

No. __ - ____

IN THE
SUPREME COURT OF THE UNITED STATES

RODNEY PATTON,

IPetitioner,

v.

WILVIS HARRIS

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604

(312) 427-3200
Attorney for Petitioner

QUESTIONS PRESENTED

28 U.S.C. §1915(b)(1) provides that "if 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 circuits are divided on the question of whether

When a prisoner files a notice of appeal and application to proceed in forma pauperis, and his (or her) application is denied, should the prisoner be treated as having "file[d] an appeal in forma pauperis" so that the fee requirement attaches?

TABLE OF CONTENTS

Opinions Below	1
Jurisdiction	1
Statute Involved	1
Statement	2
Reasons for Granting the Writ	3
Conclusion	5

TABLE OF CITED AUTHORITIES

<i>Banos v. O’Guin</i> , 144 F.3d 883 (5th Cir. 1998)	3
<i>Henderson v. Norris</i> , 129 F.3d 481 (8th Cir. 1997)	3
<i>In re Alea</i> , 286 F.3d 378 (6th Cir. 2002)	3, 4
<i>Keener v. Pennsylvania Bd. of Probation & Parole</i> , 128 F.3d 143 (3d Cir. 1997)	3
<i>Leonard v. Lacy</i> , 88 F.3d 181 (2d Cir. 1996)	3, 4
<i>Newlin v. Helman</i> , 123 F.3d 429 (7th Cir. 1997)	3, 4
<i>Smith v. District of Columbia</i> , 182 F.3d 25 (D.C.Cir. 1999)	3-4
28 U.S.C. §1915(b)	passim

PETITION FOR WRIT OF CERTIORARI

Petitioner Rodney Patton respectfully prays that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 10, 2008.

OPINIONS BELOW

The opinions and orders of the court of appeals (Pet.App. 1-4), and the opinions of the district court (Pet.App. 5-12) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The final order of the court of appeals (Pet.App. 29) was entered on September 10, 2008.

STATUTE INVOLVED

This case involves the 28 U.S.C. §1915, which provides in pertinent part as follows:

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

* * *

(b) (1) Notwithstanding subsection (a), if 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.

(b)(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

* * *

(g) 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 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.

STATEMENT

Petitioner Rodney Patton is an Illinois prisoner who is subject to the "three strikes rule" of 28 U.S.C. §1915(g) because "on three or more prior occasions, [he] brought an action or appeal that was dismissed on the grounds that it is frivolous or fails to state a claim upon which relief may be granted." (Pet.App. 1.)

On August 22, 2008, the Seventh Circuit applied the "three strikes rule" and denied petitioner's request for leave to appeal in forma pauperis. (Pet.App. 1.) The Court of Appeals subsequently dismissed the appeal for failure to prosecute when petitioner failed to

pay the docketing fee. (Pet.App. 2.) In addition to dismissing the appeal, the Seventh Circuit ordered the clerk of the district court to "collect the appellate fees [of \$455] from the prisoner's trust account using the mechanism of [28 U.S.C.] Section 1915(b)." *Id.*

REASONS FOR GRANTING THE WRIT

28 U.S.C. §1915(b)(1) provides that "if 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 circuits are divided on the question of whether, when a prisoner files a notice of appeal and application to proceed in forma pauperis, and his (or her) application is denied, should the prisoner be treated as having "file[d] an appeal in forma pauperis" so that the fee requirement attaches?

The Seventh Circuit in this case followed the rule it had established in *Newlin v. Helman*, 123 F.3d 429 (7th Cir. 1997) and ordered the clerk of the district to "collect the appellate fees [of \$455] from the prisoner's trust account using the mechanism of [28 U.S.C.] Section 1915(b)." (Pet.App. 2.)

