ORIGINAL

.No. _____ 18-8369

IN THE

SUPREME COURT OF THE UNITED STATES

ARTHUR JAMES LOMAX — PETITIONER
(Your Name)

vs.

CHRISTINA ORTIZ-MARQUEZ; NATASHA KINDRED;DANNY DENNIS; MARY QUINTANA; MR./ MRS.JOHN/ JANE DOE; JOSHUA FROST —

RESPONDENT(S) ON PETITION FOR A WRIT OF CERTIORARI TO

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE) United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

(Your Name) Arthur James Lomax
(Address)
Limon Correctional Facility
P.O.Box 10000,

Limon Co 80826

QUESTION(S) PRESENLIST OF PARTIES

A dismissal of a civil action without prejudice for failure to state a claim, is it or is it not a strike under 28 U.S.C. 1915(g)?

Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with prejudice, is this true or false?

" A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice, is this true or false? " [I]n the absence of a clear statement to the contrary, a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is presumed to be with prejudice."

The Fourth Circuit Court decided a dismissal without prejudice for failure to state a claim did not count as a strike under 28 U.S.C.S. 1915(g), but the Tenth Circuit Court decided that a dismissal without prejudice do count as a strike under the Prison Litigation Reform Act of 1995(PLRA)and/or 28

U.S.C.S. 1915(g), which court is right and, is this a legal conflict between these two courts?

Would this statement of the Tenth Circuit be legally right or wrong, A dismissal for failure to state a claim under Rule 12(b)(6) satisfy the plain text of 1915(g) and therefore will count as a strike, without making an y legal interpretation of this provision, inquiry, or analysis thereof in regard to congress intent or purpose? When Congress directly incorporates language with an established legal meaning into a statute, we may infer that Congress intended the language to take on its established meaning. United States v. Langley, 62 F. 3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute."); see also Miles v. Apex Marine Corp., 498 U. S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) (" We assume that Congress is aware of existing law when it passes legislation.").

Is it the Court task here to determine whether Congress intended an action or appeal "that was dismissed on the grounds that it...fails to state a claim upon which relief may be granted" to count as a strike under 28 U.S. C.

1915(g) if that dismissal was specifically designated to be "without prejudice?"

The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b) (6) is a "judgment on the merits and, the type of prior dismissal for failure to state a claim contemplated by subsection 1915(g) is one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations, is this true or false?

Is it true, a dismissal without prejudice for failure to state a claim "does not" fall within the plain and unambiguous meaning of 1915(g)'s unqualified phrase "dismissed ...[for] fail[ure] to state a claim"? If true, As a result, a dismissal without prejudice for failure to state a claim does not count as a strike, is this true or false?

In any Circuit Court, will it be immaterial to the strikes analysis [whether] the dismissal was without prejudice, as opposed to with prejudice? The U.S. Court of Appeals for the Tenth Circuit stated, " [i}n this circuit, it is immaterial (Not material; not pertinent; of no consequence) to the strikes analysis [whether] the dismissal was without prejudice," as opposed to with

prejudice.

Immaterial issue. An issue which occurs where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, so that the court must be at a loss to determine for which of the parties to give judgment. Garland v. Davis (US) 4 How 131, 146, 11 L Ed 907, 914.

Is it true, a dismissal without prejudice for failure to state a claim is not an adjudication on the merits, and, if true, does it permits a plaintiff to refile the complaint as though it had never been filed? See Mendez v. Elliot, 45 F.3d 75, 78(4th Cir. 1995).

[x] 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:

TABLE OF CONTENTS

INDEX TO APPENDICES

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

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix
A, B, C, D
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
E, F, G, H, I, J, K
to the petition and is

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

1

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was November 8, 2018.

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

[X] A timely petition for reconsideration was denied by the United States Court of Appeals on the following date: 12/18/18, 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

28 U.S.C. 1915(g)

28 U.S.C. 1918

1915(g)

28 U.S.C. 1915(a) (3)

42 U.S.C. 1983

28 U.S.C. 1915(g)

28 U.S.C.S. 1915(g)

1915(g)

Pub. L. No. 104-134, 110 Stat. 1321-71(1996)

1915(g).

