

16-1587

**United States Court of Appeals
for the Second Circuit**

NATHANIEL SIMS,

Plaintiff-Appellant,

v.

ANDREW ELLIS, C.O., ROBERT MOSKO, C.O., K. FOOSE, C.O.,
DAVID WADE, CORR. SGT., THOMAS COREY, CORR. LT.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of New York

BRIEF FOR PLAINTIFF-APPELLANT NATHANIEL SIMS

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PRELIMINARY STATEMENT

This is a simple case of mistaken identity that can be resolved quickly by this Court. Plaintiff-Appellant Nathaniel Sims respectfully seeks judicial review of an order by the United States District Court for the Western District of New York dated March 2, 2016, revoking his *in forma pauperis* (“IFP”) status pursuant to 28 U.S.C § 1915(g), and ordering that his suit be dismissed when he did not pay the filing fee. (Joint Appendix (“JA”) 038–042.)

Mr. Sims’s IFP status was erroneously revoked when the district court confused Mr. Sims with another inmate with the same name. That second Nathaniel Sims has a different date of birth and different inmate identification number. Our understanding is that Defendants-Appellees will not contest that there are two different Nathaniel Sims who have been incarcerated by the New York State Department of Corrections and Community Supervision (“DOCCS”).¹

The district court wrongly determined that Plaintiff-Appellant Nathaniel Sims had accumulated more than three “strikes” based on frivolous lawsuits and appeals, and therefore revoked IFP status under 28 U.S.C. § 1915(g). Four of those strikes were from cases filed and pursued by the other Nathaniel Sims. Once

¹ The DOCCS Inmate Lookup website can be used to find that there are two different men named Nathaniel Sims. See Department of Corrections and Community Supervision, *Inmate Population Information Search*, THE OFFICIAL WEBSITE OF NEW YORK STATE (July 11, 2017, 2:13 PM), <http://nysdoccslookup.doccs.ny.gov/>.

that error is corrected, there is no basis upon which the district court could have revoked IFP status. That order, and the dismissal of the suit based on it, must be reversed.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Nathaniel Sims appeals an order by the United States District Court for the Western District of New York dated March 2, 2016. (JA003, 038–042.) The district court had subject matter jurisdiction because Mr. Sims sought relief under 42 U.S.C. § 1983. *See* 28 U.S.C. §§ 1331, 1343. Mr. Sims filed a timely notice of appeal on April 22, 2016 (JA004, 044–049). *See* Fed. R. App. P. 4(a)(1)(B). Although the procedure below was not a model of perfection, it is clear that this Court has appellate jurisdiction under 28 U.S.C. § 1291 to review and overturn the wrongful denial of Mr. Sims’s IFP status. We treat the appellate jurisdiction question at some length in Point I of the Argument below, in order to ensure this Court, beyond any doubt, that its jurisdiction is proper.

STATEMENT OF ISSUE

Whether the district court erred in revoking Mr. Sims’s IFP status pursuant to 28 U.S.C § 1915(g) by finding that the following decisions, in which Mr. Sims was not a litigant, constitute “strikes” under the statute:

1. *Sims v. Barkley*, No. 95-CV-4527-TPG (S.D.N.Y. Jun. 16, 1995);
2. *Sims v. Barkley*, No. 95-2419 (2d Cir. Jul. 28, 1995);

3. *Sims v. Keane*, No. 91-CV-1121-LLS (S.D.N.Y. 2001); and
4. *Sims v. Keane*, No. 92-2202 (2d Cir. 1992).

STATEMENT OF FACTS

I. Background

Plaintiff-Appellant Nathaniel Sims, born on February 15, 1964, is currently an inmate in the State of New York's Marcy Correctional Facility. (JA001; Supplemental Appendix ("SA") 081.) DOCCS has assigned Mr. Sims Department Identification Number ("DIN") 93-A-3573.² (JA001; SA081.) Importantly for this appeal, the DOCCS has assigned DIN 78-A-2908 to a different Nathaniel Sims, born on May 18, 1938. (SA077.)³

II. The District Court Initially Granted Mr. Sims IFP Status

On June 10, 2015, Mr. Sims brought this action pro se in the United States District Court for the Western District of New York pursuant to 42 U.S.C. § 1983, asserting claims under the Eighth and Fourteenth Amendments involving cruel and unusual punishment against Corrections Officer ("C.O.") Andrew Ellis, C.O. Robert Mosko, C.O. K. Foose, Sergeant David Wade, and Lieutenant Thomas Corey (together, "Defendants"). (JA002.)