The Seventh Circuit's view of Section 1915(b) is shared by the Second, Sixth, and Eighth Circuits. *Leonard v. Lacy*, 88 F.3d 181, 184 (2d Cir. 1996); *In re Alea*, 286 F.3d 378, 381 (6th Cir. 2002); *Henderson v. Norris*, 129 F.3d 481, 483 (8th Cir. 1997);

The Courts of Appeals for the Third, Fifth, Ninth, and District of Columbia Circuits do not require a prisoner denied leave to appeal in forma pauperis to pay the docketing fee. *Keener v. Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 145 (3d Cir. 1997). *Banos v. O'Guin*, 144 F.3d 883, 885 (5th Cir. 1998); *Rodriguez v. Cook*, 169

F.3d 1176, 1182 (9th Cir. 1999); *Smith v. District of Columbia*, 182 F.3d 25 (D.C.Cir. 1999).

The District of Columbia Circuit explained the reason for its reading of the statute in *Smith v. District of Columbia, supra*:

Section 1915(b)(1) imposes fee liability when "a prisoner brings a civil action or files an appeal in forma pauperis." 28 U.S.C. § 1915(b)(1). This wording differs significantly from that of subsection 1915(a)(2), which requires a prisoner to file an affidavit of poverty and certified copy of his prison trust fund account whenever "seeking to bring a civil action or appeal a judgment in a civil action" in forma pauperis. *Id.* § 1915(a)(2) (emphasis added). While *Smith* is clearly seeking to proceed in forma pauperis, we will not treat him as having "filed an appeal in forma pauperis" when he has not been granted in forma pauperis status and his appeal has not been considered. [footnote omitted] For the present purpose, we will deem a prisoner to have "file[d] an appeal in forma pauperis" as soon as he has both filed a notice of appeal and been granted in forma pauperis status, but not before.

Smith v. District of Columbia, 182 F.3d at 29-30.

Four circuits have rejected this reading of the language of Section 1915(b). Rather than limit itself to the plain, ordinary language of the statute, the Second Circuit concluded that the statute "can be read to include both prisoners who have been granted i.f.p. status and those who seek such status." *Leonard v. Lacy*, 88 F.3d at 184. Similarly, the Seventh Circuit reads the statute "to mean 'files an appeal, and seeks to proceed *in forma pauperis*.'" *Newlin v. Helman*, 123 F.3d at 434.

The four circuits which require the prisoner to pay the filing fee for an appeal even when the prisoner is denied leave to proceed *in*

forma pauperis, justify their departure from the plain language of the statute as necessary to further the intent of the Prison Litigation Reform Act of 1995 (PLRA) to deter frivolous actions. See, e.g., *In re Alea*, 286 F.3d at 382. But when an appeal does not go forward, requiring the prisoner to pay the filing fee is more in the nature of a penalty than of a user fee.

The Court should resolve the inter-circuit conflict so that Section 1915(b) has a uniform meaning.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

December, 2008

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604
Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dirksen Federal Building
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

August 20, 2008

BEFORE

MICHAEL S. KANNE, Circuit Judge

DIANE P. WOOD, Circuit Judge

No.: 08-2175	RODNEY M. PATTON, Plaintiff - Appellant v. WILVIS HARRIS, AMI WORKMAN, DARRYL L. JOHNSON, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:08-cv-01975 Northern District of Illinois, Eastern Division District Judge Milton Shadur	

The court has carefully reviewed request for leave to proceed as a pauper on appeal, the appellant's motion filed under Federal Rule of Appellate Procedure 24, the district court's order pursuant to 28 U.S.C. § 1915(a)(3) certifying that the appeal was filed in bad faith, and the record on appeal. A review of this case indicates that the appellant Rodney Patton is not permitted to proceed in forma pauperis under 28 U.S.C. § 1915(g). The appellant has, on three or more prior occasions, brought an action or appeal that was dismissed on the grounds that it is frivolous or fails to state a claim upon which relief may be granted. *See, e.g., Patton v. Proctor*, 94-cv-00369 (N.D. Ill. Jan. 28, 1994); *Patton v. County of Cook*, 07-cv-1761 (N.D. Ill. Apr. 6, 2007); *Patton v. Harris*, 08-cv-1975 (N.D. Ill. Apr. 10, 2008). Accordingly,

