23-1340

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

DARRELL WOODS,

Plaintiff-Appellant,

—v.—

WESLEY FLUHARTY; JOHN and JANE DOE 1; JOHN and JANE DOE 2; DARCIE BOLIN, CASEWORKER; MICHAEL VINSON, CORRECTIONAL OFFICER III; HOLLIE VANDERGRIFF, CASEWORKER; LORENE ARMSTONG, FUNCTIONAL UNIT MANAGER; CECILY REESE; CHANCE MARTINEZ; ASHLEY GOODMAN; UNKNOWN WOMACK; JESSE SITES; DAVID WORLEY; CHARLES REED; TIMOTHY SEABAUGH; JOHN and JANE DOE 3, ACTING ASSISTANT WARDEN; JOHN and JANE DOE 4, ACTING ASSISTANT WARDEN; CLIFTON COSSEY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC OR PANEL REHEARING

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INTRODUCTION AND RULE 35(B) STATEMENT

This appeal should be reheard because the panel—without the benefit of full briefing and without explanation—summarily affirmed an application of the Prison Litigation Reform Act (PLRA)'s "three-strikes" rule, 28 U.S.C. § 1915(g), that is inconsistent with the clear statutory text, this Court's precedents, and "the authoritative decisions of other United States Courts of Appeals." Fed. R. App. P. 35(b)(1)(B).

Under § 1915(g), a strike accrues only when a prisoner has "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." As this Court has held, that means that the *entire* action must be dismissed on one of those three enumerated grounds to count as a strike; an action dismissed either partially or entirely on another ground is not a strike. Accordingly, every Circuit to consider the issue has held that the dismissal of a lawsuit alleging both federal and state claims does not count as a strike when the court dismisses only the federal claims and declines to exercise supplemental jurisdiction over the state claims.

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The panel, however, summarily affirmed the district court's decision directly to the contrary. The district court denied Darrell Woods the opportunity to proceed *in forma pauperis* ("IFP"), and dismissed his civil rights lawsuit entirely under the three-strikes rule. But at least two of the three prior dismissals cited by the district court are not "strikes." One case was only partially dismissed for failure to state a claim—the court dismissed Mr. Woods's federal claims but declined to exercise jurisdiction over his state-law claims rather than dismissing them on an enumerated ground. And another was dismissed for failure to comply with certain procedural requirements, not because the lawsuit was frivolous, malicious, or failed to state a claim. Those are not strikes, yet the district court erroneously counted them as such. The panel then summarily affirmed without explanation.

Panel or en banc rehearing is warranted. The panel affirmed a reading of the PLRA that contravenes the statutory text and this Court's precedents, and also directly conflicts with other Circuit decisions. And it did so in a summary affirmance without briefing, despite Mr. Woods's request for a briefing schedule. The Court should therefore grant this petition, vacate its summary affirmance, reverse the denial of IFP status

and dismissal of the action, and remand for further proceedings. Alternatively, the Court should vacate its summary ruling and allow briefing on the important issues presented by this case.

STATEMENT OF THE CASE

The following facts are alleged in Mr. Woods's *pro se* complaint, which at this stage must be taken as true and liberally construed in Mr. Woods's favor. *See Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 849 (8th Cir. 2014).

A. Prison Officers Abuse Mr. Woods After He Complains About Being Denied Access to a Hearing

Since January 2021, Mr. Woods has been incarcerated in the "administrative segregation" ("ad-seg") unit of Southeast Correctional Center ("SECC") in Charleston, Missouri. Compl. at 19-20, *Woods v. Fluharty*, No. 1:22-cv-00175 (E.D. Mo. Dec. 29, 2022) ("*Fluharty*"), ECF No. 1. In February 2022, Mr. Woods was slated to be released from the unit, but officials failed to add Mr. Woods to the list of prisoners scheduled to appear at the February 8, 2022 ad-seg committee hearing, a necessary step to release. *Id.* at 9-10.

