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Three Strikes and You're Still In? Interpreting the Three-Strike Provision of the Prison Litigation Reform Act in the Eleventh Circuit*

I. INTRODUCTION

The three-strike provision of the Prison Litigation Reform Act (PLRA)[1] was implemented to curb the filing of frivolous and meritless claims by prisoner litigants in federal courts. Although the PLRA is over two decades old, the United States Court of Appeals for the Eleventh Circuit had not had an opportunity to interpret the three-strike provision until May of 2016. *Daker v. Commissioner, Georgia Department of Corrections*[2] tasked the court with determining what constitutes a strike under the PLRA and whether a serial litigant had accrued three strikes in the dismissals of his previous filings.[3] The court determined that want of prosecution and lack of jurisdiction did not constitute strikes under the Act and concluded that the plaintiff was not barred from filing suits under the Act.[4] The Eleventh Circuit's strict adherence to the text of the statute will work to keep the doors of the courthouse open for prisoner litigants, but may require additional restriction and further deterrence to curb the potential inundation of litigation.

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1. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 42 U.S.C. § 1997(e) (2012 & Supp. II 2015)).

2. 820 F.3d 1278 (11th Cir. 2016).

3. *Id.* at 1281.

4. *Id.* at 1286.

II. FACTUAL BACKGROUND

Convicted in October of 2012, Waseem Daker is a Georgia prisoner serving a life sentence for murder.[5] Daker was convicted for the 1995 murder of Karmen Smith and the repeated stabbing of her son after the recovery and conclusive testing of DNA from Smith's body in 2009.[6] A month after his conviction, Daker filed this lawsuit against the Commissioner of the Georgia Department of Corrections, alleging various civil rights violations. Daker filed with his complaint a petition to proceed in forma pauperis. In this petition, Daker contended he is indigent, unemployed, and indebted, and therefore eligible for in forma pauperis status. The Commissioner filed a motion to dismiss, arguing that Daker is no longer eligible to proceed in forma pauperis as he had accrued three strikes under the PLRA. The Commissioner identified six previous filings Daker submitted; four were dismissed for want of prosecution and two for lack of jurisdiction.[7] An Eleventh Circuit judge denied Daker's petition because his filings were deemed frivolous in the last three dismissals.[8] The Commissioner also submitted documents supporting the argument that Daker was not indigent, including an estimate of the value of Daker's home. The Commissioner also contended Daker's debt, allegedly caused by attorney fees, was suspect as Daker represented himself at trial. A magistrate judge denied Daker's petition to proceed in forma pauperis in February 2014, agreeing with both of the Commissioner's arguments. The district court accepted the magistrate judge's recommendation and dismissed Daker's complaint as he had failed to pay the filing fee after having been denied in forma pauperis status.[9]

5. *Id.* at 1281.

6. Steve Osunsami, *Waseem Daker Trial: Ex-husband and Victim Fought Day of Murder*, ABC NEWS, Sept. 26, 2012, http://abcnews.go.com/US/waseem-daker-trial-husband-victim-fought-day-murder/story?id=17327114 (last visited Nov. 1, 2016). Daker was charged with the murder of Karmen Smith and the repeated stabbing (eighteen times) of her five-year-old son in an act of revenge against Smith's roommate, Loretta Spencer Blatz, who had previously helped send Daker to prison for stalking and harassing her. Daker represented himself at trial. *Id.*

7. *Daker*, 820 F.3d at 1281-82.

8. *Id.* at 1282.

9. *Id.*

III. LEGAL BACKGROUND

A. *In Forma Pauperis Proceedings and the PLRA*

Access to the courts is considered a fundamental right.[10] However, for the impoverished litigant, entry into the court system is not easily accomplished. In response, the federal in forma pauperis statute, 28 U.S.C. § 1915,[11] provides the indigent with access to federal courts by waiving filing fees associated with civil actions.[12] This statute ensures that poor litigants have the same access to courts as those that can afford the associated costs.[13] Today, many, if not most, in forma pauperis litigants are state and federal prisoners filing pro se civil rights actions against detention facilities and prison officials.[14]

The Prison Litigation Reform Act, passed by Congress in April of 1996, was developed to relieve the court system, which was overburdened by abundant frivolous lawsuits filed by prisoners.[15] Senator Bob Dole, one of the PLRA's biggest proponents, stated, "prisoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered."[16] To ferret out such frivolous and meritless claims, the PLRA imposed limitations on prisoners' ability to file lawsuits and appeals in forma pauperis. The PLRA amended § 1915 by adding subsection (g), which provides a limitation known as the "three-strike provision."[17] The provision states,

> In no event shall a prisoner bring a civil action or appeal a judgment. . .if the prisoner has, on three or more prior occasions. . .brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted.[18]

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10. U.S. CONST. amend. I. The right to file suit in a court of law is implicit in the right to petition the government for redress of grievances.

