, individually and as Personal Representative of the Estate of Douglas A. Small, et al.,

Appellants

v.

Walter Thomas Godbey, et al.,

Appellees

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly held that there were no genuine issues of material fact and granted summary judgment for appellee Capital Refinishing, Inc., on appellants' survival and wrongful death claims. See generally Arrington v. United States, 473 F.3d 329, 333 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7138 **September Term, 2006**

05cv01398

Filed On: March 16, 2007 [1028739]

Mihretu Bulti Dasisa,
Appellant

v.

District of Columbia Housing Authority,
Appellee

BEFORE: Ginsburg, Chief Judge, Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed December 26, 2006; and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed appellant's complaint alleging the District of Columbia Housing Authority discriminated against him in refusing to accept his public housing voucher on the grounds that: (1) the complaint was too vague to set out a cognizable cause of action; (2) an affidavit appellant himself submitted from an Authority official demonstrated the reason the Authority did not accept the voucher was that it had expired; and (3) not only had appellant presented no evidence the decision was based on "race, color, or national origin," 42 U.S.C. § 2000d, his own evidence belied such a claim.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7011 **September Term, 2006**

98cv02554

Filed On: March 16, 2007 [1028764]

Michael J. Hinnant,
Appellant

v.

Patricia Britton-Jackson, Warden, District of Columbia Department of Corrections, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Mandamus does not lie unless the petitioner's right to relief is "clear and indisputable," and there is "no other adequate means" by which the petitioner may attain the relief it seeks. In re Sealed Case, 151 F.3d 1059, 1063 (D.C. Cir.1998). Petitioner has failed to demonstrate he is entitled to the extraordinary writ. See Cobell v. Norton, 334 F.3d 1128, 1137 (D.C. Cir. 2003).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7072 **September Term, 2006**

00cv02296

Filed On: March 13, 2007 [1027785]

Kingsley Anyanwutaku,
Appellant

v.

Edward P. Wilson, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed September 7, 2006, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that this appeal be dismissed as untimely. The notice of appeal was filed beyond the 30-day period provided by Fed. R. App. P. 4(a); the district court denied appellant's motion for leave to file the notice of appeal out of time, see Fed. R. App. P. 4(a)(5)(A); and appellant's appeal from that denial, No. 06-7150, was dismissed for failure to prosecute.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5213 **September Term, 2006**

06cv00387

Filed On: March 13, 2007 [1027876]

Tyrrall Farrow Cannon,
Appellant

v.

Dianne Feinstein, United State Senator, Judiciary Committee, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which has been construed as including a request for a certificate of appealability; the motion for appointment of counsel; the motion for injunction pending appeal; the brief and the supplements thereto, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the request for a certificate of appealability be denied. Because the district court correctly construed appellant's complaint as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, appellant needs a certificate of appealability. See 28 U.S.C. § 2253(c)(1)(B). Because appellant has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). As the district court pointed out, it is unclear appellant exhausted his state remedies, as required by 28 U.S.C. § 2254(b)(1); and, in any event, his federal recourse lies in district court in California. See 28 U.S.C. § 2241(d). It is

FURTHER ORDERED that the motion for injunction pending appeal be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5213 **September Term, 2006**

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5414 **September Term, 2006**

06cv01124

Filed On: March 13, 2007 [1027794]

Denard Darnell Neal,
Appellant

v.

Henry M. Paulson, Jr., Secretary of the Treasury and
William G. Stewart, II, Acting Assistant Director
Executive Office for United StatesAttorney,
Appellees

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the order to show cause filed January 25, 2007, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed for lack of jurisdiction. The district court's order filed September 20, 2006 does not adjudicate all the claims against all the parties, and the district court has not directed the entry of final judgment; therefore, the order is not final and appealable. See Fed. R. Civ. P. 54(b) (absent express determination that there is no just reason for delay and express direction for the entry of judgment by district court, any order adjudicating fewer than all claims of fewer than all parties is not a final, appealable decision).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3068 **September Term, 2006**

FILED ON: MARCH 7, 2007 [1026707]

UNITED STATES OF AMERICA,
APPELLEE

v.

MODOU CAMARA,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 02cr00157-01)

Before: ROGERS, GARLAND, and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the court, and briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons set forth in the attached memorandum, it is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

MEMORANDUM

A federal jury in the District of Columbia convicted defendant Modou Camara of one count of conspiracy to defraud the United States, five counts of wire fraud, two counts of money laundering, and one count of interstate transportation of money and securities obtained by fraud. All of the charges were based on Camara's participation in an elaborate series of real estate frauds involving sixteen residential properties in Washington, D.C. The district court ordered him to pay $1,116,440.90 in restitution and sentenced him to sixty months in prison followed by three years of supervised release. Camara now appeals his conviction.

Camara initially argued that the district court should have granted his motion to suppress the results of a search of his home because the searching officers violated the knock-and-announce statute, 18 U.S.C. § 3109. Camara abandoned this claim at oral argument in light of the Supreme Court's intervening decision in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), which held that the exclusionary rule does not apply to a violation of the Fourth Amendment's knock-and-announce requirement. Oral Arg. Tape at 1:05. This court has since held that, after *Hudson*, a violation of § 3109 does not justify suppression of the fruits of an otherwise valid search. *See United States v. Southerland*, 466 F.3d 1083, 1086 (D.C. Cir. 2006).

Camara's only remaining argument is that the district court should not have allowed Special Agent Lisa Gore of the Department of Housing and Urban Development to testify as a summary witness at trial. Agent Gore took the stand at the conclusion of the government's case-in-chief to give a summary of hundreds of financial records and other exhibits that had already been admitted into evidence. Camara argues that the court should have excluded her testimony because it was "lengthy and pervasively conclusory." Appellant's Br. 16.

We review a district court's evidentiary rulings, including the admission of summary testimony, for abuse of discretion. *See United States v. Lemire*, 720 F.2d 1327, 1348 (D.C. Cir. 1983); *see also United States v. Abel*, 469 U.S. 45, 54-55 (1984). The government argues that Camara's claim should be reviewed only for plain error because he failed to preserve his objection to Agent Gore's summary testimony at trial. *See* Fed. R. Crim. P. 52(b). We need not decide this issue because we conclude that there was no error even under the more stringent abuse of discretion standard.

Testimony summarizing voluminous or complex documents already in evidence is relevant and therefore admissible under Rules 402 and 403 of the Federal Rules of Evidence, unless "the dangers of unfair prejudice it creates outweigh its probative value." *Lemire*, 720 F.2d at 1348. In *Lemire*, we held that the district court did not abuse its discretion by admitting summary testimony because four factors minimized any risk of unfair prejudice. First, the district court gave instructions cautioning the jurors that the summary testimony was presented only for their convenience and was not itself proof of any facts. *Id.* Second, the defendant had access to the underlying records and full opportunity to cross-examine the summary witness. *See id.* at 1349. Third, the summary testimony was based solely on documents that were already in evidence and thus did not reveal any inadmissible material to the jury. *See id.* Finally, the summary testimony was limited to "routine computations and culling through of documents to

eliminate confusing and extraneous evidence" and thus did not stray into improper argument. *Id.* at 1349-50.

A review of the record in this case reveals that the same four factors were present here. First, the district court gave a limiting instruction virtually identical to the one we approved in *Lemire*. *Compare* Trial Tr. 54-55 (Nov. 3, 2003), *with Lemire*, 720 F.2d at 1348 n.32. Second, Agent Gore was available for cross examination and Camara's counsel in fact questioned her about the basis for her calculations and the limitations of her knowledge. *See* Trial Tr. 90-99 (Oct. 30, 2003). Third, Camara concedes that Agent Gore's testimony was based on documents already in evidence and does not claim that she distorted or otherwise misrepresented the underlying exhibits. Finally, Agent Gore's testimony consisted of the same type of "routine computations and culling through of documents" that we approved in *Lemire* -- for example, she reviewed a summary chart showing the amount of money Camara received from each of the sixteen transactions at issue.

As in *Lemire*, these factors suggest that the risk of unfair prejudice was slight. We conclude that the district court acted well within its discretion when it determined that the possibility of such prejudice did not outweigh the considerable probative value of Agent Gore's summary testimony, and we therefore affirm the judgment below.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5281 **September Term, 2006**

FILED ON: FEBRUARY 27, 2007

[1025114]
MINNIE P. LONG,
APPELLANT

v.

MARY E. PETERS, SECRETARY, U.S. DEPARTMENT OF TRANSPORTATION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 00cv01443)

Before: TATEL, GARLAND and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed. Long claims that the Department of Transportation discriminated against her on the basis of her race in denying her a career ladder promotion. The Department submitted evidence that it did not promote Long because she was not qualified for a promotion. J.A. 14-15. Long did not offer sufficient evidence to create a genuine dispute that the Department's nondiscriminatory explanation was pretextual. *Id.* at 18. Therefore, the District Court properly granted the Department's motion for judgment as a matter of law. *See* FED. R. CIV. P. 50(a). *Cf. Barnette v. Chertoff*, 453 F.3d 513, 519 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1417 **September Term, 2006**

FILED ON: FEBRUARY 27, 2007

[1025122]
MELVIN COLON-CALDERON,
PETITIONER

v.

