THREE STRIKES AND YOU PAY: DOES THE PRISON LITIGATION REFORM ACT'S THREE STRIKES PROVISION ALLOW PRISONERS TO APPEAL THEIR THIRD STRIKE IN FORMA PAUPERIS?

ELIOT T. TRACZ*

ABSTRACT

Protection for poor litigants has existed since Ancient Rome, yet the Prison Litigation Reform Act—specifically its three strikes rule—has the effect of limiting the civil rights afforded to poor. The three strikes provision strips poor prisoners of their right to proceed in forma pauperis in the event that three lawsuits have been dismissed frivolous, malicious, or failing to state a claim upon which relief can be granted. It is unclear from the text of the Prison Litigation Reform Act at what point the third strike attaches.

The federal circuit courts of appeals have split on when the third strike attaches. On the one hand, the Ninth Circuit Court of Appeals has found that a prisoner is entitled to in forma pauperis status while appealing their third strike. On the other hand, both the Third and Fourth Circuits have found that a prisoner is not entitled to in forma pauperis status while appealing the third strike.

This article argues that prisoners should be allowed to proceed in forma pauperis while appealing their third strike. This conclusion is premised on the argument that an appeal is a stage of litigation rather than a "prior occasion." This reading of the statute protects the rights of prisoners while upholding the spirit of the legislation.

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*†Law Clerk to Hon. Kathy M. Wallace, MN Third Judicial District. J.D. DePaul University College of Law, B.A. Coe College. The Author wishes to thank the Rev. Kellie Tracz for her support, as well as the Editors and Members of the North Dakota Law Review for their excellent work.

I. INTRODUCTION

Protecting access to the courts for poor litigants has been a fixture of the law for centuries.[1] In 1923, Harvard law professor John MacArthur Maguire traced the protection of poor litigants as far back as ancient Rome–citing the Roman practice of requiring only such security as the litigant could afford–as well as the (slightly) more recent English practices mitigating the requirements for a security for the poor.[2] Unsurprisingly, these protections made their way into American law as in forma pauperis ("IFP") statutes.[3]

There are, however, limits to the rights afforded to poor litigants. When a prisoner pursuing civil litigation in forma pauperis has a third case dismissed for being frivolous, malicious, or for failing to state a claim upon which relief can be granted, that prisoner accrues a "third strike" and is subsequently barred from bringing a civil action or appealing a judgment in forma pauperis.[4] This limitation, created by the Prison Litigation Reform Act (PLRA), is intended to reduce "meritless" litigation,[5] yet it also functions as a means of limiting the civil rights afforded to prisoners.

Despite the existence of the PLRA's "three strikes" provision, ambiguity remains as to when the third strike takes effect. Currently, federal appellate circuits are split as to whether a prisoner may be afforded in forma pauperis while appealing their third strike, or whether the third strike takes effect immediately upon dismissal.[6] There is no U.S. Supreme Court precedent on point, therefore the purpose of this article is to address the circuit split and suggest an answer as to when the "third strike" should take effect.

In Section II, this article briefly explores the history of in forma pauperis statutes in the United States, as well as U.S. Supreme Court Precedent related to the "three strikes" provision.[7] Section III examines the current circuit split in detail, with particular emphasis on the reasoning of each of the different courts.[8] Finally, Section IV argues that an appeal is a separate stage of litigation, not a separate case, and that prisoners should be afforded in forma pauperis status during the appeal of their "third strike."[9]

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1. *See generally* John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923).

2. *See generally id*.

3. 28 U.S.C. § 1915 (2018).

4. 28 U.S.C. § 1915(g) (2018).

5. 141 CONG. REC. 14,413 (1995) (statement of Sen. Dole).

6. Richey v. Dahne, 807 F.3d 1202, 1204 (9th Cir. 2015); Parker v. Montgomery Cty. Corr. Facility/Bus. Office Manager, 870 F.3d 144, 147 (3d Cir. 2017); Taylor v. Grubbs, 930 F.3d 611, 614 (4th Cir. 2019).

7. *See infra* Section II.

8. *See supra* Section III.

9. *See supra* Section IV.

II. THE PRISON LITIGATION REFORM ACT

This section addresses the federal Prison Litigation Reform Act. In the first subsection, it delves into the legislative history of the PLRA and the specific of the three strikes rule. Finally, the second subsection looks at how the United States Supreme Court has addressed the PLRA.