11. 28 U.S.C. § 1915.

12. Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute-Equality and Frivolity*, 54 FORDHAM L. REV. 413, 414 (1985).

13. *Id.*

14. *Id.*

15. Butler v. DOJ, 492 F.3d 440, 441-42 (D.C. Cir. 2007).

16. Thompson v. DEA, 492 F.3d 428, 430 (D.C. Cir. 2007). The "peanut butter case" has become the flagship example of frivolous prisoner litigation.

17. *Butler*, 492 F.3d at 442.

18. 28 U.S.C. § 1915(g).

An exception to this provision is provided if the prisoner is in imminent danger of serious physical injury or harm.[19] Prisoners with three strikes are not permanently barred from the courts; they are prohibited from filing in forma pauperis and must therefore pay filing fees in order to continue.[20] In 1996, the year the PLRA was passed, there were approximately 1.2 million state prisoners and the number of § 1983[21] lawsuits was approaching one million.[22] Following the passage of the PLRA, the number of § 1983 lawsuits by state prisoners had dropped to below 800,000 in 1997.[23] The PLRA was a needed response to help relieve burgeoning federal court dockets and the drain on state resources to fund such litigation.[24] With the addition of the three-strike provision, courts have been tasked with interpreting what constitutes a strike and under what circumstances a court should exercise its discretion to deny in forma pauperis status to serial litigants.

B. The Meaning of a Strike

In *Andrews v. King*,[25] the United States Court of Appeals for the Ninth Circuit reviewed the dismissal of a § 1983 action by a California state prisoner against officials in the facility where he was incarcerated.[26] After disagreeing with the district court having counted a dismissal for lack of jurisdiction as a qualifying strike, the Ninth Circuit sought to define the meaning of a strike under § 1915(g).[27] The PLRA does not define the terms "frivolous" or "malicious." The Ninth Circuit relied on the ordinary and common meanings to define those terms. A case is deemed to be frivolous if there is no arguable basis in law or fact.[28] A case is malicious if it expresses an intent or desire to harm another.[29] The court held that the phrase "fails to state a claim on which relief may be granted" channels

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19. *Id.*

20. 28 U.S.C. § 1915(a).

21. 42 U.S.C. § 1983 (2012). Section 1983 claims are the common vehicle through which prisoners allege violations of their constitutional and civil rights, frequently challenging the conditions of their confinement. *See infra* note 22.

22. Fred Cheesman et al., *Prisoner Litigation in Relation to Prisoner Population*, CASELOAD HIGHLIGHTS, Sept. 1998.

23. *Id.*

24. The National Association of Attorneys General (NAAG) estimated that the states spent approximately $80 million on inmate litigation in 1995. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1625 (2003).

25. 398 F.3d 1113 (9th Cir. 2005).

26. *Id.* at 1115-16.

27. *Id.* at 1120-21.

28. *Id.* at 1121.

29. *Id.*

the language of Federal Rule of Civil Procedure 12(b)(6)[30] and should be similarly understood.[31] The Ninth Circuit determined that not all dismissals constitute strikes and, "§ 1915(g) should be used to deny a prisoner's in forma pauperis status only when, after careful evaluation of the order dismissing an action. . .the district court determines that the action was dismissed because it was frivolous, malicious, or failed to state a claim."[32]

C. Exhaustion of Appeals

In *Jennings v. Natrona County Detention Center Medical Facility*,[33] Jennings filed a § 1983 claim against the medical facility where he was incarcerated alleging that he was denied medical treatment or had received delayed medical treatment. The district court granted leave to Jennings to continue in forma pauperis and later dismissed his action for failure to state a claim. Four days later, Jennings filed another civil rights action against an employee of the detention center. Again, the district court granted leave for Jennings to proceed in forma pauperis, but dismissed the action for failure to state a claim and frivolousness. Jennings was then denied leave to appeal the dismissal after the district court concluded that Jennings had collected three strikes in prior dismissals.[34]