DRUG ENFORCEMENT ADMINISTRATION,
RESPONDENT

On Petition for Review of an Order of the
United States Drug Enforcement Agency

Before: TATEL, GARLAND, and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This petition for review of the Drug Enforcement Administration's (DEA's) denial of a petition for remission or mitigation of forfeited property was presented to the court, and briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(b). It is

ORDERED and **ADJUDGED** that the petition for review be denied.

Petitioner Melvin Colon-Calderon's sole contention in this court is that the DEA should have remitted or mitigated the forfeiture of his property because the notice of forfeiture that the agency sent him did not satisfy the requirements of the Due Process Clause. Even assuming such a claim can be raised directly in this court, *cf.* 18 U.S.C. § 983(e)(5), petitioner never raised this contention before the DEA, and we therefore will not consider it. *See United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242, 1244-45 (D.C. Cir. 1997) (holding claim waived because petitioner did not raise it before the agency); *see also Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 413-14 (D.C. Cir. 1998) (rejecting argument that constitutional issues are always excepted from exhaustion requirements and observing that "[e]xhaustion even of constitutional claims may promote many of the policies underlying the exhaustion doctrine").

The Clerk is directed to withhold the issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5092 **September Term, 2006**

02cv02156

Filed On: January 19, 2007

[1017268]
Oranna Bumgarner Felter, et al.,
Appellants

v.

Dirk Kempthorne, Secretary of the Interior, et al.,
Appellees

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7160 **September Term, 2006**

03cv00273
04cv00661

Filed On: November 13, 2006

[1004059]
Deborah A. Redman,
Appellant

v.

Philip A. Graham, et al.,
Appellees

Consolidated with 05-7168

05-7168 03cv00273

Deborah A. Redman,
Appellant

v.

District of Columbia,
Appellee

06-7070 04cv00661

Deborah A. Redman,
Appellant

v.

Raymond J. Pitts, Jr.,
Appellee

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7160 **September Term, 2006**

BEFORE: Rogers, Griffith, and Kavanaugh,* Circuit Judges

O R D E R

Upon consideration of (i) the motions to dismiss in No. 05-7160, the responses thereto, and the reply; (ii) the motion for summary reversal in No. 05-7160 and the lodged response thereto (which includes a motion for summary affirmance); (iii) the motions to extend time to respond to the motion for summary reversal in No. 05-7160; (iv) the motion to dismiss in No. 05-7168 and the response thereto; (v) the motion for summary reversal in No. 05-7168, the response thereto, and the reply; (vi) the motion for summary reversal in No. 06-7070; (vii) the motion to consolidate No. 06-7070 with No. 05-7168, the response thereto, and the reply; and (viii) the motions for appointment of counsel, the responses thereto, and the reply, it is, for the reasons stated in the memorandum accompanying this order,

ORDERED that the motions for appointment of counsel be denied. It is

FURTHER ORDERED that the motion to extend time filed in No. 05-7160 by appellees Philip A. Graham and Schuman & Felts, Chartered be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motions to dismiss No. 05-7160 be denied. It is

FURTHER ORDERED that the district court's judgment on appeal in No. 05-7160 be vacated as to Schuman & Felts and affirmed as to the remaining appellees. It is

FURTHER ORDERED that the motion to extend time filed in No. 05-7160 by appellees Lewis Bashoor and Long & Foster Real Estate, Inc. be dismissed as moot. It is

FURTHER ORDERED that the motion to dismiss No. 05-7168 be granted. It is

FURTHER ORDERED that the motion for summary reversal in No. 05-7168 be dismissed as moot. It is

FURTHER ORDERED that the motion for summary reversal in No. 06-7070 be denied, and, on the court's own motion, that the order on appeal in that case be

* For the reasons set forth in a statement accompanying this order, Judge Kavanaugh would affirm the judgment of the district court with respect to appellee Schuman & Felts, Chartered.

summarily affirmed. It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandates herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Redman v. Graham, 05-7160
Redman v. District of Columbia, 05-7168
Redman v. Pitts, 06-7070

MEMORANDUM

In two separate district court actions, appellant alleged that the District of Columbia court system engaged in discrimination (Dist. Ct. No. 03cv0273) and that her former landlords, assisted by lawyers and realtors, engaged in discrimination and retaliation (Dist. Ct. No. 04cv0661). In both cases, the alleged discrimination was based on appellant's disability.

In appeal No. 05-7168, appellant challenges an interlocutory order entered in her suit against the court system (Dist. Ct. No. 03cv0273). The order appealed from did not amount to a final judgment, and this court has no jurisdiction to review it before final judgment is entered. See 28 U.S.C. § 1291; Diamond Ventures, LLC, v. Barreto, 452 F.3d 892, 895 n.5 (D.C. Cir. 2006). For this reason, the court grants the District of Columbia's motion to dismiss appeal No. 05-7168.

In appeals No. 05-7160 and No. 06-7070, appellant challenges the final judgment entered in her suit against her former landlords and affiliated parties (Dist. Ct. No. 04cv0661). The appellees in No. 05-7160 have moved to dismiss, contending that this appeal was initiated before final judgment was entered. Although appellees are correct about the timing of appellant's notice of appeal, the jurisdictional defect that existed when the appeal began has been cured by the entry of final judgment. See Fed. R. App. 4(a)(2); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 161-62 (D.C. Cir. 2005).

Also in appeals No. 05-7160 and No. 06-7070, appellant has moved for summary reversal, and appellees Philip A. Graham and Schuman & Felts, Chartered, have moved for summary affirmance. These motions placed the merits of this appeal before the court. Because the appropriate disposition is so clear, summary action is warranted.

With respect to Schuman & Felts, the judgment of the district court is vacated. Appellant alleges that Schuman & Felts engaged in discrimination and retaliation while representing Graham in litigation involving appellant. The district court dismissed appellant's claims against Schuman & Felts for failure to state a claim, relying on decisions limiting attorneys' liability to non-clients for professional negligence. These decisions are inapposite, however, because appellant has sued Schuman & Felts for discrimination and retaliation, not professional negligence. It follows that these cases will not support summary affirmance of the district court's decision to dismiss appellant's claims against Schuman & Felts. Moreover, "[a] motion to dismiss for failure to state a claim upon which relief can be granted is generally viewed with disfavor and rarely granted." Doe v. United States Department of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985). For this reason, and in light of the district court's failure to articulate a proper basis on which to dismiss appellant's claims against Schuman & Felts, appellant should be allowed to clarify the theory of law, if any, under which her allegations fall and, if necessary, present evidence in support of these allegations.

With respect to the remaining appellees in No. 05-7160, the judgment of the district court is affirmed. Appellant previously had the opportunity to raise her discrimination and retaliation allegations as defenses in an eviction suit. See Shin v. Portals Confederation Corp., 728 A.2d 615, 618-19 (D.C. 1999). Accordingly, further consideration of those claims is barred by *res judicata*. See id. at 619.

Finally, in No. 06-7070, we affirm the judgment of the district court in favor of appellee Raymond J. Pitts, Jr. Pitts never appeared in the district court. After granting motions to dismiss by the other defendants in Dist. Ct. No. 04cv0661, the district court instructed appellant to seek a default judgment or other appropriate action with respect to Pitts within 30 days. When appellant failed to respond to this instruction, the district court dismissed for want of prosecution. We hold that the court did not abuse its discretion.

Redman v. Graham, 05-7160
Redman v. District of Columbia, 05-7168
Redman v. Pitts, 06-7070

KAVANAUGH, *Circuit Judge, dissenting from the decision to summarily reverse as to appellee Schuman & Felts*:

I would affirm the district court's dismissal of the complaint against the law firm Schuman & Felts. Plaintiff's complaint states that the defendant law firm represented a client in eviction proceedings. Amended Complaint at 2, Redman v. Graham, No. 04-cv-661 (D.D.C. Nov. 1, 2005). Plaintiff has asserted no legal theory by which an attorney representing a client in eviction proceedings can be subjected to civil liability for discrimination under the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., the District of Columbia Human Rights Act, D.C. Code §§ 2-1401.01 et seq., or the District of Columbia Rental Housing Act, D.C. Code § 42-3505.02. As relevant in this case, the Fair Housing Act applies to those who sell or rent real estate, the D.C. Human Rights Act applies to those who conduct transactions in real property, and the D.C. Housing Act applies to housing providers. Plaintiff concedes that Schuman & Felts was none of these. To the extent there is any ambiguity about the scope of liability under these statutes, the statutes should be read against the background common-law rule that "[a] lawyer, like other agents, is not as such liable for acts of a client that make the client liable." Restatement (Third) of the Law Governing Lawyers § 56 cmt. c (2000); see also Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 314 (3d Cir. 2003); Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999); Brown v. Donco Enters., Inc., 783 F.2d 644, 646-47 (6th Cir. 1986).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7160 **September Term, 2006**

03cv00273
04cv00661

Filed On: November 13, 2006

[1004059]
Deborah A. Redman,
Appellant

v.

