CASE NO. 17-6064

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MARCUS D. WOODSON

Plaintiff/Appellant,

v.

TRACY MCCOLLUM

Defendants/Appellees.

DEFENDANTS/APPELLEES' RESPONSE BRIEF

ORAL ARGUMENT NOT REQUESTED

Stefanie E. Lawson
Assistant Attorney General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921 Facsimile: (405) 521-4518
Stefanie.Lawson@oag.ok.gov
Attorneys for Defendants/Appellees

July 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCUS D. WOODSON,
Plaintiff-Appellant

v.

TRACY McCOLLUM, in his individual capacity, *et al*.,
Defendant-Appellee

CASE NO: 17-6064

APPELLEES' RESPONSE BRIEF

Defendants/Appellees Joe Allbaugh, Carl Bear, Lawrence Bell, Bruce Bornheim, Jason Bryant, Tabitha Callins, Sherry DeCamp, Darren Gibson, Brenda Goodson, Dennis Hendrix, Kerry Kendall, Bruce Kietel, Tracy McCollum, Linda Monk, Jenetta Orr, Shelia Phillips, Sam Preston, Mike Rogers, Barbie Roundsville, David Tate, Kristin Tims, Jeffrey Troutt, William Weldon and Greg Williams respectfully submit this Brief in answer to the Brief of Plaintiff/Appellant Marcus Woodson.

PRIOR OR RELATED APPEALS

Pursuant to 10th Cir. R. 28.2.(C)(1), Appellees have searched PACER and is not aware of any prior unrelated appeals arising out of a related case.

STATEMENT OF JURISDICTION

This appeal arises from a District Court order dismissing a properly removed action originally brought in Oklahoma County District Court by Plaintiff/Appellant

Marcus Woodson pursuant to 42 U.S.C. §§1981, 1983, 1985 and 1986 based on alleged constitutional violations alleged against more than two dozen defendants. The Tenth Circuit has jurisdiction over appeals from the final decisions of the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED BY DISMISSING WOODSON'S CLAIMS PURSUANT TO 28 U.S.C. §1915(g)

STATEMENT OF THE CASE

On December 16, 2016, Plaintiff/Appellant Marcus Woodson ("Woodson") filed this action in the District Court of Oklahoma County and was granted *in forma pauperis* status in that court. Defendants properly removed to the Western District of Oklahoma on January 31, 2017. The action was referred to a Magistrate Judge for the initial proceedings. The Magistrate issued a Report and Recommendation on February 6, 2017 recommending the action be dismissed pursuant to 28 U.S.C. §1915(g) because Woodson had filed at least three prior actions that had been dismissed as frivolous, malicious or had failed to state a claim and therefore Woodson was subject to the filing restrictions applicable under that section of the Prison Litigation Reform Act ("PLRA") 42 U.S.C §1997e(a). Woodson timely objected. The lower court reviewed the recommendation *de novo* and determined

that dismissal was proper under §1915(g). This appeal followed.

STATEMENT OF THE FACTS

Marcus Woodson is incarcerated in the custody of the Oklahoma Department of Corrections. Woodson has been subject to the filing restriction imposed by the PLRA at 28 U.S.C. §1915(g) since at least December 2011. Aplt. App. 17 February 6, 2017, *Report & Recommendation*. Woodson filed this action in December 2016 in Oklahoma state court seeking relief for alleged violation of federal constitutional and statutory rights. *Id.* at 21. Woodson was granted *in forma pauperis* status in state court. *Id.* at 13. Defendants properly removed the action to the Western District of Oklahoma. Appx. 8-10. The case was then referred to a Magistrate Judge. *Id.* at 4. The Magistrate issued a Report and Recommendation on February 6, 2017 recommending dismissal pursuant to §1915(g). *Id.* at 15-20. Woodson timely objected. *Id.* at 5. The court below considered Woodson's objection and reviewed the Report and Recommendation *de novo*. The court adopted the Report and Recommendation in its entirety and dismissed the action pursuant to §1915(g). *Id.* at 25.