A. THE PRISON LITIGATION REFORM ACT

1. Legislative History

The first federal statute authorizing federal courts to allow plaintiffs to proceed in forma pauperis was enacted in 1892.[10] This statute stated that "any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefore" if the plaintiff submitted an affidavit to the court stating both that his case had merit and that "because of his poverty, he is unable to pay the costs."[11] The statute required that service or process be effected by court officers and authorized the court to request an attorney to "represent such poor person, if it deem[ed] the cause worthy of a trial."[12] Finally, as a safeguard against fraud and frivolous suits, the state authorized courts to dismiss any case if "the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."[13]

Over time, Congress made several amendments to the statute. The ability to proceed in forma pauperis was extended to defendants,[14] appellants,[15] and noncitizens.[16] Additional amendments included a provision that the federal government pay for records in a criminal appeal,[17] and that the federal government also pay transcript fees in both civil and criminal appeals.[18]

By the 1990's civil rights litigation had surged, growing 18,922 actions filed in federal district courts in 1990 to 43,278 actions in 1997.[19] In 1995, Congress responded to the increase in civil rights litigation by introducing

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10. *See* Act of July 20, 1892, ch. 209, §1, 27 Stat. 252.
11. Act of July 20, 1892, ch. 209, §1, 27 Stat. 252.
12. Act of July 20, 1892, ch. 209, §4, 27 Stat. 252.
13. *Id.*
14. Act of June 25, 1910, ch. 435, §1, 36 Stat. 866.
15. *Id.*
16. Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590.
17. Act of June 27, 1922, ch. 246, 42 Stat. 666.
18. Act of Jan. 20, 1944, ch. 3, 58 Stat. 5.
19. Tracey Kyckelhahn & Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts*, 1990-2006 DEP'T OF JUST STAT. SPECIAL REP. 1 (2008).

the Prison Litigation Reform Act (PLRA).[20] The sponsors of PLRA intended "several important reforms that would dramatically reduce the number of meritless prisoner lawsuits."[21] The PLRA introduced changes to the in forma papueris statute that were meant to create financial disincentives to the filing of federal lawsuits.[22] For example, the PLRA established a garnishment procedure for prisoners bringing civil actions or filing appeals, which meant to ensure all court fees were paid over time.[23] Another addition that had a major impact was the introduction of a "three strikes" rule.

2. The Three Strikes Rule

In forma pauperis proceedings are governed by 28 U.S.C. § 1915. A prisoner who seeks to file a civil action or appeal a judgment in a civil action without prepaying fees or providing a security must follow several steps.[24] First, the prisoner must file an affidavit stating the nature of the action, defense, or appeal and the affiant's belief that the person is entitled to redress.[25] The prisoner must also submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six months immediately preceding the filing.[26] The trust fund account statement must be obtained from the appropriate official of each prison in which the prisoner is or was confined.[27]

The PLRA states that, notwithstanding any filing fee, or portion of any filing fee, that may have been paid, the court shall dismiss the case at any time if the court determines that-

(A) The allegation of poverty is untrue; or

(B) The action or appeal—

(i)is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

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20. Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's 'Three Strikes Rule,' 28 U.S.C.§ 1915(G)*, 28 CORNELL J. L. & PUB. POL'Y 207, 208 (2018).

21. 141 CONG. REC. 14,413 (1995) (statement of Sen. Dole).

22. *Id*.

23. 28 U.S.C. § 1915(b)(1) ("[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of– (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.").

24. 28 U.S.C. § 1915(a)(2) (2018).

25. 28 U.S.C. § 1915(a)(1) (2018).

26. 28 U.S.C. § 1915(a)(2) (2018).

27. *Id*.

> (iii) seeks monetary relief against a defendant who is immune from relief.[28]

In the event of such a dismissal, the consequences may be severe. The PLRA states that:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner 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 was frivolous, malicious, or it fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.[29]

This part of the PLRA, section 1915(g), constitutes the "three strikes" rule.

B. THE SUPREME COURT

The United State Supreme Court addressed the three strikes issue for the first time in the case of *Coleman v. Tollefson*.[30] Andre Coleman was an inmate at the Baraga Correctional Facility, which is located in Michigan.[31] By April of 2010, Coleman had filed three lawsuits which had been dismissed on grounds enumerated in § 1915(e).[32] Regardless, Coleman filed four new lawsuits between April 2010 and January 2011, moving to proceed IFP in each case.[33] Coleman denied that his third dismissed claim constituted a strike under § 1915(g) because he had appealed the third strike and the court of appeals had not yet ruled.[34]

