No. 18-8369

IN THE

Supreme Court of the United States

ARTHUR JAMES LOMAX,

Petitioner,

v.

CHRISTINA ORTIZ-MARQUEZ, NATASHA KINDRED, DANNY DENNIS, MARY QUINTANA

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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December 9, 2019

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 5, 2019
CERTIORARI GRANTED OCTOBER 18, 2019

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Relevant Docket Entries from the United States Court of Appeals For the Tenth Circuit, *Arthur James Lomax v. Christina Ortiz-Marquez et al.*, Case No. 18-1250.

Date Filed	#	Docket Text
06/15/2018	1	Prisoner case docketed. DATE RECEIVED:. Fee or 1915 forms and notice of appearance due on 07/16/2018 for Arthur J. Lomax. [18-1250] [Entered: 06/15/2018 01:42 PM]
06/15/2018	2	Appellant brief filed by Mr. Arthur J. Lomax. Original and 3 copies. Served on 06/11/2018 by US Mail. Required 10th Cir. R. 28.2 Attachments Included? n. [18-1250] [Entered: 06/15/2018 04:15 PM]
06/19/2018	3	Order filed by Clerk of the Court - Because it appears Mr. Lomax has accumulated three strikes, he must pay the appellate filing fee in full before proceeding. Accordingly, Mr. Lomax must show cause in writing why the appeal should not be dismissed for failure to prepay the entire filing fee as required by 28 U.S.C. 1915(g) or why 1915(g) does not apply to this appeal. 1915 response due on

		07/10/2018 for Arthur J. Lomax. Served on 06/19/2018. [18-1250] [Entered: 06/19/2018 01:12 PM]
06/25/2018	7	Prisoner's Motion and Affidavit for Leave to Proceed on Appeal Pursuant to 28 U.S.C. 1915 and Fed. R. App. P. 24 received from Mr. Arthur J. Lomax, but not filed. This pleading is on the district court's forms. [18-1250] [Entered: 06/25/2018 03:41 PM]
07/11/2018	8	Response to order to show cause [10567824-3] filed by Mr. Arthur J. Lomax. Served on 07/08/2018. Manner of Service: US mail. [18-1250] [Entered: 07/11/2018 01:28 PM]
07/12/2018	9	Order filed by Judges Matheson and Bacharach referring Appellant's response [10573766-2] to the court's show cause order to the panel of judges that will later be assigned to consider this case on the merits (no ruling will issue at this time). Fee or 1915 forms due 08/21/2018 for Arthur J. Lomax. See attached order for additional information. Served on 07/12/2018. [18-1250] [Entered: 07/12/2018 04:45 PM]

07/23/2018	11	Appellant's motion filed by Mr. Arthur J. Lomax for leave to proceed without prepayment of costs and fees. Served on 07/19/2018. Manner of Service: US mail. [18-1250] [Entered: 07/23/2018 02:15 PM]
07/23/2018	12	Order filed by Clerk of the Court assessing costs and fees in the amount of $505. Served on 07/23/2018. [18-1250] [Entered: 07/23/2018 02:56 PM]
11/08/2018	13	Order filed by Judges Lucero, Hartz and McHugh denying Appellant's motion for leave to proceed on 1915 filed by Appellant Mr. Arthur J. Lomax. Served on 11/08/2018. Text only entry - no attachment. [18-1250] Final order to be found in case termination entry. [Entered: 11/08/2018 08:08 AM]
11/08/2018	14	Affirmed; Terminated on the merits after submissions without oral hearing; Written, signed, unpublished; Judges Lucero, Hartz and McHugh, author. Mandate to issue. [18-1250] [Entered: 11/08/2018 08:10 AM]
11/30/2018	15	Mandate issued. [18-1250] [Entered: 11/30/2018 09:27 AM]

03/12/2019	16	Petition for writ of certiorari filed by Arthur J. Lomax on 02/05/2019. Supreme Court Number 18-8369. [18-1250] [Entered: 03/12/2019 01:03 PM]

Relevant Docket Entries from the United States District Court for the District of Colorado,
***Arthur J. Lomax v. Rick Raemisch et al.*,**
Case No. 1:18-cv-00321

Date Filed	#	Docket Text
02/08/2018	1	Prisoner COMPLAINT Pursuant to 1983 against Danny Dennis, David Dennis, Director of SOTMP, Joshua Frost, Hager, Natasha Kindred, Christina Ortiz-Marquez, Mary Quintana, Rick Raemisch, Trujillo, filed by Arthur J. Lomax. (Attachments: # 1 Envelope, # 2 Exhibit, # 3 Letter)(rroge,) (Entered: 02/08/2018)
02/08/2018	3	Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. 1915. by Plaintiff Arthur J. Lomax. (rroge,) (Entered: 02/08/2018)
02/27/2018	6	AMENDED prisoner COMPLAINT against Danny Dennis, David Dennis, Joshua Frost, Hager, Natasha Kindred, Christina Ortiz-Marquez, Mary Quintana, Rick Raemisch, Trujillo, filed by Arthur J. Lomax.(angar,) (Entered: 02/28/2018)

03/18/2018	8	VACATED ORDER Granting 3 Leave to Proceed Pursuant to 28 U.S.C. § 1915, by Magistrate Judge Gordon P. Gallagher on 3/18/2018. (angar,) Modified on 4/24/2018 to vacate pursuant to 13 Order (angar,). (Entered: 03/19/2018)
03/19/2018	9	ORDER to File an Amended Prisoner Complaint. If Plaintiff fails within the time allowed to file an Amended Prisoner Complaint that complies with this Order the Court may dismiss the action without further notice. Plaintiff's Motion for Appointment of Counsel, ECF No. 7 , is denied without prejudice at this time as premature pending initial review. Plaintiff's Motion for Extension of Words/Pages, ECF No. 4 , is denied as moot, by Magistrate Judge Gordon P. Gallagher on 3/19/2018. (angar,) (Entered: 03/19/2018)
04/20/2018	12	AMENDED COMPLAINT against Danny Dennis, Natasha Kindred, Christina Ortiz-Marquez, Mary Quintana, filed by Arthur J. Lomax.(dkals,) (Entered: 04/23/2018)

04/24/2018	13	ORDER Vacating Order Granting Leave to Proceed Pursuant to 28 U.S.C. § 1915(g) and Directing Plaintiff to Show Cause. The Order Granting Leave to Proceed Pursuant to 28 U.S.C. § 1915, ECF No. 8 , is vacated. If Plaintiff fails to show cause within thirty days from the date of this Order, he will be denied leave to proceed pursuant to 28 U.S.C. § 1915 and required to pay the $400 filing fee, by Magistrate Judge Gordon P. Gallagher on 4/24/2018. (angar,) (Entered: 04/24/2018)
05/14/2018	14	MOTION to Show Cause Order by Plaintiff Arthur J. Lomax. (agarc,) (Entered: 05/15/2018)
06/04/2018	15	ORDER Denying 14 Leave to Proceed Pursuant to 28 U.S.C. § 1915, by Judge Lewis T. Babcock on 6/4/2018. (angar,) Modified on 6/19/2018 to correct text (athom,). (Entered: 06/04/2018)
06/13/2018	16	NOTICE OF APPEAL as to 15 ORDER Denying 14 Leave to Proceed Pursuant to 28 U.S.C. § 1915 by Plaintiff Arthur J. Lomax. (angar,) (Entered: 06/15/2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

(To be supplied by the court)

Arthur James Lomax,

Plaintiff, v.

Rick Raemisch / Warden Steven T. Hager etc.,

Defendant(s).

PRISONER'S MOTION AND AFFIDAVIT FOR LEAVE TO PROCEED PURSUANT TO 28 U.S.C. § 1915

I request leave to commence this civil action without prepayment of fees or security therefor pursuant to 28 U.S.C. § 1915. In support of my request, I declare that:

1. I am unable to pay such fees or give security therefor.
2. I am entitled to redress.
3. The nature of this action is:

The Plaintiff was terminated from the SOTMP treatment program without due process, notice, and an SOTMP termination hearing, after requesting for

a hearing and the processing papers and/or forms which he was denied.

4. My assets and their value are listed below: (attach an additional page if necessary)

   (Assets may include income from employment, rent payments, interest or dividends, pensions, annuities, life insurance payments, Social Security, Veteran's Administration benefits, disability pensions, Worker's Compensation, unemployment benefits, gifts or inheritances, cash, funds in bank accounts, real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing), or any other source of income.)

5. Are you in imminent danger of serious physical injury?

   _x_ Yes ___ No (CHECK ONE). If you answered yes, briefly explain your answer: As a convicted sex offender officers, staffs, inmates alike talks about they don't like sex offenders and continue to show bias toward me by writing me up, and saying all sex offenders need to be dead while I am here at Limon Correctional Facility. When I first made it back to Limon, Officer Mahumad said to me, I thought you were dead about now. I do fear for my life being here. I need to be put back into the SOTMP treatment program, so I can get out of prison before I get killed in here. I was physically assaulted by Officer Lt. Wilson the last time while I was housed here a LCF. I did not want to come back to LCF because they officers/staffs don't like me here, therefore I believe that my life is in danger here. I do have a emo-

tional, mentally, and psychological moments or issues in having sexual intercourse with only attractive females, because when I was between 8 and 9 years of age, I was repeatedly molested and/or raped by an older girl and/or woman. He is a special need offender for sex treatment.

6. I have attached to this motion a signed authorization directing my custodian to calculate and disburse funds from my inmate trust fund account or institutional equivalent to pay the required filing fee.

7. I have attached to this motion a certificate from the appropriate official at each penal institution in which I have been confined during the six-month period immediately preceding the filing of this action and a certified copy of my inmate trust fund account statement for the same six-month period.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that the information in this motion and affidavit is true and correct. See 28 U.S.C. § 1746; 18 U.S.C. § 1621.