Philip A. Graham, et al.,
Appellees

Consolidated with 05-7168

05-7168 03cv00273

Deborah A. Redman,
Appellant

v.

District of Columbia,
Appellee

06-7070 04cv00661

Deborah A. Redman,
Appellant

v.

Raymond J. Pitts, Jr.,
Appellee

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7160 **September Term, 2006**

BEFORE: Rogers, Griffith, and Kavanaugh,* Circuit Judges

O R D E R

Upon consideration of (i) the motions to dismiss in No. 05-7160, the responses thereto, and the reply; (ii) the motion for summary reversal in No. 05-7160 and the lodged response thereto (which includes a motion for summary affirmance); (iii) the motions to extend time to respond to the motion for summary reversal in No. 05-7160; (iv) the motion to dismiss in No. 05-7168 and the response thereto; (v) the motion for summary reversal in No. 05-7168, the response thereto, and the reply; (vi) the motion for summary reversal in No. 06-7070; (vii) the motion to consolidate No. 06-7070 with No. 05-7168, the response thereto, and the reply; and (viii) the motions for appointment of counsel, the responses thereto, and the reply, it is, for the reasons stated in the memorandum accompanying this order,

ORDERED that the motions for appointment of counsel be denied. It is

FURTHER ORDERED that the motion to extend time filed in No. 05-7160 by appellees Philip A. Graham and Schuman & Felts, Chartered be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motions to dismiss No. 05-7160 be denied. It is

FURTHER ORDERED that the district court's judgment on appeal in No. 05-7160 be vacated as to Schuman & Felts and affirmed as to the remaining appellees. It is

FURTHER ORDERED that the motion to extend time filed in No. 05-7160 by appellees Lewis Bashoor and Long & Foster Real Estate, Inc. be dismissed as moot. It is

FURTHER ORDERED that the motion to dismiss No. 05-7168 be granted. It is

FURTHER ORDERED that the motion for summary reversal in No. 05-7168 be dismissed as moot. It is

FURTHER ORDERED that the motion for summary reversal in No. 06-7070 be denied, and, on the court's own motion, that the order on appeal in that case be

* For the reasons set forth in a statement accompanying this order, Judge Kavanaugh would affirm the judgment of the district court with respect to appellee Schuman & Felts, Chartered.

summarily affirmed. It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandates herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Redman v. Graham, 05-7160
Redman v. District of Columbia, 05-7168
Redman v. Pitts, 06-7070

MEMORANDUM

In two separate district court actions, appellant alleged that the District of Columbia court system engaged in discrimination (Dist. Ct. No. 03cv0273) and that her former landlords, assisted by lawyers and realtors, engaged in discrimination and retaliation (Dist. Ct. No. 04cv0661). In both cases, the alleged discrimination was based on appellant's disability.

In appeal No. 05-7168, appellant challenges an interlocutory order entered in her suit against the court system (Dist. Ct. No. 03cv0273). The order appealed from did not amount to a final judgment, and this court has no jurisdiction to review it before final judgment is entered. See 28 U.S.C. § 1291; Diamond Ventures, LLC, v. Barreto, 452 F.3d 892, 895 n.5 (D.C. Cir. 2006). For this reason, the court grants the District of Columbia's motion to dismiss appeal No. 05-7168.

In appeals No. 05-7160 and No. 06-7070, appellant challenges the final judgment entered in her suit against her former landlords and affiliated parties (Dist. Ct. No. 04cv0661). The appellees in No. 05-7160 have moved to dismiss, contending that this appeal was initiated before final judgment was entered. Although appellees are correct about the timing of appellant's notice of appeal, the jurisdictional defect that existed when the appeal began has been cured by the entry of final judgment. See Fed. R. App. 4(a)(2); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 161-62 (D.C. Cir. 2005).

Also in appeals No. 05-7160 and No. 06-7070, appellant has moved for summary reversal, and appellees Philip A. Graham and Schuman & Felts, Chartered, have moved for summary affirmance. These motions placed the merits of this appeal before the court. Because the appropriate disposition is so clear, summary action is warranted.

With respect to Schuman & Felts, the judgment of the district court is vacated. Appellant alleges that Schuman & Felts engaged in discrimination and retaliation while representing Graham in litigation involving appellant. The district court dismissed appellant's claims against Schuman & Felts for failure to state a claim, relying on decisions limiting attorneys' liability to non-clients for professional negligence. These decisions are inapposite, however, because appellant has sued Schuman & Felts for discrimination and retaliation, not professional negligence. It follows that these cases will not support summary affirmance of the district court's decision to dismiss appellant's claims against Schuman & Felts. Moreover, "[a] motion to dismiss for failure to state a claim upon which relief can be granted is generally viewed with disfavor and rarely granted." Doe v. United States Department of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985). For this reason, and in light of the district court's failure to articulate a proper basis on which to dismiss appellant's claims against Schuman & Felts, appellant should be allowed to clarify the theory of law, if any, under which her allegations fall and, if necessary, present evidence in support of these allegations.

With respect to the remaining appellees in No. 05-7160, the judgment of the district court is affirmed. Appellant previously had the opportunity to raise her discrimination and retaliation allegations as defenses in an eviction suit. See Shin v. Portals Confederation Corp., 728 A.2d 615, 618-19 (D.C. 1999). Accordingly, further consideration of those claims is barred by *res judicata*. See id. at 619.

Finally, in No. 06-7070, we affirm the judgment of the district court in favor of appellee Raymond J. Pitts, Jr. Pitts never appeared in the district court. After granting motions to dismiss by the other defendants in Dist. Ct. No. 04cv0661, the district court instructed appellant to seek a default judgment or other appropriate action with respect to Pitts within 30 days. When appellant failed to respond to this instruction, the district court dismissed for want of prosecution. We hold that the court did not abuse its discretion.

Redman v. Graham, 05-7160
Redman v. District of Columbia, 05-7168
Redman v. Pitts, 06-7070

KAVANAUGH, *Circuit Judge, dissenting from the decision to summarily reverse as to appellee Schuman & Felts*:

I would affirm the district court's dismissal of the complaint against the law firm Schuman & Felts. Plaintiff's complaint states that the defendant law firm represented a client in eviction proceedings. Amended Complaint at 2, Redman v. Graham, No. 04-cv-661 (D.D.C. Nov. 1, 2005). Plaintiff has asserted no legal theory by which an attorney representing a client in eviction proceedings can be subjected to civil liability for discrimination under the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., the District of Columbia Human Rights Act, D.C. Code §§ 2-1401.01 et seq., or the District of Columbia Rental Housing Act, D.C. Code § 42-3505.02. As relevant in this case, the Fair Housing Act applies to those who sell or rent real estate, the D.C. Human Rights Act applies to those who conduct transactions in real property, and the D.C. Housing Act applies to housing providers. Plaintiff concedes that Schuman & Felts was none of these. To the extent there is any ambiguity about the scope of liability under these statutes, the statutes should be read against the background common-law rule that "[a] lawyer, like other agents, is not as such liable for acts of a client that make the client liable." Restatement (Third) of the Law Governing Lawyers § 56 cmt. c (2000); see also Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 314 (3d Cir. 2003); Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999); Brown v. Donco Enters., Inc., 783 F.2d 644, 646-47 (6th Cir. 1986).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7160 **September Term, 2006**

03cv00273
04cv00661

Filed On: November 13, 2006

[1004059]
Deborah A. Redman,
Appellant

v.

Philip A. Graham, et al.,
Appellees

Consolidated with 05-7168

05-7168 03cv00273

Deborah A. Redman,
Appellant

v.

District of Columbia,
Appellee

06-7070 04cv00661

Deborah A. Redman,
Appellant

v.

