No. 18-5626

In the Supreme Court of the United States

BRUCE L. WISHNEFSKY,
Petitioner

v.

JAWAD A. SALAMEH, ET AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May an indigent prisoner appealing a district court's imposition of his "third strike" under 28 U.S.C. § 1915 (g) proceed *in forma pauperis* for that appeal, assuming there is no question of his not being in any imminent danger of serious physical injury?

PARTIES TO THE PROCEEDING

Petitioner, Bruce Wishnefsky, is an incarcerated prisoner held in the custody of the Pennsylvania Department of Corrections (DOC). Respondents are the DOC and Javad Salameh, MD, a physician employed at the facility where Wishnefsky is imprisoned.[1]

[1] Dr. Salameh is separately represented in this case.

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STATEMENT OF THE CASE

The current proceedings stem from a civil rights action raising an array of alleged constitutional violations and alleged violations of the Americans with Disabilities Act. *See generally*, *Wishnefsky v. Salameh*, 2016 WL 11480717 (W.D. Pa.) (report and recommendation that the case be comprehensively dismissed), *and* 2016 WL 7324080 (W.D. Pa.) (order of the district court adopting the report and recommendation without qualification).[2]

Wishnefsky was originally denied *in forma pauperis* (*ifp*) status by the district court, as mandated by 28 U.S.C. § 1915(g)[3] as he had filed at least three prior lawsuits that had been dismissed as frivolous, malicious or for failure to state a claim on which relief could be granted. (This proviso is colloquially known as the "three strike rule.") Wishnefsky took an appeal from the subsequent order of the district court dismissing the case for his resulting failure to pay the filing fees. *Wishnefsky v. Salameh*, U.S. Court of Appeals, Third Circuit, No. 15-3739, **Order** (unreported) (June 16, 2016) (*Wishnefsky* I).

The court of appeals reversed the denial of *ifp* status to Wishnefsky. *Id*. This reversal was *not* based on a determination that the district court had miscalculated

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[2] These appear as Appendix B and Appendix C of the petition for certiorari

[3] "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if a prisoner has, on 3 or more prior 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 on which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915 (g).

or misapplied the "three strike rule." Instead *ifp* status was granted on the grounds that Wishnefsky had presented adequate evidence to qualify for the exception to the three strike rule for an inmate who is in imminent danger of serious physical injury. *Id*. The case was remanded and the district court was instructed to grant Wishnefsky *ifp* status. *Id.*

The district court, on remand, dismissed the action in its entirety with prejudice on December 16, 2016. Wishnefsky again appealed the district court's determination to the court of appeals. *Wishnefsky v. Salameh*, U.S. Court of Appeals, Third Circuit, No.17-1166 (*Wishnefsky* II).

Wishnefsky sought to proceed on this appeal *in forma pauperis*. The court of appeals stayed any further proceedings pending its decision in the case that would later be reported as *Parker v. Montgomery County Corr. Facility/ Business Office Manager*, 870 F.3d 144 (3d Cir. 2017), *cert.* denied, __U.S.__, 138 S.Ct. 1284 (2018). *Wishnefsky* II, *supra*, **Order** (unreported) (February 13, 2017). After it reached its decision in *Parker, supra*, the court of appeals directed the parties to address in writing how the *Parker* decision affected Wishnefsky's pending application for *ifp* status on appeal. *Id*., (unreported order) (September 6, 2017).

The court of appeals ultimately denied *ifp* status to Wishnefsky for the appeal and ordered him to pay the filing fees or suffer dismissal. *Wishnefsky II, supra*, **Order** (unreported) (November 1, 2017). The Third Circuit counted, for the purpose of calculating the existence of the "three strikes," the dismissal of the underlying district court action from which the appeal itself was taken. *Id.*

When Wishnefsky did not pay the filing fee, the court of appeals dismissed the case. *Wishnefsky v. Salameh*, 2017 WL 104029020 (3d Cir. [Dec. 27, 2017]) (*Wishnefsky* III). On March 5, 2018 the court *en banc* denied rehearing.

REASONS FOR DENYING THE WRIT

I. Introduction: The State of the Law

This Court, in its unanimous decision in *Coleman v. Tollefson*, __U.S.__, 135 S.Ct.1759 (2015), recently interpreted and applied 28 U.S.C. § 1915(g) (The Three Strikes Provision). In *Coleman*, the Court addressed the question of whether a prisoner may bring a new action *in forma pauperis* when an appeals court has not yet decided whether a prior dismissal is legally proper. *Id.,* 135 S.Ct. at 1761. The Court concluded that "the courts must count the dismissal even though it remains pending on appeal." *Id*. The Court held in *Coleman,* that a literal reading of the language of § 1915 (g) provides the exclusive means for determining the answers to questions concerning the application of the statute. *Id.* at 1764. The controlling precept is that the words of the statute mean what they say and say what they mean. Under these terms the result in *Coleman* is the simple product of the language of the statute.

