

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

McClellon v. United States

No. 25-CV-2988 (VSB) (BCM) (S.D.N.Y. Nov. 24, 2025) · No. 25-CV-2988 (VSB) (BCM) · Decided November 24, 2025

SUMMARY

The United States District Court for the Southern District of New York extended Donte McClellon's deadline to oppose the government's motion to dismiss his FTCA and Bivens claims until December 15, 2025. The court denied his motions for appointment of pro bono counsel and for service by the U.S. Marshals Service, finding that service was moot and that he had demonstrated an ability to litigate the case pro se. The court directed the Clerk to close those motions.

CASE DETAILS

COURT	United States District Court for the Southern District of New York
WRITING FOR THE COURT	Barbara Moses
JURISDICTION	United States District Court for the Southern District of New York
DECIDED	November 24, 2025
DOCKET	25-CV-2988 (VSB) (BCM)
DISPOSITION	other
PROCEDURAL POSTURE	The United States moved to dismiss the plaintiff's FTCA and Bivens claims under Federal Rule of Civil Procedure 12(b)(1). While that motion remained pending, the plaintiff moved for appointment of pro bono counsel and for an order directing service by the U.S. Marshals Service. The court extended the deadline for opposing the motion to dismiss and denied both plaintiff's motions.
STANDARD OF REVIEW	The court applied its discretion in deciding whether to request volunteer counsel for an indigent civil litigant and determined that service by the Marshals Service was moot because the government had appeared.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Donte McClellon v. United States of America

TOPICS

motions to dismiss

subject matter jurisdiction

civil procedure

prisoners rights

civil rights

PRACTICE AREAS

civil procedure

federal courts

civil rights

prisoner litigation

pro bono counsel

QUESTIONS PRESENTED

1. Whether plaintiff's deadline to oppose the government's motion to dismiss should be extended because of repeated transfers and delayed receipt of motion papers.
2. Whether plaintiff's request for an order directing Marshals Service to serve the summons and complaint was moot after the government appeared and defended the action.
3. Whether plaintiff demonstrated sufficient merit, ability, or need to justify a request for pro bono counsel under 28 U.S.C. § 1915(e)(1).

HOLDINGS

1. The court extended plaintiff's deadline to file an opposition to the government's motion to dismiss until December 15, 2025.
2. The request for Marshals Service to serve the summons and complaint was denied as moot because the United States had appeared and was defending the action.
3. The court denied plaintiff's request for pro bono counsel because he had not shown that counsel was warranted, including because he was capable of litigating the action without assistance and the court was not persuaded that his claims had substance or a likelihood of success.

KEY QUOTATIONS

“The motion for service is moot, because the government has appeared and is defending this action.”

“As a threshold matter, plaintiff must demonstrate that his claim has substance or a likelihood of success.”

FACTUAL BACKGROUND

Donte McClellon, proceeding pro se, sought damages against the United States under the Federal Tort Claims Act and Bivens, alleging that the Bureau of Prisons failed to credit him with good-conduct time, First Step Act credits, and Residential Drug Abuse Program credits. The government moved to dismiss for lack of subject-matter jurisdiction, asserting failure to exhaust administrative remedies and sovereign immunity from constitutional tort claims for money damages. Because plaintiff had been moved among federal facilities and may not have received the motion papers promptly, the court extended his opposition deadline.

PROCEDURAL HISTORY

Plaintiff filed an action seeking damages against the United States based on alleged failure by the Bureau of Prisons to credit sentence reductions. The government moved to dismiss for lack of subject-matter jurisdiction, principally arguing failure to exhaust the FTCA claim and sovereign immunity from Bivens damages claims

against the United States. The court extended plaintiff's response deadline to December 15, 2025, denied his requests for pro bono counsel and Marshals service, and directed the Clerk to close those motions.