28U.S.C. 1915A(a)

28 U.S.C. 1915(b) (1)
28 U.S.C. 1915(g).

1983

1915

1915(g)

Section 1915(g)

28 U.S.C. 1915(g)

§ 1915(b)(4)

28 U.S.C. 1915(g)

1915(g)

1915(g)

1915(g)'s

1915

Section 1915(g)'s

1915(g)

1915

1915(g)

1915

28 U.S.C. 1915(e)(2),

1983

Eighth Amendment

1915(g),

1915(g),

1915(g).

28 U.S.C. 1915(g).

1915(g)

STATEMENT OF THE CASE

Petitioner Arthur J. Lomax, aka Arthur James Lomax, is in the custody of the Colorado Department of Corrections and currently is incarcerated at the Limon Correctional Facility in Limon, Colorado. On February 8, 2018, Petitioner initiated this action by filing pro se a Prisoner Complaint and a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. 1915. Magistrate Judge Gordon P. Gallagher reviewed the filings, found the Complaint not submitted on a current Court-approved form, and directed Plaintiff to cure the deficiency, which Petitioner did on February 27, 2018.

On March 18, 2018, Magistrate Judge Gallagher granted Petitioner leave to proceed pursuant to 28 U.S.C. 1918. Also, on March 19, 2018, Magistrate Judge Gallagher directed Petitioner to amend the Complaint, which he did on April 20, 2018. Subsequently, on April 24, 2018, Magistrate Judge Gallagher entered an order that vacated the March 18, 2018 Order, because he had determined that Petitioner on three or more occasions had brought an action that was dismissed on grounds that it failed to state a claim. See ECF No. 13 at 1. The April 24, 2018 Order to Show Cause reads in part as follows:

The Order Granting Leave to Proceed Pursuant to 28 U.S.C. 1915(g) will be vacated and Plaintiff will be directed to show cause why he should not be denied leave to proceed pursuant to 28 U.S.C. 1915(g) for the following reasons.

It has been brought to the Court's (In the United States District Court for the District of Colorado) attention that Plaintiff, on three or more occasions, has brought an action that was dismissed on the grounds that it fails to state a claim. See Lomax v. Hoffman, et al., No. 13-cv-03296-LTB (D. Colo. Jan. 23, 2014) dismissed as barred by Heck); Lomax v. Hoffman, et al., No. 13-02131-LTB (D. Colo. Aug. 15, 2013) (dismissed as barred by Heck); Lomax v. Trani, et al., No. 13-cv-00707-WJM-KMT (dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Furthermore, in the April 24, 2018 Order, Pursuant to 1915(g) Petitioner shouldn't have been precluded from bringing the instant action in forma pauperis, because both cases Lomax v. Hoffman were dismissed without prejudice, therefore, should not count as strikes and in like manner Lomax v. Trani were also dismissed without prejudice. On March 23, 2017, Plaintiff responded to the Order to Show Cause from the United States District Court for the District of Colorado, and on July 6,2018, he also responded to the United States Court of Appeals for the 10th Circuit June 19, 2018 Order to Show Cause within thirty-days from the date of each court order. The U.S. District Court of Colorado erred when it denied Petitioner leave to proceed pursuant to 1915 on June 4, 2018 because he wasn't subject to filing restrictions under 1915(g) and he were indigent(sent proof in to the court of his six months history bank-statement) at the time he was directed to pay the $400 filing

fee in full within thirty days. Further, the Tenth Circuit erred when it affirmed the Court's finding that Petitioner has accumulated three strikes prior to commencing this action. See Lomax v. Ortiz-Marquez, et al., No. 18-1250 (10th Cir. Nov. 8, 2018. And also the Court erred in dismissing this action because he couldn't pay the $400 filing fee in full, within thirty-days. In addition, the Court also certifies pursuant to 28 U.S.C. 1915(a) (3) that any appeal from this Order is not taken in good faith, and, therefore, in forma pauperis status will be denied for the purpose of appeal. See Coppedge v. United States, 369 U.S. 438 (1962). If Petitioner files a notice of appeal he must pay the full $500 appellate filing fee or file a motion to proceed in forma pauperis in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. Accordingly, it is

ORDERED that the Complaint and action are dismissed "without prejudice" pursuant to Fed. R. Civ. P. 41(b) because Plaintiff failed to pay the filing fee in full within the time allowed. It is

FURTHER ORDERED that leave to proceed in forma paupers on appeal is denied.