The District Court for the Western District of Michigan rejected Coleman's argument, holding that "a dismissal counts as a strike even if it is pending on appeal at the time that the plaintiff files his new action."[35] The district court then denied Coleman's request to proceed IFP.[36] On appeal, the Sixth Circuit agreed with the district court, affirming the district court in one case, and dismissing the other three for want of prosecution after Coleman was unable to pay the filing fee.[37]

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28. 28 U.S.C. § 1915(e) (2018).
29. 28 U.S.C. § 1915(g) (2018).
30. 135 S. Ct. 1759, 1761 (2015).
31. *Coleman*, 135 S. Ct. at 1762.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

Justice Breyer, writing for a unanimous Supreme Court, found that "A prior dismissal on statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal. That, after all, is what the statute literally says."[38] Breyer rejected Coleman's argument that the Supreme Court should read § 1915(g) "as if it considered a trial court dismissal to be provisional, or as if it meant that a dismissal falls with the statute's scope only when the litigant has no further chance to secure a reversal;" in fact, Breyer wrote, "the statute itself says none of these things."[39]

Instead, Breyer argued that the statute refers simply to whether or not an action of appeal was dismissed.[40] The word "dismissal" does not normally include subsequent appeals, he reasoned; further arguing that § 1915 itself "describes dismissal as an action taken by a single court, not as a sequence of events involving multiple courts."[41] Even so, Coleman argued that that the phrase "prior occasions" creates ambiguity because it "may refer to a single moment or to a continuing event: to an appeal, independent of the underlying action, or to the continuing claim, inclusive of both the action and its appeal."[42]

The Supreme Court disagreed with Coleman's argument, with Justice Breyer writing that there was "nothing about the phrase 'prior occasions' that would transform a dismissal into a dismissal-plus-appellate-review."[43] Drawing from the dictionary, Breyer defined an "occasion" as "a particular happening," a "happening," or an "incident."[44] The Supreme Court found that under the plain language of the statute, Coleman had experienced three "prior occasions" at the time his suit was filed.[45]

Along with the adoption of a literal reading of the statute, Justice Breyer added several additional justifications for the Court's ruling. First, Breyer argued that the Court's interpretation is consistent with the statute treating the trial and appellate states of litigation as distinct.[46] This led the Court to the conclusion that there is nothing in statutory provisions to indicate that Congress considered a trial court dismissal and an appellate court decision as if they were a single entity.[47] More importantly, Breyer argued that there was

38. *Id*. at 1763.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*. at 1763-64.
47. *Id*. at 1764.

no indication that Congress intended a trial court dismissal to take effect only upon affirmation by an appellate court.[48]

A second, related, justification offered by Breyer is that the Court's reading of the three strike provision "is supported by the way in which the law ordinarily treats trial court judgments."[49] Breyer argues that "[u]nless a court issues a stay, a trial court's judgment (say, dismissing a case) normally takes effect despite a pending appeal."[50] In addition, Breyer argued that "a judgment's preclusive effect is generally immediate, notwithstanding any appeals."[51]

Finally, Breyer argues that the purpose of the three strikes statute supports the Court's conclusion.[52] The three strikes statute, Breyer argues, "was' designed to filter out the bad claims and facilitate consideration of the good.'"[53] Refusing to consider a prior dismissal due to a pending appeal would "create a leaky filter" that would allow prisoners to possibly file multiple suits, as Coleman did.[54]

Coleman offered an additional argument posed as a hypothetical: what if his case had involved an attempt to appeal from the trial court's dismissal of his third complaint instead of an attempt to file additional complaints?[55] In this scenario, Coleman argued, counting the dismissal as a third strike would deprive him of appellate review.[56] The Solicitor General supported Coleman's position, arguing that a "3 or more prior occasions" means "that a trial court dismissal qualifies as a strike if it occurred in a prior, different lawsuit."[57] The Supreme Court declined to address this hypothetical, and so the question remains unanswered.[58]

III. CIRCUIT SPLIT

This section deals with the split among the federal circuit courts about how to apply the three strikes rule. On one side, the Ninth Circuit Court of Appeals has found that a prisoner is entitled to IFP status while appealing a third strike. On the other hand, the Third and Fourth Circuits have found that

48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*. at 1764-65.
56. *Id*. at 1765.
57. *Id*.
58. *Id*.

that a prisoner is not entitled to IFP status while appealing a third strike. Each case is considered in detail.

