No. 19-6705

In the Supreme Court of the United States

KEENAN G. WILKINS,

Petitioner,

v.

J. GALVIN, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner can bring a challenge in this case to frivolousness determinations made in two prior appeals that became final in 2012 and 2014.

2. Whether, for purposes of the Prison Litigation Reform Act's "three strikes" rule, an "appeal . . . was dismissed on the grounds that it is frivolous," 28 U.S.C. § 1915(g), where the court of appeals concluded that the prisoner's appeal was frivolous, denied IFP status on that basis, and then dismissed the appeal when the prisoner failed to pay the full appellate filing fee.

PARTIES TO THE PROCEEDING

The petitioner is Keenan Wilkins (also known as Nerrah Brown).

The respondents are Janette Galvin, Brian Kukrall, and Brent Burkhart; each respondent is represented by the Attorney General of California.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

> *Wilkins v. Galvin*, No. 19-15368, judgment entered July 31, 2019 (this case below).

United States District Court for the Eastern District of California:

> *Wilkins v. Galvin*, No. 2:16-cv-2629, judgment entered February 7, 2019 (this case below).

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STATEMENT

1. As a general matter, litigants in federal court must pay certain fees to file a civil action or a notice of appeal. When a litigant shows he or she is unable to afford the fees, however, the court "may authorize the commencement . . . of any suit . . . or appeal . . . without prepayment of fees." 28 U.S.C. § 1915(a). The litigant then proceeds *in forma pauperis* (IFP).

Unlike a paying litigant, "a litigant whose filing fees . . . are assumed by the public . . . lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). By the 1990s, this had increasingly become a problem: "Congress found that the number of prisoner lawsuits ha[d] grown astronomically," and represented "more than twenty-five percent of the suits filed in federal district court." *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998) (internal quotation marks omitted). As this Court has recognized, "[m]ost" prisoner suits "have no merit; many are frivolous." *Jones v. Bock*, 549 U.S. 199, 203 (2007). The flood of meritless litigation created a "crushing burden," making "it difficult for courts to consider meritorious claims." 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch).

Congress responded by enacting the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), which "installed a variety of measures designed to filter out the bad claims filed by prisoners and facilitate consideration of the good," *Bruce v. Samuels*, 136 S. Ct. 627, 630

(2016) (internal quotation marks omitted). One provision of the PLRA directs that a court "shall dismiss [a] case at any time if [it] determines that . . . the action or appeal is frivolous." 28 U.S.C. § 1915(e).[1] Another imposes the "three strikes" rule, which generally bars a prisoner from proceeding IFP "if the prisoner has, on 3 or more prior occasions . . . brought an action or appeal . . . 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). By requiring repeat filers of meritless actions and appeals to pay "all future filing fees . . . in full upfront," this provision helps to prevent "three strikers" from clogging the courts with further meritless filings. *Bruce*, 136 S. Ct. at 630; *see Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015).

2. Petitioner Keenan Wilkins is a California prisoner who has filed numerous actions and appeals in federal court against state officers. This case involves three prior dismissals, which the district court and court of appeals below cited in denying petitioner IFP status under the three-strikes rule:

Strike 1. In *Brown aka Wilkins v. North Cty. Jail*, petitioner sought $22 million for "emotional distress" based on allegations that his "wife sent him 22 nude pictures of herself" and "someone at the jail stole the pictures" from the mailroom. No. 3:97-cv-2298, Dkt. 2 at 1-2 (N.D. Cal. Aug. 4, 1997). The district court dismissed with prejudice for failure to state a claim. *Id.* Dkt. 2 at 3.

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[1] The IFP statute previously provided that courts "*may* dismiss" frivolous actions or appeals. 28 U.S.C. § 1915(d) (1995) (emphasis added).