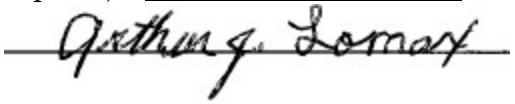
Executed on: February 5, 2018
(Date)

Arthur J. Lomax
(Prisoner's Original Signature)

AUTHORIZATION

I, Arthur James Lomax, request and authorize the agency holding me in custody to calculate and disburse funds from my inmate trust fund account or institutional equivalent in the amounts specified by 28 U.S.C. § 1915(b). This authorization is furnished in connection with this civil action and I understand that the total filing fee of $350.00 is due and will be paid from my inmate trust fund account or institutional equivalent regardless of the outcome of this case.

Prisoner Name (please print): Arthur James Lomax

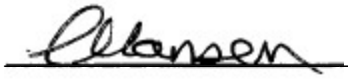
Prisoner Signature: 

CERTIFICATE OF PRISON OFFICIAL

I certify that the attached statement is an accurate copy of the inmate trust fund account statement or institutional equivalent for the past six months for the prisoner named below.

Prisoner's Name: Arthur James Lomax

Signature of Authorized Prison Official:



Date: Feb 05, 2018

[Statement of Account Activity Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-CV-00321-GPG
(To be supplied by the court)

ARTHUR J. LOMAX, Plaintiff

v.

CHRISTINA ORTIZ-MARQUEZ,

NATASHA KINDRED,

DANNY DENNIS,

MARY QUINTANA,
Defendant(s).

(*List each named defendant on a separate line. If you cannot fit the names of all defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Section B. Do not include addresses here.*)

AMENDED PRISONER COMPLAINT

NOTICE

Federal Rule of Civil Procedure 5.2 addresses the privacy and security concerns resulting from public access to electronic court files. Under this rule, papers filed with the court should not contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include only: the last four digits of a social security number; the year of an individual's birth; a minor's

initials; and the last four digits of a financial account number.

Plaintiff need not send exhibits, affidavits, grievances, witness statements, or any other materials to the Clerk's Office with this complaint.

A. PLAINTIFF INFORMATION

You must notify the court of any changes to your address where case-related papers may be served by filing a notice of change of address. Failure to keep a current address on file with the court may result in dismissal of your case.

Arthur J. Lomax, #134416, P.O. Box 10000, Limon, CO 80826

(Name, prisoner identification number, and complete mailing address)

N/A

(Other names by which you have been known)

Indicate whether you are a prisoner or other confined person as follows: (check one)

____ Pretrial detainee
____ Civilly committed detainee
____ Immigration detainee
✓ Convicted and sentenced state prisoner
____ Convicted and sentenced federal prisoner
____ Other: *(Please explain)* N/A

B. DEFENDANT(S) INFORMATION

Please list the following information for each defendant listed in the caption of the complaint. If more space is needed, use extra paper to provide the infor-

mation requested. The additional pages regarding defendants should be labeled "B. DEFENDANT(S) INFORMATION."

Defendant 1: CHRISTINA ORTIZ-MARQUEZ, Supervisor of SOTMP,

(Name, job title, and complete mailing address)

Centennial Corr. Facility, P.O. Box 600, Cannon City, CO 81215

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? ✓ Yes __ No (*check one*). Briefly explain.

Her denial of Mr. Lomax' due process SOTMP termination review hearing.

Defendant 1 is being sued in his/her ___ individual and/or ✓ official capacity.

Defendant 2: Natasha Kindred, Counselor, in the SOTMP at CCF,

(Name, job title, and complete mailing address)

Centennial Correctional Fac., P.O.B 600, Canon City, CO 81215

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? ✓ Yes __ No (*check one*). Briefly explain.

she aided and abetted in the termination of Mr. Lomax from the SOTMP treatment program.

Defendant 2 is being sued in his/her ___ individual and/or ✓ official capacity.

Defendant 3: Danny Dennis, Class' Chair Person at CCF, Centennial

(Name, job title, and complete mailing address)

Corr. Fac., P.O.B 600, Canon City, 81215

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? ✓ Yes __ No (*check one*). Brief-ly explain.

He's responsible for Mr. Lomax's move from CCF/the treatment program.

Defendant 3 is being sued in his/her ___ individual and/or ✓ official capacity.

C. JURISDICTION

Indicate the federal legal basis for your claim(s): (check all that apply)

✓ 42 U.S.C. § 1983 (state, county, and municipal defendants)

____ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971) (federal defendants)

____ Other: (*please identify*)_____

B. DEFENDANT(S) INFORMATION.

Defendant 4 : Mary Quintana, Chair Person at Central Classification Committee, at Offender Services, Central Classification Committee, 1250 Academy Park Loop, Colorado Springs, CO 80910

(Name, job title, and complete mailing address)

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? _x_ Yes ___ No (check one). Briefly explain:

She is one of the individuals who aided and abetted in removing Mr. Lomax from the SOTMP treatment program and/or Centennial Correctional Facility(CCF) to Limon Correctional Facility(LCF), as a Central Classification Committee member.

Defendant 4 is being sued in his/her ___ individual and/or _x_ official capacity.

Defendant 5: Joshua Frost were Mr. Lomax' primary therapist in the SOTMP treatment program at CCF, Centennial Correctional Facility, P.O. Box 600, Canon City, CO 81215

(Name, job title, and complete mailing address)

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? _x_ Yes ___ No (check one). Briefly explain

As Mr. Lomax' primary therapist in the SOTMP treatment program, he were responsible to assist and to ensure him a SOTMP termination review hearing prior to his termination from treatment, being Mr. Lomax' right.

Defendant 5: is being sued in his/her ___ individual and/or _x_ official capacity.

Defendant 6: John Doe/Jane Doe, Director/Designee of the SOTMP at CCF, Centennial Correctional Facility, P.O. Box 600, Canon City, CO 81215.

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? _x_ Yes ___ No (check one). Briefly explain.

He/She were responsible to ensure Mr. Lomax his due process SOTMP review termination hearing prior to being terminated from the treatment program.

Defendant 6: is being sued in his/her ___ individual and/or _x_ official capacity.

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incidents) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label the additional pages re-

garding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM ONE: _____

Supporting facts: The plaintiff were tried and convicted pursuant to C.R.S. 18-3-402, of a class four felony, in the City and Country of Denver, Colorado in September, 2006. As a convicted sex offender, Mr. Lomax is required to participate in a sex offender treatment program. Although Mr. Lomax began the SOTMP treatment program, he was terminated without written notice and/or due process. The plaintiff is filing his complaint, because he believes that he have a protected Liberty interest in continued participation in the treatment program, even though it is required for plaintiff's eligibility for parole. The plaintiff have a powerful interest in the right to participate in treatment and in being provided due process before being terminated from the program, particularly since his progress had to be evaluated before he be considered for parole.

"D. STATEMENT OF CLAIM(S)."

CLAIM ONE:

Supporting Facts:

The Action Properly Asserts a Claim Pursuant to 42 U.S.C. 1983

First, the court should agree with Mr. Lomax that this action is properly brought under 42 U.S.C. 1983 rather than pursuant to a writ of habeas corpus. Challenges to " the very fact or duration —of [a prisoner's] physical confinement itself," or actions prisoners "seeking immediate release or a speedier release from confinement" must be brought under the

habeas statute. Preiser v. Rodriguez, 411 U.S. 475,498, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973). However, where "a district court determines that a plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed [as a 1983 action], in the absence of some other bar to the suit. Heck v. Humphrey, 512 U. S. 477,129 L. Ed. 2d 383,114 S. Ct. 2364 (1994).

In the case at hand, Mr. Lomax is not challenging the legality of his confinement, but rather the propriety of the Colorado Department of Corrections' denial of the treatment required by statute as one of the conditions of his sentence - both how the denial occurred and the denial itself. Although the relief Mr. Lomax seeks - either a declaration that Plaintiff has a liberty interest in continued participation in sex offender treatment, or, more liberally construed, a declaration that he has a liberty interest in being afforded due process before being dismissed from treatment - would, ultimately, have an effect on the duration of his sentence, Mr. Lomax' challenge is more properly characterized as a challenge to a condition of his confinement than it is as a challenge to the validity of the criminal judgment against him. See Leamer v. Fauver, 288 F. 3d 532, 541-44 (3d Cir. 2002).

This reasoning is supported by the Third Circuit's decision in Leamer v. Fauver, 288 F.3d 532 (3d Cir. 2002), which the Court find persuasive. In that case, the Court invalidated the district court's dismissal of the due process claim of a prisoner who, like Plaintiff, was required to undergo treatment as part of his

sentence and whose [**10] to be considered for parole, like Plaintiff's, was conditioned on his progress in treatment. Id. at 535, 544. The leamer Court recognized as valid the plaintiff's claim under Section 1983 that the state had violated his due [*1015] process rights by failing to provide him with a hearing at which he would have had the opportunity to rebut or refute the allegations that had resulted in his expulsion from the treatment program and his consequent ineligibility for consideration for parole. Id. at 543-44. In this case, as in Leamer, a favorable ruling for Plaintiff on this action would not invalidate his sentence, nor would it necessarily shorten his sentence. Instead, "the only benefit that a victory in this case would provide . . . is a ticket to get in the door of the parole board, thus only making plaintiff eligible for parole consideration according to the terms of [his sentence.] If [plaintiff] wins, it will in no way guarantee parole or necessarily shorten [his] prison sentence by a single day. The parole board will still have the authority to deny the [plaintiff's] request for parole on the grounds presently [**11] available to it in evaluating such a request. A victory in this case would not alter the calculus for them review of parole requests in any way. Because the [plaintiff's challenge in this case does not necessarily imply the invalidity of [his] conviction or continuing confinement, it is properly brought under subsection 1983."