Raymond J. Pitts, Jr.,
Appellee

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7160 **September Term, 2006**

BEFORE: Rogers, Griffith, and Kavanaugh,* Circuit Judges

O R D E R

Upon consideration of (i) the motions to dismiss in No. 05-7160, the responses thereto, and the reply; (ii) the motion for summary reversal in No. 05-7160 and the lodged response thereto (which includes a motion for summary affirmance); (iii) the motions to extend time to respond to the motion for summary reversal in No. 05-7160; (iv) the motion to dismiss in No. 05-7168 and the response thereto; (v) the motion for summary reversal in No. 05-7168, the response thereto, and the reply; (vi) the motion for summary reversal in No. 06-7070; (vii) the motion to consolidate No. 06-7070 with No. 05-7168, the response thereto, and the reply; and (viii) the motions for appointment of counsel, the responses thereto, and the reply, it is, for the reasons stated in the memorandum accompanying this order,

ORDERED that the motions for appointment of counsel be denied. It is

FURTHER ORDERED that the motion to extend time filed in No. 05-7160 by appellees Philip A. Graham and Schuman & Felts, Chartered be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motions to dismiss No. 05-7160 be denied. It is

FURTHER ORDERED that the district court's judgment on appeal in No. 05-7160 be vacated as to Schuman & Felts and affirmed as to the remaining appellees. It is

FURTHER ORDERED that the motion to extend time filed in No. 05-7160 by appellees Lewis Bashoor and Long & Foster Real Estate, Inc. be dismissed as moot. It is

FURTHER ORDERED that the motion to dismiss No. 05-7168 be granted. It is

FURTHER ORDERED that the motion for summary reversal in No. 05-7168 be dismissed as moot. It is

FURTHER ORDERED that the motion for summary reversal in No. 06-7070 be denied, and, on the court's own motion, that the order on appeal in that case be

* For the reasons set forth in a statement accompanying this order, Judge Kavanaugh would affirm the judgment of the district court with respect to appellee Schuman & Felts, Chartered.

summarily affirmed. It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandates herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Redman v. Graham, 05-7160
Redman v. District of Columbia, 05-7168
Redman v. Pitts, 06-7070

MEMORANDUM

In two separate district court actions, appellant alleged that the District of Columbia court system engaged in discrimination (Dist. Ct. No. 03cv0273) and that her former landlords, assisted by lawyers and realtors, engaged in discrimination and retaliation (Dist. Ct. No. 04cv0661). In both cases, the alleged discrimination was based on appellant's disability.

In appeal No. 05-7168, appellant challenges an interlocutory order entered in her suit against the court system (Dist. Ct. No. 03cv0273). The order appealed from did not amount to a final judgment, and this court has no jurisdiction to review it before final judgment is entered. See 28 U.S.C. § 1291; Diamond Ventures, LLC, v. Barreto, 452 F.3d 892, 895 n.5 (D.C. Cir. 2006). For this reason, the court grants the District of Columbia's motion to dismiss appeal No. 05-7168.

In appeals No. 05-7160 and No. 06-7070, appellant challenges the final judgment entered in her suit against her former landlords and affiliated parties (Dist. Ct. No. 04cv0661). The appellees in No. 05-7160 have moved to dismiss, contending that this appeal was initiated before final judgment was entered. Although appellees are correct about the timing of appellant's notice of appeal, the jurisdictional defect that existed when the appeal began has been cured by the entry of final judgment. See Fed. R. App. 4(a)(2); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 161-62 (D.C. Cir. 2005).

Also in appeals No. 05-7160 and No. 06-7070, appellant has moved for summary reversal, and appellees Philip A. Graham and Schuman & Felts, Chartered, have moved for summary affirmance. These motions placed the merits of this appeal before the court. Because the appropriate disposition is so clear, summary action is warranted.

With respect to Schuman & Felts, the judgment of the district court is vacated. Appellant alleges that Schuman & Felts engaged in discrimination and retaliation while representing Graham in litigation involving appellant. The district court dismissed appellant's claims against Schuman & Felts for failure to state a claim, relying on decisions limiting attorneys' liability to non-clients for professional negligence. These decisions are inapposite, however, because appellant has sued Schuman & Felts for discrimination and retaliation, not professional negligence. It follows that these cases will not support summary affirmance of the district court's decision to dismiss appellant's claims against Schuman & Felts. Moreover, "[a] motion to dismiss for failure to state a claim upon which relief can be granted is generally viewed with disfavor and rarely granted." Doe v. United States Department of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985). For this reason, and in light of the district court's failure to articulate a proper basis on which to dismiss appellant's claims against Schuman & Felts, appellant should be allowed to clarify the theory of law, if any, under which her allegations fall and, if necessary, present evidence in support of these allegations.

With respect to the remaining appellees in No. 05-7160, the judgment of the district court is affirmed. Appellant previously had the opportunity to raise her discrimination and retaliation allegations as defenses in an eviction suit. See Shin v. Portals Confederation Corp., 728 A.2d 615, 618-19 (D.C. 1999). Accordingly, further consideration of those claims is barred by *res judicata*. See id. at 619.

Finally, in No. 06-7070, we affirm the judgment of the district court in favor of appellee Raymond J. Pitts, Jr. Pitts never appeared in the district court. After granting motions to dismiss by the other defendants in Dist. Ct. No. 04cv0661, the district court instructed appellant to seek a default judgment or other appropriate action with respect to Pitts within 30 days. When appellant failed to respond to this instruction, the district court dismissed for want of prosecution. We hold that the court did not abuse its discretion.

Redman v. Graham, 05-7160
Redman v. District of Columbia, 05-7168
Redman v. Pitts, 06-7070

KAVANAUGH, *Circuit Judge, dissenting from the decision to summarily reverse as to appellee Schuman & Felts*:

I would affirm the district court's dismissal of the complaint against the law firm Schuman & Felts. Plaintiff's complaint states that the defendant law firm represented a client in eviction proceedings. Amended Complaint at 2, Redman v. Graham, No. 04-cv-661 (D.D.C. Nov. 1, 2005). Plaintiff has asserted no legal theory by which an attorney representing a client in eviction proceedings can be subjected to civil liability for discrimination under the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., the District of Columbia Human Rights Act, D.C. Code §§ 2-1401.01 et seq., or the District of Columbia Rental Housing Act, D.C. Code § 42-3505.02. As relevant in this case, the Fair Housing Act applies to those who sell or rent real estate, the D.C. Human Rights Act applies to those who conduct transactions in real property, and the D.C. Housing Act applies to housing providers. Plaintiff concedes that Schuman & Felts was none of these. To the extent there is any ambiguity about the scope of liability under these statutes, the statutes should be read against the background common-law rule that "[a] lawyer, like other agents, is not as such liable for acts of a client that make the client liable." Restatement (Third) of the Law Governing Lawyers § 56 cmt. c (2000); see also Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 314 (3d Cir. 2003); Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999); Brown v. Donco Enters., Inc., 783 F.2d 644, 646-47 (6th Cir. 1986).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7053 **September Term, 2006**

05cv00987

Filed On: November 8, 2006

[1003263]
Aaron (Isby) Israel,
Appellant

v.

Richard L. Young,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by the appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. Appellant seeks a declaration that the exhaustion requirement of the Prison Litigation Reform Act, codified at 42 U.S.C. § 1997e(a), is unconstitutional. He also requests an order compelling a district judge in the Southern District of Indiana to consider the merits of claims that the judge previously dismissed for lack of exhaustion. The request for an injunction against the district judge amounts to an impermissible collateral attack on the judgment entered in appellant's previous suit. See United States v. Atkins, 116 F.3d 1566, 1571 (D.C. Cir. 1997). Furthermore, because appellant has not alleged that he has any other cases subject to § 1997e either pending or imminent, he lacks standing to challenge the constitutionality of that provision. See Worth v. Jackson, 451 F.3d 854, 858 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7053 **September Term, 2006**

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5403 **September Term, 2006**

04cv01225

Filed On: October 25, 2006

[1000307]
Paul R.F. Ramsey,
Appellant

v.

Jo Anne B. Barnhart, Commissioner, Social Security Administration,
Appellee

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be denied and, on the court's own motion, that this case be remanded to the district court for further proceedings. In some cases, administrative delay may justify waiver of the exhaustion requirement. See Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 591-92 (1926); Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90, 106 (D.C. Cir. 1986). Appellant has asserted that appellee has not acted promptly on his benefits claim. The court is unable to evaluate this argument, however, because appellee did not file the administrative record with the district court and the declaration submitted by appellee did not address the question of administrative delay. Therefore, this case is remanded so that the district court can order appellee to file the administrative record with the court and then the court can evaluate the exhaustion issue in light of the administrative record.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5022 **September Term, 2006**

05cv01811

Filed On: October 25, 2006

[1000266]
Andrew N. White,
Appellant

v.

United States Parole Commission,
Appellee

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the United States Parole Commission's ("USPC") motion to dismiss for lack of a certificate of appealability ("COA"); the order to show cause and the response thereto; and the motions for appointment of counsel; it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motions for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. See 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the motion to dismiss for lack of a COA be granted. See 28 U.S.C. § 2253(c). Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), issuance of a COA is unwarranted in this case. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner has not demonstrated his argument that the USPC's parole revocation decision violated due process is "debatable among jurists of reason," United States v. Mitchell, 216 F.3d 1126, 1130 (D.C. Cir. 2000) (internal citation omitted), as there is no indication the USPC's decision was "lacking in evidentiary support or . . . so irrational as to be fundamentally unfair." Duckett v. Quick, 282 F.3d 844, 847 (D.C. Cir. 2002) (internal citations omitted). Moreover, although petitioner now contends the USPC erred in denying him "educational good time" credits when revoking his parole, petitioner waived this argument by failing to raise it in his habeas petition. See Singleton v. Wulff, 428 U.S. 106, 120 (1976); United States v. Hylton, 130 F.3d 130, 1135-36 (D.C. Cir. 2002). Nor would "jurists of reason" find "debatable" petitioner's argument that the USPC erred in refusing to credit the "street time" he earned prior to revocation of his parole. See United States Parole Commission v. Noble, 693 A.2d 1084 (D.C. 1997) (loss of street time following revocation of parole mandated by D.C. Code § 24-206(a); see also Davis

No. 06-5022 September Term, 2006

v. Moore, 772 A.2d 204, 215 (D.C. 2001) (retroactive application of Noble did not violate Ex Post Facto Clause, as decision was not unforeseeable at time of underlying conduct).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5029 **September Term, 2006**

04cv01511

Filed On: October 25, 2006

[1000333]
Bernard Smith,
Appellant

v.