Specifically, the Court determined that "[a] prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal. That, after all, is what the statute *literally* says." *Id*., 135 S. Ct. at 1763 (emphasis supplied). The word "dismiss" (or its variants) used in § 1915 (g), as well as in subsection (e) (2) of the statute, describes an action taken by a single court, not a sequence of events involving multiple courts. *Id.* Similarly, the plain language of the

statute regarding "prior occasions" can only sensibly mean, in the pertinent statutory context, an "occurrence" (or an "incident") at some previous time, in which a qualifying dismissal of a civil action "happened." *Id*. The Court emphasized that its literal reading of the statute is fully consistent with the manner in which the terms are used in the rest of the statute, with the ordinary legal treatment of trial court judgments as a matter of civil procedure, and with the express purpose of the statute to filter out bad claims and facilitate consideration of the good with minimal leakage. *Id*., 135 S. Ct. at 1763-4.

The *Coleman* decision left open the specific question of whether its analysis would somehow be different if the case involved the appeal of the trial court's dismissal that qualifies as the third strike. The Court explained that the issue was purely a hypothetical one, since the *Coleman* case did not present those circumstances. *Id*. at 1765.

The Court also explained that it did not need to resolve the correctness of the position taken by the Solicitor General, who appeared in *Coleman* as an *amicus*, addressing the same hypothetical. *Id.* The Solicitor General took the view that "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.*, (citation omitted; emphasis in the original). The Court in *Coleman* carefully withheld expressing its agreement with this reasoning. This reasoning is, in fact, inconsistent with the *Coleman* decision itself. *Id.* at 1763 ("Linguistically speaking,

we see nothing about the phrase 'prior occasions' that would transform a dismissal into a dismissal-plus-appellate-review").

II. The Responses of the Ninth Circuit and the Third Circuit to *Coleman*.

The first precedential decision by a court of appeals on the issue to follow *Coleman*, was made seven months later in *Richey v. Dahne*, 807 F.3d 1202, 1209-10 (9th Cir. 2015). In *Richey,* the Ninth Circuit continued to adhere to a free-wheeling pre-*Coleman* approach to interpreting the term "prior occasions". The Ninth Circuit held that "the phrase 'prior occasions' is most sensibly read as referring to strikes imposed in prior-filed suits, not those imposed in an earlier stage of the same suit." *Richey,* 807 F.3d at 1209. This holding is in irreconcilable conflict with the literal language of the statute, which, as the Court found in *Coleman*, treats a qualifying appellate dismissal as an "occasion" in its own right separate and apart from the dismissal of an action by the district court. *Coleman,* 135 S.Ct. at 1762-63 (a strike is " 'an action or appeal . . . that was dismissed on' " one of three specified grounds) (quoting § 1915(g)).

In addition to ignoring the literal statutory language, the *Richey* decision is remarkable because of that court's uncritical acceptance of the Solicitor General's views in *Coleman*. It does so, moreover, without seeing any need to consider—because the Solicitor General's views obviously had been formulated before *Coleman* had been decided—the extent to which *Coleman* had in fact rendered those views obsolete. One cannot square reading words into the statute that simply are not there in order to reach a desired construction of the statute after the guidance provided by *Coleman*.

Rather than look to the literal language of the statute, the court of appeals focused instead upon the extraneous concern that "[d]enying IFP review of a district court's third strike dismissal would prevent us from performing our 'appellate function'." *Richey*, 807 F.3d at 1209. The *Richey* court was untroubled by its frank assertion that the advancement of the performance of its own "appellate function" is of such controlling importance that it effectively supersedes the contradictory direction provided by the plain language of the statute.

The opinion in *Richey* cannot be read as having followed, or even having taken seriously, the teachings of the Court in *Coleman*. This conclusion necessarily follows from the observation that the opinion is conspicuously lacking in the slightest effort to use the literal language of § 1915 (g) to support its conclusion.

The Third Circuit's opinion in *Parker v. Montgomery County Corr. Facility/ Business Office Manager,* 870 F.3d 144 (3d Cir. 2017), *cert. denied*, __U.S.__, 138 S. Ct. 1284 (2018), was decided over two years after *Coleman*. It is, however, still only the second precedential decision of a court of appeals on the issue expressly left unresolved by *Coleman*. The Third Circuit's analysis of the issue there, in sharp contrast to that of the Ninth Circuit, is carefully guided by *Coleman*, as is apparent from both the terms of its analysis and the tenor of its language.