Leamer, 288 F.3d at 543 (quoting Neal v. Shimoda, 131 F.3d 818,824 (9th Cir. 1997) (emphasis in Neal). Ultimately, even if Plaintiff prevails and progresses through the treatment program, discretion over the length of his sentence will continue to rest with the parole board. As such, I find that his claim is properly brought pursuant to 42 U.S.C. subsection 1983.

Mr. Lomax claims that Defendants, acting under color of state law, deprived him of both his procedural and substantive due process rights under the Fourteenth Amendment. The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 60 L. Ed. 2d 668, 99 S. Ct 2100 (1979). "This has meant that to obtain a protectable right a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Greenholtz, 442 U.S. at 7 (citation omitted).

Mr. Lomax, were terminated and removed from the SOTMP treatment program at Centennial Correctional Facility without a SOTMP due process review termination hearing, and without written notice which is his right etc, by local, state, federal laws, and CDOCAR's rules and policies. Under Colorado law, Mr. Lomax as a convicted sex offender is required as a part of his sentence to undergo " appropriate" treatment. See COLO. REV. STAT. 18-1.3-1004(3) and 16-11.7-106. The sex offender is further required to undergo an evaluation to determine what kind of treatment would be appropriate for him or her. See COLO. REV. STAT. 16-11.7-104,16-11.7-105. For a sex offender to be eligible for release on parole, the parole board must consider "whether the sex offender has successfully progressed in treatment." COLO. REV. STAT. 18-1.3-1006(l)(a).

In the case of persons incarcerated by the state [**13], the Supreme Court has held that "a prisoner is not wholly stripped of constitutional protections when he imprisoned for a crime." Wolff v. McDonnell, 418 U.S. 539, 555, 41 L.Ed 935, 94 S. Ct. 2963 (1974), Chambers v. Colorado Dep't of Crr., 205 F.3d 1237,1242 (10th Cir. 2000) (quoting Wolff). Prisoners, thus, retain some rights under the Due Process Clause. These rights, are "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed."

Where a right may not otherwise have existed, a state may create prisoner [*1016] rights through the use of mandatory statutory language. See Wolff, 418 U.S. at 557 (noting authority of states to create rights). Where such a right is created, a prisoner is entitled to some minimal due process before he is arbitrarily deprived of it. See id. (holding that where state creates right to earn goodtime credits toward shortened prison sentence, prisoner's right "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due [**14] Process Clause to insure that the state-created right is not arbitrary abrogated"), Sandin v. Conner, 515 U.S. 472, 477,132 L. Ed. 2d 418,115 S. Ct. 2293 (1995) (reiterating ruling in Wolff).

Colorado's Sex Offender Lifetime Supervision Act does not merely suggest that a prisoner who wants to seek parole might enhance his chances of being granted early release if he participates in a sex offender treatment program. To the contrary, the Act states, HN11 " Each sex offender sentenced pursuant

to this section shall be required as part of the sentence to undergo treatment to the extent appropriate pursuant to section 16-11.7-105 . . . ." COLO. REV. STAT. 181.3-1004(3) (emphasis added). HN12 While the statute does vest some degree of discretion in the Colorado Department of Corrections, that discretion is not as to whether a sex offender should receive treatment; rather, it is as to what kind of treatment is "appropriate" for the offender. Id., COLO. REV. STAT. 16-11.7-105 (requiring provision of appropriate treatment based upon evaluation of offender, recommendation of department of corrections, and other factors). In the case at hand, Mr. Lomax's claim of a liberty interest is predicated on the mandatory language of the statute which requires the state to provide sex offenders with treatment during their imprisonment.

As in Leamer, under Colorado's statutory scheme, "confindment and treatment are inextricably linked." Leamer, 288 F.3d at 544. "Neither good behavior, parole policies, or other credits can affect the term of his sentence. Only successful therapy can shorten [the prisoner's] incarceration. Therapy is thus an inherent and integral element of the scheme, and it's deprivation is clearly a grievous loss not emanating from the sentence." Id. Accordingly, the court must examine the constitutional claims asserted in the Amended Complaint to determine (1) whether Plaintiff could possess a liberty interest in treatment that was implicated for purposes of procedural and substantive due process; (2) whether Plaintiff has alleged that the procedures employed in evicting him from the treatment program comport with due process; and (3) whether Plaintiff has properly alleged that the denial of treatment was deliberately indif-

ferent and so arbitrary [**16] as to shock the conscience for purposes of substantive due process. See id.

Plaintiff's Due Process Rights

In Sandin v. Conner, the Supreme Court held that HN14 a court determining whether a liberty interest created by state law warrants due process protection must assess the " nature" of the interest and whether the Plaintiff's being deprived of it has caused the inmate to suffer "a 'grievous loss' of liberty retained even after . . . imprisonment." Sandin, 515 U. S. at 480,481. The Court clarified that such state-created liberty interests are "generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U. S. at 484. However, the Court has also recognized that a "major change" in a prisoner's conditions of confinement may amount to a "grievous loss" to the prisoner. See Wolff, 418 U. S. at 572 n.19 (noting that "major change" can constitute constitutionally cognizable deprivation), Vitek v. Jones, 445 U.S. 480,492, 63 L. Ed. 2d 552,100 S. Ct. 1254 (1980) (noting with approval district court finding that increased [**17] stigma suffered by prisoner transferred to mental hospital, plus accompanying increased restrictions on freedom, plus compelled treatment in mandatory behavior modification program constitutes "grievous loss").

Colorado has created a scheme in which a sex offender is require to undergo treatment and in which the Colorado Department of Corrections lacks discretion to withhold treatment. See COLO. REV. STAT. 18-1.3-1004(3), 16-11.7-105. The withholding of treat-

ment, then, would work a "major change in the condition of [Plaintiff's] confinement," Vitek, 445 U.S. at 492, since his status would change from "eligible to be considered for parole" to "ineligible to be considered for parole." Such a change would, without doubt, have a serious impact on a prisoner's morale, outlook, hope for the future, and motivation to pursue rehabilitation. As such, there can be no serious dispute that the deprivation of treatment amounts "to a grievous loss to the inmate," Vitek at 492. For this reason, the Court should find that the Amended Complaint asserts allegations stating a cognizable liberty interest for due process purposes.

D. STATEMENT OF CLAIMS.

Supporting facts:

Thus, participation in treatment program is an absolute prerequisite for release on parole.

Mr. Lomax, were requested by CCF for ITC SOTMP Track II program on July 17, 2017 and recommended Close custody and accepted for sex offender treatment program on or about July 26, 2017, acknowledged and approved by Classification chair person Mr. Anton Evans at CCF and Offender Services Mr. Michael Martinez, who both acknowledge and approved the acceptance of Mr. Lomax into the sex offender treatment program. Mr. Lomax signed his "SOTMP Treatment Contract" on or about August 1, 2017. He "was required to sign the "SOTMP Treatment Contract" in order to be eligible for statutorily mandated treatment, and Mr. Lomax did singed the contract under duress." He begin to participate in the treatment program on or about September 18, 2017 and were recommended for termination from

the SOTMP treatment program and to be transferred to a Close Custody Facility (level IV) on or about October 27, 2017, because CDOC claimed that Mr. Lomax' behavior indicated the need to move from CCF and/or the ITC program, acknowledged and approved by CCF Classification Chair person Mr. Danny Dennis at CCF and Offender Services Classification Chair person Ms. Mary Quintana, which violated his Fifth, Eighth, Ninth, and Fourteenth Amend. Consts. The CDOC Administrative did not have the right and/or authority to terminate or remove Mr. Lomax from the SOTMP treatment program apart from a SOTMP review termination hearing because of his COPD-write-up, he should have been removed or terminated by an SOTMP review hearing board and not by a so call administrative termination because of his bogus COPD-write-up, being Mr. Lomax's had a right to have a SOTMP review terminato hearing by the SOTMP hearing board in regard to his due process, see AR 700-19; AR 700-32 and the Fourteenth Conts. Amends. And therefore, Mr. Danny Dennis and Ms. Mary Quintana they caused the deprivation of his federal rights and violated the named COLO. REV. STAT's above and his Fourteenth Amend. Mr. Lomax also understand that he cannot choose what prison facility he would like to go to and/or to be able to participate in treatment program, that is not the issue in this case. When Mr. Lomax were administratively terminated or removed from the SOTMP treatment program without a SOTMP termination review hearing, the opportunity to be heard, and to call witness etc., and being that the COPD disciplinary hearing is a separate process for COPD- charges or rule(s) violations, for exsample, for the alleged action in the COPD - Class

II write-up, Rule 14, Advocating or Creating Facility Disruption, which he plead not guilty to, the Authorized Sanction Matrix, Loss of Good Time (Max Days-30), Loss of Privileges (Max Day 30), Housing Restriction Sanction (Max Days-15), and Restrictive Housing (Max Days-15), see Notice of Charge(s), CCF, Case No. 18-071 and Incident # 1059626. When Mr. Lomax were asked twice to leave the class-room, his presence and/or action in the SOTMP Track II group did not constitute a threat or a dangerous situation to the physical well-being of any Officer, staff, other inmates, or to himself, and there was no prison riot in progress. This action by CDOC staffs/employees deprived and violated Mr. Lomax of his due process rights, equal protection of the law, privilege, and liberty interest. Mr. Lomax, have waited almost 12 years for his placement in the SOTMP treatment program and was terminated within one and a half month. Mr. Lomax has felt a great loss and have suffered mentally, emotionally, psychologically injury, and because of CDOC ill action has provoked Mr. Lomax to relapse into his old sexual behaviors because they have denied and deprived him of his required sex treatment, and felt as he was deprived and denied the opportunity to continue to progress in treatment and the chance to be released by the parole board, and getting out of prison. Mr. Lomax believes he were discriminated against, CDOC employees abused their discretion and authority, and violated his right to equal protection of the law. Overall Mr. Lomax is claiming that his procedural and substantive due process rights were violated because of the manner in which he was terminated from the program.

