

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Dec 14, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

AARON JOSEPH CUNNINGHAM,

No. 2:20-cv-0356-SMJ

Plaintiff,

**ORDER DENYING MOTION OF  
ARGUMENT AND DISMISSING  
ACTION**

v.

SPOKANE COUNTY JAIL  
ADMINISTRATION and SPOKANE  
COUNTY JAIL OFFICIALS,

Defendants.

By Order filed October 28, 2020, the Court directed Plaintiff Aaron Joseph Cunningham, a *pro se* pretrial detainee currently housed at Spokane County Detention Services, to show cause why the Court should grant his application to proceed *in forma pauperis*. ECF No. 9 at 4. In the alternative, Plaintiff could have paid the \$400.00 filing fee. *Id.* He did neither.

According to court records, Plaintiff has brought at least three other cases that a court dismissed as frivolous or malicious or for failure to state a claim upon which relief may be granted. *Id.* at 2. *See Cunningham v. Mrphy*, [sic] *et al.*, 2:04-cv-00238-FVS, ECF No. 5 (November 29, 2004) (dismissed without prejudice for failure to state a claim upon which relief may be granted); *Cunningham v. Spokane*

ORDER DENYING MOTION OF ARGUMENT AND DISMISSING  
ACTION – 1

1 *County Jail et al.*, 2:19-cv-00301-SMJ, ECF No. 24 (February 3, 2020) (dismissed  
2 with prejudice for failure to state a claim upon which relief may be granted); and  
3 *Cunningham v. Unknown Named Agent 1 et al.*, 2:19-cv-00318-SMJ, ECF No. 15  
4 (January 30, 2020) (dismissed with prejudice for failure to state a claim upon which  
5 relief may be granted). Consequently, Plaintiff is precluded from proceeding in this  
6 action without prepayment of the filing fee under 28 U.S.C. § 1915(g), unless he  
7 can demonstrate that he was “under imminent danger of serious physical injury” at  
8 the time he filed his complaint. *Id.* at 2.

### 9 MOTION OF ARGUMENT

10 On October 30, 2020, Plaintiff filed a 21-page “Motion of Argument,” ECF  
11 No. 10, in which he recites various constitutional provisions, cites numerous cases,  
12 and presents arguments concerning pretrial detention. Plaintiff asserts that  
13 “[i]nnocent citizens are being arrested, detained, and locked in jails and [e]nslaved  
14 to the rules and regulations of these penal institutions designed to punish duly  
15 convicted criminals.” *Id.* at 2. To the extent Plaintiff is asserting that the present  
16 conditions of his confinement violate due process, he has presented no factual  
17 allegations supporting a viable Fourteen Amendment claim. *See Gordon v. Cnty. of*  
18 *Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018).

19 Plaintiff does not identify the relief he is seeking in this motion. The Court  
20 has considered Plaintiff’s previously filed “Argument,” ECF No. 6, as well as his

1 additional supplemental materials, ECF No. 8, in the Order to Show Cause, ECF  
2 No. 9 at 3-4. Because Plaintiff has failed to assert any requested relief or his  
3 entitlement thereto, the Court denies his “Motion of Argument,” ECF No. 10.

4 **RESPONSE TO ORDER TO SHOW CAUSE AND APPEAL**

5 On November 9, 2020, Plaintiff filed a single-page Response, ECF No. 11,  
6 to the Order to Show Cause, ECF No. 9, as well as a construed Notice of  
7 Interlocutory Appeal, ECF No. 13. Plaintiff asserts that he is indigent and cannot  
8 afford the filing fee because any money he receives is applied to his child support  
9 obligations. ECF No. 11. He does not assert that he was “under imminent danger of  
10 serious physical injury” as required by 28 U.S.C. § 1915(g). Nor does he challenge  
11 the Court’s finding that he has brought at least three other cases that were dismissed  
12 as frivolous or malicious or for failure to state a claim.