A. NINTH CIRCUIT

Thomas W.S. Richey was an inmate at Stafford Creek Corrections Center, located in Aberdeen, Washington.[59] On November 11, 2011, Richey filed a grievance alleging that one of the guards had denied his "right to a yard, a shower, and clean underwear."[60] Claiming not to know the guards name, Richey identified her simply as an "extremely obese Hispanic female guard."[61] The grievance was returned to Richey with instructions to "Rewrite-appropriately. Just stick to the issue of what happened, when, who was involved."[62] Richey resubmitted the grievance, but it was again returned with instructions to for rewriting, including omitting any references to the guards weight.[63]

Instead of rewriting the grievance a second time, Richey chose to write a kite—a form used by prison inmates to communicate with staff—to the grievance coordinator requesting clarification of the word "adiquit" [sic] and explaining that his description of the guard's weight was necessary to identify her since he did not know her name.[64] Richey asked the coordinator "not to punish [him] by rejecting [his] grievance because [the coordinator] disagreed with [his] choice of language."[65] When the coordinator- Dahne- did not respond, Richey wrote a second kite on December 7, 2011 asking "ARE YOU GOING TO PROCESS MY PROPERLY SUBMITTED GRIEVANCE OR WHAT? I'M NOT REWRITING IT SO DO YOUR JOB AND PROCESS IT."[66] This time Dahne wrote back, saying "No, due to your decision not to rewrite as requested your grievance has been administraitevly [sic] withdrawn."[67]

Richey then sued Dahne pro se for violating his "First Amendment right 'to redress grievances and to be free of retaliation'" as well as for violating his right to free speech.[68] The district court dismissed Richey's case for fail-

59. Richey v. Dahne, 807 F.3d 1202, 1205 (9th Cir. 2015).
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Id*.

ure to state a claim, finding that Richey "provide[d] no authority for the proposition that insulting a prison guard is protected conduct."[69] At the same time, the district court also revoked Ritchey's IFP status.[70]

Ritchey appealed and moved for IFP status on appeal.[71] The motions panel granted the motion, finding that "review of the record indicates that appellant is entitled to proceed in forma pauperis" pursuant to 28 U.S.C. § 1915(a).[72] After Ritchey had been appointed pro bono counsel the parties completed briefing and Dahne moved to revoke Richey's IFP status under the "three strikes" rule in the PLRA.[73]

In reviewing whether Richey had acquired three (or more, as Dahne alleged that Richey in fact had four strikes) the Court of Appeals for the Ninth Circuit examined dismissals in several prior cases filed by Richey, while also acknowledging that "[O]nce a prisoner has been placed on notice of the potential disqualification under § 1915(g) by either the district court or the defendant, the prisoner bears the ultimate burden of persuading the court that § 1915(g) does not preclude IFP status."[74] Labelling these prior cases, which all feature the same defendant, as *Thaut I*, *Thaut II*, and *Thaut III*, the Court of Appeals found that Richey did not have three strikes and was therefore eligible for IFP status.[75]

In *Thaut I*, Richey had filed suit under similar circumstances including the filing of a grievance alleging that his rights had been violated by an "extremely obese female Hispanic guard."[76] When asked to rewrite the grievance, Richey sued.[77] A magistrate judge decided that Richey had not exhausted his administrative remedies because he "simply failed to amend his grievance when he was asked to do so."[78] Because Richey had failed to exhaust his administrative remedies, the magistrate determined that the claim was frivolous, especially when considering the fact that Richey was familiar with the prison grievance system.[79] The district court agree with the magistrate and granted the dismissal.[80]

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69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*. at 1206 (quoting Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005)).
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*.
80. *Id*.

On appeal, the Ninth Circuit upheld the dismissal, but did not follow the magistrates ruling.[81] Instead, the Court of Appeals held that "[t]he district court did not clearly err in finding that Richey was required to appeal the non-grievability determination to the grievance program manager and failed to do so."[82] Reasoning that declining to follow the magistrate judge's reasoning raised questions about the correctness of that reasoning, the Court of Appeals found that it had not assessed a strike on appeal.[83]

In *Thaut II*, Richey filed a grievance alleging that he had been charged money for envelopes which he never received.[84] That grievance was rejected because Richey was unable to provide an invoice number for the envelopes.[85] Richey resubmitted the grievance, claiming that he did not provide an invoice number because he did not have a receipt.[86] That grievance was classified as withdrawn.[87] Richey then submitted another grievance for the same matter which was accepted, and Richey was refunded. This caused the district court to dismiss Richey's claim that Thaut had denied his right to file grievances.[88] This was Richey's first strike.[89]

Thaut II was appealed to the Ninth Circuit, becoming *Thaut III*.[90] Richey made a motion to proceed IFP, but a motion's panel determined that the appeal was frivolous and declined to grant IFP status.[91] While the motion's panel did not dismiss the suit, it was ultimately dismissed four weeks later due to Richey's failure to pay the filing fee.[92]

Relying on prior precedent declaring that:

> when a district court disposes of an in forma pauperis complaint "on the grounds that [the claim] is frivolous, malicious, or fails to state a claim upon which relief may be granted," such a complaint is "dismissed" for purposes of § 1915(g) even if the district court styles such dismissal as denial of the prisoner's application to file the action without prepayment of the full filing fee.[93]

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81. *Id*.
82. *Id*. at 1207.
83. *Id*.
84. *Id*. at 1208.
85. *Id*.
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id*.
92. *Id*.
93. *Id*. (quoting O'Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008)).