Strike 2. In *Wilkins v. Cty. of Alameda*, the district court dismissed the complaint because petitioner improperly joined numerous unrelated claims against multiple defendants in the same action. No. 5:11-cv-2704, Dkt. 21 at 2 (N.D. Cal. May 1, 2012).[2] The court provided petitioner an opportunity to amend, instructing him to limit his complaint to defendants for whom there were "common questions of law or fact." *Id.* But when petitioner failed to comply, the court concluded that further opportunities to amend would be "futile" and ordered the case dismissed. *Id.* Dkt. 21 at 3.[3] Petitioner then appealed, accruing his second strike when that appeal was dismissed. Concluding that petitioner's challenge to the district court's joinder-based dismissal "is frivolous," the Ninth Circuit denied petitioner permission to proceed IFP on appeal and ordered "automatic dismissal of the appeal by the Clerk" if petitioner failed to pay the filing fee within 21 days. *Wilkins v. Cty. of Alameda*, No. 12-16170, Dkt. 7 at 1 (9th Cir. Aug. 6, 2012) (*Wilkins I*). When petitioner failed to do so, the Clerk entered an order closing the case for failure "to perfect the appeal" and "pay the docketing/filing fees." *Id.* Dkt. 8 (Sept. 12, 2012).

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[2] Among petitioner's 14 claims were allegations that "several Defendants confiscated his legal documents"; "there is no jail procedure for recording incoming or outgoing mail"; "unnamed jail officials eavesdropped on confidential telephone calls"; and "unnamed jail officials failed to provide adequate footwear." *Wilkins v. Cty. of Alameda*, No. 5:11-cv-2704, Dkt. 21 at 2 (N.D. Cal. May 1, 2012).

[3] Respondents do not contend that this district-court dismissal qualifies as a strike.

Strike 3. Following the *Wilkins I* dismissal, petitioner returned to district court and filed a motion to reopen the judgment under Federal Rule of Civil Procedure 60(b)(1). But because he filed outside the rule's one-year window, the district court denied the motion as untimely. *Wilkins v. Cty. of Alameda*, No. 5:11-cv-2704, Dkt. 36 at 1-2 (N.D. Cal. Oct. 4, 2013). Petitioner accrued the third strike when he appealed that Rule 60(b)(1) denial. Once again, the Ninth Circuit determined that "the appeal is frivolous." *Wilkins v. Cty. of Alameda*, No. 13-17060, Dkt. 7 at 1 (9th Cir. Jan. 13, 2014) (*Wilkins II*). As in *Wilkins I*, the court denied IFP status and ordered the case dismissed if petitioner failed to pay the filing fee in 21 days. *Id.* Dkt. 7 at 2. The Clerk then closed the case when petitioner failed to do so. *Id.* Dkt. 10 (Mar. 17, 2014).

3. The present dispute began in November 2016, when petitioner sought damages and injunctive relief against several state officers for refusing to deliver three mail-ordered magazines. *Wilkins v. Galvin*, No. 2:16-cv-2629, Dkt. 7 at 3 (E.D. Cal. Dec. 27, 2017). Prison authorities originally barred delivery of all three magazines, concluding that they violated regulations forbidding prisoners from possessing obscene materials. *Id.* Dkt. 7 at 3-4. While officials later delivered two of the magazines because regulations were changed to permit possession of materials showing partially nude female breasts, petitioner claimed that the officers violated the First Amendment by

delaying delivery for several months and blocking delivery of the third magazine entirely. *Id.* Dkt. 7 at 4-6.[4]

A magistrate judge initially granted petitioner IFP status and, pursuant to the PLRA, screened petitioner's complaint to determine whether it should be dismissed for "fail[ing] to state a claim upon which relief may be granted." 28 U.S.C. § 1915A. The magistrate judge declined to recommend immediate dismissal, concluding that, "liberally construed," the complaint stated a First Amendment claim by alleging that prison officials erroneously withheld and delayed delivery of the magazines. *Wilkins v. Galvin*, No. 2:16-cv-2629, Dkt. 7 at 6 (E.D. Cal. Dec. 27, 2017). The complaint was then served on respondents, who moved to have petitioner's IFP status revoked under the PLRA's three-strikes rule. *Id.* Dkt. 16 (filed Sept. 4, 2018).

