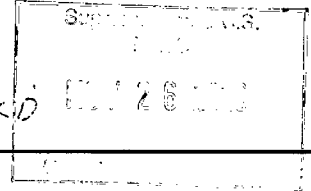


19-8648

ORIGINAL

No. 18-15466

D.C. NO. 2:02-CV-02524-TLN-CKD



IN THE

SUPREME COURT OF THE UNITED STATES

VERNON WAYNE MCNEEL — PETITIONER
(Your Name)

vs.

FLEMING et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Vernon Wayne McNeel
(Your Name)

P.O. Box 911 - B3-114
(Address)

Imperial, CA 92251
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- (a) Congress did not include a Statute of Limitation inside 28 U.S.C. §1915 for Defendants officers that file a late motion to ~~Revoke a indigent inmate in forma pauperis for allege~~ three strikes.
- (b) Congress did not state in 28 U.S.C. 1915(g) that a pending action in the courts could be dismissed for alleged three strikes bar.
- (c) Congress PLRA Section 28 U.S.C. (b)(4) contradict 28 U.S.C. §1915(g)

LIST 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:

Martin
Arnold
Hatley

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A *§1915*

APPENDIX B *Nine circuit orders*

APPENDIX C *Legislative History*

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

STATUTES AND RULES

OTHER

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

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 13 to the petition and is

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☐ is unpublished.

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

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☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____; and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

united states Constitution, Amendment 6

united states Constitution, Amendment 8

united states Constitution, Amendment 14

28 U.S.C. § 1915

STATEMENT OF THE CASE

On March 1, 2018 a Jury found Defendants Fleming et al. not guilty of using excessive force on Plaintiff. ~~App. A~~ The jury was bias toward Plaintiff and the trial transcripts show this. Also the jury was not a cross-section of the community as the Constitution describe it to be, Plaintiff argued this in his appeal. See Appeal, which the Ninth circuit set aside to hear defendants late filed motion to revoke Plaintiff In forma pauperis status for 28 U.S.C. § 1915(g) three strikes. ~~App. A~~

28 U.S.C. § 1915(g) under the plain language of the statute the dismissal of a claim in a pending action cannot possibly trigger the so called three strikes bar. App. A. 28 U.S.C. § 1915(g) don't include a statute of limitation to file motion to revoke a indigent inmate in forma pauperis status once a inmate has acquired the three strike, there is a statute of limitation to file a complaint. But no statute of limitation for Defendants to file motion to revoke inmate in forma pauperis status.

In Defendants motion to revoke plaintiff's in forma pauperis status they don't acknowledge when plaintiff first became barred from his in forma pauperis status because of three strikes. Plaintiff has been incarcerated for over 21 years with no income. The affidavit and certify copy of the trust account statement that was filed in the McNeal v. Fleming et al. Lawsuit proved that. On July 30, 2019 Ninth Circuit granted Defendants motion to revoke plaintiff in forma pauperis status and given Plaintiff 21 days to pay \$505.00. App. B.

— Congress created the Prison Litigation Reform Act to eliminate frivolous, malicious or for failure to state a claim lawsuits. which plaintiff lawsuit is not "The requirements for achieving in forma pauperis status have been made more stringent by the PLRA. A prisoner seeking in forma pauperis status must now include in the required affidavit a statement of all assets such prisoner possesses and a certified copy of the trust fund account statement (or Institutional equivalent), for the prisoner for the six month period immediately preceding the filing of the Complaint or notice of appeal." Quoted from the Legislative History of the PLRA Act of 1996 Pub. L. No. 104-134 110 Stat. 1321 App. C
Judge Troy L. Nunley continue plaintiff's IFP after the March 1, 2018 Civil trial.

Reasons FOR GRANTING THE WRIT

Vernon Wayne McNeal currently incarcerated in Centinela State Prison. In 2002 Plaintiff filed a 42 U.S.C. § 1983 complaint stating in complaint that his Eighth Amendment to the United States Constitution was violated by Defendants Fleming, Arnold, Martin, Hatley and two unknown officers. *Hudson v. McMillian* 503 U.S. at 7-8, 113 S. Ct 995 (1992) (Standard applies "whenever prison officials stand accused of using excessive physical force in violation of the cruel and unusual punishment clause"). To state a claim under 42 U.S.C. § 1983 a plaintiff must allege ~~the~~ violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins* 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) see also *Dominquez v. Corr. Med. Servs.* 555 F.3d 543, 549 (6th Cir. 2009) (same). Because section 1983 is not a source of substantive rights, but instead provides a method for vindicating federal rights. A section 1983 Plaintiff must first identify the specific Constitutional right allegedly infringed. *Arlight v. Oliver* 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). (citations omitted) quoting 2010 U.S. Dist. Lexis 45711 *Balch v. Ohio Dept of Rehab & Corr.* May 18, 2010.

