

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-3161

Charles W. Armentrout, III,

Appellant,

v.

John Tyra, Deputy Sheriff; Unknown
Kehoe, Officer, Deputy Sheriff;
Unknown Central Jailer,

Appellees.

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Appeal from the United States
District Court for the
Eastern District of Missouri.

[UNPUBLISHED]

Submitted: January 28, 1999
Filed: February 9, 1999

Before FAGG, HEANEY, and HANSEN, Circuit Judges.

PER CURIAM.

Missouri prisoner Charles W. Armentrout appeals from the district court's order denying him leave to proceed in forma pauperis (IFP) under the "three strikes" provision of 28 U.S.C. § 1915(g). Armentrout concedes he has one "strike," and we believe the district court correctly concluded a second of Armentrout's prior actions--an action which was dismissed without prejudice under Heck v. Humphrey, 512 U.S.

477 (1994)--counted as a strike.¹ See Rivera v. Allin, 144 F.3d 719, 730-31 (11th Cir. 1998), pet. for cert. filed, ____ U.S.L.W. ____ (U.S. Sept. 17, 1998) (No. 98-5572); Patton v. Jefferson Correctional Ctr., 136 F.3d 458, 462-64 (5th Cir. 1998). Because we conclude, however, the district court erred in counting as a “strike” a third prior action that Armentrout voluntarily withdrew, we grant Armentrout leave to proceed IFP and remand for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

¹The two cases counted as strikes by the district court to which we are referring are McDonald v. Carnahan, No. 4:97CV1927, and Armentrout v. Haman, No. 4:96CV467.