The Court of Appeals in Thaut III then extended this reasoning to include denials of IFP status.[94] The court then declared that the dismissal in *Thaut III* constituted a second strike.[95]

Finally, the Court of Appeals addressed Dahne's argument that the dismissal of the complaint in his case constituted a strike. The Court of Appeals acknowledged the Supreme Court ruling in *Coleman*, writing that *Coleman* found that a "prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal."[96] The Court distinguished Richey's case by finding that the issue here was "whether a prisoner is entitled to IFP status on "appeal from the trial court's dismissal of [a] third complaint instead of [in] an attempt to file several additional complaints."[97]

In finding that a prisoner is entitled to IFP status while appealing a third strike dismissal, the Court of Appeals adopted the argument of the Solicitor General in *Coleman* that "[t]he phrase 'prior occasions' is most sensibly read as referring to strikes imposed in prior-filed suits, not those imposed in an earlier stage of the same suit."[98] The court also acknowledged the problems that could be raised if a prisoner were barred from appealing his third strike, especially if that third strike were erroneously assessed.[99] Ultimately, the Court held that dismissal of the complaint in an action underlying an appeal does not constitute a "prior occasion" under the PLRA.[100]

B. THIRD CIRCUIT

Jason Parker was well known as a pro se litigant in the United States District Court for the Eastern District of Pennsylvania, having been the plaintiff in over forty suits.[101] Although Parker had an extensive litigation history, the Court of Appeals for the Third Circuit considered only three of the proceedings.[102] First the court considered a case in which Parker had filed a complaint alleging that a number of officials had subjected him to false arrest, malicious prosecution, and excessive force.[103] The complaint was accompanied by a motion to proceed IFP, which the district court granted.[104] Upon

94. *Id*.
95. *Id*.
96. *Id*. at 1208-09.
97. *Id*. at 1209.
98. *Id*.
99. *Id*.
100. *Id*. at 1209-10.
101. Parker v. Montgomery Cty. Corr. Facility/Bus. Office Manager, 870 F.3d 144, 147 (3d Cir. 2017).
102. *Id*. at 147.
103. *Id*.
104. *Id*.

review, the district court determined that the claims were barred by a two-year statute of limitations and the case was dismissed with prejudice under § 1915(2)(B)(ii).[105] This was the first strike that Parker accrued.[106]

The next two strikes the court of appeals considered came in civil rights cases filed in 2015, both of which were consolidated in order to create the appeal at issue. In the first case, *O'Connor*, Parker alleged that officials had subjected him to assault, false arrest, and malicious prosecution.[107] In the second case, *MCC*, Parker alleged that prison officials "interfered with his access to the courts by depriving him of prisoner account statements necessary to perfect IFP motions in his pending litigation."[108] On September 17, 2015, the district court dismissed *O'Connor* because it repeated claims that had already been litigated, and was therefore frivolous, malicious, and failed to state a claim.[109] This was Parker's second strike.[110]

On the same day the district court also dismissed *MCC* because Parker, having already received the prisoner account statements, could not establish an injury.[111] Because Parker could not establish an injury, the district court determined that Parker had failed to state a claim pursuant to § 1915(e)(2)(B)(ii).[112] This was Parker's third strike.[113]

Parker appealed both *O'Connor* and *MCC*, additionally filing motions to proceed IFP and for appointment of counsel.[114] Because the two dismissals were Parker's second and third strikes, he was directed to file a motion demonstrating imminent danger of serious injury. Parker complied with those instructions.[115]

The motions panel for the Third Circuit entered an order: (1) consolidating the appeals for briefing; (2) provisionally granting Parker's IFP motions for the purpose of considering his counsel motions, as well as deferring the appeal fees; (3) granting the counsel motions; (4) directing counsel to address whether the IFP statute affords a prisoner IFP status with respect to an appeal from a third qualifying dismissal; and (5) referring the IFP and imminent danger motions to the merits panel.[116] At oral argument, counsel for Parker