Plaintiff and Defendant Fleming et al. has had two civil trial 2008 and 2018. Plaintiff in forma pauperis was granted years ago for the McNeal v. Fleming et al., due to Plaintiff's severe poverty. See also U.S.C. § 1915(a)(1)(2)(B)(i)(A), App.C, see 2017 U.S. Dist. Lexis 138997 *Chapman v. Dixon* Oct 24, 2017, "En

1 addition to federal jurisdiction standards applications to
2 proceed in forma pauperis are governed by 28 U.S.C. § 1915.
3 The ~~main~~ purpose of 28 U.S.C. § 1915 is to ensure that indigent
4 litigants have meaningful access to the courts. *Adkins v. W.I. Dupont*
5 *de Nemours & Co.*, 335 U.S. 331, 342, 69 S. Ct. 85, 93 L. Ed. 43
6 (1948); *Neitzke v. Williams*, 490 U.S. 319, 324, 109 S. Ct. 1827,
7 104 L. Ed. 2d 338 (1989). To accomplish this end, a court
8 must evaluate the litigant's indigence, but notwithstanding
9 indigence, a court may sua sponte dismiss a matter
10 under 28 U.S.C. § 1915 if the litigation is frivolous and
11 malicious or fails to state a claim upon which relief can
12 be granted.

13 Section 1915 allow a litigant to commence a civil or
14 criminal action in federal court without paying the administrative
15 cost of the lawsuit. *Deton v. Hernandez*, 504 U.S. 25, 112 S. Ct.
16 1728, 118 L. Ed. 2d 340 (1992). The court's review of an
17 in forma pauperis application is normally based solely on
18 the affidavit of indigence. see *Gibson v. R.G. Smith Co.*
19 915 F.2d 260, 262-63 (6th Cir. 1990). The threshold requirement
20 which must be met in order to proceed in forma pauperis
21 is that the petitioner show, by affidavit the inability to pay
22 courts fee and costs. 28 U.S.C. § 1915(a). However one need not be
23 absolutely destitute to enjoy the benefit of proceeding in forma
24 pauperis. *Adkins*, 335 U.S. at 342. An affidavit to proceed in forma
25 pauperis is sufficient if it states that the petitioner cannot
26 because of poverty afford to pay for the costs of litigation
27 and still pay for the necessities of life. *id.* at 339. see 28 U.S.C. §
28 1915 it contradict Plaintiff affidavit and statement showing

1 my poverty, Defendants never demonstrate in their motion to
2 revoke plaintiff in forma pauperis that Plaintiff allegation
3 of poverty was untrue. Plaintiff has been incarcerated for over
4 21 years. Plaintiff Eighth Amendment lawsuit is not frivolous,
5 malicious or fails to state a claim upon which relief may be
6 granted. 28 U.S.C. § 1915(e)(2)(A) it contradict 28 U.S.C. § 1915(g)
7 because Plaintiff poverty is absolutely true. Plaintiff
8 lawsuit was dismiss under 28 U.S.C. § 1915(g).

9 Defendants ~~was~~ timing and where they filed their motion
10 to revoke Plaintiff IFP status should be locked at. Congress
11 did not include in ~~any~~ 28 U.S.C. 1915 any statute's of limitation
12 for Defendants officers accused in a excessive use of force to
13 file a late motion to revoke Plaintiff in forma pauperis for
14 allege three strikes. see O'Neal v. Price 531 F.3d 1146, 1153 (9th Cir.
15 2008) once a prisoner has accumulated three strike he is
16 prohibited by section 1915(g) from pursuing any other IFP
17 action in federal court unless he can show he is facing
18 imminent danger of serious physical injury. quoting Jones
19 v. Blahnik Jan 17, 2019 U.S. D. St. Lexis 8643. Plaintiff
20 question is when should a Defendants file a motion to revoke
21 a indigent inmate IFP status. "Once a inmate has
22 accumulated the three strikes? or within a span of time?
23 Ninth circuit state in O'Neal v. Price " once a prisoner has
24 accumulated three strike he is prohibited by section 1915(g)
25 What did the Ninth circuit mean? Defendants did not
26 state the date(s) in there motion to revoke plaintiff
27 in forma pauperis status when plaintiff first less
28 his in forma pauperis status. There is a statute of

1 Limitation that Plaintiff must follow to file the 1983 Complaint
2 in the courts. It should not be no difference for the
3 Defendants in the McNeal v. Fleming et al., lawsuit
4 not to have a statute of limitation to file their
5 motion to revoke plaintiff's in forma pauperis
6 status in the courts. See 2019 U.S. Dist. Lexis 70055
7 Van Buren v. Spoon May 2, 2019. District Courts are
8 authorized to dismiss claims as frivolous if it is clear
9 from the face of a complaint filed in forma pauperis
10 that the claims asserted are barred by the applicable
11 statute of limitations. Moore v. McDonald 30 F.3d 616,
12 620 (5th Cir. 1994); Gartrell v. Gaylor 981 F.2d 256 (5th Cir. 1993)
13 A district court may raise the limitation period sua sponte,
14 see Harris v. Hegmann 198 F.3d 153 (5th Cir. 1999).