The United States Court of Appeals for the Tenth Circuit determined whether Jennings had three or more qualifying dismissals.[35] In counting Jennings' strikes, the district court included a habeas corpus action he had filed in 1997. The Tenth Circuit concluded this was an error as habeas petitions are not considered civil actions under § 1915(g).[36] The district court also incorrectly counted the dismissals of the two complaints that were underlying both of Jennings' appeals. The Tenth Circuit held that a dismissal should not count against a litigant until their appeals have been waived or exhausted, as a district court error could bar a litigant from appealing an otherwise meritorious claim.[37]

30. FED. R. CIV. P. 12(b)(6).
31. *Andrews*, 398 F.3d at 1121.
32. *Id.*
33. 175 F.3d 775 (10th Cir. 1999).
34. *Id.* at 777-78.
35. *Id.* at 778.
36. *Id.* at 778-79.
37. *Id.* at 779.

D. Premature Filing of an Appeal

In *Tafari v. Hues*,[38] an inmate in a New York correctional facility filed a § 1983 action against various employees at the detention center where he was previously incarcerated. The district court granted Tafari in forma pauperis status, but his claim was dismissed as he had not exhausted the available administrative remedies.[39] Once Tafari had exhausted these remedies, he refiled. The defendants, citing four previous dismissals, requested the court revoke Tafari's in forma pauperis status pursuant to § 1915(g). The prior filings were dismissed for lack of jurisdiction, failure to state a claim, frivolousness, and failure to exhaust the claim that was being appealed. In one of the actions, the appeal was dismissed for lack of jurisdiction as it had been filed prematurely.[40] The district court agreed with the defendants and held that Tafari had accrued three strikes, thereby revoking his in forma pauperis status.[41]

The United States Court of Appeals for the Second Circuit reviewed this appeal to determine whether the premature filing of an appeal is frivolous for the purposes of § 1915(g).[42] The term frivolous is defined as "lack[ing] an arguable basis either in law or in fact,"[43] and refers to the underlying merits of the case. The Second Circuit reasoned that premature appeals are remediable and a dismissal would not be based on a determination that the appeal cannot ultimately succeed, so the court cannot conclude that it would be frivolous within the meaning of § 1915(g).[44] An appeal that is jurisdictionally defective because of prematurity cannot be said to be frivolous on the merits and is therefore not a strike.[45] The Second Circuit determined the PLRA did not intend to cast such a broad

38. 473 F.3d 440 (2d Cir. 2007).

39. For information regarding an Eleventh Circuit decision on failure to exhaust administrative remedies, see Terri L. Carver, *Administrative Law, Eleventh Circuit Survey*, 50 MERCER L. REV. 827 (1999). The Eleventh Circuit, in *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998), affirmed the district court's dismissal after the plaintiff, a federal prisoner, bypassed the prison grievance process and filed a § 1983 lawsuit in the district court. *Supra* note 39.

40. This action, *Tafari v. Moscicki*, No. 01-0035 (2d Cir. Aug. 8, 2001), was dismissed sua sponte by the Second Circuit because it lacked jurisdiction to review a non-final order. The claim had previously been dismissed by the district court for failure to state a claim. *Tafari*, 473 F.3d at 441.

41. *Tafari*, 473 F.3d at 441-42.

42. *Id.* at 442.

43. *Id.*

44. *Id.* at 443.