The district court agreed, revoking petitioner's IFP status based on the three prior dismissals discussed above: the 1997 district-court dismissal and the two Ninth Circuit dismissals in *Wilkins I* and *II*. *Wilkins v. Galvin*, No. 2:16-cv-2629, Dkt. 25 (Dec. 11, 2018). When petitioner failed to pay the filing fee, the court dismissed the case. Pet. App. 5.

Petitioner appealed and sought IFP status in the Ninth Circuit. The court of appeals agreed with the district court's application of the three-strikes

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[4] The two magazines petitioner eventually received were "Straight Stuntin: Limited Edition Pornstar Issue" and "Straight Stuntin: Troy Ave/ India Baby." *Wilkins v. Galvin*, No. 2:16-cv-2629, Dkt. 7 at 3 (E.D. Cal. Dec. 27, 2017). The magazine denied to petitioner was "Phat Puffs." *Id.* Dkt. 7 at 4.

rule and denied IFP status based on the same three dismissals. Pet. App. 1-2. It also ordered the appeal dismissed outright pursuant to 28 U.S.C. § 1915(e), which authorizes it to dismiss an appeal "at any time" if it determines that "the appeal . . . is frivolous." Pet. App. 2.

ARGUMENT

Petitioner primarily contends (at 4-6) that the court of appeals erred when, in 2012 and 2014, it held that the appeals in *Wilkins I* and *II* were frivolous. He further argues (at 6) that, even accepting that those appeals were frivolous, the court of appeals mistakenly treated *Wilkins I* and *II* as strikes. This Court recently denied petitioner's request to review virtually identical issues. *See Wilkins v. Gonzalez*, No. 18-7311 (denied Feb. 25, 2019). There is no reason it should do otherwise here: *Wilkins I* and *II* have long since become final and are not subject to collateral attack in this case. Moreover, because *Wilkins I* and *II* were "dismissed on the grounds that [they were] frivolous," 28 U.S.C. § 1915(g), the court of appeals properly counted them as strikes. Contrary to petitioner's argument (at 6), that determination does not conflict with an Eleventh Circuit decision, which turned on a procedural consideration that is absent here. In any event, the question whether the dismissals in *Wilkins I* and *II* are properly treated as strikes under the PLRA is unlikely to affect the outcome because petitioner's First Amendment claim would likely fail and he has recently accrued two additional strikes. More generally, this

question is not likely to arise frequently and lacks practical significance. Further review is unwarranted.

1. Petitioner contends that *Wilkins I* and *II* were incorrectly deemed frivolous at the time they were decided, both because the court lacked authority to review the merits when adjudicating an IFP motion, Pet. 4-5, and because the appeals were not frivolous, Pet. 6. But *Wilkins I* and *II* became final long ago (in 2012 and 2014). Petitioner may not "escape the [PLRA] consequences of . . . prior judgment[s]" by mounting an "untimely collateral attack." *Hoffmann v. Pulido*, 928 F.3d 1147, 1150 (9th Cir. 2019); *see also Thompson v. DEA*, 492 F.3d 428, 438-439 (D.C. Cir. 2007).

Even if petitioner's arguments were timely, they would fail on the merits. The court of appeals did not abuse its broad "discretionary authority to deny IFP status," *Butler v. Dep't of Justice*, 492 F.3d 440, 444 (D.C. Cir. 2007), when it disallowed petitioner from proceeding IFP based on its determination that petitioner's challenges to the district court's joinder and timeliness rulings were frivolous. As to joinder, the district court dismissed because petitioner failed to amend his complaint after the court advised him that he could not join multiple defendants in one action unless there was a "question of law or fact common to all defendants." Fed. R. Civ. P. 20(a)(2); *see Wilkins v. Cty. of Alameda*, No. 5:11-cv-2704, Dkt. 21 at 2 (N.D. Cal. May 1, 2012). As to timeliness, the court's judgment was entered on May 1, 2012, but petitioner did not file his Rule 60(b)(1) motion until July 26, 2013—beyond the one-year

deadline set by Rule 60(c)(1). *Wilkins v. Cty. of Alameda*, No. 5:11-cv-2704, Dkt. 36 at 1-2 (N.D. Cal. Oct. 4, 2013).