After Mr. Woods complained, prison officials retaliated against him. For months, prison guards repeatedly slammed the "window slider" of

Mr. Woods's cell at all hours, intentionally keeping Mr. Woods awake. *Id.* at 58. Prison guards also encouraged other prisoners, including Mr. Woods's cellmates, to attack him. *Id.* at 38. As a result of officers' provocations, Mr. Woods "accumulated 48 documented enemies" and was attacked by three different prisoners. *Id.* When Mr. Woods requested to be placed in protective custody and separated from threatening cellmates, prison officials refused. *Id.*

On one occasion in April 2022, an officer not only refused Mr. Woods's protective-custody request but also forced Mr. Woods into mechanical wrist restraints on a "restraint bench" and yelled in front of 70 other prisoners that "[Mr. Woods] is out here snitching y'all," effectively painting a bullseye on Mr. Woods's back. *Id.* at 36, 54.[1] Another officer then aggressively and painfully bent Mr. Woods's wrist while removing him from the bench. *Id.* at 54. After "forcefully pulling" Mr. Woods into a new cell, the officers confiscated Mr. Woods's property from the old cell. *Id.* at 55. This included Mr. Woods's clothing and

[1] Jacob Gershman, *Why Life for 'Snitches' has Never Been More Dangerous*, Wall St. J. (June 20, 2017), https://www.wsj.com/articles/criminals-subvert-online-court-records-to-expose-snitches-1497960000.

bedding, leaving him with just one pair of boxers, one pair of pants, one sheet, and one blanket. *Id.* Mr. Woods repeatedly requested replacement clothing and bedding for months, but his requests went unanswered until December 5, 2022. *Id.* at 56. Mr. Woods was thus forced to spend more than half a year in dirty and scant clothing that left him cold at night. *Id.*

SECC staff have also encouraged other prisoners to "flood [Mr. Woods's] cell with urine and feces." *Id.* at 17. This occurred multiple times per day for more than 35 days. *Id.* at 18. One officer even told Mr. Woods: "you can stay here and continue getting pissed on." *Id.* Guards have encouraged other prisoners to verbally harass Mr. Woods, offering one prisoner an extra lunch tray to do so. *Id.* at 17. On several occasions, officers have skipped Mr. Woods's turn for outdoor exercise and have refused him meals without any explanation. *Id.* at 57.

On top of this physical and verbal abuse, officers have repeatedly "free-cased" Mr. Woods—that is, they have issued him conduct violations based on false information. *Id.* at 12-14. Because of these sham violations, the ad-seg committee has refused to transfer Mr. Woods out of

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the unit, forcing him to remain in an environment where he faces a risk of serious bodily injury at every turn. *Id.* at 14.[2]

B. Mr. Woods's Lawsuit

On December 29, 2022, Mr. Woods sued 18 prison officials *pro se* in the United States District Court for the Eastern District of Missouri, asserting, *inter alia*, claims under 42 U.S.C. §§ 1983, 1985, and 1986 for violations of the First, Eighth, and Fourteenth Amendments, as well as claims under state law. *Id.* at 7. Among other things, he alleged that the officials had retaliated against him in violation of the First Amendment; and had used excessive force against him, failed to protect him from violence at the hands of other prisoners, and deprived him of clothing and bedding, all in violation of the Eighth Amendment. *Id.* Mr. Woods sought injunctive relief in the form of a transfer, as well as money damages. *Id.* at 61. Mr. Woods moved for leave to proceed IFP. *Fluharty*, ECF No. 2.

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[2] As a result of his extended stay in ad-seg, Mr. Woods's access to the prison's law library has also been hindered, causing him to miss court deadlines or file inadequate papers. *Id.* at 15, 21-22.

C. The District Court Dismisses the Case Under the Three-Strikes Rule

On February 3, 2023, the district court denied Mr. Woods's IFP motion and dismissed his lawsuit without prejudice. *Fluharty*, ECF No. 7. Without addressing the merits of Mr. Woods's claims, the district court concluded that the PLRA's "three strikes" rule barred Mr. Woods from proceeding IFP. *Id.* at 3-5. The district court identified three of Mr. Woods's prior cases that supposedly constituted "strikes":

- *Woods v. Doe*, No. 6:19-cv-3091 (W.D. Mo.);
- *Woods v. Boeckman*, No. 2:16-cv-4037 (W.D. Mo.)
- *Woods v. Todd*, No. 2:17-cv-4117 (W.D. Mo.)