Plaintiff believes that Defendant Mr. John Doe/Ms. Jane Doe the then director of the SOTMP treatment program violated his right to procedural and substantive due process under the Fourteenth Amendment of the United States Constitution. Mr. Lomax/Plaintiff alleges not just he has a right to participate in the sex offender treatment program, but also that the Defendant(s) Mr. John Doe/Ms. Jane Doe the then director of the SOTMP treatment program, failed to provide him with due process protections before and apart from his illegal so-call administrative termination from the SOTMP treatment program (See letter from the SOTMP Treatment Team, date recived by inmate Mr. Lomax on 10/30/2017, the day before he were transferred from CCF.) The Defendant, the then director of the SOTMP treatment program denied and deprived the plaintiff of his due process of a SOTMP review determination hearing, without prior written notice, of the reason for his termination, without the opportunity to be heard, without an opportunity to present evidence in his defense, and without an opportunity to present witnesses in his defense. See AR 700-19, AR 700-32, and AR 1450-01, Staff, Code of Conduct.

Mr. Lomax believes that the Defendant/Ms. Christina Ortiz-Marquez the then supervisor of the SOTMP treatment program at the Centennial Correctional Facility violated Mr. Lomax's right to procedural and substantive due process under the Fourteenth Amendment of the United States Constitution.. Mr. Lomax/Plaintiff alleges not just he has a right to participate in the sex offender treatment program, but also that this defendant failed to provide him with due process protection before and apart from his COPD hearing or prior to his illegal so-call adminis-

trative termination from the SOTMP treatment program and prior to him being removal or termination from the treatment program on or about October 27, 2017. Without prior written notice, of the reason for his termination, and without the opportunity to be heard, without an opportunity to present evidence in his defense, and without an opportunity to present witnesses in his defense. The Defendant Natash kindred being one of Mr. Lomax's Counselor in the SOTMP Track II treatment program entry group from the time he started on or about September 18,2017, aided and abetted and being complicity to the removal and/or termination of Mr. Lomax from SOTMP treatment program, therefore caused his loss, pain, suffering, and the deprivation of treatment and liberty interest in violation of his 5th, 9th, and 14th Const. Amends. Natash kindred showed bias and were unfair, discriminated, and retaliated against Mr. Lomax because of his race, sex offense, polical views, and his personality. On or about October 5, 2017, Mr. Lomax were placed on Probationary status in the Intensive Treatment Community (ITC) and was regressed to Level One for him having allegingly received over 11 negative chrons (there has not been any proof or evidence presented to Mr. Lomax of any negative chrons) and he was removed from group twice due to alleged disruptive behavior, after supervisor Christina Ortiz- Marquez of the SOTMP treatment program, Natasha Kindred, and Mr. Lomax's primary thoripist Mr. Joshua Frost had a meeting with the correctional staff they ageed to place Mr. Lomax on probation status for 30 days (see, Probationary Status SOTMP Track II Form, dated 10/5/2017, to Arthur Lomax). It was either probation or termination from treatment, Mr. Lomax

agreed to the probation and signed the probation agreement terms. Mr. Lomax did comply and followed all probationary rules, terms, and the criteria up until the day he were transferred from CCF to LCF on 10/31/2017. On the same date, October 5, 2017, that Mr. Lomax were placed on probation counsel Ms. Natasha Kindred intentionally, knowingly, and maliciously wrote the plaintiff up for a Class II charge-Advocating or Creating Facility Disruption for the same thing he were placed on probation for hoping that the plaintiff would get terminated from the treatment program. Ms. Natasha Kindred did know that Mr. Lomax was on probation during the time she wrote the COPD Class II charge against him. She did not like the plaintiff at all, he hadn't gotten no other COPD-write-ups before then. The withholding of treatment, have worked a major change in the life and condition of Mr. Lomax's confinement, his status has change from eligible to be considered for parole to ineligible to be considered for parole. Such a change has, without doubt, have had a serious impact on Mr. Lomax's morale, outlook, hope for the future, and his motivation to pursue rehabilitation. As such, that the deprivation of treatment of Mr. Lomax amounts to a grievous loss for him.

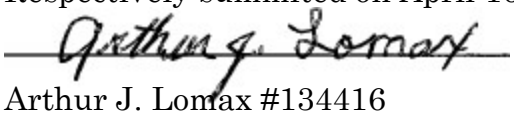
Mr. Joshua Frost, Mr. Lomax's primary therapist in the SOTMP treatment as a professional has the moral duty, obligation, responsibility and should have had the knowledge to ensure that Mr. Lomax receive the sex treatment he needed to continue to progress in treatment and prior to his termination from the treatment program that he should have known that Mr. Lomax had the right to a SOTMP review termination hearing. See AR 700-19, AR 700-

32, and AR 1450-15, Staff, Code of Conduct. Mr. Josh Frost, didn't inform Mr. Lomax about his termination from SOTMP treatment program. Therefore, the Defendant Mr. Josh Frost aided and abetted and were complicity to the withholding of sex treatment from Mr. Lomax and violated his 5th, 8th, 9th, and 14th Cont. Amends. Mr. Lomax, on the same date October 30,2017, he received the letter from the SOTMP Treatment team, on this date he initiated a conversation with his primary therapist Mr. Josh Frost and mention to him about assisting him in having a SOTMP termination review hearing and getting Mr. Lomax a AR 700-32C Form for him to complete, he said he could not do nothing for me in that regard. The SOTMP clinicians never presented their recommendation for the plaintiff's termination in an SOTMP termination staffing. Because Mr. Lomax was denied and deprived of his SOTMP due process hearing prior to being terminated from the sex offender treatment program. Mr. Josh Frost failed to represent Mr. Lomax as his primary therapist to the best of his interest, capability, and responsibility.

There is a prograg (SOTMP) and/or policy in place to provide due process to Plaintiff before he was arbitrarily deprived of his right to treatment in the program which CDOC employees deliberately and completely denied the Plaintiff/ Mr. Lomax his due process to a termination review hearing without notice could satisfy the "shocks the conscience" test. Plaintiff believes that Defendants violated his right to procedural and substantive due process under the Fourteenth Amendment of the United States Constitution, and owe him 'the Legal duty to provide him with due process protections of his liberty interest in

continued participation in treatment before he were ill- legally Administratively terminated from treatment.

Respectively summited on April 16, 2018.



Arthur J. Lomax #134416

E. PREVIOUS LAWSUITS

Have you ever filed a lawsuit, other than this lawsuit, in any federal or state court while you were incarcerated? ✓ Yes ___ No (*check one*).

If your answer is "Yes," complete this section of the form. If you have filed more than one previous lawsuit, use additional paper to provide the requested information for each previous lawsuit. Please indicate that additional paper is attached and label the additional pages regarding previous lawsuits as "E. PREVIOUS LAWSUITS."

Name(s) of defendant(s):	Don't Remember
Docket number and court:	Don't Recall
Claims raised:	Constitutional Violation
Disposition: (is the case still pending? has it been dismissed?; was relief granted?)	Dismissed
Reasons for dismissal, if dismissed:	Time Barred

Result on appeal, if appealed: Time Barred

F. ADMINISTRATIVE REMEDIES

WARNING: Prisoners must exhaust administrative remedies before filing an action in federal court regarding prison conditions. See 42 U.S.C. § 1997e(a). Your case may be dismissed or judgment entered against you if you have not exhausted administrative remedies.

Is there a formal grievance procedure at the institution in which you are confined?

✓ Yes No (*check one*)

Did you exhaust administrative remedies?

✓ Yes No (*check one*)

G. REQUEST FOR RELIEF

State the relief you are requesting or what you want the court to do. If additional space is needed to identify the relief you are requesting, use extra paper to request relief. Please indicate that additional paper is attached and label the additional pages regarding relief as "G. REQUEST FOR RELIEF."

Mr. Lomax is requesting and demanding a jury trial, see Cont. Amend. 7 and Rule 38, Rights to Trial by Jury. He's also requesting compensation for punitive damages for Loss, pain, and suffering. The ~~he~~ amount he seeks and request is no less than $50,000 and no more than $250,000. And for injunction, the Court should order COOC to place Mr. Lomax immediately back into the SOTMP treatment program.

H. PLAINTIFF'S SIGNATURE

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this complaint, and that the information in this complaint is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Under Federal Rule of Civil Procedure 11, by signing below, I also certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending or modifying existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

Arthur J. Lomax

(Plaintiff's signature)

March 26, 2018

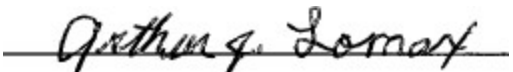
(Date)

(Form Revised December 2017)

CERTIFICATE OF SERVICE

I certify that on this 16 day of April 2018, I sent a true and correction copy of the foregoing Amended Prisoner's Complaint by depositing the same in the United States mail, postage prepaid to the following:

Ms. Cynthia H. Coffman
Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203



Arthur J. Lomax #134416
Limon Correctional Facility/LCF
PO Box 10000
Limon, CO 80826

Civil Action No. 18-cv-00321-GPG

Arthur J. Lomax # 134416
Limon Correctional Facility/LCF
PO Box 10000
Limon, CO 80826

April 16, 2018

Re: Request to file Amended Prisoner Complaint.

Dear Clerk of the Court,

The Plaintiff were Ordered to File an Amended Prisoner Complaint on March 19, 2018, within thirty (30) days from the date of the Order, by U.S. Magistrate Judge-Gordon P. Gallagher. I'm requesting you to please file his "Amended Prisoner Complaint".

Thank you in advance.

Sincerely,

Arthur J. Lomax

[Images Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00321-GPG

ARTHUR J. LOMAX, aka ARTHUR JAMES LOMAX,

Plaintiff,

v.

CHRISTINA ORTIZ-MARQUEZ,
NATASHA KINDRED,
DANNY DENNIS, and
MARY QUINTANA,

Defendants.