SUMMARY OF THE ARGUMENT

The District Court did not err in its order dismissing Woodson's Complaint pursuant to 28 U.S.C. §1915(g). The lower court correctly determined that

Woodson, as an inmate having previously had three or more actions dismissed as frivolous, malicious or for failure to state a claim, was subject to the filing restrictions imposed by the PLRA in §1915(g)[1]. As a "three-striker" subject to the PLRA, Plaintiff was required to prepay the filing fee or meet the imminent danger exception to proceed in federal court. Because Defendants paid the filing fee upon removal, the option to prepay was unavailable. Woodson therefore had to show that he was "under imminent danger of serious physical injury" to continue his claims. Because Woodson's Complaint does not allege that he was in fear of imminent serious bodily injury at the time he filed, he could not meet the exception[2]. The court below properly dismissed his claims.

Standard of Review

A district court's determination that 28 U.S.C. §1915(g) applies is reviewed *de novo*. *Smith v. Veteran's Admin*., 636 F.3d 1306, 1309 (10th Cir. 2011)("We review *de novo* the district court's determination that Mr. Smith had three strikes under §1915(g)")(citations omitted). Interpretation and application of the Prison

[1] Woodson had requested and been granted *in forma pauperis* status in state court. Woodson was ordered to pay a partial filing fee by the state court. Aplt. App 13-14.

[2] In fact, the nature of Woodson's claims appear to be due process claims related to a transfer, classification decisions, and misconduct reports, and a deliberate indifference claim based on medication decisions, making even the inference of imminent serious physical harm difficult to perceive. Aplt. App 15-16.

Litigation Reform Act and 28 U.S.C. §1915(g) are also reviewed *de novo*. *See Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005), *Chavis v. Chappius*, 618 F.3d 162, 167 (2nd Cir 2010), *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003), and *Dupree v. Palmer*, 284 F.3d 1234, 1235 (11th Cir. 2002)(per curium).

PROPOSITION I: THE DISTRICT COURT PROPERLY APPLIED 28 U.S.C. §1915(g) TO WOODSON'S COMPLAINT, DISMISSING BECAUSE HE COULD NOT PAY THE FILING FEE AND DID NOT MEET THE IMMINENT DANGER EXCEPTION

The District Court properly dismissed Woodson's action because Woodson has accumulated "three strikes", did not pay the filing fee and did not meet the imminent danger exception in 28 U.S.C. §1915(g). Congress enacted the Prison Litigation Reform Act, 42 U.S.C. §1997e(a), in 1996 to help deal with the large number of prisoner actions in federal court. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). As part of the PLRA, Congress included 28 U.S.C. §1915(g) which places restrictions on prisoners who have:

> 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.

The lower court correctly determined that Woodson is subject to §1915(g) filing restrictions. *See Woodson v. Barlow*, No. CIV 11-1349-D (W.D. Okla. 2011).

Because there is no Tenth Circuit opinion directly on point, the court below looked to other circuits and district courts within this Circuit to determine whether §1915(g)'s filing restrictions should apply in the instant case [3]. Aplt. App. 23. Courts have generally interpreted §1915(g) as requiring prisoners subject to its restrictions to *either* prepay the filing fee *or* meet the imminent danger exception. *See Lizenby v. Lear*, 674 F.3d 259, 263 (4th Cir. 2012)(emphasis added).

The lower court looked to *Evans v. Bristol-Myers Squibb Co.*, No. 16-1039 (2016 WL 318442)(D. Kan. June 8, 2016), a district court order within this Circuit, which synthesized the relevant law from outside the Tenth Circuit. The situation in *Evans* is nearly identical to the case at bar. Evans was aware that he had accumulated three strikes under the PLRA and therefore filed federal claims in state court seeking *in forma pauperis* status. *Id*. at p. 1. Defendants properly removed to federal court. The court was then left to decide if Evans should be able to proceed. The court determined that federal law applied, including §1915(g), meaning that Evans "must prove his right to litigate" in federal court. *Id*. at 3. Because §1915(g) applied to Evans, he had to either prepay the filing fee or meet the

[3] *See Lizenby v. Lear*, 674 F.3d 259 (4th Cir. 2012)(reversing remand to state court and declining to decide if §1915(g) would apply); *Lloyd v. Benton*, 686 F.3d 1225 (11th Cir. 2012)(reversing remand to state court finding §1915(g) did not deprive the court of jurisdiction but declining to decide whether §1915(g) should be enforced in Lloyd's action).

exception. *Id*. The fee had been paid by Defendants, so the only avenue available to Evans to continue was under the imminent danger exception. Evans could not meet the exception and the court dismissed his claims.