Id. at 4 n.3.

The district court also observed that Mr. Woods has had other cases dismissed under the three-strikes rule. *Id.* at 4 (citing *Woods v. Fuwell*, No. 1:21-cv-103 (E.D. Mo.); *Woods v. Eckenrode*, No. 6:21-cv-3077 (W.D. Mo.); and *Woods v. Fulghum*, No. 6:20-cv-3391 (W.D. Mo.)). Finally, the district court concluded that the "imminent danger" exception to the three-strikes rule did not apply because Mr. Woods's complaint did not allege specific facts showing an imminent danger of serious physical injury. *Id.* at 4-5.

D. This Court Summarily Affirms

On February 10, 2023, Mr. Woods, still *pro se*, timely appealed the district court's decision to this Court. On March 10, 2023, undersigned counsel from the MacArthur Justice Center appeared on his behalf *pro bono*. Counsel then moved to set a briefing schedule, explaining that this appeal presents nonfrivolous questions regarding the scope of the PLRA's three-strikes rule. The next day, the clerk ordered that Mr. Woods's motion for a briefing schedule would be "taken with the case for consideration by the panel to which this case is submitted for disposition on the merits." Clerk Order (Mar. 30, 2023).

On April 24, 2023, this Court summarily affirmed the district court's judgment under Eighth Circuit Rule 47A(a). Judgment (Apr. 24, 2023). Other than stating that it "has reviewed the original file of the United States District Court," the panel provided no explanation for its decision. *Id.* It denied the motion to set a briefing schedule as moot. *Id.*

ARGUMENT

Rehearing is warranted because the panel, without explanation, summarily affirmed an application of the three-strikes rule that contravenes the PLRA's plain text, ignores precedents of this Court, and directly conflicts with other Circuit decisions. Under the PLRA's plain

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language, Mr. Woods has not accrued three strikes. At least two of the three cases cited by the district court (*Doe* and *Todd*) were dismissed, either partially or entirely, on grounds not enumerated in the statute.[3] Because Mr. Woods has not accrued any other strikes, and because the district court dismissed *solely* under the three-strikes rule, this Court should vacate its summary affirmance and reverse the dismissal of Mr. Woods's lawsuit.

Moreover, even assuming that Mr. Woods does have three strikes, the panel overlooked crucial facts in Mr. Woods's complaint that—assuming their truth and construing them in the light most favorable to him—demonstrate that he faced imminent danger when he filed the complaint, contrary to the district court's holding. This is another reason to grant rehearing.

I. MR. WOODS HAS NOT ACCRUED THREE STRIKES

This Court reviews the district court's application of the PLRA's three-strikes rule *de novo*. *Castillo-Alvarez v. Krukow*, 768 F.3d 1219, 1219 (8th Cir. 2014) (per curiam). Its interpretation of that rule "begins,

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[3] In this petition, Mr. Woods is not challenging the third strike cited by the district court (*Boeckman*) but he does not concede that it was, in fact, a strike.

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and pretty much ends, with the text of Section 1915(g)." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020).

Under that section's plain text, a strike accrues when a prisoner has "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." 28 U.S.C. § 1915(g). "A strike-call under Section 1915(g) thus hinges exclusively on the basis for the dismissal[.]" *Lomax*, 140 S. Ct. at 1724. If the dismissal is "not among the types of dismissals listed as strikes in section 1915(g)," then "the dismissal of [the] action is not a strike under section 1915(g)." *Castillo-Alvarez*, 768 F.3d at 1220 (dismissals based on immunity do not count as strikes).

A. *Doe* and *Todd* Are Not Strikes

The district court erred in counting the dismissals of two of Mr. Woods's prior lawsuits, *Doe* and *Todd*, as strikes.

In *Doe*, Mr. Woods asserted federal claims, as well as state tort claims, against SECC officials. *See* Compl., 6:19-cv-3091 (W.D. Mo. Feb. 28, 2019), ECF No. 1. The district court dismissed Mr. Woods's federal claims for failure to state a claim. *See* Order at 2-9, 6:19-cv-3091 (W.D.