105. *Id*.
106. *Id*.
107. *Id*.
108. *Id*.
109. *Id*. at 147-48.
110. *Id*. at 148.
111. *Id*.
112. *Id*.
113. *Id*.
114. *Id*.
115. *Id*.
116. *Id*.

advised that he was abandoning his appeal in *O'Connor*, leaving *MCC* as the only case left on appeal.[117] Before deciding the merits of Parker's claim, the court of appeals addressed whether he was entitled to IFP status.[118]

The court of appeals rejected the *Richey* decision, which it characterized as "noticeably lacking in discussion of the statutory language."[119] While not truly engaging in an analysis of *Richey*, the Third Circuit determined that *Richey* appeared to have been driven by perceived unfairness rather than the language of the statute.[120] While claiming to be sympathetic to the concerns voiced in Richey, the Third Circuit determined that it "must adhere to the apparent intent of Congress as embodied in the language of § 1915(g)."[121]

Looking to the text of the statute, the Court of Appeals argues that "what the statute does not do, and what the statute easily could have done if Congress had intended it" was create an exception to § 1915 treating an appeal from an order imposing a third strike differently from any other instance in which a person chooses to bring an action or appeal.[122] The court of appeals rejected Parker's argument that "the plain meaning of the phrase 'prior occasions' in this context is most reasonably read to refer to lawsuits that were instituted *before* the current lawsuit," because it was not compatible with the Supreme Court's reasoning in *Coleman*.[123] The reason for this is that *Coleman* recognized "that 'actions' and 'appeals' are treated separately, and must each be considered distinct 'occasions.'"[124] This interpretation resulted in the Third Circuit arriving at the conclusion that the imposition of a third strike in a district court is an "occasion" that is "prior" to an appeal.[125] Accordingly, the Third Circuit denied Parker's motion to proceed IFP.

C. FOURTH CIRCUIT

Therl Taylor was an indigent prisoner who filed three civil rights claims in the District of South Carolina.[126] The defendants in these suits were employees of the South Carolina Department of Corrections and the City of Allendale.[127] In the first case, Taylor alleged that seven employees of the South

117. *Id*. at 149.
118. *Id*.
119. *Id*. at 151.
120. *Id*.
121. *Id*.
122. *Id*. at 152.
123. *Id*. (emphasis in original).
124. *Id*. (citing Coleman v. Tollefson, 135 S. Ct. 1759, 1763 (2015)).
125. *Id*. at 152-53.
126. Taylor v. Grubbs, 930 F.3d 611, 614 (4th Cir. 2019).
127. *Taylor*, 930 F.3d at 614.

Carolina Department of Corrections and the City of Allendale had not allowed him access to the mailroom at the prison, and thus interfered with his ability to petition the courts.[128] In the second suit, Taylor alleged that his rights were violated when he was transferred to a new unit.[129] The third suit alleged that corrections officials had improperly transferred him to another unit and confiscated his personal property.[130] On the same day, the district court dismissed each complaint for failure to state a claim and then assigned Taylor three strikes under § 1915(g).[131]

On appeal, the Fourth Circuit Court of Appeals initially focused on the meaning of the term "prior."[132] The Court of Appeals wrote that "[i]n the context of a direct appeal, the ordinary meaning of the term 'prior' most naturally encompasses dismissals in *other* actions, but not in the underlying dismissal that is on appeal."[133] The Court acknowledged that it, and other appellate courts, "regularly (and intuitively) describe proceedings before the district court as part of 'this case' not as a 'prior case.'"[134] Drawing the Solicitor General's brief in *Coleman*, the Court stated that "although a district court's dismissal of an action is surely an 'occasion' from the perspective of the court of appeals, it is not a '*prior* occasion.'"[135]

The Court of Appeals argued that this approach was consistent with the Coleman decision.[136] The reason that it is compatible is that, while Coleman "reinforced the conclusion that, as to the filing of a fourth action, a district court's dismissal- and its assignment of a strike under § 1915(g)–was a final judgment." Cases like Taylor's were distinguishable because "a district court judgment has no preclusive effect on appeal from the ruling itself."[137] Going further, the court argued that " [to] hold otherwise would read out the term 'prior' and violate the cardinal rule of statutory construction that we are 'obliged to give effect, if possible, to every word Congress used.'"[138] The Court concluded that by including the word "prior," "Congress made clear that an appellate court should only count a prisoner's strikes" in prior actions rather than in the case at bar.[139]

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128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*.
132. *Id*. at 616-18.
133. *Id*. at 616 (emphasis in original).
134. *Id*. at 616-17.
135. *Id*. at 617.
136. *Id*.
137. *Id*.
138. *Id*.
139. *Id*.