Woodson was aware of his three strike status as of at least December 2011. As recently as May 15, 2015 Woodson's request to proceed in federal court had been denied under the three strikes provision. *See Woodson v. Corrections Corporation of America*, No. CIV-15-422-D (W.D. Okla.)(Order May 15, 2015)(attached). Woodson originally filed this action in state court and was granted *in forma pauperis* status in that venue. It was reasonable for the court below to assume that he filed in state court to avoid the restriction of §1915(g). As an indigent prisoner who would otherwise qualify for *in forma pauperis* status but is subject to the three strikes provision, Woodson should have prepaid the filing fee or shown imminent harm. Defendants properly removed from state court and paid the filing fee, thereby making prepayment of fees unavailable to Woodson. Woodson would have had to meet the exception, which the court found he could not do. Therefore, to properly apply Congress's intent when it enacted §1915(g)'s filing restrictions and to prevent an inmate from circumventing the three strikes provision, the lower court dismissed the action.

Contrary to Woodson's argument on appeal, he was not ordered to pay an additional filing fee. The court below determined that prepayment of the fee was unavailable because Defendants paid the fee on removal. Aplt. App. 24. Therefore, to continue his action in federal court and subject to federal law including §1915(g), Woodson had to meet the imminent danger exception. *Id*. The court below found "Plaintiff is a 'three strikes' litigant who has not paid the filing fee and who has not made specific credible allegations of imminent danger". *Id*. at 25. The lower court did not order Woodson to pay an additional filing fee (or any filing fee). Rather, the court found that because §1915(g) applied to Woodson and he could not pay the fee (because Defendants had paid the fee upon removal), Woodson was required to meet the exception. The application of §1915(g) to Woodson in this instance furthers Congress's purpose to incentivize prisoners to pursue only meritorious claims in federal courts, lest previous abuse prevent future claims. The result is the same as if Woodson had filed in federal court himself.

Woodson was indigent at the time he filed as evidence by the *in forma pauperis* application in state court. Appx. 13-14. He originally filed the action requesting *in forma pauperis* status, attesting that he could not pay the state's filing fee. Had he filed his action in federal court, it is plausible that he would not have been able to pay the federal court's filing fee, and thus would have been subject to

the imminent danger exception to proceed with this litigation. The District Court's interpretation prevents Woodson from circumventing §1915(g)'s filing restrictions while still allowing Defendants to exercise their right to removal. The District Court Order dismissing Woodson's claims pursuant to 28 U.S.C. §1915(g) should be upheld.

CONCLUSION

For the reasons stated above, the District Court's dismissal of Woodson's cause of action should be AFFIRMED.

NECESSITY OF ORAL ARGUMENT

Pursuant to Fed.R.App.P. 34(a) and 10th Cir. R. 34.1, Defendants/Appellees request that this case be submitted without oral argument because it would not materially assist the Court in its determination.

Respectfully submitted,

/s/Stefanie E. Lawson
STEFANIE E. LAWSON, OBA# 22422
Assistant Attorney General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, Oklahoma 73105
Telephone: 405.521.3921
Facsimile: 405.521.4518
Email: Stefanie.lawson@oag.ok.gov
Attorney for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 2082 words.

Complete one of the following:

■ I relied on my word processor to obtain the count and it is MS Word 10.

☐ I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Tenth Circuit Court of Appeals' General Order on Electronic Submission of Documents (March 18, 2009), I hereby certify that:

1. There are no required privacy redactions (Fed. R. App. P. 25(a)(5)) to be made to the attached ECF pleading; and

2. This ECF submission is an exact copy of the additional hard copies of Appellee's Response Brief; and

3. This ECF submission was scanned for viruses with Sophos Endpoint Security and Control, version 9.7, a commercial virus scanning program that is updated hourly, and, according to the program is free of viruses.