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Mo. May 21, 2019), ECF No. 9. However, the district court did not dismiss the *state-law claims* on that basis. Rather, it expressly declined to exercise supplemental jurisdiction over them. *Id.* at 3 n.4.

Such a "mixed dismissal" is not a strike. The word "action" in 1915(g) means the "*entire* 'case' or 'suit,'" not particular *claims*. *Orr v. Clements*, 688 F.3d 463, 466 (8th Cir. 2012) (emphasis added) (quoting *Tolbert v. Stevenson*, 635 F.3d 646, 650-51 (4th Cir. 2011)). An action dismissed only *partially* on one of the grounds enumerated in 1915(g) is therefore not a strike. *See id.*; *see also Ellis v. Simmons*, 654 F. App'x 250, 251 (8th Cir. 2016) (per curiam) ("[I]n applying section 1915(g), courts have focused on the dismissal of the entire complaint or case, not on the dismissal of claims."); *Taylor v. Hull*, 538 F. App'x 734, 735 (8th Cir. 2013) (per curiam).

The Third, Ninth, Tenth, and D.C. Circuits have all directly considered whether "a case count[s] as a strike when a district court dismisses a prisoner's federal claims for failure to state a claim, or as frivolous or malicious, but declines to exercise supplemental jurisdiction over the prisoner's state-law claims[,]" and all have answered "no." *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1150-51 (D.C. Cir.

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2017) (Kavanaugh, J.); *see also Talley v. Wetzel*, 15 F.4th 275, 279-85 (3d Cir. 2021); *Harris v. Harris*, 935 F.3d 670, 674 (9th Cir. 2019); *Mullins v. Inthink, Inc.*, 2022 WL 2359624, at *2 (10th Cir. June 30, 2022). As then-Judge Kavanaugh explained, the court "must stick to the text of the statute" and "[w]hen a district court has declined to exercise supplemental jurisdiction over state-law claims, the court has not dismissed the state-law claims for failure to state a claim, nor has the court dismissed the state-law claims as frivolous or malicious." *Fourstar*, 875 F.3d at 1152. *Doe*, therefore, is not a strike.

Neither is *Todd*. There, the district court dismissed the lawsuit "because of [Mr. Woods's] failure to meet the requirements of Rules 18 and 20 of the Federal Rules of Civil Procedure, and because [Mr. Woods] failed to comply with the Court's Orders of September 19, 2017, and October 5, 2017." Order at 1, No. 2:17-cv-4117 (W.D. Mo. Oct. 18, 2017), ECF No. 14. A dismissal for failure to comply with a procedural rule or a court order is "not among the types of dismissals listed as strikes in section 1915(g)." *Castillo-Alvarez*, 768 F.3d at 1220; *see also Escalera v. Samaritan Vill.*, 938 F.3d 380, 383 (2d Cir. 2019) (no strike for dismissal based on failure to comply with court order); *Turley v. Gaetz*, 625 F.3d

1005, 1013 (7th Cir. 2010) ("[D]ismissal of an action for failure to exhaust therefore does not incur a strike."); *Thompson v. DEA*, 492 F.3d 428, 438 (D.C. Cir. 2007) (dismissal based not on enumerated ground but on "some other procedural mechanism" is not a strike). For that reason, this Court has not counted as strikes dismissals "for failure to exhaust," *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007) (per curiam); "improper joinder," *Taylor*, 538 F. App'x at 735; or "for failure to comply with Federal Rule of Civil Procedure 8," *Williams v. Harmon*, 294 F. App'x 243, 245 (8th Cir. 2008) (per curiam). The procedural dismissal in *Todd* was likewise not a strike.

B. None of Mr. Woods's Other Dismissals Are Strikes

Publicly available sources show that, while incarcerated, Mr. Woods has brought eight actions aside from *Doe*, *Todd*, and *Boeckman*. None are strikes under the PLRA.