DISPOSITION

other

CASES CITED

- Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)
- McClellon v. Marshall, 24-CV-10053 (S.D.N.Y. Dec. 20, 2024)
- Hodge v. Police Officers, 802 F.2d 58, 60-61 (2d Cir. 1986)
- Mallard v. U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 301-10 (1989)
- Cooper v. A. Sargenti Co., Inc., 877 F.2d 170, 172-73 (2d Cir. 1989)
- United States v. McClellon, No. 2:22-CR-00073-LK (W.D. Wash. Oct. 19, 2025)
- McClellon v. Rikard, No. 2:24-CV-01975 (W.D. Wash. Mar. 4, 2025)
- McClellon v. Weaver, No. 2:25-CV-566 (W.D. Wash. Apr. 8, 2025)
- McClellon v. Illa, No. 2:25-CV-609 (W.D. Wash. Apr. 16, 2025)

OPINION

McClellon

PER CURIAM.

| USDC SDNY

DOCUMENT

UNITED STATES DISTRICT COURT ELECTRONICALLY FILED

SOUTHERN DISTRICT OF NEW YORK | DOC =:

DONTE McCLELLON, DATE FILED: _ 11/24/25

Plaintiff, 25-CV-2988 (VSB) (BCM) -against-

ORDER EXTENDING TIME TO

UNITED STATES OF AMERICA, RESPOND TO MOTION TO

Defendant. DISMISS AND DENYING REQUEST

FOR PRO BONO COUNSEL AND

MOTION TO SERVE

BARBARA MOSES, United States Magistrate Judge. Plaintiff Donte McClellon, proceeding pro se, seeks damages against the United States under the Federal Tort Claims Act (FTCA) and Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging that after his 2024 conviction for bank and wire fraud, for which he was sentenced to 42 months in prison, the Bureau of Prisons failed to credit him with various "sentence reductions," including "Good Conduct Time (6 months), First Step Act credits (12 months), and the Residential Drug Abuse Program (RDAP) credits (12 months)." Compl. (Dkt. 1) { 7. Many of the same allegations

underlie the habeas corpus petition that plaintiff filed in this District last year. See Pet. (Dkt. 1), McClellon vy. Marshall, 24-CV-10053 (S.D.N.Y. Dec. 20, 2024)..! On August 15, 2025, the government moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. (Dkt. 17.) The government argues principally that plaintiff failed to exhaust his administrative remedies before filing his FTCA claim, and that this Court lacks jurisdiction over his Bivens claim because the United States has not waived its sovereign immunity as to constitutional tort claims for money damages. (Dkt. 20.) Plaintiff's opposition to the motion to dismiss is due on November 24, 2025. (See Dkt. 26.) However, plaintiff has been moved to several different federal facilities in recent months, requiring the Court to mail the government's motion papers (and other documents) to him several times. (See, e.g., Dkts. 22, 23, 25, 26.) Most recently, on October 31, 2025, plaintiff advised that he was "no longer in BOP custody," and asked that the motion papers be sent to him c/o the U.S. Probation Office in Seattle. (Dkt. 27.) On November 4, 2025, the Clerk re-mailed copies of those documents to petitioner, c/o the U.S. Probation Office in Seattle, as requested." ' The undersigned Magistrate Judge has recommended that the habeas petition be denied, concluding, among other things, that McClellon was not entitled to the credits he claims under the First Step Act or RDAP. See Report and Recommendation (Dkt. 30), McClellon v. Marshall (S.D.N.Y. June 24, 2025). ? According to recent filings in petitioner's underlying criminal case, he was released from the BOP "as homeless" on October 1, 2025. See Order (Dkt. 384) at 1, United States v. McClellon, No. 2:22-CR-00073-LK (W. D. Wash. Oct. 19, 2025). Because he had "no viable residence or means of financial support," he "requested a placement at a residential reentry center [RRC] to provide him with stability while he searches for a residence and employment." /d. The court The Court notes that plaintiff is computer-literate and (when not in BOP custody) has been following the progress of this action on Pacer. Nonetheless, given that paper copies of the government's motion papers may not have reached him until some time after November 4, 2025, this Court hereby EXTENDS plaintiff's time to file his opposition to the motion to dismiss, sua sponte, until December 15, 2025. No further extensions of this deadline will be granted absent compelling circumstances. The Court now turns to plaintiff's April 9, 2025 motions (a) for the appointment of pro bono counsel (Dkt. 5), and (b) for an order directing service of his summons and complaint by the U.S. Marshals Service. (Dkt. 6.) Both motions are before me on referral from the District Judge (see Dkt. 15) and are hereby DENIED. The motion for service is moot, because the government has appeared and is defending this action. With respect to the motion for appointment of pro bono counsel, the Court reminds plaintiff that this is a civil case, in which there is no requirement that courts supply indigent litigants with counsel. *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986). Instead, the courts have "[b]road discretion" when deciding whether to seek pro bono representation for a civil litigant. *Id.* Even if a court does believe that a litigant should have a lawyer, it has no authority to "appoint" counsel, but instead, may only "request," pursuant to 28 U.S.C. § 1915(e)(1), that an attorney volunteer to represent that litigant. *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 301-10