15 Defendants motion to revoke plaintiff's IFP status should
16 have been denied. See *Maree-Bey v. Williams*, 2006 WL
17 403259 *1 (D.D.C. Feb 24, 2006) (under the plain language
18 of the statute the dismissal of a claim in a pending
19 action cannot possibly trigger the so called three-
20 strike bar). See *Rodgers v. Deboe* 950 F.Supp. at 1626
21 (S.D. Cal. 1997). The statute at issue here specifically
22 identifies the events that require the assessment and
23 payment of fee: bringing a case, and filing an appeal.
24 Once these milestones have passed, fees do not attach to
25 later activities. Cf. *Landgraf v. USI Film Prods.*, 511 U.S.
26 244, 775 n.29, 128 L.Ed.2d 229 (1994); *Diaz v. Shalibetter*,
27 934 F.2d 850 (7th Cir. 1993). Therefore, because the PLRA does
28 not, by its express language or legislative intent, seek to

1 prohibit the prosecution of a pending civil action, especially
2 one which has already been determined to be nonfrivolous
3 for purposes of section 1915 by virtue of an existing court
4 order granting plaintiff in forma pauperis status at the
5 time of filing. See *Franklin v. Murphy*, 745 F.2d 1221, 1226-27
6 (9th Cir. 1984), the court declines to apply section 1915(b) to
7 plaintiff's case as he has already brought his civil action,
8 and has not yet had opportunity to file an appeal.
9 also see *Rodgers* at 950 F.Supp. 1029. (Landgraf, 511 U.S.
10 at 275 n.29, 114 S.Ct. at 1502 n.29 (emphasis added)).

11 Thus, just as a new rule concerning the filing of
12 complaints would not govern an action in which the complaint
13 had already been properly filed, new rules concerning
14 the mandatory payment of filing fees accompanying a
15 properly filed complaint need not be applied here.
16 id. This court is cognizant of the common-sense notion that
17 the applicability of new provisions ordinarily depends on the
18 posture of the particular case. Accordingly, given the
19 posture of this case (i.e., plaintiff's filing fees have already
20 been waived pursuant to the law as it existed at the time
21 his complaint was filed, service upon defendants has
22 already been ordered and completed, and dispositive
23 motions have already been filed and decided).

24 Also see *Garcia v. Silbert* 141 F.3d at 1416. (Section 1915(g)
25 governs bringing new actions or filing new appeal - the
26 events that trigger an obligation to pay a docket fee -
27 rather than the disposition of existing cases.) ~~now~~

1 Section 1915(g) governs bringing new actions or filing new
2 appeal. Section 31915(g) in part "brought a action or appeal
3 in a court of the united States that was dismiss on the ground
4 that it is frivolous, malicious, or fails to state a claim upon
5 which relief may be granted. New appeals come when you file a
6 new actions that was frivolous, malicious, or fails to state a
7 claim. The McNeal v. Fleming et al., is a pending case in the
8 ~~lower~~ Courts that has went to trial twice, see Landgraf,
9 511 U.S. at 275 n.29 (i.e., plaintiff's filing fees have already been
10 waived pursuant to the law as it existed at the time his
11 complaint was filed, service upon defendants has already been
12 ordered and completed, and dispositive motion have already
13 been filed and decided).

14 The McNeal v. Fleming lawsuit was never dismiss or appeal as
15 section 31915(g) describes. See Coleman 135 S. Ct. at 1763. "Instead,
16 the statute refers to whether an action or appeal was dismissed 31915(g).
17 Plaintiff is appealing a Jury verdict which section 31915 don't
18 mention nothing about appealing a jury verdict, which separate
19 the McNeal v. Fleming a Eight Amendment lawsuit from Coleman
20 case. McNeal v. Fleming never fitted under the frivolous,
21 malicious or fails to state a claim because it was never dismiss
22 under one of the ~~enumerated~~ section 31915 enumerated grounds.
23 see Coleman 135 S. Ct. at 1764. "Finally, the statute's purpose favors
24 our interpretation. The three strikes provision was designed to
25 filter out the bad claim and facilitate consideration of the good."
26 *id.* at 204, 127 S. Ct. 910. To refuse to count a prior dismissal
27 because of a pending appeal would produce a leaky filter.