² A printout from the DOCCS website describing how a DIN is assigned is found at SA085.

³ This Court has previously noted that Nathaniel Sims DIN 93-A-3573 is a different person than Nathaniel Sims DIN 78-A-2908. (JA051.)

With his complaint, Mr. Sims filed a motion to proceed IFP. (JA002, 005–007.) He supported his motion with an affirmation declaring that, at the time, (1) neither he, nor his spouse, was employed, (2) he had no money in a checking or a savings account, and (3) he owned no real estate. (JA005–006.) In addition, Mr. Sims provided a certification from an authorized C.O. stating that Mr. Sims had \$0 on account at the correctional facility where he was confined. (JA006.) The district court granted Mr. Sims’s motion on June 16, 2015. (JA002.)

III. The District Court Later Revoked Mr. Sims’s IFP Status

On October 29, 2015, the government moved for an order revoking Mr. Sims’s IFP status pursuant to the Prison Litigation Reform Act’s (“PLRA”) three strikes provision, 28 U.S.C. § 1915(g). (JA003, 008–037.) In an attached declaration, the government stated that it had “looked up the federal lawsuits initiated by [Mr. Sims] on PACER and reviewed the results. Per those results, [Mr. Sims] has accumulated the following strikes” under the statute:

1. *Sims v. Barkley*, No. 95-CV-4527-TPG (S.D.N.Y. Jun. 16, 1995);
2. *Sims v. Barkley*, No. 95-2419 (2d Cir. Jul. 28, 1995);
3. *Sims v. Wilhelm*, No. 94-CV-3042-TPG (S.D.N.Y. Apr. 25, 1994);
4. *Sims v. Keane*, No. 91-CV-1121-LLS (S.D.N.Y. 2001);
5. *Sims v. Keane*, No. 92-2202 (2d Cir. 1992); and
6. *Sims v. Ware*, No. 97-CV-6179-CJS (W.D.N.Y. 1998).

(JA010–011.)

The declaration also included printouts of the purported PACER dockets for the district court proceedings in *Barkley, Wilhelm, Keane, and Ware*. (JA014–031.) However, the government stated that, despite its efforts to contact the “relevant agency,” it was unable to obtain “copies of the relevant docket entries from the above-referenced cases.” (JA012.) The government further stated that “[i]f . . . the relevant decisions are produced” it would “provide them to the Court in a supplement to the instant Motion.”⁴ (JA012.)

On March 2, 2016, the district court granted Defendants’ request to revoke Mr. Sims’s IFP status. (JA003, 038–042.) The district court found that each of the six cases identified by the government constituted a strike under the PLRA (JA038–042), and noted that

Plaintiff . . . contests that the Nathaniel Sims 93 A 3573 who filed those lawsuits is the same Nathaniel Sims 93 A 3573 who is the plaintiff in the present lawsuit. Official records are entitled to a presumption of regularity, and it is the plaintiff’s burden to overcome that presumption. Plaintiff has not done so. Courts in this Circuit routinely rely on the DIN assigned by DOCCS to determine whether a particular litigant has previously filed a lawsuit. The Court relies on that number now to determine that Plaintiff is not entitled to continue proceeding as a poor person.

(JA041.)

⁴ The government never supplemented its motion with filings from the relevant cases.

The district court ordered that Mr. Sims would be required to pay the full filing fee of \$400.00 by March 30, 2016, and that Mr. Sims's failure to pay the filing fee would result in dismissal of the case without prejudice and without further order of the court. (JA041.) In a letter dated April 19, 2016, the district court extended the deadline by which Mr. Sims would be required to pay the \$400.00 filing fee until May 20, 2016. (JA003–004, 043.)

IV. Mr. Sims Filed The Instant Appeal Challenging The District Court's Revocation Of His IFP Status

On April 22, 2016, Mr. Sims timely filed the instant appeal of the district court's March 2, 1016, order. (JA004, 044–049.) In an order dated September 7, 2016, this Court granted Mr. Sims's motion for leave to proceed IFP on appeal. (JA050.) In the same order, this Court stated:

We direct the parties to brief, among any other issues, whether Appellant was the litigant in *Sims v. Barkley*, S.D.N.Y. 95-cv-4527, and *Sims v. Keane*, S.D.N.Y. 91-cv-1121. This Court's docket sheets in the *Barkley* and *Keane* appeals reflect that the litigant's Department Identification Number was 78-A-2908. 2d Cir. dks. 92-2202, 95-2419.