B. A. Bledsoe, Warden,
Appellee

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, which the court construes as including a request for a certificate of appealability, it is

ORDERED that the request for a certificate of appealability be denied. A certificate of appealability is needed to appeal the district court's denial of appellant's motion for relief under Fed. R. Civ. P. 60(b), in which appellant sought reconsideration of "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A); see United States v. Vargas, 393 F.3d 172, 174-75 (D.C. Cir. 2004) (holding certificate of appealability required to appeal denial of Rule 60(b) motion seeking reconsideration of the denial of a § 2255 motion).

Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant may not challenge his District of Columbia conviction in federal court unless his remedy under D.C. Code § 23-110(g) is inadequate or ineffective to test the legality of his detention. See, e.g., Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998). The § 23-110 remedy, however, is not considered inadequate or ineffective simply because the requested relief has been denied. See Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no certificate of appealability has been allowed, no mandate will issue.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5029 **September Term, 2006**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5187 **September Term, 2006**

05cv01091

Filed On: October 25, 2006

[1003270]

Shaikh Abdul Shakur, SENIOR AMIR, AL-ISLAM, TO THE UNITED STATES, AND ALL MUSLIMS SIMILARLY SITUATED,
Appellant

v.

United States, BY ITS: SOCIAL SECURITY ADMINISTRATION; DEPARTMENT OF HOUSING and URBAN DEVELOPMENT; AND ITS DEPARTMENT OF JUSTICE, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to appeal, the motion for leave to proceed in forma pauperis, and the motion for stay pending appeal, it is

ORDERED that the motion for leave to appeal be denied. The district court properly determined that judgment or a final appealable order had not been entered and the case presented no basis for certification of an interlocutory appeal. It is

FURTHER ORDERED that the motions for leave to proceed in forma pauperis and for stay pending appeal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5091 **September Term, 2006**

01cv01059

Filed On: October 20, 2006

[999193]

Kimberly J. Daisher,
Appellant

v.

Maria Cino, Acting Secretary, U.S. Department of Transportation and James M. Loy, Adm., Commandant, United States Coast Guard,
Appellees

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; and the order to show cause filed July 5, 2006, the answer thereto, and the supplement to the answer, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion for summary affirmance be granted in part. The judgment of the district court is affirmed as to appellant's claim for damages. The merits of the parties' positions on this claim are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). It is well established that the doctrine enunciated in Feres v. United States, 340 U.S. 135, 146 (1950), bars claims for damages that "arise out of or are in the course of activity incident to [military] service." See also Bois v. Marsh, 801 F.2d 462, 467 (D.C. Cir. 1986). It is

FURTHER ORDERED that the district court's judgment be vacated with respect to appellant's claims for injunctive and declaratory relief. The district court is instructed to dismiss those claims without prejudice pending appellant's exhaustion of her administrative remedies. See Bois, 801 F.2d at 468, 471; Knehans v. Alexander, 566 F.2d 312, 313 (D.C. Cir. 1977).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5228 **September Term, 2006**

06cv01121

Filed On: October 3, 2006 [995341]

In re: Ralph E. Williams, Jr.,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, and the motion for leave to proceed in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The papers filed in the district court have been sent to the United States District Court for the Eastern District of Tennessee, and no electronic version of the pleadings is available. The physical transfer of the original papers to another district where jurisdiction would lie deprives this court of jurisdiction to review the transfer. See Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5247 **September Term, 2006**

96cr00011

Filed On: October 3, 2006 [995344]

In re: Fred M. Glover,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not shown a clear and indisputable right to the extraordinary remedy of mandamus compelling the district court to accept his pleadings for filing. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1110 **September Term, 2006**

Filed On: October 3, 2006 [995276]

Ronald Shaw,
Petitioner

v.

United States Parole Commission,
Respondent

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; and the order to show cause filed June 23, 2006, and the responses thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that this case be dismissed. Petitioner has filed with this court a petition for review of a decision of the National Appeals Board, dated March 1, 2006, affirming the United States Parole Commission's previous decision denying parole. Insofar as petitioner is asserting a habeas corpus claim, it appears that it must be brought in the jurisdiction in which his warden is located. See 28 U.S.C. § 2241; Chatman-Bey v. Thornburgh, 864 F.2d 804, 810-14 (D.C. Cir. 1988) (en banc). Because petitioner represents that he has a habeas action pending in the United States District Court for the Western District of Tennessee, which pertains to the same claim he seeks to pursue in this case, it would not be in the interest of justice to transfer the case. See 28 U.S.C. § 1631.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1170 **September Term, 2006**

Filed On: October 3, 2006 [995310]

Gregory R. Swecker and Beverly F. Swecker,
Petitioners

v.

Federal Energy Regulatory Commission,
Respondent

Midland Power Cooperative and National Rural Electric Cooperative Association,
Intervenors

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss the petition for review and to suspend the requirement to file the certified index of record, and the responses thereto; and the motion for summary reversal, and the response thereto, it is

ORDERED that the motion to dismiss be granted. The commission's refusal to initiate an enforcement action is not reviewable. See Indus. Cogenerators v. FERC, 47 F.3d 1231, 1234-36 (D.C. Cir. 1995). Appellants' only remedy under the Public Utility Regulatory Policies Act of 1978 is to file an enforcement action in district court. See 16 U.S.C. § 824a-3(h)(2)(B); Xcel Energy Servs. Inc. v. FERC, 407 F.3d 1242, 1244 (D.C. Cir. 2005) (per curiam). It is

FURTHER ORDERED that the request to suspend the requirement to file the certified index of record and the motion for summary reversal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1170 **September Term, 2006**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1189 **September Term, 2006**

Filed On: October 3, 2006 [995305]

Transmission Agency of Northern California, et al.,
Petitioners

v.

Federal Energy Regulatory Commission,
Respondent

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss petition for review or, in the alternative, to hold in abeyance, and the opposition thereto, it is

ORDERED that the motion to dismiss be granted. The orders on review are not final given the ongoing agency proceeding, and petitioners have not shown that the orders are otherwise subject to immediate review. See Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 239 (D.C. Cir. 1980). It is "usually preferable to require the parties to wait for appellate review until the lawsuit is ultimately resolved – to insist on the standard of one case, one appeal." State of Alaska v. FERC, 980 F.2d 761, 764 (D.C. Cir. 1992).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1249 **September Term, 2006**

Filed On: October 3, 2006 [995272]

Baltimore Gas and Electric Company,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss and to suspend the requirement to file the certified index to the record, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. A party may not simultaneously seek agency rehearing and judicial review of the same agency order. See Clifton Power Corp. v. FERC, 294 F.3d 108, 110-11 (D.C. Cir. 2002). Moreover, the orders on review are not final, and petitioners have not shown that the orders are otherwise subject to immediate review. See Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 239 (D.C. Cir. 1980); see also State of Alaska v. FERC, 980 F.2d 761, 763-64 (D.C. Cir. 1992).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5255 **September Term, 2006**

06cv00775

Filed On: October 3, 2006 [995353]

Aaron A. Austin,
Appellant

v.

United States Army and U.S. Veterans Administration,
Appellees

BEFORE: Ginsburg, Chief Judge, and Griffith and Kavanaugh, Circuit Judge

O R D E R

Upon consideration of the order to show cause filed September 6, 2006, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed. By order entered on the civil docket on May 2, 2006, the district court dismissed appellant's case without prejudice. Appellant filed a notice of appeal on August 23, 2006. On September 6, 2006, this court ordered appellant to show cause why the appeal should not be dismissed as untimely, to which appellant has responded. The court lacks jurisdiction to review the order of dismissal, because the notice of appeal was filed more than 60 days after entry of that order in the civil docket. See Fed. R. App. P. 4(a)(1)(B).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5411 **September Term, 2006**

01cv01652

Filed On: September 29, 2006

[994604]
Harishankar L. Sanghi, M.D.,
Appellant

v.