13 Instead, Plaintiff attached a letter indicating he wished to appeal two of the  
14 cases the Court relied on to calculate the “strikes” under 28 U.S.C. § 1915(g), case  
15 numbers 2:19-cv-00301-SMJ and 2:19-cv-00318-SMJ, ECF No. 13-2 at 1. He also  
16 asked to appeal the Order to Show Cause in this case. *Id.* The letter was construed  
17 as a Notice of Appeal and filed separately in each of these cases, and as a Notice of  
18 Interlocutory Appeal in this case, ECF No. 13.

19 The Court notes that on November 10, 2020, briefing was suspended in case  
20 number 2:19-cv-00301-SMJ, and Plaintiff was granted twenty-one days to either

1 voluntarily dismiss that appeal or to show cause why it should not be dismissed for  
2 lack of jurisdiction, ECF No. 30 at 1-2. On December 9, 2020, the Ninth Circuit  
3 Court of Appeals dismissed the appeal in case number 2:19-cv-00318-SMJ for lack  
4 of jurisdiction and denied all pending motions. ECF No. 28. *See* 28 U.S.C. §  
5 2107(b); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of  
6 timely notice of appeal is jurisdictional); *see also* Fed. R. App. P. 26(b)(1) (court of  
7 appeal may not extend time to file a notice of appeal except as authorized in Fed.  
8 R. App. P. 4).

9 In his letter/Interlocutory Notice of Appeal in this case, Plaintiff contends  
10 that he was never notified that his civil suits had been dismissed for failure to state  
11 a claim, and he accuses either this Court or the Spokane County Jail of hindering  
12 his access to the courts. ECF No. 13-2 at 1. He asserts that he has been “working on  
13 these cases for years and would not make a simple mistake.” *Id.* Any accusation  
14 that legal mail sent to a prisoner was not delivered is concerning. Nevertheless,  
15 Plaintiff has presented no facts showing he dutifully prosecuted his prior litigation.

16 The Court takes judicial notice of the fact that in 2019, Plaintiff filed nine  
17 civil rights cases in this district. In five of those cases, documents from the Court  
18 were returned as undeliverable both before and after the Court dismissed the actions  
19 in June and July 2019 for failure to comply with the filing fee and *in forma pauperis*  
20 requirements of 28 U.S.C. §§ 1914(a) and 1915(a). *See Cunningham v. Doe et al.*,

1 2:19-cv-00028-SMJ; *Cunningham v. Naphcare Medical et al.*, 2:19-cv-00029-SMJ;  
2 *Cunningham v. Walla Walla State Penitentiary, et al.*, 2:19-cv-00047-SMJ;  
3 *Cunningham v. Sheriff Superintendent of Jail (Spokane) et al.*, 2:19-cv-00050-SMJ;  
4 and *Cunningham v. Washington State et al.*, 2:19-cv-00072-SMJ.

5 In September and October 2019, Plaintiff filed four additional cases while  
6 incarcerated at Spokane County Detention Services. He filed Motions to  
7 Voluntarily Dismiss two of them, and they were dismissed on January 8, 2020 and  
8 February 3, 2020, respectively. *See Cunningham v. Walla Walla State Penitentiary*  
9 *et al.*, 2:19-cv-00319-SMJ and *Cunningham v. Department of Corrections et al.*,  
10 2:19-cv-00360-SMJ. Copies of the dismissal orders were mailed to Plaintiff at  
11 Spokane County Detention Services and were not returned as undeliverable.  
12 Plaintiff makes no assertion that he failed to receive these dismissal orders.

13 During that same period, the Court issued the orders denying pending  
14 motions and dismissing case numbers 2:19-cv-00301-SMJ and 2:19-cv-00318-SMJ  
15 for failure to state a claim upon which relief may be granted. Like the voluntary  
16 dismissal orders, neither of these dismissal orders was returned as undeliverable.

