

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

FREDERICK PENNINGTON, JR.  
ADC #71305

PLAINTIFF

V.

4:09CV00705 JMM

PAUL J. JAMES, Attorney,  
Little Rock, Arkansas, et al.

DEFENDANTS

**ORDER OF DISMISSAL**

On August 31, 2009, Plaintiff, Frederick Pennington, Jr., a prisoner in the Maximum Security Unit of the Arkansas Department of Correction, filed the Complaint initiating this § 1983 action. See docket entries #1 and #2. Since 1988, Plaintiff has filed more than *forty* separate lawsuits, and he is a well-established three-striker under the Prison Litigation Reform Act (“PLRA”).<sup>1</sup>

Pursuant to the screening function mandated by 28 U.S.C. § 1915A,<sup>2</sup> this case will be dismissed, with prejudice, for the reasons explained below.

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<sup>1</sup> The “three-strikes” provision of the PLRA specifies that a prisoner cannot proceed *in forma pauperis* “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)

<sup>2</sup> The PLRA requires federal courts to screen prisoner complaints seeking relief against a governmental entity, officer, or employee. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or a portion thereof if the prisoner has raised claims that: (a) are legally frivolous or malicious; (b) fail to state a claim upon which relief may be granted; or (c) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

## I. Discussion

### A. The *Kelley* Case; 5:08CV00018 JLH

On January 28, 2008, Plaintiff filed a § 1983 action alleging that various ADC officials were failing to provide him with adequate medical care for hepatitis C. *See Pennington v. Kelley, et al.*, 5:08CV00018 JLH. The Court determined that Plaintiff's allegations satisfied the imminent danger exception to the three-strikes rule and allowed Plaintiff to proceed with his case.<sup>3</sup> *Id.*, docket entry #4. Thereafter, the Court appointed Mr. Paul James to represent Plaintiff and approved his request for funds to hire a medical expert on Plaintiff's behalf. *Id.*, docket entries #39, #56, and #59.

On August 25, 2009, the Court issued a Recommended Disposition concluding that Defendants were not deliberately indifferent to Plaintiff's medical needs because they timely began giving him anti-viral medications for treatment of his Hepatitis C. *Id.*, docket entry #177. Accordingly, the Court recommended that Defendants be granted summary judgment, and that the case be dismissed, with prejudice. *Id.* On August 31, 2009, Plaintiff filed his Objections to the Recommended Disposition.<sup>4</sup> *Id.*, docket entry #179.

### B. The *James* Case; 4:09CV00705 JMM

On the same day, Plaintiff filed *this* § 1983 action alleging that: (1) Defendant Paul James provided him with ineffective assistance of counsel in the *Kelley* case; (2) Defendant Dr. Otis

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<sup>3</sup> *See* 28 U.S.C. § 1915(g) (providing that three-strikers should, nevertheless, be granted permission to proceed *in forma pauperis* if they are “under imminent danger of serious physical injury”). The Eighth Circuit has clarified that the imminent danger exception applies *only* if the prisoner alleges that he is in imminent danger *at the time of filing*. *Martin v. Shelton*, 319 F.3d 1048, 1058 (8th Cir. 2003); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998).

<sup>4</sup> The Recommended Disposition is still pending before the Honorable J. Leon Holmes, United States Chief District Judge.

Gordon wrongfully refused to serve as Plaintiff's medical expert in the *Kelley* case; (3) Dr. Arshad Malik gave erroneous opinions as Plaintiff's medical expert in the *Kelley* case; and (4) Correctional Medical Services, Inc.'s Regional Director Roland Anderson wrongfully arranged for Dr. Malik to only review Plaintiff's *medical records* in the *Kelley* case, and not give him a physical examination. *See Pennington v. James, et al.*, 4:09cv00705 JMM; docket entry #2.

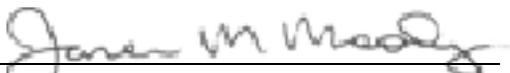
It is clear from the face of the Complaint that Plaintiff's claims are a frivolous collateral attack on the proceedings in the *Kelley* case, which is still pending. Additionally, *none* of these allegations satisfy the imminent danger exception to the three-strikes rule.

## **II. Conclusion**

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's Application to Proceed *In Forma Pauperis* (docket entry #1) is DENIED, pursuant to 28 U.S.C. § 1915(g).
2. Pursuant to the screening function mandated by 28 U.S.C. § 1915A, this case is DISMISSED, WITH PREJUDICE, as being frivolous.
3. The Court CERTIFIES, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal from this Order of Dismissal and the accompanying Judgment would not be taken in good faith.

Dated this 3<sup>rd</sup> day of September, 2009.

  
UNITED STATES DISTRICT JUDGE