

No: _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE L. WISHNEFSKY
PETITIONER

VS.

JAWAD A. SALAMEH, M.D.
RESPONDENT(S)

ON A PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRUCE L. WISHNEFSKY DQ-4829
(NAME)

SCI Laurel Highlands
5706 Glades Pike
(ADDRESS)

Somerset, PA 15501-0631
(CITY, STATE, ZIP CODE)

(PHONE NUMBER)

QUESTIONS PRESENTED

Whether the "three strikes" provision of the federal *in forma pauperis* statute, 28 U.S.C. § 1915(g), bars a prisoner from appealing *in forma pauperis* a district court dismissal constituting a third strike?

LISTS OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

JAWAD A. SALAMEH, M.D.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The order of the United States court of appeals appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was December 27, 2017, when it dismissed for failure to pay the requisite filing fee.

[] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 5, 2018, and a copy of the order denying rehearing appears at Appendix D.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including August 2, 2018 (date) on May 23, 2018 (date) in Application No. 17 A 1301.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The "three strikes" provision of the federal *in forma pauperis* statute states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

STATEMENT OF THE CASE

Petitioner has been in prison since he was arrested in Virginia during June of 1997. Petitioner filed *Wishnefsky v. Ouly* in the Eastern District of Virginia under 42 U.S.C. § 1985(3). After Petitioner was extradited to Pennsylvania, the case was transferred to the Middle District of Pennsylvania, No: 1:98-cv-00907, and eventually dismissed for failure to state a claim. No appeal was taken.

On August 19, 1999, Petitioner paid the filing fee and filed *Wishnefsky v. Carroll*, No: 4:99-cv-01494, a Civil RICO case against his former employer about the employers failure to pay an agreed to forwarding fee. The district court dismissed the case as frivolous, but after reconsideration, the district court dismissed for failure to state a claim. Petitioner appealed to the Third Circuit and paid the required filing fee, but after briefing was closed, the clerk wrote to Petitioner and told him the panel wanted to appoint counsel to address the issue of the application of the *in pari delicto* defense in the Civil RICO context, so Petitioner filed a petition to proceed IFP for the purpose of having counsel appointed. The Third Circuit affirmed the district court. *Wishnefsky v. Carroll*, 44 Fed. Appx. 581 (CA3 2002).

On May 26, 2015, Petitioner, who is incarcerated at SCI Laurel Highlands (“SCI LAU”) in Pennsylvania, filed a complaint (PACER Doc. 4) (“Doc.”) and a motion for leave to proceed in forma pauperis (“IFP”), in the U.S. District Court for the Western District of Pennsylvania, and case No. 3:15-cv-00148 was assigned. The complaint named Dr. Salameh and the PA Department of Corrections (“Pa DOC”) as defendants and alleged that Dr. Salameh was deliberately indifferent to Petitioner’s serious medical

needs because he refused to refer Petitioner to be seen by an urologist, and asked that Dr. Salameh be ordered to refer Petitioner to a urologist, and also alleged violations of the ADA and due process.

That court granted petitioner's IFP motion on June 4, 2015 (Doc. 3).

On June 6, 2015, counsel for Dr. Salameh entered his appearance (Doc. 6). He served subpoenas on the Pa DOC, asking for medical, grievance and disciplinary records pertaining to Petitioner.

After receiving these records, he filed a motion on July 7, 2016, (Doc. 13) to vacate the order granting Petitioner IFP status, alleging that Petitioner had six strikes for filing cases that were held to fail to state a claim and that Petitioner had not alleged that he was in imminent danger of serious physical harm.

U.S. Magistrate Judge granted this motion on July 9, 2015, (Doc. 14), Petitioner filed a response on July 11, 2015, (Doc. 15) explaining that he only had one strike, an amended order was issued, on July 17, 2015, finding that Petitioner had 3 strikes, rather than 6 (Doc. 16).

On September 17, 2015, Judge Gibson dismissed Petitioner's complaint without prejudice to Petitioner's reopening the case by paying the full filing fee (Doc. 30).

After Judge Gibson denied Petitioner's motion for reconsideration on October 13, 2015, (Doc. 32) Petitioner filed a notice of appeal to the Third Circuit (Doc. 33).