2. Petitioner next argues (at 6) that the dismissals in *Wilkins I* and *II* are not strikes under the PLRA. That contention lacks merit. The Ninth Circuit's application of the three-strikes rule was correct and does not conflict with that of any other court of appeals. Moreover, it is unlikely that the question would alter the outcome here or recur in many other cases.

a. A PLRA strike accrues when a prior appeal "was dismissed on the grounds that it is frivolous." 28 U.S.C. § 1915(g). The statute thus directs courts to look to the "basis" or "reason[s]" for the prior dismissal. *O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008) (internal quotation marks omitted); *see also, e.g.*, Webster's New International Dictionary 1002 (3d ed. 1976) (defining "grounds").

In both of the strikes at issue—*Wilkins I* and *II*—the Ninth Circuit issued an order providing the basis for dismissal. The court explained that, because "the appeal is frivolous," it was denying IFP status and ordering "automatic dismissal of the appeal" unless petitioner paid the filing fee within 21 days. *Wilkins I*, No. 12-16170, Dkt. 7 at 1 (9th Cir. Aug. 6, 2012); *Wilkins II*, No. 13-17060, Dkt. 7 at 1 (9th Cir. Jan. 13, 2014). When petitioner failed to do so, the Clerk entered a docket entry formally closing the case. *Wilkins I*, Dkt. 8 (Sept. 12, 2012); *Wilkins II*, Dkt. 10 (Mar. 17, 2014). *Wilkins I* and *II* are thus exactly what the PLRA requires courts to treat as strikes: prior dismissals where a

court expressly deemed the prisoner's filings frivolous and ordered dismissal on that basis. Treating such dismissals otherwise "would produce a leaky filter," allowing a demonstrated frivolous filer to bring "additional lawsuits that are frivolous." *Coleman*, 135 S. Ct. at 1764.

In petitioner's view, *Wilkins I* and *II* do not qualify as strikes because the cases were "dismissed as 'Failure to Prosecute,'" not as "frivolous." Pet. 5. While the boilerplate docket entries entered by the Clerk state that the cases were dismissed for failure to prosecute—specifically, failure to "perfect the appeal" and "pay the docketing/filing fees," *Wilkins I*, Dkt. 8 (Sept. 12, 2012); *Wilkins II*, Dkt. 10 (Mar. 17, 2014)—nothing in the PLRA requires a court to confine its analysis to the single docket entry formally closing a case. Rather, the three-strikes provision turns on the "grounds" for a dismissal. Here, the Ninth Circuit panels spelled out the grounds for dismissing *Wilkins I* and *II* in the orders determining that the appeals were "frivolous." Because it concluded that the appeals were frivolous, the court denied IFP status and ordered dismissal if petitioner failed to pay the filing fee. *Wilkins I*, Dkt. 7 at 1 (Aug. 6, 2012); *Wilkins II*, Dkt. 7 at 1 (Jan. 13, 2014).

Even if "failure to prosecute" could be said to be a ground for dismissal in *Wilkins I* and *II*, it would not be the sole ground. Petitioner actively sought to litigate his appeals and submitted the requisite filings on a timely basis. The cases were dismissed, however, because the court determined that the appeals were frivolous and the consequence of that determination—requiring

petitioner to pay the full filing fee—prevented him from continuing to prosecute the appeals. It would thus be incomplete to say that the appeals were dismissed for "failure to prosecute" alone, implying that petitioner abandoned the appeals of his own volition without the court's involvement.