45. *Id.* at 444.

net, and as such the court must look at the plain language of the statute.[46]

E. Failure to Prosecute and Discretionary Authority

In *Butler v. Department of Justice*,[47] James Butler, a federal prisoner serving a life sentence for murder, filed a claim under the Freedom of Information Act (FOIA)[48] seeking records related to his conviction. The district court denied his motion after finding Butler had exhausted his three strikes under § 1915(g). Butler sought leave to file a motion to proceed in forma pauperis on appeal before the United States Court of Appeals for the District of Columbia (D.C.) Circuit. Butler brought five previous appeals before this court that were each dismissed for failure to prosecute. The Department of Justice (DOJ) argued these five dismissals constituted strikes under the statute.[49]

To determine whether a dismissal for failure to prosecute should be considered a strike, the D.C. Circuit followed the plain language of § 1915(g).[50] The PLRA states only three grounds that constitute a strike: frivolousness, maliciousness, and failure to state a claim. Failure to prosecute is not a failure to state a claim nor is it frivolous.[51] Furthermore, failure to prosecute does not rest on the merits of the claim.[52] It also cannot be classified as malicious as there are other reasons why a prisoner litigant may fail to prosecute, such as sickness or transfer to another detention facility.[53] Thus, failure to prosecute is not a strike.[54] The DOJ, nonetheless, urged the court to exercise its discretion and create a per se rule that would allow failure to prosecute to be considered a strike under the statute. In response, the D.C. Circuit maintained that its role is not to make policy, and declined to make this a strike.[55]

Under § 1915(a), courts can exercise discretionary authority to deny in forma pauperis status to prisoners who have abused the privilege of filing

46. *Id.* at 443.
47. 492 F.3d 440 (D.C. Cir. 2007).
48. 5 U.S.C. § 552.
49. *Butler*, 492 F.3d at 442.
50. *Id.* at 443.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 443-44. "If we were to adopt the government's approach, we would be effectively writing another category of strikes into the PLRA. We have neither the authority nor inclination to substitute our policy judgment for that of Congress." *Id.* at 444.

in forma pauperis despite having not accrued three strikes.[56] Because IFP litigation does not cost them, prisoners may file claims as a pastime, thereby burdening the courts. In forma pauperis status is a privilege and can be denied for abusive litigants. If they wish to continue with their claims, litigants can pay the associated filing fees, ensuring this discretionary authority is not a total denial to the courts. To determine if Butler should be denied in forma pauperis status, the D.C. Circuit considered the following factors: number, content, frequency, and the disposition of Butler's previous filings.[57] The court concluded that Butler was a "prolific filer," having filed at least fifteen actions under the Freedom of Information Act, all seeking the same documents.[58] Eight of which were filed within the last four years.[59] Accordingly, the D.C. Circuit exercised its discretionary authority and denied Butler's petition to proceed in forma pauperis.[60]

F. Lack of Jurisdiction

In *Thompson v. Drug Enforcement Agency*,[61] prisoner Michael Thompson moved for leave to appeal in forma pauperis. Thompson had seven actions and appeals that were potential strikes, including this suit against the Drug Enforcement Agency (DEA). Thompson conceded, and the D.C. Circuit agreed, that he had one strike for an action dismissed as frivolous by the district court.[62] Another action, Thompson's 1998 claim against the Department of Justice, was dismissed by the district court for lack of jurisdiction.[63]

The D.C. Circuit, tasked with determining the proper number of Thompson's strikes, held that this dismissal did not constitute a strike, as lack of jurisdiction is not expressly listed as a strike in § 1915(g).[64] Nothing is frivolous or malicious about bringing an action in a court that lacks jurisdiction; it is also not a failure to state a claim.[65] Nonetheless, the DEA urged the court to make a per se rule, allowing lack of jurisdiction to qualify as grounds for a strike. The D.C. Circuit declined to do so,

56. *Id.* at 444-45.
57. *Id.* at 444.
58. *Id.* at 446-47.
59. *Id.* at 446.
60. *Id.* at 447.
61. 492 F.3d 428 (D.C. Cir. 2007).
62. *Id.* at 431, 433.
63. *Id.* at 437.
64. *Id.*
65. *Id.*

holding that the DEA's request is flawed in two ways.[66] First, the average prisoner does not understand the complexities of federal court jurisdiction.[67] Treating this as a strike would be unfair to prisoners and presents a risk of penalizing prisoners who have meritorious claims.[68] Second, while the court recognized that it had the ability to deny in forma pauperis status when the PLRA otherwise permits it, the court contended that it does not have the authority to impute a new meaning to the PLRA, stating, "the judge's job is to construe the statute—not make it better."[69] The D.C. Circuit concluded that the best approach is to first decide whether IFP status should be denied pursuant to the PLRA.[70] Following its prior reasoning in *Butler*, the court determined it should then evaluate the previous filings to decide if there was any abuse of in forma pauperis privilege.[71]