Four of those actions were resolved at the summary judgment stage based on insufficient evidence. *See* Order, *Woods v. Chada*, No. 6:19-cv-03151 (W.D. Mo. May 4, 2020), ECF No. 67; Order, *Woods v. Hays*, No. 2:15-cv-00013 (E.D. Mo. Mar. 19, 2018), ECF No. 67; Order, *Woods v. Lewis*, No. 2:16-cv-00006 (E.D. Mo. Mar. 19, 2018), ECF No. 55; Order,

Woods v. Ewing, No. 2:15-cv-04251 (W.D. Mo. Jan. 16, 2018), ECF No. 78. An adverse grant of summary judgment based on insufficient evidence is not a strike because it is not a disposition "on the ground that the complaint was frivolous, malicious, or failed to state a claim." *El-Shaddai v. Zamora*, 833 F.3d 1036, 1044 (9th Cir. 2016); *see also Cincoski v. Richard*, 418 F. App'x 571, 572 (8th Cir. 2011) ("[A] case resolved through summary judgment does not count as a strike."); *Gard v. Kaemingk*, 670 F. App'x 433, 434 (8th Cir. 2016).[4] Moreover, in three of those four cases (*Hays*, *Lewis*, and *Ewing)*, Mr. Woods also alleged state-law claims over which the court declined to exercise supplemental jurisdiction. *See* Order at 17, *Hays*, No. 2:15-cv-13 (E.D. Mo. Mar. 19, 2018), ECF No. 67; Order at 9, *Lewis*, No. 2:16-cv-6 (E.D. Mo. Mar. 19, 2018), ECF No. 55; Order at 3, *Ewing*, No. 2:15-cv-4251 (W.D. Mo. Jan. 16, 2018), ECF No. 78. That is further reason those cases are not strikes.

As for the other four actions, three were dismissed (erroneously) solely on three-strikes grounds. *See Woods v. Fuwell*, No. 1:21-cv-103

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[4] While it is possible for a court to dismiss a case at summary judgment as "frivolous, malicious, or fail[ing] to state a claim," 28 U.S.C. § 1915(g), that was not the case in *Chada*, *Hays*, *Lewis*, and *Ewing*.

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(E.D. Mo.); *Woods v. Eckenrode*, No. 6:21-cv-3077 (W.D. Mo.); *Woods v. Fulghum*, No. 6:20-cv-3391 (W.D. Mo.).[5] "Where IFP status is denied solely on the ground that the plaintiff has accumulated too many strikes, the denial of IFP status and subsequent dismissal of the case do not count as a strike for purposes of § 1915(g)." *El-Shaddai*, 833 F.3d at 1042.

The last action was a habeas petition. *See Woods v. Buckner*, No. 4:18-cv-354 (E.D. Mo.). Every Circuit to have considered the issue has concluded that the denial of a habeas petition does not count as a strike. *See, e.g.*, *Jones v. Smith*, 720 F.3d 142, 146 (2d Cir. 2013) (citing cases from the Fifth, Ninth, Tenth, and D.C. Circuits). As the Ninth Circuit has explained, "the language of § 1915(g) does not encompass habeas petitions," and "Congress intended § 1915(g) to address civil rights and prison condition cases, not habeas petitions." *Andrews v. King*, 398 F.3d

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[5] The district courts in all three cases erroneously applied the three-strikes rule. In *Fulghum*, the court counted *Boeckman*, *Doe*, and the appellate affirmance in *Doe* as three strikes. *See* Order at 1, No. 6:20-cv-3391 (W.D. Mo.), ECF No. 5. In *Eckenrode*, the court just cited *Fulghum*. *See* Order at 1, No. 6:21-cv-3077 (W.D. Mo.), ECF No. 5. And in *Fuwell*, the court counted *Doe*, *Boeckman*, *Fulghum*, and three of the cases resolved on summary judgment (*Chada*, *Hays*, and *Lewis*). *See* Order at 3-4, No. 1:21-cv-103 (E.D. Mo.), ECF No 9.

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1113, 1122 (9th Cir. 2005); *see also Brown v. Megg*, 857 F.3d 287, 291 (5th Cir. 2017).

Lastly, none of Mr. Woods's appeals in any of these actions was dismissed as frivolous, malicious, or for failure to state a claim.[6] So they are not strikes either. *See Owens*, 487 F.3d at 563.