IT IS ORDERED that the motion for leave to proceed on appeal in forma pauperis is **DENIED**. *See Lee v. Clinton*, 209 F.3d 1025 (7th Cir. 2000). Appellant shall pay the required docketing fee within 14 days, or else this appeal will be dismissed for failure to prosecute pursuant to Circuit Rule 3(b). *See Newlin v. Helman*, 123 F.3d 429, 434 (7th Cir. 1997).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dirksen Federal Building
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

PLRA C.R. 3(b) FINAL ORDER

September 10, 2008

No.: 08-2175	RODNEY M. PATTON, Plaintiff - Appellant v. WILVIS HARRIS, AMI WORKMAN, DARRYL L. JOHNSON, et al., Defendants - Appellees
--------------	--

Originating Case Information:
District Court No: 1:08-cv-01975 Northern District of Illinois, Eastern Division Court Reporter J. Andrews Clerk/Agency Rep Michael Dobbins District Judge Milton Shadur

The pro se appellant was DENIED leave to proceed on appeal in forma pauperis by the appellate court on August 20, 2008 and was given fourteen (14) days to pay the \$455.00 filing fee. The pro se appellant has not paid the \$455.00 appellate fee. Accordingly,

IT IS ORDERED that this appeal is **DISMISSED** for failure to pay the required docketing fee pursuant to Circuit Rule 3(b).

IT IS FURTHER ORDERED that the appellant pay the appellate fee of \$455.00 to the clerk of the district court. The clerk of the district court shall collect the appellate fees from the prisoner's trust fund account using the mechanism of *Section 1915(b)*. *Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir. 1997).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RODNEY PATTON #N-90674,)
)
 Plaintiff,)
)
 v.) No. 08 C 1975
)
 WILVIS HARRIS, et al.,)
)
 Defendants.)

MEMORANDUM ORDER

Rodney Patton ("Patton"), who is scarcely a stranger to the federal courts, has just filed another 42 U.S.C. §1983 ("Section 1983") Complaint, making handwritten inserts to the form provided by this District Court's Clerk's Office, as well as tendering an accompanying handwritten Motion for Appointment of Counsel ("Motion"). As for his earlier lawsuits, Complaint ¶III lists only his Case No. 04 C 3933, still pending before this Court's colleague Honorable Robert Gettleman, then goes on to note:

The Plaintiff does not know all cases brought before the court.

But the "Petitioner Profile Information" that has been supplied to this Court by this District Court's Prisoner Pro Se Staff Attorneys lists no fewer than seven earlier Patton cases in addition to the pending matter before Judge Gettleman, and three of those prior cases may well have triggered the application of 28 U.S.C. §1915(g) to this action:¹

¹ All further references to Title 28's provisions will simply take the form "Section--."

1. Each of Case Nos. 94 C 369 and 07 C 1761 constitutes a "strike" for Section 1915(g) purposes.

2. In addition, when in Case No. 07 C 2180 Patton sought to appeal this Court's order of dismissal for failure to exhaust administrative remedies, this Court certified under Section 1915(a)(3) that the appeal was filed in bad faith. That certification resulted in an order from the Court of Appeals denying Patton's motion for leave to proceed in forma pauperis and ordering him to pay the \$455 in appellate fees, coupled with a dismissal of the appeal.

Under those circumstances Patton may be precluded by Section 1915(g) from bringing this current action unless he pays the \$350 filing fee in full up front. That alone would call for a dismissal of the Complaint and this action in the absence of such payment on or before April 28, 2008.²

But given the possibility that what has been said as to Case No. 07 C 2180 might not be viewed as a third strike for Section 1915(g) purposes, this Court has engaged in the screening of Patton's current Complaint called for by Section 1915A(a). In that respect it is clear that with Patton's allegations being accepted as true (as is required for such purposes), he has not stated a viable (or even a colorable) claim of any violation of

² That would allow Patton more than the 14-day timetable that our Court of Appeals granted him in connection with his attempted appeal in Case No. 07 C 2180.

his federal constitutional rights--the necessary predicate for Section 1983 relief.