The Ninth and Tenth Circuits have rejected petitioner's position in *Richey v. Dahne*, 807 F.3d 1202, 1208 (9th Cir. 2015), *Knapp v. Hogan*, 738 F.3d 1106, 1110 (9th Cir. 2013), and *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1178-1179 (10th Cir. 2011). In each of these cases, the court of appeals counted a prior appellate dismissal as a strike where, as in *Wilkins I* and *II*, the court "denied appellant's motion for leave to proceed [IFP] . . . as frivolous," and then "dismissed the appeal for nonpayment" when "appellant did not pay the filing fee." *Hafed*, 635 F.3d at 1178-1179. As *Hafed* explained, the frivolousness determination was an essential basis for the dismissal: "[B]ut for the judge declaring it frivolous, the prisoner's appeal would have gone forward." *Id.* (internal quotation marks and alterations omitted). It would thus be "hypertechnical" to say "that the resulting dismissal for nonpayment was not a strike." *Id.* (internal quotation marks omitted); *see Richey*, 807 F.3d at 1208 (similar).[5]

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[5] Courts have addressed an analogous issue that sometimes arises in district-court proceedings: When a district court orders dismissal for failure to state a claim, while providing an opportunity to amend, sometimes the prisoner fails to file an amended complaint as directed, which results in termination of the case for failure to prosecute. *E.g.*, *Harris v. Mangum*, 863 F.3d 1133, 1141-1142 (9th Cir. 2017) (counting such dismissal as a strike); *Orr v. Clements*, 688

b. Petitioner contends that *Hafed* and the decision below conflict with *Daker v. Comm'r, Georgia Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016). That is incorrect. In *Wilkins I* and *II*, as well as the prior dismissal addressed in *Hafed*, a multi-judge panel made the frivolousness determination. *Richey* and *Knapp* likewise involved frivolousness determinations by multi-judge panels.[6] In *Daker*, by contrast, the motion to proceed IFP was denied "by a single judge" "because [the prisoner's] arguments were frivolous," and then the court automatically dismissed the appeal for failure to pay the filing fee. 820 F.3d at 1284. That difference matters because, as *Daker* stressed, "under the Federal Rules of Appellate Procedure, a single judge 'may not dismiss or otherwise determine an appeal or other proceeding.'" *Id.* at 1285 (quoting Fed. R. App. 27(c)).[7] Accordingly, *Daker* reasoned that a single-judge determination

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F.3d 463, 465-466 (8th Cir. 2012) (similar). Some of the filings in *Lomax v. Ortiz-Marquez*, No. 18-8369 (argued Fed. 26, 2020), briefly refer to this issue. *E.g.*, Br. for United States as *Amicus Curiae* at 28. But there is no need to hold this petition pending the Court's decision in *Lomax* because *Lomax* does not present any question involving cases terminated for want of prosecution. It instead presents the question whether district-court dismissals without prejudice should be treated as PLRA strikes—a question that has no bearing on the issues presented here.

[6] *See Wilkins I*, No. 12-16170, Dkt. 7 (9th Cir. Aug. 6, 2012); *Wilkins II*, No. 13-17060, Dkt. 7 (9th Cir. Jan. 13, 2014); *Hafed v. Government of the State of Israel,* No. 08-2744, Dkt. 17 (7th Cir. Dec. 2, 2008); *Richey v. Thaut*, No. 12-35632, Dkt. 4 (9th Cir. Oct. 17, 2012); *Knapp v. Knowles*, No. 04-16701, Dkt. 14 (9th Cir. Jan. 24, 2005); *Knapp v. Harrison*, No. 08-56629, Dkt. 9 (9th Cir. Jan. 22, 2009).

[7] The Fifth and Eleventh Circuits appear to be the only two circuits with local rules expressly permitting single judges to deny motions to proceed IFP. 5th Cir. Local Rule 27.1-27.2; 11th Cir. Local Rule 27-1(d). Most other circuits

cannot properly be deemed a "ground" of dismissal under the PLRA. *Id.* That holding is not implicated here, however, because *Daker* had no occasion to consider a multi-judge frivolousness determination.