IV. ANALYSIS

This section analyzes the PLRA—specifically the three strikes rule—by addressing court rulings and statutory interpretation. The first subsection discusses the distinctions between a "stage of litigation" or a "prior occasion." The second subsection argues that an appeal of a third strike should be considered a "stage of litigation" rather than a "prior occasion."

A. STAGES OF LITIGATION OR "PRIOR OCCASIONS"

Ideally, the courts "read the words of [a statutory] text as any ordinary Member of Congress would have read them, and apply the meaning so determined."[140] Both the Supreme Court in *Coleman* and the Third Circuit Court of Appeals in *Parker* emphasize the plain language of the text. The plain text of the three strikes provision states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner 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 was frivolous, malicious, or it fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.[141]

Coleman and *Parker* both stress the importance of the phrase "prior occasions".

In *Coleman*, Breyer defined an "occasion" as "a particular happening," a "happening," or an "incident."[142] The term "prior occasion" then, would literally indicate a previous happening or incident. *Parker* endorsed this argument, arguing that "the term 'prior' sets a temporal parameter, referring only to strikes accrued earlier in time than the notice of appeal."[143] The theory behind this pure textualist approach can be simply stated: "[T]he text of the law is the law."[144]

Despite its appeal, textualism has its limits. One example is the case of *Green v. Bock Laundry Co*.[145] In that case, which involved an injury to an inmate while working in the prison laundry, Justice Scalia wrote that the

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140. Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

141. 28 U.S.C. § 1915(g) (2018).

142. Coleman v. Tollefson, 135 S. Ct. 1759, 1764 (2015).

143. Parker v. Montgomery Cty. Corr. Facility/Bus. Office Manager, 870 F.3d 144, 153 (3d Cir. 2017).

144. Brett Kavanaugh, *Fixing Statutory Interpretation By Robert A Katzmann*, 129 HARV. L. REV. 2118, 2118 (2016).

145. 490 U.S. 504 (1989).

court was "confronted here with a statute which, if interpreted literally, produces and absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word 'defendant' in Federal Rule of Evidence 609(a)(1) that avoids this consequence . . . ."[146] Scalia echoed an important tenant of textualism: that a court should not adhere to the strict language of the text if such adherence will result in an absurd or unconstitutional outcome.[147]

Parker, as an exercise in textualism, reaches just such an absurd result. To consider an appeal from a district court proceeding as a separate occasion is inconsistent with the language generally employed by courts during the appeals process. As the United States Court of Appeals for the Fourth Circuit admitted in Taylor, "we and other appellate courts regularly (and intuitively) describe proceedings before the district court as part of 'this case' not as a 'prior case.'"[148] In *Coleman*, the Solicitor General agreed, arguing "the phrase 'prior occasion' is most sensibly read as referring to strikes imposed in prior-filed suits, not to those imposed in earlier stages of the same suit."[149]

In *Coleman*, Justice Breyer argued that "[u]nless a court issues a stay, a trial court's judgment (say, dismissing a case) normally takes effect despite a pending appeal."[150] Breyer also wrote that "a judgment's preclusive effect is generally immediate, notwithstanding any appeals."[151]

The federal rules govern the method for requesting a stay. Rule 62 of the Federal Rules of Civil Procedure states, in part, "[a]t any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security."[152] But, if courts adopt the reasoning of *Parker*, the ability of prisoners to post a security may be frustrated.

It is plausible that a prisoner able to secure employment may be able to post a bond or security, but even if this were so, barriers still exist. A prisoner able to find employment earns between 12¢ to 40¢ per hour.[153] Even then, the Bureau of Prisons has a financial resource plan which dictates the order in which a prisoners obligations will receive payment: "(1) Special Assessments imposed under 18 U.S.C. 3013; (2) Court-ordered restitution; (3) Fines

146. *Green*, 490 U.S. at 527 (Scalia, J. concurring).
147. *Id*.
148. Taylor v. Grubbs, 930 F.3d 611, 616-17 (4th Cir. 2019).
149. *See* Coleman v. Tollefson, 135 S. Ct. 1759, 1765 (2015).
150. *Id*. at 1764.
151. *Id*.
152. FED. R. CIV. P. 62(b).
153. *Work Programs*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custodyandcare/workprograms.jsp (last visited Dec. 27, 2019).

and court costs; (4) State or local court obligations; and (5) Other federal government obligations."[154] With such low pay, and in the face of competing obligations, the ability of a prisoner to post a bond or security in order to appeal their third strike is compromised.