On June 16, 2016, the Third Circuit, case No. 15-3739, issued the following order: Bruce Wishnefsky, a prisoner at SCI LAU, sought to file a complaint in IFP against a prison doctor, Dr. Salameh, and the Pa DOC. He presented two lines of claims, one concerning the revocation of his exemption for random drug testing, and one relating to a

refusal or failure to treat a medical condition. Initially, he was permitted to proceed IFP, but his IFP was revoked on defendant's motion and on the bases that he had "three strikes" under 28 U.S.C. § 1915(g) and that his allegations relating to the exemption from the urine drug testing did not satisfy the imminent danger standard. The District Court dismissed the case for Mr. Wishnefsky's failure to pay the fees and denied reconsideration of that ruling. Mr. Wishnefsky appeals...Upon review, we conclude that the District Court erred in dismissing Mr. Wishnefsky's complaint on the basis that he did not qualify for IFP status and in denying him reconsideration if that decision. Even if Mr. Wishnefsky has "three strikes" under 28 U.S.C. § 1915(g), a conclusion that is not certain, he met the standard to show he was in imminent danger of serious physical injury based on his claims relating to a refusal or failure to treat a medical condition (claims that the District Court did not consider)...For this reason, we hereby vacate the District Court's order of September 17, 2015, and October 13, 2015. We remand this matter to the District Court for further proceedings. On remand, the District Court is directed to grant IFP status to Mr. Wishnefsky (Case citations omitted). (Doc. 36)

After this remand to the U.S. District Court, Petitioner amended his complaint to allege that while the case was on appeal, Dr. Salameh did authorize a consultation with a urologist, and Petitioner now asked for damages caused by the delay in providing the urology referral, instead of the injunctive relief previously requested. The urologist performed a cystoscopy and noted a marked obstruction of the prostate and recommended surgical intervention.

On December 16, 2016, the U.S. District Court, dismissed Petitioner's complaint for failure to state a claim of deliberate indifference to Petitioner's serious medical needs, primarily because Petitioner did receive some treatment for his urinary problems, even when Dr. Salameh refused to send him to an urologist (Doc. 66). (App. B). The district court also adopted the U.S. Magistrate Judge's report and recommendation (Doc. 62) (App. C).

Petitioner filed a motion to reconsider, which was denied on January 27, 2017 (Id. at PACER Doc. 72).

On February 13, 2017, Petitioner filed a timely appeal to the U.S. Court of Appeals for the Third Circuit, No. 17-1166, which stayed the appeal pending the disposition of *Parker v. Montgomery County Correctional Facility*, 870 F.3d 144 (2017), which also involved an appeal from a “third strike.”

The Third Circuit decided *Parker v. Montgomery County Correctional Facility*, 870 F.3d 144 (2017), on August 29, 2017. The opinion for the Third Circuit answered the question, may an indigent prisoner appealing a District court’s imposition of a “third strike” proceed IFP for that appeal without demonstrating that he is in imminent danger of serious physical injury, in the negative. Id. at 146.

On September 6, 2017, the Third Circuit ordered that the stay was lifted and directed to address that the parties are to address in writing how the decision for *Parker* effects the application to proceed IFP filed in this case.

After considering the arguments presented, on November 1, 2017, the Third Circuit ordered that Petitioner’s IFP motion is denied stating:

Appellant’s motion to proceed in forma pauperis on appeal, as amended, is denied. Appellant has, on at least three occasions, while incarcerated or detained, brought an action or appeal in a court of the United States that was dismissed for failure to state a claim...Appellant has not made the required showing of imminent danger...For these reasons, if appellant wishes to proceed with this appeal, he must pay the full applicable filing and docketing fee in the amount of \$505 to the Clerk of the United States District Court for the Western District of Pennsylvania within 14 days of the date of this order. No extensions of time to pay the fee will be granted. Failure to pay the filing and docketing fees within that time will result in dismissal of the appeal without further notice. See 3d Cir. L.A.R. Misc. 107.1a).

The 3 occasions referred to were *Wishnefsky v. Ouly*, *Wishnefsky v. Carroll*, and this case.

A motion to reconsider was denied on December 4, 2017.

On December 27, 2017, the Third Circuit ordered that the case is dismissed for failure to timely prosecute insofar as Petitioner failed to pay the requisite fee as directed. (App. A). Petitioner filed a petition for rehearing that was denied on March 5, 2018. (App. D.)

Petitioner filed an application to extend the time to file a Petition for Writ of Certiorari which Justice Alito granted on May 23, 2018, which extended the filing deadline to and including August 2, 2018, in application No. 17 A 1301.

REASONS FOR GRANTING THE WRIT

In order “to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States solely because his poverty makes it impossible for him to pay the costs,” Congress in 1892 enacted a federal *in forma pauperis* statute. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948) (internal quotations marks omitted). The current iteration of the statute provides that “any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore.” 28 U.S.C. § 1915(a)(1).

Since enactment of the Prison Litigation Reform Act of 1995, however, a prisoner has been prohibited from “bring[ing] a civil action or appeal[ing] a judgment in a civil action or proceeding” *in forma pauperis* if “the prisoner has, on 3 or more prior occasions, while incarcerated ..., brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(g) (“three strikes” provision). Absent a showing of “imminent danger of serious physical injury,” *id.*, such a prisoner must pay the full amount of the ordinary filing fee before proceeding.