(1989). Moreover, courts do not have funds to pay counsel in civil matters. Courts must therefore request the services of pro bono counsel sparingly, in order to preserve the "precious commodity" of volunteer-lawyer time for the cases in which representation is most crucial. *Cooper v. A. Sargenti Co., Inc.*, 877 F.2d 170, 172-73 (2d Cir. 1989). In determining whether to grant an application for counsel, the Court must consider "the merits of plaintiff's case, the plaintiff's ability to pay for private counsel, his efforts to obtain a lawyer, the availability of counsel, and the plaintiff's ability to gather the facts and deal with the issues if unassisted by counsel." *Cooper*, 877 F.2d at 172. As a threshold matter, plaintiff must demonstrate that his claim has substance or a likelihood of success. See *Hodge*, 802 F.2d at 60-61. In this case, petitioner has proven himself capable of litigating this action unassisted by counsel. In fact, he is a frequent and vigorous pro se litigant, not only in this Court, where he has two cases pending, but also in the Western District of Washington, where he was convicted of the crimes underlying his sentence. In that forum, plaintiff has filed at least nine post-conviction thereupon modified petitioner's conditions of supervised release, mandating placement at the RRC for "not more than 120 days." *Id.* at 1, 2. Petitioner did not advise this Court that he was residing at the RRC in Seattle, and did not request that his mail be sent to the RRC. According to the government's inmate look-up website, see https://www.bop.gov/mobile/find_inmate/byname.jsp (searching for "Donte McClellan"), petitioner remains at the RRC in Seattle as of today. motions (this year alone),* a habeas corpus petition,' and two civil lawsuits against attorneys who represented him in the criminal case.° Moreover, for the reasons set forth in the government's motion to dismiss this action (and in the Report and Recommendation in *McClellon v. Marshall*), this Court is not persuaded that plaintiff's claims in this action have substance or a likelihood of success. The Clerk of Court is respectfully directed to close the motions at Dkts. 5 and 6. Dated: New York, New York November 24, 2025
SO ORDERED.

BARBARA MOSES

United States Magistrate Judge 3 See Dkts. 301, 352, 355, 356, 359, 361, 370, 380, 390, *United States v. McClellon* (W. D. Wash., May 29, 2024; Feb. 7, 2025; Feb. 14, 2025; Feb. 14, 2025; Mar. 3, 2025; Mar. 24, 2025; Oct. 3, 2025; Nov. 16, 2025). See *Petition* (Dkt. 8), *McClellon v. Rikard*, No. 2:24-CV-01975 (W.D. Wash. Mar. 4, 2025). > See *Compl.* (Dkt. 5), *McClellon v. Weaver*, No. 2:25-CV-566 (W. D. Wash. Apr. 8, 2025); *Compl.* (Dkt. 6), *McClellon v. Illa*, No. 2:25-CV-609 (W. D. Wash. Apr. 16, 2025).