17 The Court had advised Plaintiff that if he chose to amend and the Court found  
18 his amended complaint was frivolous, malicious, or failed to state a claim, the  
19 amended complaint would be dismissed under 28 U.S.C. §§ 1915(e)(2) and  
20 1915A(b)(1) and would count as a “strike” under 28 U.S.C. § 1915(g). *See Order*

1 Denying Construed Motion for Summary Judgment and Directing Plaintiff to  
2 Amend or Voluntarily Dismiss Complaint, 2:19-cv-00301-SMJ, ECF No. 17 at 18;  
3 Order Directing Plaintiff to Amend or Voluntarily Dismiss Complaint, 2:19-cv-  
4 00318-SMJ, ECF No. 9 at 7. After filing his First Amended Complaints in both  
5 actions, Plaintiff filed additional motions in December 2019 and January 2020. Yet,  
6 from that time until November 2020, a period of more than ten months, there is no  
7 record of any inquiries about the status of these two cases.

8 Plaintiff did not ask the Court about the disposition of the motions he had  
9 noted for hearing in either of the two cases. Nor did he inquire whether his First  
10 Amended Complaints had been served or dismissed. Plaintiff neglects to state what  
11 efforts he made to prosecute these cases. Consequently, the Court finds no merit in  
12 Plaintiff's asserted diligence in the pursuit of these two cases.

13 Plaintiff has appealed the Order to Show Cause in this action. This challenged  
14 order is neither final nor appealable. *See* 28 U.S.C. § 1291; *Chacon v. Babcock*, 640  
15 F.2d 221, 222 (9th Cir. 1981) (order is not appealable unless it disposes of all claims  
16 as to all parties). Indeed, on December 9, 2020, the Ninth Circuit Court of Appeals  
17 dismissed that appeal for lack of jurisdiction. *See* ECF No. 17. The Court now  
18 resolves the *in forma pauperis* issue in this case.

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1 **DISMISSAL**

2 Despite Plaintiff’s present efforts to appeal actions dismissed for failure to  
3 state a claim upon which relief may be granted in January and February 2020, he is  
4 precluded from proceeding *in forma pauperis* in this action. “A prior dismissal on  
5 a statutorily enumerated ground counts as a strike even if the dismissal is the subject  
6 of an appeal.” *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763 (2015) (concluding that  
7 where prisoner filed multiple other lawsuits while appeal of dismissal of third  
8 complaint was pending, the prisoner was not entitled to *in forma pauperis* status in  
9 the successive suits).

10 Without a showing that Plaintiff was “under imminent danger of serious  
11 physical injury” at the time he filed his complaint, Plaintiff has lost the privilege of  
12 filing this lawsuit *in forma pauperis* under 28 U.S.C. § 1915(g). Although granted  
13 the opportunity to do so, Plaintiff did not pay the \$400.00 filing fee to commence  
14 this action filed on October 2, 2020, ECF No. 1. As a result, this Court dismisses  
15 this action without prejudice for failure to comply with the filing fee requirements  
16 of 28 U.S.C. § 1914.


17 Accordingly, **IT IS HEREBY ORDERED:**

- 18 **1.** Plaintiff’s “Motion of Argument,” **ECF No. 10**, is **DENIED**.
- 19 **2.** This action is **DISMISSED WITHOUT PREJUDICE** for failure to  
20 comply with the filing fee requirements of 28 U.S.C. § 1914.

1           **3.**    The Court certifies any appeal of this dismissal would not be taken in  
2                                good faith.

3           **IT IS SO ORDERED.** The Clerk’s Office is directed to enter this Order,  
4 enter judgment, provide copies to *pro se* Plaintiff at his last known address, and  
5 **CLOSE** the file.

6           **DATED** this 14<sup>th</sup> day of December 2020.

7     
8   SALVADOR MENDOCZA, JR.  
9   United States District Judge