DATED at Denver, Colorado, this 13th day of November, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge

REASONS FOR GRANTING THE PETITION

See, Rules of the Supreme Court of the United States.

PART III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter or right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In regard to both of these cases the nature of them were habeas corpus claims raised on an incorrect 42 U.S.C. 1983 form, which were not civil action. See Lomax v. Hoffman, et al. No. 13-cv-03296-LTB (D. Colo. Jan.23, 2014) (dismissed as barred by Heck); Lomax v. Hoffman, et al. , No. 13-02131-LTB (D. Colo. Aug. 15, 2013) (dismissed as barred by Heck): The District Court in it's Order stated, " that the Prisoner Complaint and action are dismissed without prejudice because the habeas corpus claims may not be raised in this action pursuant to 42 U.S.C. 1983 and the claims for damages barred by the rule in Heck.

FURTHER ORDERED that leave to proceed in forma pauperis on appeal is denied without prejudice to the filling of the motion seeking leave to proceed in Forma pauperis is on appeal in the United States Court of Appeals for the Tenth Circuit, Dated at Denver, Colorado, this 15th day of August, 2013. BY THE COURT: /s/ Lewis T. Babcock/ LEWIS T. BABCOCK, Senior Judge, United States District Court.

In the third case Lomax v. Trani, et al., No. 13-cv-00707-WJM-KMT(dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6):

The Court stated, " It is apparent that Mr. Lomax's claims in the Prisoner Complaint implicate the validity of his criminal conviction and sentence. It

also is apparent that Mr. Lomax has not invalidated the criminal conviction sentence he is challenging in this action. There, the Court finds that Mr. Lomax's claims for damages are barred by the rule in Heck and must be dismissed. The dismissal will be without prejudice. See Fottler v. United States, 73 F.3d 1064, 1065 (10th Cir. 1969). The action will be dismissed without further notice. Dated March 20, 2013, at Denver, Colorado. BY THE COURT: /s/ Boyd N. Boland, United States Magistrate Judge.

Without prejudice. A judicial act without effect a final determination or res judicata. United States ex rel. Almeida v. Baldi (CA3 Pa) 195 F2d 815, 33 ALR2d 1407; Ogens v. Northern Industrial Chemical Co. 304 Mass 401, 24 NE2d 1, 126 ALR 280. The term imports that no right or remedy of the parties is affected. The use of the phrase simply shows that there has been no decision of the case upon the merits, and prevents the defendant from setting up the defense of res adjudicate. Olson v. Coalfield School Dist. 54 ND 657, 661, 210 NW 180, 181.

Dismissal without prejudice. A voluntary dismissal of an action or proceeding without an adjudication of the cause that would prevent the bringing of a new action upon the same cause. 24 Am J2d Dism subsection 6 et seq. An order of dismissal of an action reciting that it is without prejudice, the effect of which is to prevent the dismissal from operating as a

bar to any new suit which the plaintiff might thereafter desire to bring on the same cause of action. W. T. Raleigh Co. v. Barnes, 143 Miss 597, 600, 109 So 8.

With prejudice. The effect of a final adjudication as res judicata. Dismissal with prejudice. An order of dismissal granted on motion of the defendant made without reservation as to prejudice. 24 Am J2d Dism Subsection 53 et seq. An adjudication on the merits of the case, a final disposition of the controversy which bars the right to bring or maintain an action on the same claim or cause of action. Roden v. Roden, 29 Ariz 549, 243 P 413; Pulley v. Chicago, R. I. & P. Ry. Co. 122 Kan 269, 251 P 1100.

Dismissal of appeal. The refusal by the appellate court to examine the merits of the cause-that is, a dismissal on a ground not involving the merits of the cause. 5 Am J2d A & E subsection 905.