CERTIFICATE OF SERVICE

I certify that on this 12th day of July 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing; and transmitted the original and seven copies of the foregoing to the Clerk of the Court via U.S. Mail, postage prepaid and a copy to be served by U.S. Mail, postage prepaid on:

Amir H. Ali
RODERICK & SOLANGE MACARTHUR
JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
Email: amir.ali@macarthurjustice.org
Attorney for the Plaintiff-Appellant

/s/Stefanie E. Lawson
Stefanie E. Lawson

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

MARCUS D. WOODSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-11-1349-D
	)	
WILLIAM BARLOW, *et al*.,	)	
	)	
Defendants.	)	

O R D E R

This matter is before the Court for review of the Report and Recommendation issued by United States Magistrate Judge Gary M. Purcell on November 16, 2011 [Doc. No. 6]. Judge Purcell recommends that Plaintiff's motion to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 be denied, and that this action be dismissed without prejudice unless Plaintiff pays the full $350 filing fee within 20 days. This recommendation is based on findings that Plaintiff is subject to filing restrictions under the "three strikes" provision of § 1915(g). Plaintiff, who appears *pro se*, has filed a timely objection. Thus, the Court must make a *de novo* determination of portions of the Report to which a specific objection is made, and may accept, modify, or reject the recommended decision. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

Upon consideration of Plaintiff's *pro se* filing, which is liberally construed, the Court discerns the sole objection is a contention that Plaintiff has not accumulated three dismissals that qualify as "prior occasions" or strikes under § 1915(g).[1] Plaintiff does not dispute Judge Purcell's

[1] Plaintiff also requests permission to pay the filing fee in installments. However, payment of a filing fee in this manner is authorized only by 28 U.S.C. § 1915(b) and (c), and is not available when § 1915(g) applies.

findings that he has previously filed four cases under 42 U.S.C. § 1983 in this judicial district and the Northern District of Texas that were dismissed as frivolous or for failure to state a claim upon which relief may be granted. However, "Plaintiff asserts that he has never been assessed with 'three strikes.'" *See* Pl.'s Objection [Doc. No. 7] at 2. He also "disputes whether those dismissals were properly classified" and whether such classifications would be "invalid under Feathers v. McFaul, 274 Fed Appx 467, 479." *See id*.

Upon *de novo* consideration of court records, the Court finds that Judge Purcell is entirely correct. The two dismissals in this district identified by Judge Purcell each involved an assessment of a "strike." In dismissing *Woodson v. Garfield County Sheriff*, Case No. CIV-05-778-T (W.D. Okla. Aug. 23, 2005), Judge Thompson adopted Judge Purcell's finding that Plaintiff's amended pleading failed to state a claim for relief, and adopted a recommendation that the action should be dismissed under 28 U.S.C. § 1915A and § 1915(e)(2)(B). Judge Purcell expressly notified Plaintiff in that case "that a dismissal of this cause of action pursuant to 28 U.S.C. §1915A or §1915(e)(2)(B) constitutes one 'strike' pursuant to 28 U.S.C. §1915(g)." See *Woodson v. Garfield County Sheriff*, Case No. CIV-05-778-T, Rep. & Recom. at 8 (W.D. Okla. Aug. 11, 2005) (Purcell, M.J.). Similarly, Judge Thompson's order of dismissal in *Woodson v. Garfield County Sheriff's Dep't*, Case No. CIV-05-1204-T (W.D. Okla. Dec. 28, 2006), expressly stated that "this dismissal counts as a 'strike' or prior occasion in accordance with 28 U.S.C. § 1915(g)." Plaintiff did not appeal either dismissal. Upon the waiver of further review, each dismissal counts as a strike. *See Jennings v. Natrona Cnty. Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999); *see also Hafed v. Federal Bureau of Prisons*, 635 F.3d 1172, 1176-77 (10th Cir. 2011).