Jim Nicholson, Secretary, Department of Veterans Affairs and United States of America,
Appellees

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; and the motion for summary reversal, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The Disciplinary Appeal Board's findings are neither arbitrary, capricious, nor contrary to law. Cf. NRDC v. EPA, 937 F.2d 641, 649 (D.C. Cir. 1991) (in which the court relied upon the "arbitrary and capricious" standard in a Surface Coal Mining Reclamation Act case); Southern Union Gas Co. v. FERC, 840 F.2d 964, 968 (D.C. Cir. 1988) (same in Natural Gas Act case); American Petroleum Institute v. Costle, 665 F.2d 1176, 1187 (D.C. Cir. 1981) (same in Clean Air Act case). Furthermore, there was substantial evidence in the record on which to conclude that appellant violated the norms of professional conduct required of a Department of Veterans Affairs physician. See Richardson v. Perales, 402 U.S. 389, 401 (1971) ("Substantial evidence is what a reasonable person would accept as adequate to support a conclusion.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3038 **September Term, 2006**

04cr00287-02

Filed On: September 29, 2006

[994635]
United States of America,
Appellee

v.

Carlton Beachum,
Appellant

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's brief, the government's motion to vacate and remand, and the absence of any opposition thereto, it is

ORDERED that the government's motion to vacate and remand be granted. Appellant's sentence is hereby vacated, and the case is remanded for resentencing in light of D.C. Code § 16-710(b-1) ("The court may order as a condition of probation for any defendant convicted of a felony that the defendant remain in custody or in a community correctional center during nights, weekends, or other intervals totaling not more than one year during the term of probation.") (emphasis added).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3096 **September Term, 2006**

05cv02235

Filed On: September 29, 2006

[994608]

In Re: Levon Spaulding,
Petitioner

BEFORE: Rogers, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis; the motion for leave file a second or successive habeas petition and the supplement thereto; and the motion to dismiss or, in the alternative to transfer, petitioner's petition for an authorization order pursuant to 28 U.S.C. § 2244, and the opposition thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motion to dismiss be granted. A habeas petition must be filed in the district having personal jurisdiction over the warden of the facility in which the petitioner is incarcerated, see Rumsfeld v. Padilla, 542 U.S. 426, 434-35 (2004); Chatman-Bey v. Thornburg, 864 F.2d 804, 811 (D.C. Cir. 1988) (en banc), and this court is not the "appropriate court of appeals," 28 U.S.C. § 2244(b)(3)(A), to grant authorization to file a second or successive habeas petition in district court in North Carolina.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5157 **September Term, 2006**

FILED ON: SEPTEMBER 22, 2006 [993315]

AFSSAR PARI DELFANI,

APPELLANT

v.

U.S. CAPITOL GUIDE BOARD,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 03cv00949)

Before: GINSBURG, *Chief Judge*, and GRIFFITH and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. The court has determined that the issues presented occasion no need for oral argument. *See* D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the Order of the District Court in *Delfani v. U.S. Capitol Guide Board*, Civil Action No. 03-0949 (RWR), 2005 U.S. Dist. LEXIS 5661, at *1 (D.D.C. March 31, 2005) be affirmed. The district court lacked subject matter jurisdiction because the plaintiff had an administrative complaint pending when she filed this civil action. We need not decide whether a claimant's election of the administrative option is irrevocable such that any later-filed civil action in the district court must be dismissed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7029 **September Term, 2006**

FILED ON: SEPTEMBER 14, 2006 [991641]

CURTIS TALLEY, JR.,
APPELLANT

v.

DISTRICT OF COLUMBIA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv01930)

Before: GINSBURG, *Chief Judge*, and GRIFFITH and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. The Court has determined that the issues presented occasion no need for oral argument. *See* D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the Order of the District Court in *Talley v. District of Columbia, et al.*, Civ. No. 01-1930, (D.D.C. February 12, 2004) be affirmed. As the District Court held, our decision in *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986), governs the resolution of the issues raised in this matter. Based on *Carter*, we conclude that it was permissible for the District Court to allow the District of Columbia to present evidence of the actions of its agent, a defaulting co-defendant, in its own defense and with regard to the determination of damages. *See Carter* at 138. The jury, considering such evidence, could permissibly award merely nominal damages against the defendants. *Id.* We also determine that the District Court was well within the "broad discretion" we customarily afford a trial court to decide who may and who may not testify at trial, *In re*

U.S. Dept. of Defense, 848 F.2d 232, 238 (D.C. Cir. 1988) (recognizing the "broad discretion over trial-management tactics with which a district judge is vested"), when it permitted the defaulting defendant to testify.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5151 **September Term, 2005**

06cv00392

Filed On: September 14, 2006

[991618]

Daniel Tilli,
Appellant

v.

Donald H. Rumsfeld, Secretary, U.S. Defense Department,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Ginsburg, Chief Judge, and Garland and Kavanaugh, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed March 3, 2006, be affirmed. The district court correctly dismissed appellant's complaint on the ground appellant could not sustain a cause of action for injuries his brother incurred incident to military service. See United States v. Stanley, 483 U.S. 669, 678 (1987); Feres v. United States, 340 U.S. 135, 146 (1950).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1121 **September Term, 2005**

Filed On: September 13, 2006

[991275]

Massachusetts Municipal Wholesale Electric Company,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

New England Power Pool Participants Committee, et al.,
Intervenors

BEFORE: Ginsburg, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss or alternatively to hold in abeyance, and the opposition and the response thereto, it is

ORDERED that the motion to dismiss be granted. The orders on review are not final. See Papago Tribal Utility Authority v. FERC, 628 F.2d. 235, 240 (D.C. Cir. 1980) ("Acceptance of a filing, coupled with scheduling of a hearing, is the *initiation* of an administrative proceeding; judicial review properly follows the *conclusion* of the proceeding.") (emphasis in original).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5161 **September Term, 2005**

06ms00246

Filed On: September 6, 2006

[989956]

In re: John Robert Demos, Jr.,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for a writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not demonstrated a "clear and indisputable" right to that extraordinary relief. Gulfstream Aeorospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1976). Petitioner sought leave to proceed in forma pauperis with respect to a challenge to his Washington State conviction over which the district court lacked jurisdiction. See 28 U.S.C. §§ 2254, 2241.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5163 **September Term, 2005**

Filed On: September 6, 2006

[989958]
In re: John G. Westine,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for a writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not demonstrated a "clear and indisputable" right to that extraordinary relief. Gulfstream Aeorospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1976). If petitioner's pleading was a civil action, the three-strikes provision, 18 U.S.C. § 1915(g), operated to bar its filing. If the pleading was a challenge to petitioner's conviction and sentence pursuant to 28 U.S.C. § 2255, the district court lacked jurisdiction because a § 2255 motion must be filed in the sentencing court. See 28 U.S.C. § 2255. The district court also lacked jurisdiction if the pleading was a challenge pursuant to 28 U.S.C. § 2241 to the Parole Commission's administration of petitioner's sentence because a § 2241 motion must be filed in the district having personal jurisdiction over the warden of the facility in which the petitioner is incarcerated. See Chatman-Bey v. Thornburg, 864 F.2d 804, 811 (D.C. Cir. 1988) (en banc).

Pursuant to D. C. Circuit rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5171 **September Term, 2005**

95cv02366

Filed On: September 6, 2006

[989855]
In re: Johnny Ray Chandler,
Petitioner

BEFORE: Ginsburg, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for leave to proceed in forma pauperis and the petition for a writ of mandamus, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for a writ of mandamus be denied. Petitioner has not demonstrated he has a "clear and indisputable" right to the extraordinary relief of mandamus, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), because he has not demonstrated he has "no other adequate means" to obtain the relief he seeks. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). In fact, petitioner has already sought relief in the district court, which denied without prejudice his motion for retraction of the district court's order filed March 11, 2006, on the ground petitioner had failed to provide proof of service on the defendants.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7005 **September Term, 2005**

05cv00852

Filed On: September 6, 2006

[989865]
Cornell W. Barber,
Appellant

v.

District of Columbia, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Garland and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly granted judgment in favor of appellees on the ground of res judicata. Appellant's Superior Court complaint against the District arose from the same set of facts underlying his district court complaint, and the District of Columbia courts have conclusively resolved appellant's claims. See Nevada v. United States, 463 U.S. 110, 129-30 (1982).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-3141 **September Term, 2006**

92cr00213-01

Filed On: September 5, 2006

[989654]
United States of America,
Appellee

v.