ORDER VACATING ORDER GRANTING LEAVE TO PROCEED PURSUANT TO 28 U.S.C. § 1915(g) AND DIRECTING PLAINTIFF TO SHOW CAUSE

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

It has been brought to the Court's attention that Plaintiff, on three or more occasions, has brought an action that was dismissed on the grounds that it fails to state a claim. *See Lomax v. Hoffman, et al.*, No. 13-cv-03296-LTB (D. Colo. Jan. 23, 2014) (dismissed as barred by *Heck*); *Lomax v. Hoffman, et al.,* No. 13-02131-LTB (D. Colo. Aug. 15, 2013) (dismissed as barred by *Heck*); *Lomax v. Trani, et al.,*

No. 13-cv-00707-WJM-KMT(dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6)).

In relevant part, § 1915 provides:

> 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.

28 U.S.C. § 1915(g).

Each dismissal for failure to state a claim, which are noted above, qualifies as a "strike" under 28 U.S.C. § 1915(g). *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1176-77 (10th Cir. 2011). As a result, the Court finds that Plaintiff is subject to the filing restriction in § 1915(g).

"There is only one exception to the prepayment requirement in § 1915(g)." *Id.* at 1179. A prisoner litigant with three or more strikes who seeks to fall within that exception must "make specific, credible allegations of imminent danger of serious physical harm." Id. at 1179-80. Vague and conclusory assertions of harm will not satisfy the imminent danger requirement of § 1915(g). *See White v. Colorado*, 157 F.3d 1226, 1231-32 (10th Cir. 1998). Allegations of past injury or harm also are not sufficient. *See Fuller v. Wilcox*, 288 F. App'x 509, 511 (10th Cir.

2008). "Every circuit to have decided the issue so far has concluded that the statute's use of the present tense shows that a prisoner must have alleged an imminent danger at the time he filed his complaint." *Hafed*, 635 F.3d at 1179-80 (collecting cases).

Plaintiff does not assert that Defendants' actions are the cause of any current imminent danger of serious physical injury. Plaintiff's response to the question, on Page Two of the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 form, if he is in imminent danger of serious physical injury, is vague and refers to a past alleged attack. ECF No. 2 at 7. Therefore, the Court finds that Plaintiff has initiated three or more actions that count as strikes pursuant to § 1915(g) and that he is not under imminent danger of serious physical injury based on Defendants' actions. Pursuant to § 1915(g) he is precluded from bringing the instant action *in forma pauperis*. Plaintiff will be ordered to show cause why he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915(g). Accordingly, it is

ORDERED that the Order Granting Leave to Proceed Pursuant to 28 U.S.C. § 1915, ECF No. 8, is vacated. It is

FURTHER ORDERED that Plaintiff show cause in writing **within thirty days from the date of this Order** why he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915 because: (1) he has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action in a court of the United States that was dismissed on the grounds that it is frivolous; and (2) he fails to establish that he is under imminent danger of serious physical injury. It is

FURTHER ORDERED that, if Plaintiff fails to show cause **within thirty days from the date of this Order**, he will be denied leave to proceed pursuant to 28 U.S.C. § 1915 and required to pay the $400 filing fee.

DATED April 24, 2018, at Denver, Colorado.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00321-GPG

(To be supplied by the court)

ARTHUR J. LOMAX,

Plaintiff,

v.

CHRISTINA ORTIZ- MARQUEZ,

NATASHA KINDRED,

DANNY DENNIS, and

MARY QUINTANA,

Defendant(s).

MOTION TO SHOW CAUSE ORDER

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

The United States District Court stated, It has been brought to the Court's attention that Plaintiff, on three or more occasions, has brought an action that was dismissed on the grounds that it fails to state a claim. The Court cited, See Lomax v. Hoffman, et al., No. 13-cv-03296-LTB (D. Colo. Jan. 23, 2014) (dismissed as barred by Heck); Lomax v. Hoff-

man, et al., No. 13-02131- LTB (D. Colo. Aug. 15,2013) (dismissed as barred by Heck); Lomax v. Trani, et al., No. 13-cv-00707- WJM-KMT (dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6)). (See Court's Order dated April 24,2018, at Denver, Colorado, pages 1 and 2. Initially the clerk entered an order granting Plaintiff leave to proceed without full prepayment of fees.

Each dismissal for failure to state a claim, which are cited above, does not qualify as a "strike" under 28 U.S.C. 1915(g). The Court further stated, as a result, the Court finds that Plaintiff is subject to the filing restriction in 1915(g). Each of Plaintiff s dismissal for failure to state a claim, were dismissed without prejudice for failure to state a claim. As a result, Mr. Lomax is not a three-striker, and he should be able to proceed in this civil action without the prepayment of filing fees. See Mclean v. United States, 566 F. 3d 391 While incarcerated, the prisoner filed six non-habeas actions that were dismissed for failure to state a claim upon which relief might be granted. Four of the six actions were dismissed without prejudice. The court held that a dismissal without prejudice for failure to state a claim did not count as a strike under 28 U.S.C.S. § 1915(g) of the Prison Litigation Reform Act of 1996. The type of prior dismissal for failure to state a claim contemplated by § 1915(g) was one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations. Thus, the prisoner had only two strikes under § 1915(g). As a result, the prisoner was permitted to proceed on appeal without the prepayment of filing fees because he had fewer than three prior dismissals that counted as strikes under § 1915(g). The

court did not have jurisdiction to consider whether 28 U.S.C.S. § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996 was unconstitutional because the United States and the U.S. Congress had sovereign immunity from suit. The United States had not waived its immunity for constitutional tort suits.

HN1. The Prison Litigation Reform Act of 1996 (PLRA or Act), Pub. L. No. 104-134, 110 Stat. 1321-71 (1996), limits the ability of prisoners to file civil actions without prepayment of filing fees. When a prisoner has previously filed at least three actions or appeals that were dismissed on the grounds [**2] that they were frivolous, malicious, or failed to state a claim upon which relief may be granted, the Act's "three strikes" provision requires that the prisoner demonstrate imminent danger of serious **[*394]** physical injury in order to proceed without prepayment of fees. 28 U.S.C. § 1915(g). The main issue before the Court is whether a dismissal without prejudice for failure to state a claim counts as a strike under § 1915(g). The Court should acknowledge. The three previous actions filed by Mr. Lomax, in this case, were dismissed without prejudice for failure to state a claim. As a result, Mr. Lomax is not a three-striker, and he may proceed in this civil action without the prepayment of filing fees. However. McLean attempts to sue the United States and the United States Congress, asserting that a statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996), is retroactive and therefore unconstitutional. Because the United States and its Congress are immune from such a suit, we

affirm the district court's dismissal of McLean's complaint.

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

> has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

Mr. Lomax presented appeal(s) challenging the dismissal of his § 1983 action contesting the enactment of AEDPA's statute of limitations. The Court will reach the merits of his appeal only if he is eligible to proceed without prepayment of fees under § 1915 (the IFP statute). To resolve the eligibility issue, The Court must determine whether he has fewer than three prior dismissals that count as strikes or, if not, whether he is in imminent danger of serious physical injury. [**8] The determination of whether Mr. Lomax is a three-striker under § 1915(g) turns on whether a dismissal without prej-

udice for failure to state a claim counts as a strike. The Court should conclude for the following reasons that such a dismissal is not a strike.

A.

HN4. Section 1915(g) includes in its list of strikes an action or appeal "that was dismissed on the grounds that it . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). **HN5**. In interpreting this provision, The CourtOur task here is to determine whether Congress intended an action or appeal "that was dismissed on the grounds that [**9] it . . . fails to state a claim upon which relief may be granted" to count as a strike under 28 U.S.C. § 1915(g) if that dismissal was specifically designated to be "without prejudice." The language "fails to state a claim upon which relief may be granted" in § 1915(g) closely tracks the language of Federal Rule of Civil Procedure 12(b)(6). *Compare* Fed. R. Civ. P. 12(b)(6) (listing "failure to state a claim upon which relief can be granted" as grounds for dismissal). **HN6**. When Congress directly incorporates language with an established legal meaning into a statute, we may infer that Congress intended the language to take on its established meaning. *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute."); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) ("The Court assume that Congress is aware of existing law when it passes legislation."). must first determine whether its language "has a plain and unambiguous meaning with regard

to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340,117 S. Ct. 843,136 L. Ed. 2d 808 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. "Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)).

The Court task here is to determine whether Congress intended an action or appeal "that was dismissed on the grounds that [**9] it . . . fails to state a claim upon which relief may be granted" to count as a strike under 28 U.S.C. § 1915(g) if that dismissal was specifically designated to be "without prejudice." The language "fails to state a claim upon which relief may be granted" in § 1915(g) closely tracks the language of Federal Rule of Civil Procedure 12(b)(6). *Compare* Fed. R. Civ. P. 12(b)(6) (listing "failure to state a claim upon which relief can be granted" as grounds for dismissal). **HN6**. When Congress directly incorporates language with an established legal meaning into a statute, we may infer that Congress intended the language to take on its established meaning. *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute."); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct 317,112 L. Ed. 2d 275

(1990) ("We assume that Congress is aware of existing law when it passes legislation.").

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

It follows that **HN7** the type of prior dismissal for failure to state a claim contemplated by § 1915(g) is one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations. In contrast, a dismissal without prejudice for failure to state a claim is not an adjudication on the merits, *Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997); [**11] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct 2447, 110 L. Ed. 2d 359 (1990), and "permits a plaintiff to refile the complaint as though it had never been filed,"

Mendez v. Elliot, 45 F.3d 75, 78 **[*397]** (4th Cir. 1995). Consequently, a dismissal *without prejudice* for failure to state a claim does not fall within the plain and unambiguous meaning of § 1915(g)'s unqualified phrase "dismissed . . . [for] fail[ure] to state a claim." As a result, a dismissal without prejudice for failure to state a claim does not count as a strike.