In *Haury v. Lemmon*,[72] an Indiana prisoner filed a § 1983 lawsuit against prison personnel for interfering with the delivery of his mail and for not providing a sufficient law library. The district court dismissed Haury's action, claiming that he had already accumulated three strikes under § 1915(g) for previous filings. Haury appealed that decision and moved for leave to proceed in forma pauperis.[73]

In a previous filing by Haury,[74] the district court dismissed the suit as "frivolous for want of jurisdiction."[75] The United States Court of Appeals for the Seventh Circuit determined that this was not an accurate statement.[76] The district court dismissed the first portion of Haury's complaint for failure to state a claim and the other two portions of the complaint were dismissed for lack of jurisdiction. Lack of jurisdiction, the Seventh Circuit determined, is not an enumerated ground and cannot count as a

66. *Id.*

67. *Id.* "[B]ecause understanding federal court jurisdiction is no mean feat even for trained lawyers, creating a rule that mechanically treats dismissals for lack of jurisdiction as strikes would pose a serious risk of penalizing prisoners proceeding in good faith and with legitimate claims." *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. 656 F.3d 521 (7th Cir. 2011).

73. *Id.* at 521-22.

74. *Id.* at 523 (discussing Haury v. Rose Bros. Trucking Inc., No. EV 91-128-C (S.D. Ind. Mar. 5, 1993)). There, even though the district court could have thought the action to be frivolous in addition to lacking jurisdiction, "[h]e could not have known that the PLRA (enacted three years later in 1996) would make the precise ground of his decision important in another suit so many years later." *Id.*

75. *Id.* at 522.

76. *Id.*

strike.[77] The Seventh Circuit acknowledged that the district court could have also considered Haury's suit to be frivolous; however, that notion was not conveyed by the judge.[78] The opinion stated, "[w]here the judge did not make such findings, we cannot read into his decision a ground for dismissal that he did not state, and which would also substantially limit Haury's ability to file a lawsuit."[79] Unless a court expressly states one of the three grounds for dismissal outlined by the PLRA, a strike is not warranted.[80]

IV. COURT'S RATIONALE

In *Daker v. Commissioner, Georgia Department of Corrections*, a case of first impression, the Eleventh Circuit sought to determine whether Daker had accrued three strikes under the Prison Litigation Reform Act.[81] Daker is a serial litigator, having "submitted over a thousand pro se filings in over a hundred actions and appeals in at least nine different federal courts."[82] Daker was denied in forma pauperis status when the lower court concluded that his six previous filings, two dismissed for lack of jurisdiction and four dismissed for want of prosecution, produced six strikes. The Eleventh Circuit determined that this was error.[83]

The court began its analysis by determining the appropriate standards of review.[84] Interpretations of the PLRA are reviewed de novo, where the denial of in forma pauperis petitions are reviewed for abuse of discretion.[85]

A. Interpreting the Statute

For questions of statutory interpretation, the Eleventh Circuit relied on Justice Frankfurter's three-part test, which outlines the following steps: "(1) Read the statute; (2) read the statute; (3) read the statute!"[86] The PLRA outlines only three specific grounds that render a dismissal a strike under § 1915(g). The court applied the negative-implication canon of statutory interpretation, which holds that the three enumerated

77. *Id.*
78. *Id.* at 523.
79. *Id.*
80. *Id.*
81. *Daker*, 820 F.3d at 1281.
82. *Id.*
83. *Id.*
84. *Id.* at 1283.
85. *Id.*
86. *Id.* (quoting Dobbs v. Costle, 559 F.2d 946, 948 n.5 (5th Cir. 1977)).

grounds are the only grounds that qualify as a strike under the statute.[87] This canon provides that the specification of one implies the exclusion of another.[88] The Eleventh Circuit determined "[n]either 'lack of jurisdiction' nor 'want of prosecution' are enumerated grounds, so a dismissal on either of those bases, without more, cannot serve as a strike."[89] The court noted that this decision does little to advance the goals of the PLRA; however, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [found] in the statute's text."[90]