Paul B. Campbell,
Appellant

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the notice of appeal, which the court construes as including a request for a certificate of appealability; the motion to dismiss, and the opposition thereto; and the motion for appointment of counsel, it is

ORDERED that the motion for appointment of counsel be denied. The interests of justice do not warrant appointment of counsel in this case. *See* 18 U.S.C. § 3006A(a)(2)(B). It is

FURTHER ORDERED that the request for a certificate of appealability be denied and the motion to dismiss be granted with respect to appellant's claims of ineffective assistance of counsel, trial court error, and prosecutorial misconduct for sponsoring false testimony by Calvin Stevens. Because appellant has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability is warranted. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). It is

FURTHER ORDERED, on the court's own motion, that the district court's denial of appellant's remaining claims be affirmed. The district court concluded that "constitutional challenges to convictions arising from conduct at trial . . . are generally brought pursuant to § 2255," and construed the Rule 33 motion as an application under 28 U.S.C. § 2255. *United States v. Campbell*, 92cr0213, slip op. at 4 (D.D.C. Sept. 1, 2004). The district court's recharacterization of appellant's motion as to these remaining claims deprived him of the right to appeal the district court's denial of the motion without first obtaining a certificate of appealability. These claims were timely brought under Fed. R. Crim. P. 33

and were based on newly discovered evidence. *See* Fed. R. Crim. P. 33 (providing that defendant must move for new trial based on newly discovered evidence "within 3 years after the verdict or finding of guilty"). The district court's reliance on *United States v. Canino*, 212 F.3d 383 (7th Cir. 2000), was misplaced. *Canino* involved recharacterization of a motion, unlike appellant's Rule 33 motion, inappropriately brought under the Federal Rules of Criminal Procedure. *See Canino*, 212 F.3d at 384. Because appellant's remaining claims were correctly brought under Rule 33, we conclude that appellant was not required to obtain a certificate of appealability to appeal their denial by the district court. Upon consideration of the merits of these claims, however, appellant is not entitled to a new trial under Fed. R. Crim. P. 33 because he has not demonstrated that a "new trial would probably produce an acquittal." *United States v. Williams*, 233 F.3d 592, 593 (D.C. Cir. 2000) (citation omitted).

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5084 **September Term, 2005**

05cv01798

Filed On: August 7, 2006 [984519]

Philander Butler,
Appellant

v.

Drug Enforcement Administration,
Appellee

BEFORE: Sentelle, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel; and the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated any likelihood of success on the merits. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court's grant of summary judgment was appropriate, as appellee properly withheld the requested third-party law enforcement records (assuming such records exist) pursuant to Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C). Appellant has not produced evidence sufficient to establish a public interest in disclosure of the records. See National Archives and Records Admin. v. Favish, 541 U.S. 157, 174 (2004) ("more than a bare suspicion" is required to overcome third-party privacy interest in nondisclosure of law-enforcement records; "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred"). Accordingly, the court "need not consider" whether appellee "erred . . . by refusing to confirm or deny the existence of the records. Right or wrong, that refusal deprives [appellant] of nothing to which he is entitled." Oguaju v. United States, 288 F.3d 448, 451 (D.C. Cir. 2002), vacated and remanded, 541 U.S. 970, judgment reinstated, 378 F.3d 1115 (D.C. Cir.), amended, 386 F.3d 273 (D.C. Cir. 2004).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5084 **September Term, 2005**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5090 **September Term, 2005**

04cv01841

Filed On: August 24, 2006 [988105]

M.P.S. Prasad, Dr.,
Appellant

v.

Michael Chertoff, Secretary, Department of Homeland Security and Condoleezza Rice, Secretary, Department of State,
Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, the supplement to the response, and the reply, it is

ORDERED that motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Insofar as the petition sought action on a pending visa application, the district court was correct that there is no relief it could grant when no application was pending. With respect to the adjudication of appellant's request for reinstatement of a visitor's visa and application for a waiver of unlawful presence – both of which were previously denied – the Immigration and Nationality Act commits such determinations to the appellees' discretion. See 8 U.S.C. §§ 1184(a)(1), 1201(i). Accordingly, the district court was correct that appellant has not shown a clear right to have the government perform a duty owed to him. See 28 U.S.C. § 1361; In re: Cheney, 406 F.3d 723, 729-30 (D.C. Cir. 2005) (en banc). Without a clearly established duty to act, mandamus relief is not proper. See Weber v. United States, 209 F.3d 756, 760 (D.C. Cir. 2000).

In resting the appeal on claims of wrongdoing by appellees, appellant has offered no legal basis for the relief requested and no grounds for challenging the district court's ruling. Moreover, this court will not consider the claims and argument presented for the first time on appeal, namely, allegations relating to Federal Rule of Civil Procedure 11 and matters presented in the "supplemental opposition" to appellees' motion for summary affirmance. See District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1084 (D.C. Cir.

No. 06-5090 **September Term, 2005**

1984) (court need not consider issues and legal theories not

asserted at the district court level); Nat'l Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost, 711 F.2d 1071, 1075 (D.C. Cir. 1983) (an appellate court ordinarily has no factfinding function and will generally not consider new evidence on appeal).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5098 **September Term, 2005**

04cv00865

Filed On: August 24, 2006 [988108]

Wendy W. Ghannam,
Appellant

v.

Andrew Natsios, Administrator, U.S. Agency for International Development,
Appellee

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly ruled that appellant's discrimination claims are time-barred. See 29 C.F.R. § 1614.105(a)(1).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5223 **September Term, 2005**
06cv01302

Filed On: August 9, 2006 [985218]

Keith Longtin,
Appellant

v.

Department of Justice, et al.,
Appellees

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the emergency motion for injunctive relief; appellant's dispositive motion for judgment, which the court construes as a motion for summary reversal; the emergency motion for expedited appeal; appellees' motion for summary affirmance and combined response to appellant's motions; and appellant's brief, it is

ORDERED that the motion for summary reversal be denied and the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant has not shown the Department of Justice's determination, denying his request pursuant to the Department's "Touhy" regulations, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951); 28 C.F.R. § 16.26. It is

FURTHER ORDERED that the motion for injunctive relief and motion for expedited appeal be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5017 **September Term, 2005**

04cv00375

Filed On: August 7, 2006 [984523]

David Hicks, III,
Appellant

v.

Anthony A. Williams, Mayor, et al.,
Appellees

BEFORE: Sentelle, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance and the opposition thereto; the lodged motion for enlargement of time to file a reply and the lodged opposition thereto; the motion for leave to file the motion for enlargement of time; and the motion to strike, it is

ORDERED that the motion for leave to file be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that the motion to strike be denied. It is

FURTHER ORDERED that the motions for summary affirmance be granted and, on the court's own motion, that the district court's December 28, 2005 order be affirmed as to the remaining appellees. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant's complaint sought, in part, to challenge his 1993 D.C. Superior Court conviction, relief typically cognizable in habeas. It is unclear from the record, however, whether appellant is still "in custody" pursuant to his 1993 conviction. If he is, the district court correctly held that appellant may not challenge his District of Columbia conviction in federal court unless his remedy under D.C. Code § 23-110 is inadequate or ineffective. See Blair-Bey v. Quick, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998). The § 23-110 remedy is not considered inadequate or ineffective simply because the requested relief has been denied. See Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir. 1986). If appellant is not in custody, he may no longer collaterally attack his conviction by way of habeas. See Jeffrey v. United States, 892 A.2d 1122, 1126 (D.C. 2006). Aside from federal habeas review, federal district courts generally lack jurisdiction to review or modify judicial decisions of state and D.C. courts. See District of Columbia Court of Appeals v.

No. 06-5017 **September Term, 2005**

Feldman, 460 U.S. 462, 486 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923).

The district court also correctly held that appellant has not asserted a viable claim under 42 U.S.C. § 1985, because he has not alleged "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Kush v. Rutledge, 460 U.S. 719, 725-26 (1983); Griffin v. Breckenridge, 403 U.S. 88 (1971); Hoai v. Vo, 935 F.2d 308, 314 (D.C. Cir. 1991); McCord v. Bailey, 636 F.2d 606, 614 (D.C. Cir. 1980). Moreover, because a colorable claim under § 1985 is a prerequisite to a claim under § 1986, Mollnow v. Carlton, 716 F.2d 627, 632 (9th Cir. 1983), the district court properly dismissed appellant's derivative § 1986 claim.

Appellant's claims raised pursuant to 42 U.S.C. § 1983 are barred by the applicable statute of limitations. Banks v. Chesapeake and Potomac Telephone Co., 802 F.2d 1416, (D.C. Cir. 1986) (three-year limitations period in D.C. Code § 12-301(8) applies to most Bivens actions); Carney v. American University, 151 F.3d 1090, 1096 (D.C. Cir. 1998) (claims under § 1983 governed by state's residual or general personal injury statute of limitations like § 12-301(8)). Finally, any remaining claims are also time-barred. See D.C. Code §§ 12-301(4) (providing one year limitations period for malicious prosecution, false arrest, or false imprisonment); 12-301(8) (limitation is three years where not otherwise specifically prescribed). It is

FURTHER ORDERED that the motion for enlargement of time be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1331 **September Term, 2005**

Filed On: August 7, 2006 [984400]

The Town of Cortlandt,
Petitioner

v.