A Dismissal Without Prejudice for Failure to State a Claim Do Not Count as a Strike Under 28 U.S.C.S.1915(g)

Each dismissal for failure to state a claim which the U.S. District Court for the District of Colorado and/or the U.S. Court of Appeals for the Tenth Circuit cited above, does not qualify as a "strike" under 28 U.S.C. 1915(g), because the Petitioner/Mr. Lomax's three cases were dismissed "**without prejudice"** for failure to state a claim. As a result, Mr. Lomax/Petitioner is not a three-striker and the court should have granted him leave to proceed

in forma pauperis (IFP) in his current case or action(D.C.No. 1:18-CV-00321-GPG-LTB and/or No. 18-1250, D. Colorado), and without the requirement of him paying the $400 filing fee in full.

While incarcerated, the prisoner filed six non-habeas actions that were dismissed for failure to state a claim upon which relief might be granted. Four of the six actions were dismissed without prejudice. The court (Fourth Circuit) held that a dismissal without prejudice for failure to state a claim did not count as a strike under 28 U.S.C.S. 1915(g) of the Prison Litigation Reform Act of 1996. The type of prior dismissal for failure to state a claim contemplated by 1915(g) was one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations. Thus, the prisoner had only two strikes under 1915(g). As a result, the prisoner was permitted to proceed on appeal without the prepayment of filing fees because he had fewer than three prior dismissals that counted as strikes under 1915(g). See Mclean v. United States, 566 F.3d 391.

The Prison Litigation Reform Act of 1996(PLRA or Act), Pub. L. No. 104-134, 110 Stat. 1321-71(1996), limits the ability of prisoners to file civil actions without prepayment of filing fees. When a prisoner has previously filed at least three actions or appeals that were dismissed on the grounds [**2] that they were frivolous, malicious, or failed to state a claim upon which relief mwy be granted, the Act's "three strikes" provision requires that the prisoner demonstrate imminent danger of serious **[*394]** physical injury in order to proceed without prepayment of fees. 28 U.S.C. 1915(g). The main issue before this Court today is whether a dismissal without prejudice for failure to state a claim counts as a strike under 1915(g). Mr. Lomax's

argument " a dismissal without prejudice for failure to state a claim does not count as a strike" under 1915(g). For example in this similar case. Four of the six previous actions filed by Quentin McLean, the plaintiff-appellant in this case, were dismissed without prejudice for failure to state a claim. As a result, McLean is not a three-striker, and he was allowed to proceed in his appeal without the prepayment of filing fees.

The district court that screened Mr. Lomax's present complaint erred when it concluded that all three dismissals (without prejudice) qualified as strikes for purposes of 1915(g).

HN2 The PLRA requires [**3] a district court to engage in a preliminary screening of any complaint in which a prisoner seeks redress from a governmental entity or an officer or employee of a governmental entity. 28U.S.C. 1915A(a). The court must identify 'cognizable claims or dismiss the complaint, or any portion [thereof, that] is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. 1915(b) (1). **HN3** The "three strikes" provision of the **PLRA,** 1915(g), denies in forma pauperis (IFP) status to any prisoner who: 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 may be granted, unless the prisoner is under imminent danger of serious physical injury. 28 U.S.C. 1915(g).

A review of Mclean's [**6] litigation history reveals that while incarcerated in Virginia, he had filed six non-habeas actions that were dismissed on grounds that might qualify them as strikes under 1915(g). Specifically, all six actions were dismissed for failure to state a claim upon which relief can be

granted. Four were dismissed without prejudice and the remaining two were simply dismissed, with one order noting that the dismissal counted as a strike for PLRA purposes.1↓.

The U.S. Court of Appeals for the Tenth Circuit stated, "i[n] this circuit, it is immaterial to the strikes analysis [whether] the dismissal was without prejudice," as opposed to with prejudice.See(ORDER AND JUDMENT, dated November 8, 2018, page 5.)