(JA050.)

Later, in an order dated November 30, 2016, this Court assigned Mr. Sims pro bono counsel. (JA051–052.) Similar to this Court's September 7 order, this Court further stated:

This Court's September 7, 2016 order directed the parties to brief whether Appellant was the litigant in *Sims v. Barkley*, S.D.N.Y. 95-

cv-4527, and *Sims v. Keane*, S.D.N.Y. 91-cv-1121. This Court's docket sheets in the *Barkley* and *Keane* appeals reflect that the litigant's Department Identification Number ("DIN") was 78-A-2908. 2d Cir. dkts. 92-2202, 95-2419. This DIN is associated with a Nathaniel Sims who is not the Appellant.

(JA051.)

V. Mr. Sims Was Not A Litigant In Four Of The Six Cases Identified By The District Court In Its Order Revoking His IFP Status

Mr. Sims, through his appellate counsel, was able to obtain case files—including district court filings and the relevant appellate court docket sheets—for *Keane* and *Barkley* from the National Archives and this Court's clerk's office.

(See SA001–076.) These files repeatedly identify the plaintiff in those matters as Nathaniel Sims DIN 78-A-2908, *i.e.*, not the Nathaniel Sims DIN 93-A-3573 that is the plaintiff in the instant suit. (See, *e.g.*, SA002, 008, 012, 015, 016, 017, 027, 031, 037, 043, 055, 056, 058, 072, 075, 076.)

SUMMARY OF ARGUMENT

This appeal is straightforward: Mr. Sims was deprived of his IFP status—and therefore his access to the federal courthouse—because of a simple case of mistaken identity. The district court erroneously charged Mr. Sims with four “strikes” under 28 U.S.C. § 1915(g) for cases in which a different inmate with the same name (but a different DIN number and date of birth) was the litigant. The erroneous revocation of Mr. Sims's IFP status must be reversed.

STANDARD OF REVIEW

The Second Circuit “review[s] *de novo* a district court’s conclusion that a prisoner is barred from proceeding IFP by the PLRA’s three strikes provision.” *Jones v. Smith*, 720 F.3d 142, 145 (2d Cir. 2013); *accord Chavis v. Chappius*, 618 F.3d 162, 167 (2d Cir. 2010).

ARGUMENT

POINT I THIS COURT HAS APPELLATE JURISDICTION UNDER 28 U.S.C. § 1291

As noted in the Jurisdictional Statement, we discuss this Court’s appellate jurisdiction at some length here because the proceedings in the district court were not a model of procedural regularity. There are two alternate bases for appellate jurisdiction here; either is sufficient to allow this Court to hear the appeal and reverse the clearly mistaken erroneous order of the district court.

In an order dated March 2, 2016, the district court revoked Mr. Sims’s IFP status and stated that the action would be dismissed without prejudice if the filing fee was not paid by March 30, 2016. (JA041.) A letter order of April 19, 2017, extended the time to pay the filing fee until May 20. (JA 003–004, 043.) Mr. Sims did not pay the fee because he lacked the requisite funds (JA005–007) and believed that the revocation of IFP status was erroneous.

On April 22, 2016, the district court’s docket sheet reflects that a “notice of interlocutory appeal” was filed. (JA004.) In fact, the papers filed by Mr. Sims stated he was appealing under 28 U.S.C. § 1291 from a “final decision” and “judgment” of the district court. (JA046, 048.) The district court never issued any other order. Nor did the district court judge or the clerk docket any document styled as a judgment.

If this Court finds that the action below was *not* resolved finally, there is nevertheless appellate jurisdiction under the collateral order doctrine and 28 U.S.C. § 1291. *See Roberts v. U.S. Dist. Court for N. Dist. of Cal.*, 339 U.S. 844, 845 (1950) (“The denial by a District Judge of a motion to proceed in forma pauperis is an appealable order” pursuant to 28 U.S.C. § 1291.); *accord Jones*, 720 F.3d at 145. A pro se inmate’s failure to properly describe the type of appeal he was pursuing in his notice of appeal does not deprive this Court of jurisdiction. The notice of appeal was timely under Fed. R. App. P. 4(a)(1)(B).