Although *Daker* itself viewed *Hafed* as a "contrary" decision, 820 F.3d at 1285, that rested on a misreading of *Hafed*. *Daker* understood *Hafed* to "reason that [a] single judge's denial of the petition to proceed [IFP] on the grounds of frivolousness is the 'but for' cause of the panel's dismissal of the appeal for want of prosecution." *Id.* As discussed, however, *Hafed* did not involve a single-judge determination. The *Daker* court's misplaced disagreement with a single Tenth Circuit decision does not warrant this Court's review.[8]

c. Petitioner's argument that the *Wilkins I* and *II* dismissals do not qualify as strikes also lacks practical significance, both in this case and as a general matter. To begin with, petitioner's underlying constitutional claim is likely meritless. Because courts "owe substantial deference to the professional judgment of prison administrators" in evaluating prisoner First Amendment claims, *Beard v. Banks*, 548 U.S. 521, 529 (2006) (plurality op.) (internal quotation marks omitted), petitioner would have difficulty showing that

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require a multi-judge panel. *See, e.g.*, 7th Cir. Internal Operating Procedure 1(a)(1); 8th Cir. Internal Operating Procedure 1.D.3; 9th Cir. General Orders 6.3(g)(1).

[8] *Daker* does conflict with the D.C. Circuit's ruling in *Thompson*, 492 F.3d at 433, but that conflict is not presented here. In *Thompson*, as in *Daker*, the relevant dismissal resulted from the decision of a "single appellate judge" to deny IFP status on frivolousness grounds. *Id.*

respondents acted unconstitutionally in applying prison obscenity regulations. Indeed, the record shows that officials took petitioner's complaint seriously and reversed course after determining that two of the three magazines did not contain impermissible obscenity. *Supra* at 4-5.

An additional barrier that petitioner would encounter on remand is that he has recently accrued two more PLRA strikes.[9] Thus, even excluding *Wilkins I* and *II*, petitioner still has three strikes. At a minimum, this means petitioner will be unable to proceed IFP in future cases. And even if the two additional strikes would not formally apply on remand in this case (as it was filed in 2016 before they accrued), the district court could still properly deny IFP status because petitioner has brought many meritless actions and appeals. Courts may exercise their discretion to deny IFP status where a prisoner is a "prolific filer" of meritless litigation—even if prior dismissals (*i.e.*, here, *Wilkins I* and *II* and the two more recent dismissals), would not technically count as strikes. *Butler*, 492 F.3d at 445-446; *see Blakely v. Wards*, 738 F.3d 607, 619-620 (4th Cir. 2013) (en banc) (Wilkinson, J., concurring).

Finally, the question presented is unlikely to arise with any great frequency. Once a court of appeals determines that a prisoner's appeal is frivolous, the typical approach appears to be to deny IFP status and dismiss

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[9] The additional strikes are (1) a frivolousness dismissal, *Wilkins v. Baughman*, No. 19-15344, Dkt. 6 (9th Cir. Sept. 18, 2019), and (2) a dismissal with prejudice for failure to state a claim, *Wilkins v. Stanislaus Cty.*, No. 1:16-cv-1858, Dkt. 15 at 2 (E.D. Cal. June 19, 2018).

the appeal outright. *See, e.g.*, Pet. App. 1-2; *Miles v. Kansas*, 770 F. App'x 432, 433 (10th Cir. 2019); *Canales v. Ayala*, 778 F. App'x 325, 326 (5th Cir. 2019); *Ruther v. Archdiocese Catholic*, 788 F. App'x 197 (4th Cir. 2019); *Rosiere v. United States*, 2018 WL 2273792 (9th Cir. Apr. 17, 2018); *Talley v. Simandle*, 599 F. App'x 33 (3d Cir. 2015); *Akassy v. PIX 11 News*, No. 15-2905, Dkt. 29 (2d Cir. Dec. 14, 2015). The question presented by petitioner will arise only if a multi-judge panel, after determining that the appeal is frivolous and denying permission to proceed IFP, instead gives the prisoner time to pay the filing fee and continue prosecution of the appeal—an opportunity that is largely illusory in practice because a multi-judge panel has already determined that the appeal is frivolous. Petitioner provides no basis for concluding that courts frequently opt for that approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 18, 2020

Respectfully submitted

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