Courts interpretation that the three strikes provision was designed to filter out the bad claims and ~~and~~ facilitate consideration of the good, where do the Monreal v. Fleming lawsuit fit at under courts interpretation of the three strikes provision? The Monreal v. Fleming et al., lawsuit was never filter out as a bad claim, see Monroe v. Pape, 365 U.S. 167 (1961); Cooper v. Pate 378 U.S. 546 (1964) The U.S. Congress passed section 42 U.S.C. §1983 specifically to help African-Americans enforce Constitutional rights. Defendants want to get rid of plaintiff lawsuit under 1915(g) instead of proving there case in the courts. Plaintiff Constitutional violation is still present along with the injuries, see Jones v. Pock 549 U.S. 199; 222-23, 127 S.Ct. 910 (2007); Robinson v. Page 107 F.3d 747, 749 (7th Cir. 1999) see section 1997e(e) Prohibits action for mental or emotional injury without physical injury.

Section §1997e(e)

A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which last even up to two or three weeks... It is more than the types and kinds of bruises and abrasion about which the plaintiff complains. Injuries treatable at home and with over the counter drugs, heating pads, rest, etc., do not fall within the parameters of 1997(e)(e).

1 Section 1997e(e), conflicted with §1915(g), Plaintiff
2 injuries falls under 1997e(e).

3 Plaintiff 42 U.S.C. §1983 stated demand for trial. See
4 City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526
5 U.S. 877, 729, 119 S.Ct. 1624 (1999) (Scalia, J., Concurring);
6 see Curtis v. Loether 415 U.S. 189, 94 S.Ct. 1005 (1974).
7 (discussing Scope of Seventh Amendment); Marshall v.
8 Knight 445 F.3d 965, 970 (7th Cir. 2006) (allowing plaintiff
9 to amend complaint to add jury demand), under the
10 statute §1915(b)(4) ~~now apply~~ state ~~now~~ "In no event shall
11 a prisoner be prohibited from bringing a civil action
12 or appealing a civil or criminal judgment for the
13 reason that the prisoner has no assets and no means
14 by which to pay the initial partial filing fee," defendants
15 are going against §1915(b)(4) because plaintiff don't
16 have no assets and no means to pay fee, see Taylor v.
17 Delatoro, 281 F.3d 844, 850-51 (9th Cir. 2003) (a prisoner
18 who cannot pay the initial fee must be allowed to
19 proceed with his case and not merely be granted more
20 time to pay)" 28 U.S.C. §1915(b)(4) contradict §1915(g).

21 On April 18, 2019 plaintiff was placed in imminent
22 danger while housed at CSP-SAC, see McNeal v. Fleming
23 appeal filed in the Ninth Circuit. This was plaintiff second
24 incident at CSP-SAC while out to court for ~~more~~ ~~for~~
25 civil trials. See McNeal v. Roberts, Case No. 2:18-cv-
26 2998-AC PC. The McNeal v. Fleming and the McNeal v.
27 Evert, lawsuits have created imminent danger and
28 that is where all of plaintiff alleged ~~prisoner~~ ~~prisoner~~

1 five strikes have come from as well as the April 18,
2 2019 and the McNeal v. Roberts incidents. See
3 Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999)

4 (rejecting idea that imminent danger is measured at time
5 of incidents but not deciding whether time of filing or IFP
6 motion is appropriate rule) See also Andrew v. Cervante,
7 493 F.3d 1047, 1050 (9th Cir. 2007) (the three-strikes rule is a
8 screening device that does not judge the merits of prisoners'
9 lawsuits); Lewis v. Sullivan 279 F.3d 526, 531 (7th Cir 2002)
10 (Stating that the exception applies when a threat or prison
11 condition is real and proximate, and when the potential
12 consequence is serious physical injury).

13 The screening process in §1915A is wrong because
14 it is screening for ~~frivolous~~ frivolous claim but not
15 imminent danger. question, why imminent danger
16 is not screen at at the initial screening? why the
17 courts don't interpret the complaint imminent danger
18 complaint? See Andrew v. Cervante, 493 F.3d 1047
19 1050 (9th Cir. 2007.) (the three-strikes rule is a screening
20 device that does not judge the merits of prisoners' lawsuit).

21 Plaintiff is requesting from the supreme courts
22 that they look at all of Plaintiff five alleged
23 strikes. §1915A contradict §1915(g).
24
25
26

27 //

28 //

Conclusion

Plaintiff pray that Supreme court grant Plaintiff relief in this matter. Section §1915(g) is not the appropriate means to dismiss a Eighth Amendment violation to the united States Constitution by Defendants Fleming, Martin, Arnold and Hatley because Plaintiff can not pay the filing fee.

Dated: Jan 19, 2020

Respectfully Submitted,
Vernon McNeal