The court should have reached the merits of his present 1983 complaint and/or appeal being he was eligible to proceed without prepayment of fees under 1915 (the IFP statute). To resolve the eligibility issue, the court must determine whether Mr. Lomax has fewer than three prior dismissals that counts as strikes or, if not, whether he is in imminent danger of serious physical injury. [**8] The determination of whether Mr. Lomax is a three-striker under 1915(g) turns on whether a dismissal without prejudice for failure to state a claim counts as a strike. The court should have concluded for the following reasons that such a dismissal is not a strike.

Section 1915(g) includes in its list of strikes an action or appeal "that was dismissed on the grounds that it... fails to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). In interpreting this provision, the court must first determine whether its language "has a plain and unambiguous meaning with regard to the particular dispute in the case."

Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 808

1↑. Even so, § 1915(b)(4) provides that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."

(1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Id. At 341. "Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent." Id. At 340 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)).

The court task here is to determine whether Congress intended an action or appeal "that was dismissed on the grounds that [**9] it... fails to state a claim upon which relief may be granted" to count as a strike under 28 U.S.C. 1915(g) if that dismissal was specifically designated to be "without prejudice." The language "fails to state a claim upon which relief may be granted" in 1915(g) closely tracks the language of Federal Rule of Civil Procedure 12(b)(6). Compare Fed. R. Civ. P. 12(b)(6) (listing "failure to state a claim upon which relief can be granted" as grounds for dismissal). When Congress directly incorporates language with an established legal meaning into a statute, we may infer that Congress intended the language to take on its established meaning. United States v. Langley, 62 F.3d 602, 605 (4th Cir. 19950) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute."); see also Miles v. Apex Marine Corp., 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

When the word "dismissed" is coupled with the words "[for] fail[ure] to state a claim upon which relief may be granted," the complete phrase has a well-

established [**10] legal meaning. Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with prejudice. See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3, 101 S.Ct. 2424, 69 L. Ed. 2d 103 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits."); Carter v. Norfolk Cmty. Hosp. Ass'n, 761 F.2d 970, 974 (4th Cir. 1985) ("A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice."); U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 241 (1st Cir. 2004) ("[I]n the absence of a clear statement to the contrary, a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is presumed to be with prejudice.").

It follows that the type of prior dismissal for failure to state a claim contemplated by 1915(g) is one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations. In contrast, a dismissal without prejudice for failure to state a claim is not an adjudication on the merits, Mann v. Haigh, 120 F.3d 34, 36 (4th Cir. 1997); [**11] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990), and "permits a plaintiff to refile the complaint as though it had never been filed," Mendez v. Elliot, 45 F.3d 75, 78 [*397] (4th Cir. 1995). Consequently, a dismissal without prejudice for failure to state a claim does not fall within the plain and unambiguous meaning of 1915(g)'s unqualified phrase "dismissed... [for] fail[ure] to state a claim." As a result, a dismissal without prejudice for failure to state a claim does not count as a strike. Although our conclusion as to the unambiguous meaning of an unqualified dismissal for failure to state a claim in the context of 1915 is sufficient to end our inquiry. The government's and the dissent's

assertions that the legislative purpose of the PLRA supports a contrary interpretation. The impetus behind the enactment of the PLRA was a concern about the "endless flood of frivolous litigation" brought by inmates. 141 Cong. Rec. S14,418 (1995) (statement of Sen. Hatch). The Act's proponents expressed dismay because these frivolous suits were "draining precious judicial resources." 141 Cong. Rec. S7526 (1995) (statement of Sen. Kyl); see also 141 Cong. Rec. S14,418 (1995) [**12] (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for courts to consider meritorious claims.").

The purpose of the PLRA was not, however, to impose indiscriminate restrictions on prisoners' access to the federal courts. Senator Kyl emphasized that the Act would "free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. S7526 (1995) (statement of Sen. Kyl); see also 141 Cong. Rec. S14,627 (1995) (statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised.") As other courts have concluded, "[t]here is no doubt that the provisions of the PLRA...were meant to curb the substantively meritless prisoner claims that have swamped the federal courts." Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000) (emphasis in original).