B.

Although our conclusion as to the unambiguous meaning of an unqualified dismissal for failure to state a claim in the context of § 1915 is sufficient to end our inquiry, we address the government's and the dissent's assertions that the legislative purpose of the PLRA supports a contrary interpretation.

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

The purpose of the PLRA was not, however, to impose indiscriminate restrictions on prisoners' access to the federal courts. Senator Kyl emphasized that the Act would "free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. S7526 (1995) (statement of Sen. Kyl); *see also* 141 Cong. Rec. S14, 627 (1995) (statement of Sen. Hatch) ("I do not want to prevent in-

mates from raising legitimate claims. This legislation will not prevent those claims from being raised."). As other courts have concluded, "[t]here is no doubt that the provisions of the PLRA . . . were meant to curb the *substantively meritless* prisoner claims that have swamped the federal courts." *Shane v. Fauver*, 213 F.3d 113,117 (3d Cir. 2000) (emphasis in original).

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

> Section 1915(g)'s mandate that prisoners may not qualify for IFP status if their suits have thrice been dismissed on the ground that they were 'frivolous, malicious, or fail[ed] to state a claim' was intended to apply to nonmeritorious suits dismissed with prejudice, not suits dismissed without prejudice for failure to comply with a procedural prerequisite.

Snider v. Melindez, 199 F.3d 108,111 (2d Cir. 1999) (alteration in original). To treat as equivalent nonmeritorious suits dismissed with prejudice and those dismissed without prejudice for failure to state a claim by counting both as strikes would cut against the clearly expressed goal of Congress.

The dissent nevertheless contends that it is "evident" that the "legislative purpose underlying § 1915(g)" does not support our construction of the statute. Post at 28 n.8. The cases cited by the dissent, however, do not demonstrate that Congress intended § 1915(g)'s strike designation to reach potentially meritorious [**14] claims.

[*398] The dissent is of course correct in noting that, at the broadest level, "the PLRA's 'focus is to limit litigation brought by prisoners,'" *post* at 19 (quoting *Montcalm Publ. Corp. v. Virginia*, 199 F.3d 168,171 (4th Cir. 1999)). A broadly conceived purpose does not imply, however, that Congress intended to use a meat-axe approach to achieve the purpose. The Supreme Court's opinion in *Jones v. Bock*, 549 U.S. 199, 127 S. Ct 910, 166 L. Ed. 2d 798 (2007), cited frequently by the dissent, fully supports our understanding of the goal of the PLRA. As the dissent itself explains, using the language of *Jones,* "[a]lthough our legal system 'remains committed to guaranteeing that prisoner claims . . . are fairly handled according to law,' the 'challenge lies in ensuring that the flood of *nonmeritorious* claims does not submerge and effectively preclude consideration of the allegations with merit.'" *Post* at 18 (quoting *Jones*, 549 U.S. at 203) (emphasis added). A dismissal without prejudice for failure to state a claim is not an adjudication on the merits of the claim. *Mann v. Haigh*, 120 F.3d at 36. Consequently, a suit dismissed without prejudice for failure to state a claim cannot properly be characterized as ultimately nonmeritorious; [**15] that determination has simply not been made.

C.

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

Finally, [**16] the dissent relies on a more recent case from the Ninth Circuit, *O'Neal v. Price*, 531 F.3d 1146 (9th Cir. 2008). There, a divided panel concluded that a denial of an application to proceed IFP constituted "bringing" an action for purposes of § 1915(g). The court also held that any § 1915 dismissal, however styled and regardless of whether it was rendered with leave to refile, counts as a strike. After noting that § 1915(g) "does not distinguish between dismissals with and without prejudice," the court said that it "decline[d] to read into the statute

an additional requirement not enacted by Congress." 531 F.3d at 1154,1155. Our holding today, however, does not read an additional requirement into the statute that was not already implied by Congress' use of the familiar phrase "dismissed . . . [for] fail[ure] to state a claim." 2. An unqualified dismissal for failure to state a claim is presumed to operate with prejudice; the addition of the words "with prejudice" **[*399]** to modify such a dismissal is simply not necessary.

D.

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

Indeed, the Supreme Court's detailed comparison in *Neitzke v. Williams*, 490 U.S. 319,109 S. Ct. 1827,104 L. Ed. 2d 338 (1989), of dismissals for failure to state a claim under Rule 12(b)(6) and dismissals for frivolousness under § 1915 (the IFP statute) makes clear that meaningful differences exist between these two types of dismissal. In *Neitzke* the Court considered whether an IFP complaint that fails to state a claim under Rule 12(b)(6) is automatically frivolous within the meaning of the IFP statute. *Id.* at 320. In concluding that the two categories were distinct, the Court explained that a complaint is frivolous only "where it lacks an arguable basis either in law or in fact." *Id.* at 325. The Court also

noted that the IFP statute's sua sponte dismissal [**18] provision, now 28 U.S.C. § 1915(e)(2), is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. *Id.* at 327. Examples of frivolous claims include those whose factual allegations are "so nutty," "delusional," or "wholly fanciful" as to be simply "unbelievable." *Gladney v. Pendleton Corr. Facility*, 302 F.3d 773, 774 (7th Cir. 2002); *Denton v. Hernandez*, 504 U.S. 25, 29, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992).

In contrast, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke*, 490 U.S. at 326. "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless [**19] discovery and factfinding." *Id.* at 326-27. Although the Supreme Court has subsequently made clear that the factual allegations in a complaint must make entitlement to relief plausible and not merely possible, *see Bell Atlantic Corp, v. Twombly*, 550 U.S. 544, 554-63, 127 S, Ct, 1955,167 L. Ed, 2d 929 (2007), "[w]hat Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations," *Neitzke*, 490 U.S. at 327; *see also Twombly*,

550 U.S. at 556. "District court judges looking to dismiss claims on such grounds must look elsewhere for legal support." *Neitzke*, 490 U.S. at 327. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotations omitted).

[*400] *Neitzke* makes clear that a dismissal for frivolousness is of a qualitatively different character than a dismissal for failure to state a claim. As a result, our holding today should not be read to indicate that a dismissal for frivolousness that is rendered without prejudice should avoid a strike designation.

E.

Our decision today is fully consistent with Congress' dual goals [**20] of reducing prisoner litigation and, at the same time, preserving meaningful access to the courts for prisoners with potentially meritorious claims. In expressing its concerns to the contrary, the dissent, *post* at 28-30, posits a situation in which a district court is confronted with a prisoner's complaint that "wholly lack[s] merit" and dismisses the complaint without prejudice for failure to state a claim. The dismissal is appealed, and this court entertains the appeal pursuant to *Domino Sugar Coro, v. Sugar Workers Local Union 392*, 10 F.3d 1064 (4th Cir. 1993), and affirms the dismissal. The dissent contends that failure to count the district court's dismissal as a strike would undermine the goals of the PLRA. To illustrate its argument the dissent invokes *De'lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003).

De'lonta, however, does not substantiate the dissent's concerns. In *De'lonta* a prisoner brought a § 1983 claim alleging denial of adequate medical treatment in violation of the Eighth Amendment. Although the district court was "unable to conceive of any set of facts under which the Eighth Amendment would entitle" the plaintiff to relief, it nevertheless dismissed the complaint [**21] without prejudice to avoid "complicating any future actions with issues of collateral estoppel or claim preclusion." 330 F.3d at 633.

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

tiff's] claims with prejudice and without leave to amend.").

Rather than compelling an overbroad interpretation of the term "dismiss" when used in the context of failure to state a claim under § 1915(g), we suggest *De'lonta* instead counsels that courts remain mindful of the distinction between an unqualified dismissal for failure to state a claim and a dismissal without prejudice. **HN9** While a potentially meritorious claim, particularly by a pro se litigant, should not be unqualifiedly dismissed for failure to state a claim unless its deficiencies are truly incurable, *see Bolding v. Holshouser*, 575 F.2d 461,464-65 (4th Cir. 1978), such an **[*401]** unqualified dismissal is entirely proper when the court has reviewed the claim and found it to be substantively meritless. Once a court has determined that the complaint is truly unamendable, a dismissal without prejudice is of little benefit to the litigant, as the claim cannot be made viable through reformulation. Similarly, dismissal of such a complaint without prejudice works [**23] to defeat the PLRA's goal of reducing substantively meritless prisoner lawsuits because it allows the prisoner to file the same meritless claim again. When a district court is confronted with a complaint that fails not because of some technical deficiency but because its claims lack legal merit, this complaint is properly dismissed for failure to state claim -- that is, finally and prejudicially disposed of. Rather than detracting from Congress' goal of reducing meritless prisoner litigation, today's decision will preserve the ability of district courts to meaningfully distinguish between poorly pled but potentially meritorious claims and those that simply lack merit. Any

prisoner whose complaint falls in the latter category will be penalized with a strike as the PLRA intended.

F.

McLean has had six prior civil actions dismissed. Because four of those dismissals were without prejudice for failure to state a claim, he has accrued only two strikes under § 1915(g). Accordingly, the clerk's order allowing him to proceed in this appeal without full prepayment of fees will be allowed to stand. Because McLean is not a "three striker," it is not necessary for us to consider his claim that he [**24] is under imminent danger of serious physical injury.

Mr. Lomax did state, because of the defendant's action in the violation of his constitutional right and transferring him back to Limon Correctional Facility where he was previous assaulted by a correctional officer because of his sex offense, his life not only in the past but as well as in the future continue to be under imminent danger of serious physical injury. The district court should have allowed the plaintiff lawsuit to proceed IFP because he sufficiently alleged an imminent danger of serious physical injury. 28 U. S. C. 1915(g) creates an exception for prisoners who are under imminent danger of serious physical injury when they "bring a civil action," the imminent-danger exception applies only when such danger exists at the time the action is brought.