* * *

For all these reasons, Mr. Woods has not accrued three strikes. Yet the panel summarily affirmed the district court's holding to the contrary, even though that conclusion contradicts the statutory text, ignores relevant holdings of this Court, and conflicts with the precedents of other Circuits. Because the three-strikes rule was the district court's only basis for dismissal, Mr. Woods should have been allowed to proceed with his lawsuit, which alleges serious misconduct by several SECC officers.[7]

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[6] *Chada*, No. 20-2055 (8th Cir. Dec. 7, 2020) (summary affirmance); *Doe,* No. 19-2100 (8th Cir. Sept. 6, 2019) (summary affirmance); *Hays*, No. 18-1821 (8th Cir. June 4, 2019) (affirmance); *Lewis*, No. 18-2009 (8th Cir. Apr. 23, 2019) (affirmance); *Ewing*, No. 18-1225 (8th Cir. July 5, 2018) (summary affirmance); *Todd*, No. 17-3329 (8th Cir. Apr. 13, 2018) (summary affirmance).

[7] Among other claims, Mr. Woods has plausibly alleged an Eighth Amendment conditions-of-confinement claim. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take

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II. MR. WOODS SUFFICIENTLY PLEADED IMMINENT DANGER

Even assuming that Mr. Woods had accrued three strikes, the district court still erred by not allowing him to proceed under the imminent-danger exception. In so doing, the district court ignored critical facts that Mr. Woods alleged in his complaint—an error the panel repeated with its summary affirmance.

A prisoner may proceed IFP "if he is in imminent danger at the time of filing," regardless of prior strikes. *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (per curiam) (emphasis removed). In *Ashley*, the Court found that Mr. Ashley had "sufficiently alleged imminent danger of serious physical injury" by alleging that prison officials had placed him near an "enemy" who had previously attacked him. *Id.* at 717.

That reasoning applies here. Mr. Woods has alleged that, as a result of the officers' months-long pattern of misconduct, he has acquired ***48*** "enemies" in the ad-seg unit at SECC. ECF No. 1 at 38. He has further alleged that, at the instigation of prison officials, three inmates

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reasonable measures to guarantee the safety of the inmates[.]" (quotation marks removed)). As alleged, Mr. Woods was unreasonably deprived of clothing and bedding and forced to share a cell with several other inmates whom officers had encouraged to attack him.

have attacked him. *Id.* And he has alleged that, despite his protestations, prison officials have labeled him a snitch in front of other prisoners and forced him to share a cell with various enemies of his. *Id.* at 36, 39-40. To be sure, Mr. Woods admits in his complaint that he has not yet sustained any injuries—a fact on which the district court heavily relied. But a prisoner does not need to already be injured to establish imminent danger. So long as there is a "*likelihood* of imminent serious physical injury," the exception applies. *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (emphasis added). That is the case here, given Mr. Woods's allegations regarding the sheer volume of enemies he has acquired; the officers' placement of those enemies near Mr. Woods; and the officers' history of offering rewards to prisoners in return for assaulting him.

III. THE PANEL'S SUMMARY AFFIRMANCE DENIED MR. WOODS A FAIR OPPORTUNITY TO BRIEF THIS APPEAL

That the panel summarily affirmed the district court without any briefing from counsel is further reason to grant rehearing. Here, appellate counsel appeared, paid the filing fee, and moved for a briefing schedule. Instead of issuing one, the panel summarily affirmed under

Rule 47A, which allows the Court to "summarily dispose of any appeal without notice." 8th Cir. R. 47A(a).

Given the significant issues implicated by this appeal, summary affirmance was particularly inappropriate here. The Court should, at the very least, vacate its summary affirmance and allow briefing before rendering a decision.

CONCLUSION

The Court should grant panel or en banc rehearing, vacate its summary affirmance, reverse the denial of IFP status and dismissal of the action, and remand for further proceedings. Alternatively, the Court should vacate its summary affirmance and allow briefing on the issues presented by this case.

Date: May 30, 2023

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limit of Rules 35(b)(2) 40(b) because it contains 3,845 words. This petition also complies with the typeface and type-style requirements of Circuit Rule 32(b) because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced serif typeface.

<u>/s/ Steven A. Zalesin</u>

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Steven A. Zalesin
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