Because a dismissal without prejudice for failure to state a claim is not an adjudication on the merits, treating such a dismissal as a strike would undermine Congress's intent. A potentially meritorious but inartfully pleaded claim by a prisoner that is dismissed without prejudice for failure [**13] to state a claim is wholly distinct from a claim that is dismissed as frivolous, malicious, or substantively meritless. The former claim might be revived by

competent pleading, but the latter cannot. As the Second Circuit explained: Section 1915(g)'s mandate that prisoners may not qualify for IFP status if their suits have thrice been dismissed on the ground that they were 'frivolous, malicious, or fail[ed] to state a claim' was intended to apply to nonmeritorious suits dismissed with prejudice, not suits dismissed without prejudice for failure to comply with a procedural prerequisite. Snider v. Melindez, 199 F.3d 108, 111 (2d Cir. 1999) (alteration in original). To treat as equivalent nonmeritorious suits dismissed with prejudice and those dismissed without prejudice for failure to state a claim by counting both as strikes would cut against the clearly expressed goal of Congress.

The dissent nevertheless contends that it is "evident" that the "legislative purpose underlying 1915(g)" does not support our (4th Circuit Court) construction of the statute. Post at n.8. The cases cited by the dissent, however, do not demonstrate that Congress intended 1915(g)'s strike designation to reach potentially meritorious [**14] claims.

[*398] The dissent is of course correct in noting that, at the broadest level, "the PLRA's 'focus is to limit litigation brought by prisoners," post at 19 (quoting Montcalm Publ. Corp. v. Virginia, 199 F.3d 168, 171 (4th Cir. 1999)). A broadly conceived purpose does not imply, however, that Congress intended to use a meat-axe approach to achieve the purpose. The Supreme Court's opinion in Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed.2d 798 (2007), cited frequently by the dissent, fully supports our understanding of the goal of the PLRA. As the dissent itself explains, using the language of Jones, "[a]lthough our legal system 'remains committed to guaranteeing that prisoner claims...are fairly handled according to law,' the 'challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and

effectively preclude consideration of the allegations with merit." Post at 18 (quoting Jones, 549 U.S. at 203) (emphasis added). A dismissal without prejudice for failure to state a claim is not an adjudication on the merits of the claim. Mann v. Haigh, 120 F.3d at 36. Consequently, a suit dismissed without prejudice for failure to state a claim cannot properly be characterized as ultimately nonmeritorious; [**15] that determination has simply not been made.

The government (in the past) also cites one circuit court opinion, Day v. Maynard, 200 F.3d 665 (10th Cir. 1999), which held that a dismissal without prejudice is a strike under the PLRA. Day is a Tenth Circuit per curiam opinion that offers no analysis to support its holding; it only states that "a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim." 200 F.3d at 667. Day relies on opinions from two other circuits as authority, Rivera v. Allin,144 F.3d 719 (11th Cir. 1998); and Patton v. Jefferson Correctional Center, 136 F.3d 458 (5th Cir. 1998). Nether Rivera nor Patton, however, informs the 4th Circuit decision today because neither case involved a dismissal without prejudice for failure to state a claim. The dismissal without prejudice analyzed in Rivera and Patton were dismissal for frivolousness, abuse of the judicial process, and failure to exhaust administrativeremedies. The Rivera and Patton courts had no occasion to examine the implications of their holdings on the type of dismissal at issue in this case, a dismissal for failure to state a claim.

- Finally, (in the past) the dissent relies on a more recent case from the Ninth Circuit, O'Neal v. Price, 531 F.3d 1146 (9th Cir. 2008). There, a divided panel concluded that a denial of an application to proceed IFP constituted "bringing" an action for purposes of 1915(g). the court also

> held that any 1915 dismissal, however styled and regardless of whether it was rendered with leave to refile, counts as a strike. After noting that 1915(g) "does not distinguish between dismissals with and without prejudice," the court said that it "decline[d] to read into the statute an additional requirement not enacted by Congress." 531 F.3d at 1154, 1155. (The Fourth Circuit expressed), Our holding today, however, does not read an additional requirement into the statute that was not already implied by Congress' use of the familiar phrase "dismissed...[for] fail[ure] to state a claim.' 2↓

An unqualified dismissal for failure to state a claim is presumed to operate with prejudice; the addition of the words 'with prejudice" **[*399]** to modify such a dismissal is simply not necessary.

