# APPENDIX A

USCA No. 18-12403-'F'
Filed on 11/2/2018

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-12403-F

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JOHN J. WILSON, JR.,

Plaintiff-Appellant,

versus

CORRECT CARE, LLC,
DR. S. CALDERON,
DR. SANFORD JACOBSON, M.D.
DR. DITOMASSO, PHD.,
DR. PEDRO SAEZ, PHD., et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Florida

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Before: WILSON, WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's September 7, 2018 order denying his motion for leave to proceed based on imminent danger, designating him as a three strikes litigant, and dismissing his appeal from the district court's orders dismissing his *pro se* 42 U.S.C. § 1983 complaint with prejudice pursuant to the three-strikes provision of 28 U.S.C. § 1915(g) and denying his motion for reconsideration. Upon review, Appellant's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 18-12403-F

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JOHN J. WILSON, JR.,

Plaintiff - Appellant,

versus

CORRECT CARE, LLC,
DR. S. CALDERON,
DR. SANFORD JACOBSON, M.D.
DR. DITOMASSO, PHD.,
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Defendants - Appellees.

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Appeal from the United States District Court
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ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant John J. Wilson, Jr. has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective September 28, 2018.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Dionne S. Young, F, Deputy Clerk

FOR THE COURT - BY DIRECTION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-12403-F

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JOHN J. WILSON, JR.,

Plaintiff-Appellant,

versus

CORRECT CARE, LLC,
DR. S. CALDERON,
DR. SANFORD JACOBSON, M.D.
DR. DITOMASSO, PHD.,
DR. PEDRO SAEZ, PHD., et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Florida

---

BEFORE: WILSON, WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

ORDER:

Section 1915(g) of Title 28, commonly known as the "three strikes" provision, precludes a prisoner from bringing a civil action or appealing a civil judgment *in forma pauperis* if he has filed three or more civil suits that have been dismissed as frivolous, malicious, or for failure 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). John Wilson, Jr., while a prisoner, has filed three prior civil actions or appeals that have been dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted, and Wilson is not currently under imminent danger of serious physical injury. Accordingly, Wilson cannot

proceed without prepaying the filing fee under 28 U.S.C. § 1915. *See* 28 U.S.C. § 1915(g); *Rivera v. Allin*, 144 F.3d 719, 724 (11th Cir. 1998), *abrogated in part on different grounds by Jones v. Bock*, 549 U.S. 199, 213–16 (2007).

If Wilson does not prepay the entire appellate filing fee within 14 days from the date of this order, this appeal will be dismissed for lack of prosecution without further notice, pursuant to Eleventh Circuit Rule 42-1(b).

Additionally, this Court's Clerk is DIRECTED to list Wilson as a "three-striker" under the Prison Litigation Reform Act in this Court for the purposes of future matters.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:17-cv-24174-KMM

John J. Wilson, Jr.,

Plaintiff,

v.

Correct Care, LLC, et al.,

Defendants.
_____/

**ORDER ADOPTING REPORT AND RECOMMENDATION**

THIS CAUSE came before the Court upon Plaintiff John J. Wilson's Complaint Under 42 U.S.C. § 1983 ("Complaint") (ECF No. 1). THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, who issued a Report (ECF No. 8), recommending that Plaintiff's Complaint be dismissed. Plaintiff has filed Objections (ECF No. 9), a Motion for Temporary Injunction (ECF No. 10), a Motion for Referral to Volunteer Attorney Program (ECF No. 11), and a Motion for Leave (ECF No. 12). For the reasons that follow, the Court ADOPTS Magistrate Judge White's Report and Recommendation, and denies each of Plaintiff's other motions as moot.

A district court may accept, reject, or modify a magistrate judge's report and recommendation. *See* 28 U.S.C. § 636(b)(1). Pursuant to Federal Rule of Civil Procedure 72(b)(3), the Court "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). However, "the district court will review those portions of the R & R that are not objected [to] under a clearly erroneous

standard." *Liberty Am. Ins. Group, Inc. v. WestPoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

A prisoner attempting to proceed IFP in a civil action in federal court must comply with the mandates of the Prison Litigation Reform Act ("PLRA"), Pub.L. No. 104–134, §§ 801–810, 110 Stat. 1321 (1996). In relevant part, the PLRA provides:

> 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 prior occasions, while incarcerated or detained in any facility, brought an action or appeal in an 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 maybe granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. §1915(g).

Judge White recommends dismissal of this action because (1) Plaintiff has previously filed four § 1983 cases which have been dismissed for failing to state a claim or for being frivolous and (2) Plaintiff has not alleged or demonstrated that he is under "imminent danger of serious physical injury," as required by § 1915(g). *See* Report at 3–4.

Liberally construed, in the Objections, Plaintiff disputes Judge White's recommended finding that Plaintiff's prior § 1983 cases qualify under the PLRA. *See generally* Objections (ECF No. 9). A review of each of these cases reveals that each of these cases has been dismissed as frivolous, malicious, or fails to state a claim. In light of the fact that Plaintiff has previously filed at least three such cases, and the fact that the Complaint (ECF No. 1) lacks allegations of imminent danger of serious physical injury, the Court DISMISSES the Complaint WITH PREJUDICE.