B. Evaluation of Prior Dismissals

The Commissioner argued Daker's six previous filings were frivolous; however, the Eleventh Circuit could not conclude that a dismissal was made on the grounds that the action was frivolous unless the dismissing court made an express statement as such.[91] When determining the reasons for a dismissal, the use of past-tense phrasing in the Act instructed the court to consult the prior dismissing order.[92] The Eleventh Circuit held that it cannot look to the present-day determination or the fact that the dismissing court could have dismissed it as frivolous.[93] The court's reasoning closely tracks that of the Seventh Circuit in *Haury v. Lemmon*, where the court held that it cannot impute a ground for dismissal where the judge did not express such findings.[94] Here, Daker's filings were not dismissed as frivolous.[95] Applying the D.C. Circuit's reasoning in *Butler v. DOJ*, a dismissal for want of prosecution does not speak to the underlying merits of the action.[96] A dismissal for lack of jurisdiction also cannot reflect any view on the merits of the action or appeal.[97] The Eleventh Circuit further held, "the dismissing court does not need to invoke any magic words or even use the word 'frivolous' . . . [b]ut the dismissing court

87. *Id.* at 1283-84.

88. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 107-11 (2012). The negative-implication canon applies only when what is specified is thought to be an expression of all that is included in a grant or prohibition. Scalia and Garner write, "the sign outside a veterinary clinic saying 'Open for treatment of dogs, cats, horses, and all other farm and domestic animals' does suggest. . .that the circus lion with a health problem is out of luck." *Id.* at 107-08.

89. *Daker*, 820 F.3d at 1284.

90. *Id.* at 1285-86 (quoting Nichols v. United States, 136 S. Ct. 1113, 1119 (2016)).

91. *Id.* at 1284.

92. *Id.*

93. *Id.*

94. *Haury*, 656 F.3d at 523.

95. *Daker*, 820 F.3d at 1284.

96. *Id.* at 1284; *Butler*, 492 F.3d at 443.

97. *Daker*, 820 F.3d at 1284.

must give some signal in its order that the action or appeal was frivolous."[98] As there was no such signal in the prior orders, the Eleventh Circuit concluded that Daker's previous filings could not be considered frivolous.[99]

C. Denial and Dismissal

In the next part of its analysis, the Eleventh Circuit noted that three of Daker's dismissals for want of prosecution were dismissed after a single judge of the court found Daker's petition to proceed in forma pauperis to be frivolous and thus denied the petition.[100] The D.C. Circuit, in *Thompson v. DEA*, determined that such a sequence of events constituted a strike.[101] The sister circuit considered the judge's determination of the appeal as frivolous when denying the appellant's motion for in forma pauperis status as the but-for cause of the court's subsequent dismissal.[102] The Eleventh Circuit disagreed with this reasoning, finding that a dismissal for want of prosecution cannot qualify as a strike, even after the in forma pauperis petition was denied as being frivolous.[103] If a single judge finds a prisoner to be ineligible to proceed in forma pauperis, an order is entered to deny the prisoner's petition; an order is not entered dismissing the action or appeal.[104] The court points out this distinction, as the Federal Rules of Appellate Procedure[105] do not allow a single judge to dismiss or determine an appeal or proceeding.[106] Here, panels of the court dismissed Daker's filings, but none of the orders indicated that the panels agreed with the single judge's findings that Daker's arguments were frivolous.[107] The Eleventh Circuit declines to adopt the but-for reasoning of its sister circuit as this reasoning does not appear in the PLRA.[108] The Act is not concerned with the sequence of events giving rise to the dismissal. The court wrote, "[e]ven if but-for causation were somehow relevant under the Act, the denial of Daker's petitions to proceed in forma pauperis was not the but-for cause of his dismissals. The but-for

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*; *Thompson*, 492 F.3d 428, 433.
102. *Daker*, 820 F.3d at 1285.
103. *Id.*
104. *Id.*
105. FED. R. APP. P. 27(c). Under the Rules, only a panel of judges can dismiss an appeal or petition. *Id.*
106. *Id.*
107. *Daker*, 820 F.3d at 1285.
108. *Id.*

cause was his failure to pay the filing fee."[109] If Daker had paid on time, the panel would have to determine anew if the filing was frivolous.[110] In conclusion, the Eleventh Circuit determined that the six prior dismissals were incorrectly identified as strikes under the PLRA and that Daker was not barred from filing suits under § 1915(g).[111]