In the alternative, the district court’s actions below can be viewed as a final decision dismissing the action. The March 2, 2016, order was a conditional order of dismissal. (*See* JA041) (“[T]he Plaintiff’s failure to pay the filing fee shall result in dismissal of this case without prejudice and without further order of the court.”). When the condition occurred—failure to pay the filing fee—the dismissal became effective.

In the Second Circuit, a dismissal of a complaint is a final, appealable order, unless it was accompanied by an expression of leave to amend (assuming the statute of limitations does not bar amendment), or by some other indication of retention of jurisdiction by the district court. *See Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 219 (2d Cir. 2006); *Wynder v. McMahon*, 360 F.3d 73, 76 (2d Cir. 2004); *Elfenbein v. Gulf & W. Indus., Inc.*, 590 F.2d 445, 448 (2d Cir. 1978); *Weisman v. LeLandais*, 532 F.2d 308, 309 (2d Cir. 1976) (per curiam).

Here, the dismissal was denominated “without prejudice” by the district court, but that did not refer to leave to amend the pleadings or indicate that the district court was retaining jurisdiction. By stating that the dismissal was “without prejudice,” the court merely meant that the action could be refiled if the filing fee were paid.

At least four other circuits have held that dismissing a complaint for failure to pay a filing fee is final and appealable under § 1291. *See Thomas v. Butts*, 745 F.3d 309, 311 (7th Cir. 2014) (per curiam); *McKenzie v. Casillas*, 585 F. App’x. 369, 369 (9th Cir. 2014); *Lindsey v. Roman*, 408 F. App’x 530, 532 (3d Cir. 2010); *Davis v. Advocate Health Ctr. Patient Care Exp.*, 523 F.3d 681, 683 (7th Cir. 2008); *Thayer v. Utah*, 265 Fed. App’x. 710, 712 (10th Cir. 2008); *Redmond v. Gill*, 352 F.3d 801, 803 (3d Cir. 2003) (per curiam). And this Court has assumed

that dismissal for failure to pay the filing fee after revocation of IFP status is an appealable final order. *See Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007).

Defendants may argue that the failure of the district court or clerk of that court to formally enter judgment in a separate document—as should have occurred, under Federal Rule of Civil Procedure 58—somehow deprives this Court of appellate jurisdiction. Any such argument would be without merit. This Court recently rejected a challenge to its appellate jurisdiction made on the ground that “the district court did not enter judgment in a separate document.” *Dancause v. Mount Morris Cent. Sch. Dist.*, 590 F. App’x 27, 28 (2d Cir. 2014). As this Court stated, “[i]n the absence of a separate document, however, judgment is deemed entered 150 days after the order from which the appeal lies is entered” *Id.* at 28, n.1 (citing Fed. R. Civ. P. 58(c)(2)(B)). And the Federal Rules of Appellate Procedure provide that “[a] failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.” Fed. R. App. P. 4(a)(7)(B).

Defendants may also argue that this Court lacks appellate jurisdiction because Mr. Sims filed his notice of appeal prior to the expiration of the time set by the district court to pay the filing fee. Presumably the argument would be that the dismissal was not effective until the time limit ran out, and hence the notice of appeal was filed prematurely.

But that is not the right way to view what happened. Mr. Sims could not pay the filing fee because he lacked funds to do so. (JA005–007.) In addition, he believed that the revocation of his IFP status was erroneous and intended to challenge that determination. His filing of the notice of appeal (JA004, 044–048) should be understood as his rejection of the district court’s offer that the suit could continue if he paid the fee. As such, the dismissal became effective on the date of and by virtue of Mr. Sims’s rejection. The notice of appeal, therefore, was not filed prematurely.

But even if this Court does view the notice of appeal as premature, that does not affect appellate jurisdiction. Under Federal Rule of Civil Procedure 4(a)(2), “[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.” As the Supreme Court explained, “[t]he Rule recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal.” *FirsTier Mtg. Co. v. Inv’rs Mtg. Co.*, 498 U.S. 269, 273 (1991). *FirsTier* saves premature notices of appeal if the notice would have been appealable had it been immediately followed by entry of judgment. See *Outlaw v. AirTech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 158 (D.C. Cir. 2005) (Roberts, J.). Had the district court followed Federal Rule of

Civil Procedure 58 and caused judgment to be entered in a separate document after its dismissal order, there is no question that the order would have been final and appealable.