In contrast, under the Gibbs construction, the prisoner need only show that he was subject to imminent danger at the [**17] time of the alleged incident. By definition, an imminent threat of serious physical injury always exists in the moments before any such injury is inflicted. Thus, under the Gibbs

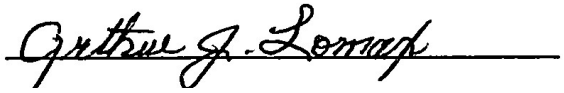
approach, any time that an otherwise disqualified prisoner alleges that any threat of physical injury occurred at any time, that prisoner automatically qualifies for the imminent danger exception. The Gibbs interpretation of the imminent danger exception thereby swallows the rule. Like every other court of appeals that has considered this issue, we refuse to conclude that with one hand Congress intended to enact a statutory rule that would reduce the huge volume of prisoner litigation, but, with the other hand, it engrafted an open-ended exception that would eviscerate the rule. See Abdul-Akbar v. Mckelvie, 239 F. 3d 307.

The principal holding announced by the majority is not very far-reaching. It rejects a statement in our earlier Gibbs case to the effect that imminent danger is to be determined as of the time of the incident complained of, and joins with our sister courts of appeals that have held that danger must exist at the time the Complaint or appeal is filed. I joined in, and continue to adhere to, the able opinion of Judge Garth in Gibbs. In Gibbs we held that a prisoner who alleged two prior attacks by inmates and death threats, each related to his identification as a government informant, and who alleged that his "life was in constant danger", provided sufficient allegations of "imminent danger" to survive the "three strikes" rule. Although our principal holding was that "a complaint alleging imminent danger . . . must be credited as having satisfied the threshold criterion of § 1915(g) unless that element is challenged", we also stated that "the proper focus when examining an inmate's complaint filed pursuant to § 1915(g) must be the imminent danger faced by the inmate at the

time of the alleged incident, and not at the time the complaint was filed." 116 F.3d at 86.

Mr. Lomax, clearly stated in his response to the question, on Page Two of the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to Proceed Pursuant to 28 U.S.C. 1915 form, would be in imminent danger of serious physical injury, was not vague because he referred to a past assault by officer Lt. Wilson who is still employed here, and being transferred back to Limon Correctional Facility by the Defendants when he did not want to be transferred here, place him in harm way once again.

Submitted on May 9, 2018



Arthur James Lomax # 134416
Limon Correctional Facility
Limon, CO 80826

CERTIFICATE OF SERVICE

I certify that on this 9th day of May, 2018, I sent a true and correct copy of the foregoing "Motion To Show Cause Order" by depositing the same in the United States Mail, postage prepaid to the following:

Ms. Cynthia H. Coffman/
Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Arthur J. Lomax #134416
Limon Correctional Facility
P.O. Box 10000
Limon, CO 80826

[Images Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00321-GPG

ARTHUR J. LOMAX, aka ARTHUR JAMES LOMAX,

Plaintiff,

v.

CHRISTINA ORTIZ-MARQUEZ,
MATASHA KINDRED,
DANNY DENNIS, and
MARY QUINTANA,

Defendants.

ORDER DENYING LEAVE TO PROCEED
PURSUANT TO 28 U.S.C. § 1915

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

On March 18, 2018, Magistrate Judge Gallagher granted Plaintiff leave to proceed pursuant to 28 U.S.C. § 1918. Also, on March 19, 2018, Magistrate

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

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

In relevant part, § 1915 provides:

> 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.

28 U.S.C. § 1915(g).

Each dismissal for failure to state a claim, which are noted above, qualifies as a "strike" under 28 U.S.C. § 1915(g). *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1176-77 (10th Cir. 2011). As a result, the Court finds that Plaintiff is subject to the filing restriction in § 1915(g).

"There is only one exception to the prepayment requirement in § 1915(g)." *Id.* at 1179. A prisoner litigant with three or more strikes who seeks to fall within that exception must "make specific, credible allegations of imminent danger of serious physical harm." *Id.* at 1179-80. Vague and conclusory assertions of harm will not satisfy the imminent danger requirement of § 1915(g). *See White v. Colorado*, 157 F.3d 1226, 1231-32 (10th Cir. 1998). Allegations of past injury or harm also are not sufficient. *See Fuller v. Wilcox*, 288 F. App'x 509, 511 (10th Cir. 2008). "Every circuit to have decided the issue so far has concluded that the statute's use of the present tense shows that a prisoner must have alleged an imminent danger at the time he filed his complaint." *Hafed*, 635 F.3d at 1179-80 (collecting cases).

Plaintiff does not assert that Defendants' actions are the cause of any current imminent danger of serious physical injury. Plaintiff's response to the question, on Page Two of the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 form, if he is in imminent danger of serious physical injury, is vague and refers to a past alleged attack. ECF No. 2 at 7. Therefore, the Court finds that Plaintiff has initiated three or more actions that count as strikes pursuant to § 1915(g) and that he is not under imminent danger of serious physical injury

based on Defendants' actions. Pursuant to § 1915(g) he is precluded from bringing the instant action in forma pauperis. Plaintiff will be ordered to show cause why he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915(g).

ECF No. 13 at 1-3.

On March 23, 2017, Plaintiff responded to the Order to Show Cause. ECF No. 14. Relying on the findings in *McLean v. United* States, 566 F.3d 391 (4th Cir.), Plaintiff argues that he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915 because even though each of the three actions were dismissed for failure to state a claim, they were dismissed without prejudice and do not count as strikes. *Id.* at 2. Plaintiff further contends on Page Two of the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 that he stated he is in imminent danger of serious physical injury at the Limon Correctional Facility because Lieutenant Wilson is still employed at Limon and he had assaulted Plaintiff in the past.

"Under the PLRA, prisoners obtain a 'strike' against them for purposes of future ifp eligibility when their action or appeal in a court of the United States . . . was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." *Hafed*, 635 F.3d at 1176 (quoting § 1915(g)) (internal quotation marks omitted). The Tenth Circuit also has found that "a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim." *Day v. Maynard*, 200 F.3d 665, 667 (10th Cir. 1999) (per curiam). An action dismissed pursuant to *Heck* is dis-

missed for failure to state a claim. *Hafed*, 635 F.3d at 1178 (citing *Davis v. Kan. Dep't of Corr.*, 507 F.3d 1246, 1249 (10th Cir. 2007)). The Court, therefore, finds that Plaintiff's arguments lack merit and he is subject to the three-strike provision under 28 U.S.C. § 1915(g).

In the Order to Show Cause, Plaintiff was instructed that he must "make specific, credible allegations of imminent danger of serious physical harm." *Hafed,* 635 F.3d at 1179-80. Plaintiff's claim that because Lieutenant Wilson assaulted him previously, and he still works at the Limon Facility, he is subject to imminent danger of serious physical harm, does not state a specific credible allegation of imminent danger.

Because Plaintiff fails to establish that he is under imminent danger of serious physical injury, and because he has on three or more occasions, while incarcerated or detained in any facility, brought an action in a court of the United States that was dismissed on the grounds that it failed to state a claim, the Court will deny Plaintiff leave to proceed pursuant to 28 U.S.C. § 1915.

If Plaintiff wishes to pursue the claims raised in this action he must pay the $400.00 filing fee ($350 filing fee, plus a required $50 administrative fee) pursuant to 28 U.S.C. § 1914(a). Plaintiff is reminded that, even if he pays the filing fee in full, a review of the merits of the claims is subject to 28 U.S.C. § 1915(e)(2), and the claims may be dismissed notwithstanding any filing fee if the claims are found to be frivolous or malicious, lacking in merit, or asserted against a defendant who is immune from suit. Accordingly, it is

ORDERED that the Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915, ECF No. 3, is denied. It is

FURTHER ORDERED that Plaintiff shall have **thirty days from the date of this Order** to pay the entire $400.00 filing fee if he wishes to pursue his claims in this action. It is

FURTHER ORDERED that if Plaintiff fails to pay the entire $400.00 filing fee within the time allowed the Complaint and the action will be dismissed without further notice. It is

FURTHER ORDERED that the only proper filing at this time is the payment of the $400.00 filing fee. No other filings will be considered. It is

FURTHER ORDERED that the Motion to Show Cause Order, ECF No. 14, is construed as a Response to the Order to Show Cause.

DATED June 4, 2018 at Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK,
Senior Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARTHUR J. LOMAX,
a/k/a Arthur James Lomax,

Plaintiff - Appellant,

v.

No. 18-1250
(D.C. No. 1:18-CV-00321-GPG-LTB)
(D. Colorado)

CHRISTINA ORTIZ-MARQUEZ;
MATASHA KINDRED;
DANNY DENNIS;
MARY QUINTANA,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **LUCERO, HARTZ,** and **McHUGH,** Circuit Judges.

* After examining Mr. Lomax's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rate 32.1.

Arthur J. Lomax appeals the district court's order denying him leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. The district court denied Mr. Lomax's motion as barred by the three-strikes provision, 28 U.S.C. § 1915(g). Because Mr. Lomax has accumulated three strikes prior to commencing this action, and because he has not alleged sufficient imminent danger, we affirm the judgment of the district court.

I. BACKGROUND

Mr. Lomax is a Colorado prisoner at the Limon Correctional Facility. Mr. Lomax was previously incarcerated at the Centennial Correctional Facility and filed a complaint naming, as defendants, five Centennial Correctional Facility employees and a member of the Central Classification Committee at Offender Services. Mr. Lomax also filed a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Upon direction of the district court, Mr. Lomax amended his complaint. Through his amended complaint, Mr. Lomax alleged Fifth, Eighth, Ninth, and Fourteenth Amendment violations stemming from his expulsion from the Sex Offender Treatment and Monitoring Program at Centennial Correctional Facility.