In 2015, this Court in *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015) held that, under section 1915(g), a prisoner who has accrued a third strike by virtue of a qualifying district court dismissal cannot proceed *in forma pauperis* in other subsequently filed actions despite a pending appeal of that third strike. 135 S. Ct. at 1763-1764. The Court

found that result to be supported by the rule that a district court judgment ordinarily is given immediate preclusive effect even if appealed; the concern that prisoners could file multiple additional suits while an appeal of the third strike is pending; and the mechanisms that prisoners could use to revive other suits in the event the third strike is reversed. *Id.* at 1764.

Of central relevance here, the Court flagged a “hypothetical” posed by the prisoner—a situation that has in fact occurred numerous times both before and after *Coleman*: “What if this case had involved an attempt to appeal from the trial court’s dismissal of his third complaint instead of an attempt to file several additional complaints?” 135 S. Ct. at 1764-1765. According to the prisoner, that scenario demonstrated why the district court dismissal could not count as a third strike until the related appeal had concluded: “he would lose the ability to appeal *in forma pauperis*” from that strike itself” and thus be unfairly “deprive[d] … of appellate review.” *Id.* at 1765.

The Solicitor General, who supported the Court’s holding that a third strike in a separate prior proceeding must be effective pending appeal, disagreed that appellate review of that strike would become unavailable. In his view, “we can and should read the statute to afford a prisoner *in forma pauperis* status with respect to an appeal from a third qualifying dismissal—even if it does not allow a prisoner to file a *fourth* case during that time.” 135 S. Ct. at 1765. That is because “the statute, in referring to dismissals ‘on 3 or more prior occasions,’ means that a trial court dismissal qualifies as a strike only if it occurred in a prior, different, lawsuit.” *Id.* (internal citation omitted).

In response, the Court stated that it “need not, and do[es] not, now decide whether the Solicitor General’s interpretation (or some other interpretation with the same result) is correct.” 135 S. Ct. at 1765. As the prisoner in *Coleman* was “appealing from the denial of *in forma pauperis* status with respect to several separate suites filed after the trial court dismissed his earlier third-strike suit,” it was enough to hold that “[w]ith respect to those suits, the earlier dismissals certainly took place on ‘prior occasions.’” Id. But “[i]f and when the situation … hypothesize[d] does arise,” the Court indicated, “courts can consider the problem in context.” Id.

As discussed below, the Third Circuit in *Parker v. Montgomery County Correctional Facility*, 870 F.3d 144 (2017) cert. denied, 138 S. Ct. 1294 (3rd Cir. 2018), joined a number of its sister circuits that have considered the issue in context and perpetuated a circuit split that warrants this Court’s intervention.

Parker’s third strike, arose out of a civil-rights action against the Montgomery County Correctional Facility and certain employees for interfering with access to his account statements. Id. at 147. Because Parker (proceeding *in forma pauperis*) ultimately received the account statements, the district court held that Parker could not establish any injury and dismissed the action for failure to state a claim. Id. at 148.

Parker immediately appealed the judgment and filed motions to proceed *in forma pauperis* and to have counsel appointed. The Third Circuit, *inter alia*, granted the appointment and directed counsel to address at minimum “the question left unanswered by *Coleman*, 135 S. Ct. at 1765, i.e., ‘whether the *IFP* statute affords a prisoner *in forma*

pauperis status with respect to an appeal from a third qualifying dismissal under § 1915.”

Id. at 148.

Following briefing and oral argument, the Third Circuit denied Parker’s motion to proceed *in forma pauperis* on appeal. In its opinion, the Third Circuit first recounted *Coleman*’s holding that a third-strike district court dismissal is effective immediately as to other separately filed suits, notwithstanding an appeal of that strike. It also noted, however, that the Solicitor General had read section 1915(g) to “preserve” a prisoner’s “ability to appeal the imposition of a third strike.” Id. at 150. Whether the Solicitor General is correct was the “issue squarely before [the court].” Id. at 151.

The Third Circuit recognized that the Ninth Circuit had expressly adopted the Solicitor General’s view and permitted an *in forma pauperis* appeal of a third strike. Id. at 151. In addition, the Fourth, Sixth, and Tenth Circuits had backed the same interpretation of section 1915(g) before *Coleman*, and in the case of the Tenth Circuit, continued to do so in post-*Coleman* unpublished opinions. Id. at 151 n.10. The court of appeals nonetheless labeled the Ninth Circuit’s reasoning “driven” by “perceived unfairness” concerns and, based on “*Coleman*’s instruction to read the [statutory] language literally,” rejected the Ninth Circuit’s view. Id. at 151-152.