With that being so, Section 1915A(b) calls for the present dismissal of the Complaint and this action for failure to state a claim upon which Section 1983 relief may be granted, and this Court so orders.³ Finally, if Case No. 07 C 2180 has not met the standards for a third strike under Section 1915(g), this dismissal certainly does so--so that Patton has now attained the three-strike level under any view of the matter.⁴



Milton I. Shadur
Senior United States District Judge

Date: April 10, 2008

³ This of course compels the denial of Patton's Motion as moot, and this Court orders that as well.

⁴ Meanwhile Patton has not been in compliance with his obligations to pay prior filing fees pursuant to Section 1915. This Court has not troubled itself to obtain docket printouts in all of his cases, but the one that it has obtained (in Case No. 07 C 2180) shows that he still owes whatever unpaid amount remains of the \$350 District Court filing fee and of the \$455 in Court of Appeals filing fees. Although that is of course his primary responsibility, a copy of this memorandum order is also being sent to the fiscal authorities at Stateville Correctional Center (where Patton is in custody) as an express reminder of the obligation that Congress has directly imposed on the institution in that respect under Section 1915(b) (2).

OB

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RODNEY PATTON #N-90674,)	
)	
Plaintiff,)	
)	
v.)	No. 08 C 1975
)	
WILVIS HARRIS, et al.,)	
)	
Defendants.)	

SUPPLEMENT TO MEMORANDUM ORDER

At the time this Court received the chambers copy of the 42 U.S.C. §1983 Complaint brought by Rodney Patton ("Patton"), which led to the issuance of an April 10, 2008 memorandum order ("Order") dismissing both the Complaint and this action, the case had not yet been docketed. Accordingly this Court was unaware that Patton had contemporaneously submitted an In Forma Pauperis Application ("Application"), no copy of which had been delivered to chambers together with Patton's motion seeking the appointment of counsel.

Now the Application, together with an accompanying printout showing transactions in Patton's trust fund account at Stateville Correctional Center ("Stateville," where he is now in custody) has been received here, so that this Court is in a position to supplement the Order with the required calculation under 28 U.S.C. §1915 ("Section 1915"). This Court has made the required calculation under Section 1915(b)(1) and has determined that the average balance in Patton's trust fund account during the

relevant six-month period amounted to \$70.84, so that the required initial payment on account of the \$350 filing fee (20% of that figure) is \$14.17.¹ Accordingly Patton is assessed that initial fee of \$14.17, and the Stateville trust fund officer is ordered to collect that amount from Patton's trust fund account there and to pay it directly to the Clerk of Court ("Clerk"):

Office of the Clerk
United States District Court
219 South Dearborn Street
Chicago IL 60604

Attention: Fiscal Department

After such payment, the trust fund officer at Stateville (or at any other correctional facility where Patton may hereafter be confined) is authorized to collect monthly payments from his trust fund account in an amount equal to 20% of the preceding month's income credited to the account. Monthly payments collected from the trust fund account shall be forwarded to the Clerk each time the amount in the account exceeds \$10 until the full \$350 filing fee is paid. Both the initial payment and all future payments shall clearly identify Patton's name and the

¹ In the "Certificate" section at the end of the Application form, the Stateville fiscal officer lists the average monthly deposits to the trust fund account as \$17.79. That may be so, but it ignores the Section 1915(b)(1) provision that the calculation must take account of the greater of two numbers: the average monthly deposits and the average balance in the account. That has pointed up a deficiency in the form provided by this District Court, for the Certificate refers only to the "average monthly deposit."

08 C 1975 case number assigned to this action. To implement these requirements, the Clerk shall send a copy of this order to the Stateville trust fund officer.



Milton I. Shadur
Senior United States District Judge

Date: April 11, 2008

BR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Rodney Patton,)
)
 Plaintiff,)
)
 v.) No. 08 C 1975
)
 Wilvis Harris, et al.,)
)
 Defendants.)

