The State and Local Legal Center's (SLLC) Supreme Court amicus brief in *Lomax v. Ortiz-Marquez* argues that a dismissal without prejudice for failure to state a claim counts as a strike under the Prison Litigation Reform Act (PLRA). Less technically, the SLLC brief is aimed at decreasing meritless prisoner litigation.

Arthur Lomax filed three lawsuits alleging a variety of constitutional violations stemming from his expulsion from the Sex Offender Treatment and Monitoring Program at Centennial Correctional Facility.

The federal district court dismissed the first and second lawsuits as barred by *Heck v. Humphrey*, which holds that a litigant cannot bring a lawsuit challenging his or her conviction's legitimacy until that conviction has been dismissed. The third lawsuit was dismissed for a failure to state a claim. The first two cases were dismissed without prejudice (meaning Lomax is not permanently barred from bringing them again).

The PLRA contains a three-strikes rule disallowing an inmate who can't pay filing fees upfront from filing a fourth lawsuit when he or she has filed three previous lawsuits which were dismissed on the grounds that they were “frivolous, malicious, or fail[] to state a claim upon which relief may be granted.”

Lomax argues he should be able to bring another lawsuit without paying filing fees upfront regardless of the three-strikes rule because two of his previous lawsuits were dismissed without prejudice.

The Tenth Circuit ruled against Lomax, relying on “long standing precedent” that “the fact that two of the dismissals were without prejudice is immaterial.”

Most prisoners reside in either state prisons or local jails; state and local governments pay the costs of defending meritless prisoner cases. Lomax argues that the problem with ruling against him is that if a prisoner files an otherwise meritorious lawsuit with a curable problem, which is dismissed without prejudice, and this dismissal leads to a third strike, another meritorious claim is barred.

The SLLC amicus brief explains Lomax’s concerns are unfounded. First, “without-prejudice dismissals often occur when district courts throw up their hands at unintelligible . . . prisoner complaints, which is a common occurrence, to say the least.” Second, as happened in this case, courts routinely dismiss prisoner suits without prejudice on the basis of *Heck v. Humphrey*, because a prisoner’s conviction has yet to be dismissed. In fact, most Courts of Appeals require *Heck* dismissals to be entered without prejudice.

Misha Tseytlin, Sean T.H. Dutton, Elizabeth Holt Andrews, Hillary A. Lehmann, Katharine Lane Malone, Michael K. Cassata and George Laiolo of Troutman Sanders wrote the SLLC amicus brief in this case which the following organizations joined: Council of State Governments, National Association of Counties, National League of Cities, US Conference of Mayors, International City/County Management

By:
Wednesday, January 22, 2020 at 01:39 PM

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