UPON CONSIDERATION of the Complaint (ECF No. 1), the Report (ECF No. 8), the Objections (ECF No. 9), the pertinent portions of the record, and being otherwise fully advised in

the premises, it is hereby ORDERED AND ADJUDGED that Plaintiff's Complaint is DISMISSED WITH PREJUDICE. The Clerk of Court is instructed to CLOSE this case. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 29th day of January, 2018.

Kevin Michael Moore

Digitally signed by Kevin Michael Moore
DN: o=Administrative Office of the US Courts, email=k_michael_moore@flsd.uscourts.gov, cn=Kevin Michael Moore
Date: 2018.01.29 15:57:19 -05'00'

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

cc: All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-24174-MOORE
MAGISTRATE JUDGE P. A. WHITE

JOHN J. WILSON, JR.,

Plaintiff,

v.

Correct Care, LLC, et al.,

Defendants.
_____/

**REPORT RE DISMISSAL OF COMPLAINT-28 U.S.C. §1915(g)**

## I. Introduction

The *pro se* Plaintiff, **John J. Wilson, Jr.**, no stranger to the federal courts, has filed this civil rights complaint, pursuant to 42 U.S.C. §1983.[1] (DE#1).

This latest filing has been referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district court regarding dispositive motions. See 28 U.S.C. §636(b)(1)(B), (C); Fed.R.Civ.P. 72(b), S.D.Fla. Local Rule 1(f) governing Magistrate Judges, and S.D. Fla. Admin. Order 2003-19.

The instant complaint is subject to dismissal based on Plaintiff's status as a "three-striker" under the provision of the

[1]This Court takes judicial notice of its own records as well as records filed in another court pursuant to Federal Rule of Evidence 201(b) and (c). See United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)("A court may take judicial notice of its own records and the records of inferior courts."); United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994)(indicating that documents filed in another court may be judicially noticed)(*quoting* Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388-89 (2d Cir. 1992)).

Prison Litigation Reform Act ("PLRA").

## II. §1915(g) Standard

A prisoner attempting to proceed IFP in a civil action in federal court must comply with the mandates of the Prison Litigation Reform Act ("PLRA"), Pub.L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996). 28 U.S.C. §1915(g) of the PLRA provides:

> 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 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 upon which relief maybe granted, unless the prisoner is under imminent danger of serious physical injury.

The constitutionality of the foregoing provision of the PLRA, referred to as "three strikes provision," has been comprehensively explored and upheld by the Eleventh Circuit Court of Appeals. See Rivera v. Allin, 144 F.3d 719 (11th Cir. 1998) (internal citations omitted), *abrogated on other grounds by* Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). Specifically, the Eleventh Circuit has determined that the new "three strikes" IFP provision does not violate an inmate's the First Amendment right of access to the courts; the doctrine of separation of judicial and legislative powers; the Fifth Amendment's right to due process of law; or, an inmate's right to equal protection. Id. at 721-27.

However, to invoke the exception to §1915(g), a plaintiff must

allege and provide specific factual allegations of ongoing serious physical injury, or a pattern of misconduct evidencing the likelihood of imminent serious physical injury, and vague allegations of harm and unspecific references to injury are insufficient. Niebla v. Walton Correctional Inst., 2006 WL 2051307, *2 (N.D.Fla. July 20, 2006)(*citing* Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003)(conclusory assertions insufficient to show imminent serious physical injury) and White v. State of Colorado, 157 F.3d 1226, 1231 (10th Cir. 1998)). The "imminent danger" exception is available "for genuine emergencies," where "time is pressing" and "a threat ... is real and proximate." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002).

Thus, in order to meet this exception, "the complaint, as a whole, [must] allege[] imminent danger of serious physical injury." Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004). The issue is whether the plaintiff falls within the exception to the statute, imminent danger of serious physical injury at the time of filing the lawsuit, not at the time of the alleged incident that serves as the basis for the complaint. See Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999)(prison officials deliberately indifferent to plaintiff's safety by placing him in dangerous situation, causing prisoner to fear for his life, which ceased at the time of filing, fails to demonstrate imminent danger).