According to the Third Circuit, Parker was wrong to rely on the Solicitor General’s view that “prior occasions” refers to “strikes imposed in prior-filed suits, not those imposed in an earlier stage in the same suit.” Id. at 152. (citation and quotation marks omitted). The court believed that *Coleman*’s treatment of “actions” and “appeals” as “distinct ‘occasions’ ... leads ... to the inescapable conclusion that the imposition of a

avoid a “circuit split” with at least *Richey v. Dahne*, 807 F.3d 1202 (9th Cir. 2015). As in *Parker*, and this case, *Richey* concerned “whether a prisoner is entitled to *IFP* status on appeal from the trial court’s dismissal of [a] third complaint instead of [in] an attempt to file several additional complaints.” 807 F.3d at 1209. The Ninth Circuit held that “a prisoner is entitled to *IFP* status while appealing his third-strike dismissal.” Id.

As described in the Third Circuit’s opinion, the Tenth Circuit two decades ago reversed a district court order denying permission to appeal *in forma pauperis* from a third strike. *See Pigg v. F.B.I.*, 106 F.3d 1497, 1497-1498 (10th Cir. 1997) (per curiam). In the few years since *Coleman*, two separate panels of the Tenth Circuit have confirmed (albeit in unpublished opinions) that *Pigg* is still good law. In *Burnett v. Miller*, the court refused to “read *Coleman* to prevent … consideration of the propriety of [a third predicate] strike.” 631 F. App’x 591, 604 (10th Cir. 2015) (Tymkovich, O’Brien, & Gorsuch, JJ.). In *Dawson v. Coffman*, the court aligned itself with the Ninth Circuit. *See* 651 F. App’x 840, 842 n.2 (10th Cir. 2016) (Lucero, Matheson, & Bacharach, JJ.) (citing *Richey* as holding “that the appeal of a third dismissal should not count as a ‘prior occasion’”).

The Third Circuit’s decision reached an incorrect result. Nothing in the text of section 1915(g) deprives a prisoner who accrues a third strike in the district court of the ability to proceed *in forma pauperis* in challenging that strike. The statutory bar operate only where a prisoner has received strikes “on 3 or more *prior occasions*.” 28 U.S.C. § 1915(g) (emphasis added). A “prior occasion” is most naturally read to refer to a strike imposed in prior-filed suits, not to a strike imposed in an earlier stage of the suit from

which the appeal is taken. That interpretation “also is supported by the way in which the law ordinarily treats trial court judgments,” *Coleman*, 135 S. Ct. at 1764, *viz.*, as subject to an appeal as of right, 28 U.S.C. § 1291, and preclusive as to other suits only if an appeal is available, *see* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4433 (2d ed. 2002) (“[P]reclusion should not attach when circumstances cut off appeal of an otherwise reviewable order.”)

Whether section 1915(g) bars a prisoner from appealing *in forma pauperis* a district court dismissal that counts as a third strike is a question of exceptional importance. That question implicates a prisoner’s fundamental constitutional right—“established beyond doubt”—of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Indeed, the federal *in forma pauperis* statute exists precisely “to ensure that indigent litigants have a meaningful access to the federal courts.” *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016) (citation and quotation marks omitted). This doctrine is based on the Constitution’s guarantee of “equal justice for poor and rich, weak and powerful alike.” *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). This right includes access to the courts for indigent prisoners who cannot afford the costs of litigation. As this Court has explained, “a State can no more discriminate on account of poverty than on account of religion, race, or color,” because “the ability to pay costs in advance bears no rational relationship to” the validity of a legal claim. *Id.* 351 U.S. at 17-18.

The principle of equal access for indigent prisoners applies as robustly at the appellate stage. “There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies

the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." Id.

In view of those significant considerations, it is no surprise that this Court has granted certiorari time and again to resolve disputes over the proper interpretation of the federal *in forma pauperis* statute.¹

¹ E.g., *Bruce*, 136 S. Ct. 627 (calculation of monthly installment payments when multiple fees are owed); *Coleman*, 135 S. Ct. 1759 (timing of effectiveness of third strike); *Jones v. Bock*, 549 U.S. 199 (2007) (judicial screening rules); *Rowland v. California Men's Colony*, 506 U.S. 194 (1993) (meaning of person); *Denton v. Hernandez*, 504 U.S. 25 (1992) (standard for factual frivolousness and appellate review); *Neitzke v. Williams*, 490 U.S. 319 (1989) (standard for legal frivolousness); *Mallard v. United States Dist. Ct. for the S. Dist. Of Iowa*, 490 U.S. 296 (1989) (attorney appointment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Date: _____