

UNITED STATES COURT OF APPEALS

**Filed 7/22/96**

TENTH CIRCUIT

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GARY DON McGEE,

Plaintiff-Appellant,

v.

LARRY A. FIELDS and FRANK  
KEATING,

Defendants-Appellees.

No. 96-6080  
(W. Dist. of OK)  
(D.C. No. CIV-96-151-A)

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**ORDER AND JUDGMENT\***

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Before **ANDERSON**, **BARRETT**, and **MURPHY**, Circuit Judges.

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Plaintiff Gary Don McGee, a state prisoner proceeding *pro se* and *in forma pauperis*, appeals the dismissal of his § 1983 complaint. The district court dismissed the complaint under 28 U.S.C. § 1915(d), finding that it was legally frivolous. We **affirm**.

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\*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel.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.

McGee brought this suit under § 1983, claiming that the Oklahoma Prison Overcrowding Emergency Powers Act (the “Act”), Okla. Stat. Ann. tit. 57, §§ 570-576 (West 1991 & Supp. 1996), is unconstitutional because it denies emergency time credits to violent offenders. The district court referred the suit to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) for initial proceedings. The magistrate judge recommended that McGee’s suit be dismissed as frivolous because this court had previously upheld the Act against claims identical to those advanced by McGee. *See Shifrin v. Fields*, 39 F.3d 1112, 1114 (10th Cir. 1994); *Keeton v. Oklahoma*, 32 F.3d 451, 452 (10th Cir. 1994). After *de novo* review, the district court adopted the magistrate judge’s Report and Recommendation. McGee appeals.

“Mindful that pro se actions are held to a less stringent standard of review and that sua sponte dismissals are generally disfavored by the courts, we nonetheless allow a complaint to be dismissed under § 1915(d) ‘if the plaintiff cannot make a rational argument on the law and facts in support of his claim.’” *Yellen v. Cooper*, 828 F.2d 1471, 1475 (10th Cir. 1987 (quoting *Van Sickle v. Holloway*, 791 F.2d 1431, 1434 (10th Cir. 1986)). We review a district court’s dismissal under section 1915(d) for an abuse of discretion. *Denton v. Hernandez*, 112 S. Ct. 1728, 1734 (1992).

As the magistrate judge correctly noted, McGee’s challenge to the Act is clearly foreclosed by the decisions of this court in *Shifrin* and *Keeton*. Because McGee’s claims clearly have no basis in law, the district court did not abuse its discretion in dismissing his complaint under section 1915(d). *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (holding that *in forma pauperis* complaint is frivolous if it embraces an “inarguable legal conclusion” or a “fanciful factual allegation”). The judgment of the United States District Court for the Western District of Oklahoma is therefore **AFFIRMED**.

ENTERED FOR THE COURT

Michael R. Murphy  
Circuit Judge