

**UNITED STATES COURT OF APPEALS**

**JUN 3 2002**

**TENTH CIRCUIT**

**PATRICK FISHER**  
Clerk

BRIAN DALE DUBUC,

Plaintiff - Appellant,

v.

STATE OF OKLAHOMA;  
OKLAHOMA DEPARTMENT OF  
CORRECTIONS, Medical Services;  
CORRECTIONS CORPORATION OF  
AMERICA; JOHN DOE, insuring  
agent of Corrections Corporation of  
America; EZELL, individually and in  
his official capacity as Deputy  
Warden; DENNIS JOHNSON,  
individually and in his official  
capacity as Chief of Security of Davis  
Correctional Facility; KATHY  
MILLER, individually and in her  
official capacity as Medical  
Administrator of Davis Correctional  
Facility; HEATH, individually and in  
his official capacity as  
Doctor/Physicians Assistant of  
Corrections Corporation of America;  
JOE CROW, individually and in his  
official capacity as Canteen  
Owner/Operator; VIVIAN DAVIS,  
individually and in her official  
capacity as Nurse; MARK SPARGO,  
individually and in his official  
capacity as Correctional

No. 02-6082  
(Western District of Oklahoma)  
(D.C. No. CIV-01-1735-F)

Officer; OFFICER STORY, OFFICER  
WARNELL, SENIOR DAVIS and  
SENIOR YANDELL, in their  
individual and official capacity;  
SHANE T. FINDLEY, individually  
and in his official capacity as Senior  
Officer; RONDA SMITH ROBINSON,  
individually and in her official  
capacity as Acting Designee Grievance  
Officer,

Defendants - Appellees.

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**ORDER AND JUDGMENT\***

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Before **KELLY, McKAY**, and **MURPHY**, Circuit Judges.

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After examining appellant's brief and the appellate record, this court has determined unanimously that oral argument would not materially assist 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.

Appellant Brian Dale Dubuc, an Oklahoma state prisoner, appeals the district court's dismissal of the civil rights complaint he brought pursuant to 42 U.S.C. §§ 1983 and 1985(3). The district court denied Dubuc's motion to proceed *in forma pauperis* (*ifp*), concluding that Dubuc was barred from proceeding *ifp*

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\*This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

because he has previously filed three or more civil actions *ifp* which were dismissed as frivolous, malicious, or for failure to state a valid claim. *See* 28 U.S.C. § 1915(g). The court addressed and rejected Dubuc’s arguments that 28 U.S.C. § 1915(g) is unconstitutional and that he is in “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g) (providing an exception to the § 1915(g) bar). The court then dismissed Dubuc’s complaint without prejudice for failure to pay the filing fee. Dubuc brought this appeal.

Dubuc has filed a motion to proceed *ifp* on appeal together with an appellate brief. In his brief, Dubuc does not contest the district court’s conclusion that he has three strikes but, instead, renews his argument that 28 U.S.C. § 1915(g) is unconstitutional and also argues that the district court erred when it concluded that he had not demonstrated that he is under imminent danger of serious physical injury. After a review of Dubuc’s appellate brief, the appellate record, and the applicable law, we agree with the district court’s conclusion that Dubuc’s challenge to the constitutionality of 28 U.S.C. § 1915(g) is foreclosed by Tenth Circuit precedent. *See White v. Colorado*, 157 F.3d 1226, 1232 (10th Cir. 1998); *see also Kinnell v. Graves*, 265 F.3d 1125, 1127-28 (10th Cir. 2001). We also agree that Dubuc has failed to identify any facts suggesting that he is in “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). Accordingly, because Dubuc does not contest the district court’s conclusion that

he has three prior strikes, Dubuc's motion to proceed *ifp* on appeal is **denied** and this appeal is **dismissed** for failure to pay the appellate filing fee.

ENTERED FOR THE COURT

Michael R. Murphy  
Circuit Judge