

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISIONFILED
NOV 17 2021
Matthew J. Heaton
CLERK

SHANE D. WALIEZER, Plaintiff, vs. JEFF LARSON, in his individual and official capacity, Defendant.	1:21-CV-01021-CBK ORDER GRANTING MOTION TO VACATE ORDER AND ORDER GRANTING APPLICATION TO PROCEED <i>IN FORMA PAUPERIS</i>
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Plaintiff filed a *pro se* complaint under 42 U.S.C. § 1983. Plaintiff alleged that defendant provided plaintiff ineffective assistance of counsel during plaintiff's then-pending state court habeas proceeding. Plaintiff sought damages in the amount of \$1.25 million.

Plaintiff filed an application to proceed *in forma pauperis* without the prepayment of fees. I found that plaintiff was subject to the three strikes provision of the Prison Litigation Reform Act, U.S.C. § 1915(g) and must pay the filing fee.

Plaintiff filed a motion to vacate the order denying his application to proceed *in forma pauperis* and a notice of interlocutory appeal, along with a motion to proceed on appeal *in forma pauperis* without the prepayment of the appellate filing fee. The appeal has not been transmitted to the Court of Appeals pending ruling on his application to proceed *in forma pauperis*.

The United States Court of appeals has held that § 1915(g) "does not apply unless the inmate litigant has three strikes at the time he files his lawsuit or appeal." Campbell v. Davenport Police Dept., 471 F.3d 952, 952–53 (8th Cir. 2006). Plaintiff had not been assessed a third strike prior to the time he filed the instant action. Therefore, § 1915(g) does not apply in this case.

Now, therefore,

IT IS ORDERED:

1. Plaintiff's motion, Doc. 18, to vacate the Court's order denying plaintiff's application to proceed *in forma pauperis* is granted. The order, Doc. 17, is vacated.
2. Plaintiff's application, Doc. 20, to proceed on appeal *in forma pauperis* without the prepayment of the filing fee is denied as moot.
3. Plaintiff's application, Dos. 3, to proceed without the prepayment of the filing fee is granted.
4. Plaintiff is unable to pay an initial filing fee and the initial filing fee is waived pursuant to 28 U.S.C. § 1915(b)(4).
5. Whenever the amount in plaintiff's trust account exceeds \$10.00, the institution having custody of the plaintiff is hereby directed to forward monthly payments that equal 20% of the funds credited the preceding month to the plaintiff's trust account to the U.S. District Court Clerk's office pursuant to 28 U.S.C. § 1915(b)(2), until the \$350.00 filing fee is paid in full.
6. The Clerk of Court shall send a copy of this order to the appropriate official at plaintiff's institution.

DATED this 16th day of November, 2021.

BY THE COURT:


CHARLES B. KORNMANN
United States District Judge