Our(Fourth Circuit)holding that a dismissal without prejudice for failure to state a claim is not a strike does not, we recognize, resolve whether a dismissal for frivolousness rendered without prejudice would count as a strike. However, nothing in our analysis of dismissal for failure to state a claim suggests that dismissals for frivolousness should be exempted from 1915(g)'s strike designation, even when the dismissal is rendered without prejudice.

Indeed, the Supreme Court's detailed comparison in Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. ed. 2d 338 (1989), of dismissals for failure to state a claim under Rule 12(b)(6) and dismissal for frivolousness under 1915 (the IFP statute) makes clear that meaningful differences exist between these two types of dismissal. In Neitzke the Court considered whether an IFP complaint that fails to state a claim under Rule 12(b)(6) is

---

2↑. For the same reason, our holding does not, as the dissent suggests, see post at 27, read any words into the statute that are not already implied by well-established legal [**17] meaning. *See* part II.A, *supra*

automatically frivolous within the meaning of the IFP statute. Id. At 320. In concluding that the two categories were distinct, the Court explained that a complaint is frivolous only "where it lacks an arguable basis either in law or in fact." Id. at 325. The Court also noted that the IFP statute's sua sponte dismissal [**18] provision, now 28 U.S.C. 1915(e)(2), is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bring vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.

Id. At 327. Examples of frivolous claims include those whose factual allegations are "so nutty", "delusional," or "wholly fanciful" as to be simply "unbelievable." Gladney v. Pendleton Corr. Facility, 302 F.3d 773, 774 (7th Cir. 2002); Denton v. Hernandez, 504 U.S. 25, 29, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992).

In contrast, "Rule 12(b)(6) authorizes a court to dis miss a claim on the basis of a dispositive issue of law." Neitzke, 490 U.S. at 326. "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless [** 19] discovery and factfinding." *Id.*at 326-27. Although the Supreme Court has subsequently made clear that the factual allegations in a complaint must make entitlement to relief plausible and not merely possible, see Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-63, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007),

"[w]hat Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations," Neitzke, 490 U.S. at 327; see also Twombly, 550 U.S. at 556. "District court judges looking to dismiss claims on such grounds must look elsewhere for legal support." Neitzke, 490 U.S. at 327. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is very remote and unlikely." Twombly, 550 U.S. at 556 (internal quotations omitted). *Neitzke* makes clear that a dismissal for frivolousness is of a qualitatively different character than a dismissal for failure to state a claim. As a result, our (Fourth Circuit) decision today is fully consistent with Congress' dual goals [**20] of reducing prisoner litigation and, at the same time, preserving meaningful access to the courts for prisoners with potentially meritorious claims. In expressing its concerns to the contrary, the dissent, post at 28-30, posits a situation in a district court is confronted with a prisoner's complaint that "wholly lack[s] merit" and dismisses the complaint without prejudice for failure to state a claim. The dismissal is appealed, and this court entertains the appeal pursuant to Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064 (4th Cir. 1993), and affirms the dismissal. The dissent contends that failure to count the district court's dismissal as a strike would undermine the goals of the PLRA. To illustrate its argument the dissent invokes De'lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003).

De'lonta, however, does not substantiate the dissent's concerns. In *De'lonta* a prisoner brought a 1983 claim alleging denial of adequate medical treatment in violation of the Eighth Amendment. Although the district court was "unable to conceive of any set of facts under which the Eighth Amendment would entitle" the plaintiff to relief, it nevertheless dismissed the

complaint [**21] without prejudice to avoid "complicating any future actions with issues of collateral estoppel or claim preclusion." 330 F.3d at 633.