MEMORANDUM ORDER

Rodney Patton ("Patton") has filed a motion for reconsideration of this Court's April 10, 2008 dismissal of his self-prepared 42 U.S.C. § 1983 ("Section 1983") Complaint (a copy of the April 10 memorandum order ["Order"] is attached). As Order at 1 reflects, Patton is a frequent filer: This District Court's Prisoner Pro Se Staff Attorneys have provided a list that includes seven earlier (and now closed) cases brought by Patton over and above his lawsuit presently pending before Judge Robert Gettleman (Case No. 04 C 3933). That prior litigation list calls for the denial of Patton's current motion out of hand.

As Order at 1-2 reflects, this Court initially gave Patton the benefit of a considerable doubt by going on thereafter to discuss the substance of his then-tendered Complaint, rather than simply invoking 28 U.S.C. § 1915(g)¹ as the basis for denying Patton leave to proceed without prepayment of the entire \$350

¹ All further references to Title 28's provisions will simply take the form "Section--".

filing fee. But this Court has now given full consideration to the latter question that was reserved in the Order, and it concludes that our Court of Appeals' rulings as to Patton's appeal from the dismissal of Case No. 07 C 2180 by this Court, when that Court (1) denied Patton's motion for leave to proceed on appeal in forma pauperis, (2) ordered him to pay the \$455 in appellate fees and (3) dismissed the appeal -- actions that followed this Court's certification under Section 1915(a)(3) that the appeal was filed in bad faith -- was indeed a third "strike" for purposes of Section 1915(g).

That being the case, Patton has accumulated three "strikes" before he sought to file this action. Under those circumstances Congress has prescribed that Patton cannot proceed with the current action unless he first pays the \$350 filing fee in full, and he has offered nothing toward that end.² That in turn calls for the denial of Patton's current motion for reconsideration. This Court so orders.



Milton I. Shadur
Senior United States District Judge

May 2, 2008

² Order at 3 n.4 also commented on what appears to be a very substantial financial obligation to the court system on Patton's part, stemming from his repeated lawsuits. This Court would never entertain the notion of making the federal court inaccessible to anyone who seeks to advance a legitimate Section 1983 claim of deprivation of any constitutional right, but it certainly appears that Patton is abusing that principle by treating the justice system as somehow obligated to honor an open-ended credit card in his favor.

CH

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RODNEY PATTON #N-90674,)
)
 Plaintiff,)
)
 v.) No. 08 C 1975
)
 WILVIS HARRIS,)
)
 Defendant.)

MEMORANDUM ORDER

Rodney Patton ("Patton") has filed a Notice of Appeal from this Court's April 10, 2008 dismissal of his self-prepared 42 U.S.C. §1983 ("Section 1983") Complaint, accompanying his Notice with a handwritten Motion to Continue as a Poor Person. Quite apart from Patton's failure to tender the type of documentation that is required for any such in forma pauperis request (so that this Court might make the calculations needed for that purpose), what he has chosen to omit from his filings is the fact that the documentation furnished to this Court when Patton sought reconsideration of the April 10 dismissal has confirmed that he had previously accumulated three "strikes" countable under 28 U.S.C. §1915(g) before he sought to file this action in the District Court.

That being the case, Congress has decreed that Patton cannot proceed with his proposed appeal unless he first pays the \$455 in filing fees applicable to such an appeal. This Court attaches a copy of its May 2, 2008 memorandum order dealing with that

subject (as a matter of information, the three strikes accumulated before this action was filed were in (1) Case No. 94 C 369, Patton v. Proctor, (2) Case No. 07 C 1761, Patton v. County of Cook and (3) Case No. 07 C 2180, also Patton v. County of Cook¹).



Milton I. Shadur
Senior United States District Judge

Date: May 13, 2008

¹ In that last case our Court of Appeals appears to have denied Patton leave to proceed on appeal in forma pauperis because of this Court's certification that the appeal was filed in bad faith. That being so, it is unclear whether Case No. 07 C 2180 accounts for one or for two strikes (one at the District Court stage and one at the Court of Appeals level). But there is no gainsaying that at a minimum it accounted for a third strike, so as to call 28 U.S.C. §1915(g) into play.