In sum, this Court has jurisdiction under either (1) § 1291 and the collateral order doctrine to review the revocation of IFP status, or (2) § 1291 from a final decision of the district court dismissing the action for failure to pay the filing fee, after revocation of IFP status. Either way, the erroneous decision to revoke IFP status is squarely within this Court's appellate jurisdiction to review.

POINT II
THE REVOCATION OF IFP STATUS BASED ON MISTAKEN IDENTITY
WAS ERRONEOUS

The district court erred in revoking Mr. Sims's IFP status pursuant to § 1915(g) by holding him accountable for cases in which he was not a litigant. A *de novo* review of that decision leads to only one conclusion: the district court's order revoking Mr. Sims's IFP status should be reversed and the matter remanded for further proceedings.

“Congress enacted the *in forma pauperis* (IFP) statute, now codified at 28 U.S.C. § 1915, to ensure that indigent litigants have meaningful access to the federal courts.” *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016) (quotation marks omitted). The current statute allows an individual to litigate a federal action without prepaying filing fees if the individual files an affidavit stating, among

other things, that he or she is unable to prepay fees “or give security therefor.”

28 U.S.C. § 1915(a)(1).

“Reacting to a sharp rise in prisoner litigation, Congress . . . enacted the PLRA, which installed a variety of measures designed to filter out the bad claims [filed by prisoners] and facilitate consideration of the good.” *Bruce*, 136 S. Ct. at 629–30 (internal citations and quotation marks omitted). Among those reforms was the “three strikes” rule here at issue: “Prisoners whose suits or appeals are dismissed three or more times as frivolous, malicious, or failing to state a claim on which relief may be granted are barred from proceeding IFP ‘unless the prisoner is under imminent danger of serious physical injury.’” *Id.* at 630 (quoting 28 U.S.C. § 1915(g)). “In other words, for most three strikers, all future filing fees become payable in full upfront.” *Id.*

Here, the district court revoked Mr. Sims’s IFP status on the ground that he had accrued six strikes, *i.e.*, that Mr. Sims had filed six previous suits or appeals that were dismissed as “as frivolous, malicious, or failing to state a claim on which relief may be granted.” (*See* JA038–042.) However, court records obtained from this Court and the National Archives (where old district court records are housed) clearly show that Mr. Sims was not the litigant in four of the six cases. (*See* SA001–076.) Specifically, the case files demonstrate that Nathaniel Sims DIN 78-A-2908, not Nathaniel Sims DIN 93-A-3573, was the plaintiff in *Sims v. Barkley*,

No. 95-CV-4527-TPG (S.D.N.Y. Jun. 16, 1995); *Sims v. Barkley*, No. 95-2419 (2d Cir. Jul. 28, 1995); *Sims v. Keane*, No. 91-CV-1121-LLS (S.D.N.Y. 2001); and *Sims v. Keane*, No. 92-2202 (2d Cir. 1992). (*See, e.g.*, SA002, 008, 012, 015, 016, 017, 027, 031, 037, 043, 055, 056, 058, 072, 075, 076.)

Because the district court only identified two other “strikes” against Mr. Sims (JA038–041), the revocation of his IFP status cannot stand. *See* 28 U.S.C. § 1915(g) (requiring three “strikes” for the denial of IFP status). The district court’s order should, therefore, be reversed, and Mr. Sims should be allowed to proceed with his lawsuit IFP. *See Jones*, 720 F.3d at 148 (negating three of the five alleged strikes against plaintiff-appellant, reversing the judgment of the district court revoking IFP status, and ordering the district court to permit plaintiff-appellant to proceed with his civil rights complaint IFP).

CONCLUSION

For the foregoing reasons, Mr. Sims respectfully requests that the district court’s judgment be reversed and this case be remanded for further proceedings.

Dated: July 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 3,523 words, as counted by Microsoft Office Word 2010, excluding the cover, table of contents, table of authorities, signature block, and certificates of counsel.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman font, a proportionally spaced typeface, using Microsoft Office Word 2010.

Dated: July 12, 2017

/s/ Eric D. Lawson
Eric D. Lawson

CERTIFICATE OF FILING AND SERVICE

I certify that on July 12, 2017, I caused the foregoing Brief for Plaintiff-Appellant Nathaniel Sims to be (i) transmitted to the Clerk of the United States Court of Appeals for the Second Circuit through the Court's CM/ECF filing system, and (ii) served on counsel listed below, who is a Filing User, through the CM/ECF system:

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