The same district court dismissed three of Mr. Lomax's previous actions on the grounds that they failed to state a claim. In *Lomax v. Hoffman,* No. 13-02131-BNB, 2013 U.S. Dist. LEXIS 115589, at *4-5 (D. Colo. Aug. 15, 2013), the district court dismissed the action as barred by *Heck v. Humphrey,* 512 U.S. 477 (1994) (holding that a litigant cannot bring a § 1983 claim challenging a conviction's legitimacy until that conviction has been dismissed). The

district court dismissed Mr. Lomax's second action, *Lomax v. Hoffman,* No. 13-CV-03296-BNB, 2014 U.S. Dist. LEXIS 8230, at *3 (D. Colo. Jan. 23, 2014), also based on the action being barred by *Heck*. Mr. Lomax brought a third action, *Lomax v. Lander,* No. 13-cv-00707-WJM-KMT, 2014 U.S. Dist. LEXIS 55056 (D. Colo. Apr. 21, 2014) (adopting the magistrate judge's recommendation in *Lomax v. Lander,* No. 13-cv-00707-WJM-KMT, 2014 U.S. Dist. LEXIS 55058 at *9-22 (D. Colo. Mar. 18, 2014)), which the district court dismissed for lack of subject matter jurisdiction and failure to state a claim.[1] The district court that screened Mr. Lomax's present complaint concluded that all three dismissals qualified as strikes for purposes of § 1915(g).

Because of the previous strikes, the district court ordered Mr. Lomax to show cause before proceeding *in forma pauperis*. In response to the show cause order, Mr. Lomax advanced two arguments. First, Mr. Lomax argued that because the district court dismissed his previous complaints without prejudice, the dismissals do not count as strikes. Second, Mr. Lomax argued that if his previous dismissals counted as strikes, he is under imminent physical danger and, therefore, satisfies the only exception to the three strikes rule. In his response to the show cause order, Mr. Lomax alleged his presence at the Limon Correctional Facility places him in imminent physical danger due to how the guards there have treated him in the past. Specifically, Mr. Lomax al-

[1] The district court dismissed two of Mr. Lomax's claims for lack of subject matter jurisdiction and the others for failure to state a claim. *See Lander*, 2014 U.S. Dist. LEXIS 55058 at *9-22.

leges that a Lt. Wilson physically assaulted him the last time he was housed at Limon Correctional Facility. And, in an early filing before the district court, Mr. Lomax reported that a Limon Correctional Facility guard commented that he thought Mr. Lomax was dead by now and that, in general, the guards do not like sex offenders, have shown bias against sex offenders, and say all sex offenders should be dead.

The trial court rejected Mr. Lomax's arguments to proceed *in forma pauperis* and required him to pay the $400 filing fee if he wished to pursue his claims. Mr. Lomax appeals from the district court's denial of leave to proceed *in forma pauperis.* We exercise jurisdiction under 28 U.S.C. § 1291. *See Roberts v. U.S. Dist. Court for the N. Dist. of Cal.,* 339 U.S. 844, 845 (1950) (per curiam) (relying on *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949), and § 1291 to conclude "[t]he denial by a District Judge of a motion to proceed in forma pauperis is an appealable order"); *see also Lister v. Dep't of Treasury,* 408 F.3d 1309, 1310 (10th Cir. 2005) (applying *Roberts* when taking jurisdiction over appeal from denial of motion to proceed *in forma pauperis).*

II. DISCUSSION

Mr. Lomax proceeds without representation; thus we will "liberally construe his filings, but we will not act as his advocate." *James v. Wadas,* 724 F.3d 1312, 1315 (10th Cir. 2013). Accepting as true the facts laid out in the complaint, we review the district court's determination that Mr. Lomax had three strikes de novo. *Smith v. Veterans Admin.,* 636 F.3d 1306, 1309 (10th Cir. 2011).

A. *Motions Denied Without Prejudice Count as Strikes*

The statute governing when a prisoner is precluded from proceeding *in forma pauperis* states:

> In no event shall a prisoner bring a civil action or appeal a judgment in 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.

28 U.S.C. § 1915(g). Mr. Lomax alleges "a dismissal without prejudice for failure to state a claim does not count as a strike." ROA at 37 (citing *Mendez v. Elliot,* 45 F.3d 75, 78 (4th Cir. 1995)). Under Mr. Lomax's argument, the dismissals without prejudice of two of his prior actions as barred by *Heck* would not count as strikes.

A "dismissal for failure to state a claim under Rule 12(b)(6) satisfies the plain text of § 1915(g) and therefore will count as a strike." *Childs v. Miller,* 713 F.3d 1262, 1266 (10th Cir. 2013). Further, "[i]n this circuit, it is immaterial to the strikes analysis [whether] the dismissal was without prejudice," as opposed to with prejudice. *Id.* Finally, "[o]ur precedent holds that the dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim." *Smith,* 636 F.3d at 1312.

The previous claims Mr. Lomax filed while incarcerated were dismissed as barred by *Heck* or for failure to state a claim. And, contrary to Mr. Lomax's argument, the fact that two of the dismissals were without prejudice is immaterial. Thus, the district court correctly concluded the two *Hoffman* dismissals and the *Lander* dismissal all count as strikes.[2]

B. *Imminent Danger of Serious Physical Injury*

The exception to the prohibition on a prisoner with three strikes proceeding *in forma pauperis* is for prisoners "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Before the district court, Mr. Lomax, in an effort to satisfy the imminent danger exception, alleged a Limon Correctional Facility guard attacked him in the past, other guards at the facility do not like sex offenders, and he fears for his life.

In evaluating Mr. Lomax's imminent danger allegations, we adopt the Second Circuit's position that an inmate seeking the imminent danger exception must show "a nexus between the imminent danger a three-strikes prisoner alleges to obtain [*in forma pauperis*] status and the legal claims asserted in his

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[2]The *Lander* dismissal does not state whether it was dismissed with or without prejudice. Unless otherwise stated, dismissals under Rule 12(b)(6) are with prejudice. *See Slocum v. Corp. Express U.S. Inc.,* 446 F. App'x. 957, 960 (10th Cir. 2011) ("Rule 12(b)(6) dismissals, unless otherwise indicated, constitute a dismissal *with* prejudice."); *see also Orr v. Clements,* 688 F.3d 463, 465 (8th Cir. 2012) ("Although there is a presumption that a dismissal can be rendered without prejudice if the court so specifies." (citation omitted)); *Stern v. Gen. Elec. Co.,* 924 F.2d 472, 477 n.7 (2d Cir. 1991); *Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.,* 761 F. 2d 970, 974 (4th Cir. 1985).

complaint." *Pettus v. Morgenthau,* 554 F.3d 293, 297 (2d Cir. 2009). To determine whether a nexus exists, a court should consider "(1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is *fairly traceable* to unlawful conduct asserted in the complaint and (2) whether a favorable judicial outcome would *redress* that injury." *Id.* at 298-99.

Applying this framework, we conclude a nexus is lacking. Mr. Lomax's complaint raises claims relative to his removal from a sex offender treatment program while he was housed at the *Centennial Correctional Facility*. And the complaint alleges that five employees at the Centennial Correctional Facility, as well as a member of the Central Classification Committee at Offender Services, were responsible for his removal from the sex offender treatment program. But, Mr. Lomax's allegations regarding imminent danger involved his fears of mistreatment by guards at the *Limon Correctional Facility*. This fear is not fairly traceable to the Fifth, Eighth, Ninth, and Fourteenth Amendment violations Mr. Lomax sought to advance through his complaint. And a favorable judicial outcome will not redress any mistreatment at the hands of guards at the Limon Correctional Facility as, according to Mr. Lomax, "the only benefit that a victory in this case will provide . . . is a ticket to get in the door of the parole board." ROA at 10 (alterations in original) (quoting *Leamer v. Fauver,* 288 F.3d 532, 543 (3d Cir. 2002)). Thus, Mr. Lomax has not advanced sufficient allegations to qualify for the imminent danger exception to § 1915(g)'s prohibition on a three-strikes litigant proceeding *in forma pauperis.*

Even in the absence of the nexus requirement, Mr. Lomax has not alleged sufficient imminent physical danger as that term is understood. To qualify for the exception, a plaintiff must advance allegations that "identify at least the general nature of the serious physical injury he asserts is imminent" and that "[v]ague and utterly conclusory assertions are insufficient." *Hafed v. Fed. Bureau of Prisons,* 635 F.3d 1172, 1180 (10th Cir. 2011) (internal quotation marks omitted); *see Martin v. Shelton,* 319 F.3d 1048, 1050 (8th Cir. 2003) (holding general assertions are insufficient "absent specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent physical injury"); *Abdul-Akbar v. McKelvie,* 239 F.3d 307, 315 n.1 (3d Cir. 2001) (finding multiple generalized allegations of harassment by prison guards insufficient to establish "a pattern of threats of serious physical injury that [is] ongoing."). Finally, the allegation of imminent danger must be present "at the time [the prisoner] filed his complaint." *Hafed,* 635 F.3d at 1179.

Mr. Lomax's assertions of imminent physical danger are insufficient under this standard. Simply stating a guard attacked him in the past and still works at the prison does not indicate any type of pattern of serious and ongoing physical harm or otherwise evidence the likelihood of *imminent* danger. Accordingly, even if the nexus requirement did not apply, Mr. Lomax has not sufficiently alleged imminent physical danger and does not qualify for the exception as stated in 28 U.S.C. § 1915(g).

III. CONCLUSION

Mr. Lomax's challenge on appeal fails due to his previous dismissals counting as strikes and his insufficient pleading of imminent physical danger. We **AFFIRM** the district court's judgment. We also **DENY** Mr. Lomax's motion to proceed without prepayment of costs and fees, and Mr. Lomax is directed to pay the appellate filing fee in full. *See Childs,* 713 F.3d at 1267; *Smith,* 636 F.3d at 1315.

Entered for the Court

Carolyn B. McHugh
Circuit Judge