Federal Rule of Appellate Procedure 8 governs a stay or injunction pending appeal.[155] Rule 8 states in part that:

> (1) *Initial Motion in the District Court*. A party must ordinarily move first in the district court for the following relief:
>
> (A) a stay of the judgment or order of a district court pending appeal;
>
> (B) approval of a bond or other security provided to obtain a stay of judgment; or
>
> (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.[156]

A stay, however, "is not a matter of right, even if irreparable injury might otherwise result to the appellant."[157]

Because a stay is discretionary, the rules provide a mechanism for requesting an appeal from the appellate courts. Rule 8, in part, states:

> (2) *Motion in the Court of Appeals; Conditions on Relief*. A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.
>
> (A) The motion must:
>
> (i) show that moving first in the district court would be impracticable; or
>
> (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.
>
> (B) The motion must also include:
>
> (i) the reasons for granting the relief requested and the facts relied on;
>
> (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
>
> (iii) relevant parts of the record.

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154. Inmate Financial Responsibility Program Procedures, 28 C.F.R. § 545.11 (2019).
155. FED. R. APP. P. 8.
156. FED. R. APP. P. 8(a)(1).
157. Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 10 (1942).

> (C) The moving party must give reasonable notice of the motion to all parties.
>
> (D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.
>
> (E) The court may condition relief on a party's filing a bond or other security in the district court.[158]

But this provision is not helpful to litigants if their ability to appeal a third strike is frustrated by their inability to pay fees and costs.[159] This would affect litigants in cases such as *Parker*.

In this sense, reliance on *Coleman* to sustain an argument that a dismissal counts as a third strike regardless of the existence of an appeal, becomes a weak argument. *Coleman* argues that its decision is consistent with the rules, and for the specific facts of *Coleman* this is true. On the other hand, in cases such as *Richey*, *Parker*, or *Taylor,* a judge's decision to deny a stay, and therefore allowing the third strike to take effect, has the result of barring a poor litigant from moving for a stay from the appellate court.

B. ADDRESSING APPEALS OF A THIRD STRIKE

How should courts address the question of whether a prisoner is barred from proceeding in forma pauperis when appealing their third strike? At the outset, courts should acknowledge that *Coleman* is a readily distinguishable case. In *Coleman*, the prisoner had filed four new cases while his third strike was on appeal. The Supreme Court barred Coleman from proceeding IFP in those four subsequent cases but declined to address the pending appeal of the third strike. *Coleman* presents a completely different set of facts from *Richey*, *Parker*, or *Taylor*, so much so that the Supreme Court declined to issue a decision on whether a prisoner may proceed IFP in an appeal of their third strike. It stands to reason then, that reliance on *Coleman* is misplaced.

Instead of trying to apply *Coleman's* reasoning to appeals of a third strike, courts should acknowledge that an appeal is more like an extension of a case than a "prior occasion." As the solicitor general argued, "prior occasion" is more easily understood to mean a prior suit, rather than the district

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158. FED. R. APP. P. 8(a)(2).

159. Abdul-Akbar v. McKelvie, 239 F.3d 207, 219-20 (3rd Cir. 2001) (Mansmann, J., dissenting) (considering the dangers of the three strikes rule and its likelihood to prevent prisoners from proceeding with "potentially meritorious litigation at the filing stage, with no opportunity for substantive review or appeal.").

court phase of a case that has been appealed. This interpretation is consistent with the plain reading of the text.

The Federal Rules of Civil Procedure and Appellate Procedure also support the conclusion that while a trial court dismissal may literally be a "prior occasion," it is also simply a prior stage of litigation rather than a separate case. Rule 8 of the Federal Rules of Appellate procedure, for instance, allows a party to motion the court of appeals for a stay if they are unsuccessful in district court.[160] This rule makes the most sense when viewed through the lens of an appeal as a different stage of the same litigation, rather than as a separate case.

V. CONCLUSION

The current circuit split is based upon differing interpretations of the PLRA, and leaves open the question of whether a prisoner may proceed IFP in an appeal from their third strike. The split turns on the interpretation of the phrase "prior occasion" and whether that means a previous case, or a previous stage of litigation. Reading "prior occasion" to mean a prior stage of litigation can lead to the absurd result of barring a prisoner from appealing their third strike due to lack of financial means. This purely textualist approach can result in unjust outcomes if the dismissed case has merit. For that reason, when a prisoner's case has been dismissed resulting in a third strike, the prisoner should be allowed to appeal their case IFP.

160. FED. R. APP. P. 8(a)(2)(A)(ii).