Federal Energy Regulatory Commission and Magalie R. Salas, as Secretary,
Respondents

Millennium Pipeline Company, L.P., et al.,
Intervenors

Consolidated with 02-1332, 02-1338, 02-1348, 02-1349

BEFORE: Sentelle, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion of respondent FERC to dismiss petitions or, alternatively, continue holding them in abeyance and the response thereto; the motion of intervenor Millennium Pipeline Company ("Millennium") to dismiss; the joint motion of petitioners Town of Cortlandt, City of New York and New York City Department of Environmental Protection, and County of Westchester to continue to hold proceedings in abeyance (styled as a joint motion to govern future proceedings) and the supplement thereto; and the motion of petitioners the Villages of Croton-on-Hudson and Briarcliff Manor, New York to continue to hold in abeyance (styled as a motion to govern further proceedings), it is

ORDERED that the motions to dismiss be granted. Because the State of New York rejected Millennium's certification that its proposed pipeline was consistent with New York's Coastal Zone Management Plan; because the U.S. Department of Commerce upheld New York's denial of Millennium's request for a Coastal Zone

No. 02-1331 **September Term, 2005**

Management Act consistency certificate; because the district court also rejected Millennium's challenge; and because Millennium has indicated (in its pending motion to vacate, filed with the agency on May 3, 2006) that it does not intend to appeal the decision in Millennium Pipeline Co., L.P. v. Gutierrez, 424 F. Supp. 2d 168 (D.D.C. 2006), these cases have become moot. See, e.g., Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1379 (D.C. Cir. 1979); see generally Powell v. McCormack, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live' and the parties lack a legally cognizable interest in the outcome"). It is

FURTHER ORDERED that the motions to continue holding these petitions in abeyance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1331 **September Term, 2005**

Filed On: August 7, 2006 [984400]

The Town of Cortlandt,
Petitioner

v.

Federal Energy Regulatory Commission and Magalie R. Salas, as Secretary,
Respondents

Millennium Pipeline Company, L.P., et al.,
Intervenors

Consolidated with 02-1332, 02-1338, 02-1348, 02-1349

BEFORE: Sentelle, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion of respondent FERC to dismiss petitions or, alternatively, continue holding them in abeyance and the response thereto; the motion of intervenor Millennium Pipeline Company ("Millennium") to dismiss; the joint motion of petitioners Town of Cortlandt, City of New York and New York City Department of Environmental Protection, and County of Westchester to continue to hold proceedings in abeyance (styled as a joint motion to govern future proceedings) and the supplement thereto; and the motion of petitioners the Villages of Croton-on-Hudson and Briarcliff Manor, New York to continue to hold in abeyance (styled as a motion to govern further proceedings), it is

ORDERED that the motions to dismiss be granted. Because the State of New York rejected Millennium's certification that its proposed pipeline was consistent with New York's Coastal Zone Management Plan; because the U.S. Department of Commerce upheld New York's denial of Millennium's request for a Coastal Zone

No. 02-1331 **September Term, 2005**

Management Act consistency certificate; because the district court also rejected Millennium's challenge; and because Millennium has indicated (in its pending motion to vacate, filed with the agency on May 3, 2006) that it does not intend to appeal the decision in Millennium Pipeline Co., L.P. v. Gutierrez, 424 F. Supp. 2d 168 (D.D.C. 2006), these cases have become moot. See, e.g., Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1379 (D.C. Cir. 1979); see generally Powell v. McCormack, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live' and the parties lack a legally cognizable interest in the outcome"). It is

FURTHER ORDERED that the motions to continue holding these petitions in abeyance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1331 **September Term, 2005**

Filed On: August 7, 2006 [984400]

The Town of Cortlandt,
Petitioner

v.

Federal Energy Regulatory Commission and Magalie R. Salas, as Secretary,
Respondents

Millennium Pipeline Company, L.P., et al.,
Intervenors

Consolidated with 02-1332, 02-1338, 02-1348, 02-1349

BEFORE: Sentelle, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion of respondent FERC to dismiss petitions or, alternatively, continue holding them in abeyance and the response thereto; the motion of intervenor Millennium Pipeline Company ("Millennium") to dismiss; the joint motion of petitioners Town of Cortlandt, City of New York and New York City Department of Environmental Protection, and County of Westchester to continue to hold proceedings in abeyance (styled as a joint motion to govern future proceedings) and the supplement thereto; and the motion of petitioners the Villages of Croton-on-Hudson and Briarcliff Manor, New York to continue to hold in abeyance (styled as a motion to govern further proceedings), it is

ORDERED that the motions to dismiss be granted. Because the State of New York rejected Millennium's certification that its proposed pipeline was consistent with New York's Coastal Zone Management Plan; because the U.S. Department of Commerce upheld New York's denial of Millennium's request for a Coastal Zone

No. 02-1331 **September Term, 2005**

Management Act consistency certificate; because the district court also rejected Millennium's challenge; and because Millennium has indicated (in its pending motion to vacate, filed with the agency on May 3, 2006) that it does not intend to appeal the decision in Millennium Pipeline Co., L.P. v. Gutierrez, 424 F. Supp. 2d 168 (D.D.C. 2006), these cases have become moot. See, e.g., Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1379 (D.C. Cir. 1979); see generally Powell v. McCormack, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live' and the parties lack a legally cognizable interest in the outcome"). It is

FURTHER ORDERED that the motions to continue holding these petitions in abeyance be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1424 **September Term, 2005**

Filed On: August 7, 2006 [984510]

Exxon Mobil Corporation,
Petitioner

v.

Federal Energy Regulatory Commission and United States of America,
Respondents

Tesoro Alaska Company, et al.,
Intervenors

Consolidated with 06-1153, 06-1166, 06-1176, 06-1183, 06-1187, 06-1210, 06-1271,

BEFORE: Sentelle, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss certain petitions (Nos. 05-1424 and 06-1153) and hold others in abeyance, and the responses thereto, it is

ORDERED that the motion to dismiss No. 05-1424 be granted. Because petitioner Exxon Mobil Corporation simultaneously sought court review and agency rehearing, No. 05-1424 is "incurably premature." See Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002) (per curiam), and cases cited therein. It is

FURTHER ORDERED that the motion to dismiss No. 06-1153 be referred to the merits panel to which these cases are assigned. The parties are directed to address in their briefs the issues presented in the motion to dismiss rather than incorporate those arguments by reference. It is

FURTHER ORDERED that the motion to hold the remaining petitions in abeyance be dismissed as moot. On June 1, 2006, the agency issued its order on rehearing (Order No. 481-B). On July 3, 2006, the deadline for seeking agency

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1424 **September Term, 2005**

rehearing of Order No. 481-B passed without any rehearing petition being filed. On July 31, 2006, the deadline expired for filing petitions for judicial review of Order No. 481-B.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in No. 05-1424 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5036 **September Term, 2005**

04cv02250

Filed On: August 7, 2006 [984422]

Mara K. Clariett,
Appellant

v.

Condoleezza Rice, Secretary, United States Department of State,
Appellee

BEFORE: Sentelle, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the court's order to show cause filed March 23, 2006, and the response thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that the appeal be dismissed for lack of jurisdiction. The district court's order filed October 18, 2005, does not adjudicate all the claims against all the parties, and the district court has not directed the entry of final judgment; therefore, the order is not final and appealable. See Fed. R. Civ. P. 54(b); Building Indus. Ass'n v. Babbitt, 161 F.3d 740, 742-43 (D.C. Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5153 **September Term, 2005**

05cv02154

Filed On: August 4, 2006 [984154]

In re: Ronald D. Veteto,
Petitioner

BEFORE: Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the objection to motion to file and rule, construed as a petition for writ of mandamus, and the motion for leave to proceed on appeal in forma pauperis, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. Although this court has previously concluded that petitioner is ineligible to proceed in forma pauperis in a civil action or appeal, this ineligibility does not apply to petitioner's mandamus petition. See 28 U.S.C. § 1915(g); In re Smith, 114 F.3d 1247, 1250 (D.C. Cir. 1997). It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed as moot, in light of entry on the district court docket of petitioner's notice of appeal.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk/LD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5199 **September Term, 2005**

02cv01049

Filed On: August 3, 2006 [983919]

Richard Drake,
Appellant

v.

Michele Cappelle, FAA Inspector, Drug Abatement, et al.,
Appellees

BEFORE: Henderson, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). To the extent appellant raises generalized constitutional challenges to the drug testing regulations, his claims are barred by res judicata. See Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 476 (1998). Appellant has failed to state a claim for a Fourth Amendment violation, and has shown no legal support for his contention that appellees could be liable for the constitutional violations of a third party under his theory of "ratification." Appellant has not alleged any other violations of "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Finally, assuming appellant has preserved an Administrative Procedure Act claim against the Department of Transportation, this court has previously determined that 49 U.S.C. § 46101 grants agencies "virtually unfettered discretion" and decisions made pursuant to that statute are not judicially reviewable. Drake v. FAA, 291 F.3d 59, 71, 72 (D.C. Cir. 2002).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5199 September Term, 2005

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk/LD