Further, the court of appeals has rejected Plaintiff's apparent position that the dismissals of his § 1983 cases in the Northern District of Texas should not be counted because no "strike" was

Attachment 1

assessed when the cases were dismissed. According to the Tenth Circuit, "[i]t is irrelevant under § 1915(g) whether the district court affirmatively stated in the order of dismissal that it was assessing a strike." *Smith v. Veterans Admin.*, 636 F.3d 1306, 1313 (10th Cir. 2011). A dismissal, even one 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.'" *Id*. (quoting *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir. 1999)). The judgment in *Woodson v. Casasanta*, Case No. 2:96-CV-0049 (N.D. Tex. Nov. 19, 1998), stated that Plaintiff's civil rights claims were dismissed as frivolous and for failure to state a claim for relief. Similarly, the judgment in *Woodson v. McLeod*, Case No. 2:96-CV-0098 (N.D. Tex. Dec. 8, 1998), stated that Plaintiff's civil rights complaint in that case was dismissed as frivolous. Like the dismissals in this Court, Plaintiff took no appeal in either case. Therefore, these dismissals also count as strikes.

Finally, Plaintiff's reliance on *Feathers v. McFaul*, 247 F. App'x 467 (6th Cir. 2008), is misplaced. The Sixth Circuit held in that case that a dismissal for failure to exhaust administrative remedies may, or may not, be a dismissal for failure to state a claim that would qualify to be counted under § 1915(g). This holding does not assist Plaintiff in this Court, which is bound by Tenth Circuit precedent. The Tenth Circuit recently held in *Strope v. Cummings*, 653 F.3d 1271, 1274 (10th Cir. 2011), that a case dismissed for failure to state a claim due to a prisoner's failure to plead exhaustion of remedies, as required by *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1209-10 (10th Cir. 2003), would count as a strike if the dismissal became final before *Steele* was subsequently overruled by *Jones v. Bock*, 549 U.S. 199, 212-13 (2007). Although Judge Thompson dismissed *Woodson v. Garfield County Sheriff's Dep't*, Case No. CIV-05-1204-T, for failure to state a claim based on Plaintiff's failure to plead exhaustion of administrative remedies, the dismissal occurred in 2006 and Plaintiff did not appeal. Thus, the dismissal counts as a strike under *Strope*.

Moreover, Plaintiff has accumulated three strikes even if the dismissal of Case No. CIV-05-1204-T is not counted.

Therefore, the Court finds that Judge Purcell correctly concludes that Plaintiff has at least three "prior occasions" or strikes, and is subject to the restriction of § 1915(g) with respect to any further § 1983 action that he seeks to file *in forma pauperis*. Accordingly, Plaintiff's motion to proceed *in forma pauperis* must be denied.

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 6] is ADOPTED. Plaintiff's motion to proceed *in forma pauperis* [Doc. No. 2] is DENIED. Plaintiff shall pay the filing fee for this action in the amount of $350.00 within 21 days from the date of this Order. Failure to make full payment by that date will result in the dismissal of this action without prejudice to refiling.

IT IS SO ORDERED this 21st day of December, 2011.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

Attachment 1

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

MARCUS D. WOODSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-15-422-D
	)	
CORRECTIONS CORP. OF AMERICA,	)	
	)	
Defendant.	)	

O R D E R

This matter is before the Court for review of the Report and Recommendation issued by United States Magistrate Judge Gary M. Purcell [Doc. No. 8] pursuant to 28 U.S.C. § 636(b)(1). Judge Purcell recommends that Plaintiff's Application for Leave to Proceed In Forma Pauperis be denied, and that this action be dismissed without prejudice unless Plaintiff pays the full $400 filing fee within 20 days. This recommendation is based on findings that Plaintiff is subject to filing restrictions under the "three strikes" provision of § 1915(g) and that his allegations are insufficient to satisfy the "imminent danger" exception provided by the statute.

Plaintiff, who appears *pro se*, has not filed a timely objection or requested additional time to object. Thus, the Court finds that Plaintiff has waived further review of the issues addressed by Judge Purcell in his Report. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *see also United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996).

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 6] is ADOPTED in its entirety. Plaintiff's Application for Leave to Proceed In Forma Pauperis [Doc. No. 2] is DENIED. Plaintiff shall pay the $400.00 filing fee for this action within 20 days from the

Attachment 2

date of this Order. Failure to make full payment to the Clerk of Court by that date, or to show cause for a failure to do so, will result in the dismissal of this action without prejudice to refiling.

IT IS SO ORDERED this 15th day of May, 2015.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

Attachment 2