The *Parker* court rejects *Richey* as a guide to resolution of the issue from the outset for the reasons we previously stressed. The Third Circuit correctly pointed out that the Ninth Circuit's decision is "noticeably lacking in discussion of the statutory language," which is the linchpin of the *Coleman* decision. *Parker,* 870 F.3d at 151.

And that the Ninth Circuit's focus on "perceived unfairness, rather than the language of [§] 1915 (g), appears to have driven [its] decision." *Parker,* 870 F.3d at 151.

In contrast, the Third Circuit in *Parker* recognizes that *Coleman* marks a "sea change" in interpreting the three strikes rule by emphasizing that "the literal reading of [§] 1915 (g) … is precisely what is required in deciding when a strike takes effect." *Id.,* 870 F.3d at 150. Thus, the *Parker* court's laser-like focus is on the language of the statute. *Id.,* 152 ("We must adhere to Coleman's instruction to read that language literally"). The court's careful analysis of the plain unambiguous language of Section 1915 (g), both as directed by *Coleman,* and as mandated by the basic duty of the court in considering a statute, yields to an "inescapable conclusion" that the qualifying dismissal by the district court counts as the third strike under the statute when it is handed down. *Id.* at 152-53.

And here the law rests at this point, with the Ninth Circuit effectively acting as if this Court's decision in *Coleman* does not exist, and the Third Circuit faithfully following its reasoning. Wishnefsky's response to the state of the law is to misstate it.

First, Wishnefsky cites to a whole series of pre-*Colman* cases. *See*, Petition for Certiorari at 12. However, the Court's decision in *Coleman* worked a "sea change" in this area of the law. *Parker,* 870 F. 3d at 149-150. So Wishnefsky's reliance upon pre-*Colman* decisions is completely misplaced and irrelevant.

Second, with respect to the decisions rendered post-Coleman, Wishnefsky again misstates the law. Specifically, he suggests that The Tenth Circuit has adopted

the Ninth Circuit's analysis. *See*, Petition for Certiorari at 12. It has not. A recent non-precedential opinion of the Tenth Circuit makes clear that the issue presented here remains an "open question" in that circuit. *See Flute v. U.S.,* 723 Fed. Appx. 604, 607 (10th Cir. 2018).

The state of the law at present, on the basis of *Richey* and *Parker*, is not ripe for this Court's consideration at this time. Indeed, as we now detail, this Court has already made that determination.

A. This Court has already determined that the present circuit split lacks the weight and definition needed to justify the grant of certiorari.

As we have shown, the circuit split is as shallow as is possible. It extends across only two precedential decisions by courts of appeals since *Coleman*. Thus, the issue deserves more time to develop in the courts of appeal. We submit that further development might conceivably lead to the isolation, if not the abandonment, of the Ninth Circuit's decision in light of its failure to recognize the sea-change brought about by *Colman*. In any case, the circuit split lacks the weight and definition needed to justify a grant of certiorari at this point. The Court reached precisely this conclusion when it denied certiorari in *Parker* on March 19, 2018. *Parker v. Montgomery Co. Corr. Facility/Business Office Mngr.*, 870 F.3d 144 (3d Cir. 2017), *cert. denied*, __U.S.__, 138 S. Ct. 1284 (March 19, 2018).

There have been no changes in the legal landscape since the very recent denial of certiorari in *Parker*. There is no reason to revisit the matter now. Moreover, in *Parker,* this Court had the benefit of a full opinion by the court of appeals and the

participation of the original parties by counsel. Here, there is only a perfunctory judgment order of the court of appeals applying *Parker* as the *ratio decidendi*. If *Parker* itself was not a proper vehicle for the grant of certiorari, this case surely is even less so.

More critically, this action does not even clearly present the issue left unresolved by *Coleman*. There are three strikes against Wishnefsky regardless of whether the dismissal on appeal is counted or not. *See Wishnefsky v. Salameh*, 2015 WL 4401780, *1 (W.D. Pa.) (The district court recognized three strikes independent of any dismissals on appeal; this ruling of the district court on these grounds was not altered by the decisions of the Third Circuit in *Wishnefsky I* and *II*). Therefore, this case is a poor vehicle for a grant of certiorari because of other potentially dispositive issues in dispute regarding the denial of *ifp* status to Wishnefsky.

B. *Parker*, and thus this action, were correctly decided.

The Third Circuit decided *Parker* by means of a careful and assiduous reading of *Coleman* and scrupulous adherence to its rationale. The decision is no more than a logical corollary of the *Coleman* decision, arriving at its holding by undertaking the literal reading of the plain language of the governing statute. This approach to assessing the existence of qualifying strikes under § 1915 (g) — as laid down by *Coleman* — compels the result in *Parker*. That, in turn, compels the result here. And that means that this case, which merely applies and follows *Parker*, was correctly decided too.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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