**A. Prior Filing History**

The incarcerated *pro se* plaintiff in this case has filed the following §1983 cases:

1. Wilson v. Juan Carlos, et al.
   15-CV-22098-Cooke (S.D. Fla. 2015)

Frivolous

2. Wilson v. City of Miami Police Chief, et al.
16-CV-20244-Moreno (S.D. Fla. 2016)
Barred by the statute of limitations[2] and, alternatively, failure to state a claim

3. Wilson v. Apex Reporting Group, Inc., et al.
16-CV-23511-Cooke (S.D. Fla. 2016)
Failure to comply with court orders[3]

4. Wilson v. Ronald Suarez, et al.
17-CV-20718-Williams (S.D. Fla. 2017)
Three strikes rule, 28 U.S.C. §1915(g)

Based upon the review of Plaintiff's litigation history, it is clear that Plaintiff has had at least three civil rights complaints that qualify as strikes pursuant to §1915(g). See Rivera v. Allin, 144 F.3d 719, 731-32 (11 Cir. 1998) (dismissal of actions as frivolous count as strikes under §1915(g)), *abrogated on other grounds by* Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007)); Anderson v. Hardman, et al., No. 99 C 7282 at *3, 1999 WL 1270692 (N.D.Ill. Dec. 17, 1999); Luedtke v. Gudmanson, 971 F.Supp. 1263 (E.D.Wis. 1997).

**B. "Imminent Danger" Exception**

[2]A dismissal on statute of limitations grounds constitutes a dismissal for failure to state a claim and counts as a strike. See Jones v. Bock, 549 U.S. 199, 215 (2007) ("If the allegations ... show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim[.]").

[3]A case dismissed as an "abuse of the judicial process" counts as a strike under 28 U.S.C. §1915(g), Rivera v. Allin, 144 F.3d 719, 731 (11 Cir. 1998), and refusal to comply with court orders constitutes such abuse. See Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1544 (11 Cir.), cert denied, 510 U.S. 863 (1993) (No. 93-80) (holding that failure to comply with court orders is an "abuse of the judicial process"); Huffine v. United States, 25 Cl.Ct. 462, 464 (Cl.Ct. 1992) (pro se litigant's refusal to comply with Court orders was an "abuse of the judicial process").

Thus, Plaintiff is barred from proceeding *in forma pauperis* in this or any other federal court, pursuant to 28 U.S.C. §1915(g), unless he can show that he was under imminent danger of serious physical injury at the time he filed his complaint.

To invoke the exception to §1915(g), a plaintiff must allege and provide specific factual allegations of ongoing serious physical injury, or a pattern of misconduct evidencing the likelihood of imminent serious physical injury, and vague allegations of harm and unspecific references to injury are insufficient. Niebla v. Walton Correctional Inst., 2006 WL 2051307, *2 (N.D.Fla. July 20, 2006)(*citing* Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003)(conclusory assertions insufficient to show imminent serious physical injury) and White v. State of Colorado, 157 F.3d 1226, 1231 (10th Cir. 1998)). The "imminent danger" exception is available "for genuine emergencies," where "time is pressing" and "a threat ... is real and proximate." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002).

Review of Plaintiff's recent complaint reveals that the plaintiff has not alleged, let alone demonstrated, that he was under imminent danger of serious physical injury at the time of the filing of the complaint or that serious physical injury is imminent. See (DE#1). Nor do Plaintiff's allegations suggest a pattern of misconduct evidencing the likelihood of imminent serious physical injury. (Id.). Plaintiff has failed to make the requisite demonstration to overcome dismissal. Since Plaintiff has not paid the filing fee and the factual allegations of his complaint do not suggest that Plaintiff's current conditions of confinement pose an imminent threat of serious physical injury, he does not qualify under the imminent danger exception to §1915(g). Dismissal of the instant civil rights action is, therefore, appropriate.

## III. Recommendations

Based upon the foregoing, it is recommended that: (1) the complaint (DE#1) be DISMISSED, pursuant to 28 U.S.C. §1915(g); see Dupree, 284 F.3d at 1237 (reasoning that the filing fee is due upon filing a civil action when *in forma pauperis* provisions do not apply to plaintiff and that the court is not required to permit plaintiff an opportunity to pay the filing fee after denying leave to proceed *in forma pauperis*); (2) that all pending motions not otherwise ruled upon be dismissed; and, (3) that this civil action be CLOSED.

Dismissal with leave to amend would not be appropriate here because an amendment would be futile in that any amended complaint on the basis of the allegations now presented and attempted claims would still be properly dismissed. See Judd v. Sec'y of Fla., 2011 WL 2784422, *2 (M.D.Fla. June 3, 2011)(recommending that Plaintiff not be permitted to file an amended complaint in light of the Eleventh Circuit's decision in Johnson in that any amended complaint would be frivolous). See generally Spaulding v. Poitier, 548 Fed.Appx. 587, 594 (11th Cir. 2013)(holding that magistrate judge did not abuse his discretion in denying Plaintiff leave to amend his complaint because such an amendment would have been futile)(citing, Cockrell v. Sparks, 510 F.3d 1307, 1310 (11th Cir. 2007).

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar plaintiff from a *de novo* determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon

grounds of plain error or manifest injustice. See 28 U.S.C. §636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790,794 (1989); LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

Signed this 20th day of November, 2017.

UNITED STATES MAGISTRATE JUDGE

cc: John J. Wilson, Jr., Pro Se
DC #M86-232
Martin Correctional Institution
Inmate Mail/Parcels
1150 SW Allapattah Road
Indiantown, FL 34956

Additional material from this filing is available in the Clerk's Office.