De'lonta does not help the dissent for two reasons. First, upon review, our (Fourth Circurit) court actually reversed the district court's Rule 12(b)(6) dismissal and remanded the case for further proceedings. Thus, *De'lonta* is hardly an illustration of a complaint that "wholly lack[s] merit," the type of complaint the PLRA sought to address. Second, because we reversed the district court's dismissal, we had no cause to address the appropriateness of the district court's decision to dismiss *De'lonta's* suit "without prejudice." To the extent, however, that a district court is truly unable to conceive of any set of facts under which a plaintiff would be entitled to relief, the district would err in designating this dismissal to be without prejudice. Courts, including this one, have held that **HN8** when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend. See Cozzarelli v. Inspire Pharms. Inc.,549 F.3d 618, 630 (4th Cir. 2008) (affirming dismissal with prejudice where amendment would have been futile); [**22] see also, *e.g.,* Gadda v. State Bar of Cal., 511 F.3d 933, 939 (9th Cir. 2007) ("Because allowing amendment would be futile, we hold that the district court properly dismissed [plaintiff's] claims with prejudice and without leave to amend.").

Rather than compelling and overbroad interpretation of the term "dismiss" when used in the context of failure to state a claim under 1915(g), we suggest *De'lonta* intead counsels that courts remain mindful of the distinction between an unqualified dismissal for failure to state a claim and a dismissal without prejudice. **HN9** While a potentially meritorious claim, particularly by a pro se litigant, should not be unqualifiedly dismissed for

failure to state a claim unless its deficiencies are truly incurable, see Bolding v. Holshouser, 575 F.2d 461, 464-65 (4th Cir. 1978), such an **[*401]** unqualified dismissal is entirely proper when the court has reviewed the claim and found it to be substantively meritless. Once a court has determined that the complaint is truly unamendable, a dismissal without prejudice is of little benefit to the litigant, as the claim cannot be made viable through reformulation. Similarly, dismissal of such a complaint without prejudice works [**23] to defeat the PLRA's goal of reducing substantively meritless prisoner lawsuits because it allows the prisoner to file the same meritless claim again. When a district court is confronted with a complaint that fails not because of some technical deficiency but because its claims lack legal merit, this complaint is properly dismissed for failure to state claim – that is, finally and prejudicially disposed of. Rather than detracting from Congress' goal of reducing meritless prisoner litigation, today's decision will preserve the ability of district courts to meaningfully distinguish between poorly pled but potentially meritorious claims and those that simply lack merit. Any prisoner whose complaint falls in the latter category will be penalized with a strike as the PLRA intended.

McLean has had six prior civil actions dismissed. Because four of those dismissal were without prejudice for failure to state a claim, he has accrued only two strikes under 1915(g).

Accordingly, the clerk's order allowing him to proceed in this appeal without full prepayment of fees will be allowed to stand. Because McLean is not a "three striker," it is not necessary for us to consider his claim that he [**24] is under imminent danger of serious physical injury.

In sum, we (Fourth Circuit) hold that **HN13** the dismissal of a prisoner's

complaint without prejudice for failure to state a claim does not count as a strike under 28 U.S.C. 1915(g). This holding means that McLean does not have three strikes under 1915(g) and that he can proceed in this appeal without the prepayment of filing fees.

Under the circumstances the United States District Court and/or the United States Court of Appeals for the Tenth Circuit erred in their order and judgment and, prejudiced and defaulted Mr. Lomax and/or the Petitioner in their order, judgment, and decision. And therefore, deprived the petitioner of his rights and liberty interest. The right to protection from violation of any of the fundamental conceptions of justice which lie at the base of our civil and political institutions. 16 Am J2d Const L subsection 358.

Please see exhibits and/or supporting legal documents attachments.

Respectfully submitted on February 5, 2019.

Arthur J. Lomax

Arthur J. Lomax #134416

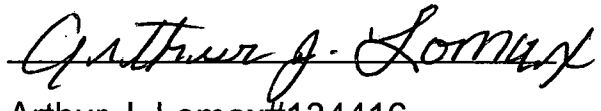
CERTIFICATE OF SERVICE

I, Arthur J. Lomax, certify that on February 5, 2019(date) the original was mailed to the Court for filing; and, a true and accurate copy of the Writ of Certiorari(title of the document) was served on the other party by placing it in the United States mail, postage pre-paid, and addressed to the following:

To: The Attorney General

1300 Broadway, 10th Floor

Denver, Colorado 80826



Arthur J. Lomax#134416

Limon Correctional Facility

P.O. Box 10000

Limon, Colorado 80829

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: February 5, 2019