V. IMPLICATIONS

A. Keeping the Doors Open

The Prison Litigation Reform Act has been in effect for almost two decades, and since its inception, courts have rendered mixed interpretations. In light of some interpretations, critics claim the addition of the three-strike provision has significantly curtailed prisoners' ability to litigate in forma pauperis.[112] While the prevention of frivolous and meritless litigation is a worthy goal, arguments have been made that § 1915(g) is overly broad, encompassing valid claims as it seeks to weed out the frivolous.[113] In the wake of the PLRA, cases have been brought challenging the constitutionality of the three strikes provision.[114] The provision has been challenged for burdening prisoners' fundamental right of access to the courts.[115] While these cases are in the minority, there is still concern that the PLRA may substantially restrict a prisoner's ability to seek redress for his grievances.

These concerns are put to rest as the Eleventh Circuit's decision in *Daker v. Commissioner, Georgia Department of Corrections* is a victory for prisoner litigants. The court's strict adherence to the plain language of the statute has not expanded the criteria for receiving strikes under § 1915(g). By strictly limiting the circumstances that allow a dismissal to qualify as a strike to the enumerated grounds listed in the statute, this decision is keeping the doors of the courthouse open to prisoner litigants.

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109. *Id.*

110. *Id.*

111. *Id.* at 1286.

112. Joshua D. Franklin, *Three Strikes and You're Out of Constitutional Rights? The Prison Litigation Reform Act's "Three Strikes" Provision and its Effect on Indigents*, 71 U. COLO. L. REV. 191, 191-92 (2000).

113. *Id.* at 193.

114. *Id.*

115. *Id.* at 194-95. *See* Lyon v. Vande Krol, 940 F. Supp. 1433, 1438 (S.D. Iowa 1996) (holding that requiring inmates to prepay filing fees, when they would otherwise qualify to proceed in forma pauperis, "places a substantial restriction on these inmates' ability to bring a new civil action and constitutes a substantial burden on their fundamental right of access to the courts").

The Eleventh Circuit's interpretation of the statute does not further burden or prevent an inmate's access to the courts.

1. Subsequent Application

The Eleventh Circuit applied its reasoning in *Daker* to its September 2016 decision in *Andrews v. Persley*.[116] Robert Andrews is a Georgia inmate that brought a § 1983 action against the Chief of the Albany, Georgia Police Department. On referral to a magistrate judge, it was recommended that Andrews' claim be dismissed for improper venue. As a result, Andrews filed a voluntary dismissal under Federal Rule of Civil Procedure 41(a).[117] The district court converted Andrews' pleading into a motion and subsequently granted the motion. The case was then dismissed for improper venue.[118] The district court's dismissal was an attempt to further the purpose of the PLRA. Because Rule 41(a) is subject to any applicable federal statute, the district court reasoned that prisoners could manipulate Rule 41(a) by exercising their right to a voluntary dismissal despite an adverse recommendation, thereby evading a strike under the PLRA.[119]

On appeal, the Eleventh Circuit came to the same conclusion as it did in *Daker*.[120] While the district court was correct to detect a conflict between Rule 41(a) and the purpose of the PLRA, the Eleventh Circuit "[found] no language in the PLRA indicating Congress' intent to override Rule 41(a)'s operation in the prisoner litigation context."[121] If failure to prosecute does not count as a strike under the PLRA, as in *Daker*, it follows that the voluntary dismissal of an action pursuant to Rule 41(a) should not count as a strike either.[122]

B. Opening the Floodgates

The three-strike provision of the PLRA was developed to combat and prevent the inundation of federal courts by frivolous litigation filed by prisoners.[123] It could be expected that the passage of the PLRA would add higher-quality cases to the docket as it prevents the filing of frivolous and

116. 2016 U.S. App. LEXIS 17559 (11th Cir. Sept. 27, 2016).
117. FED. R. CIV. P. 41(a).
118. *Andrews*, 2016 U.S. App. LEXIS 17559, at *1.
119. *Id.* at *2.
120. *Id.* at *3.
121. *Id.* at *2-3.
122. *Id.* at *3.
123. *Butler*, 492 F.3d 440, 441-42.

meritless suits.[124] However, this has not necessarily been the case. While the Eleventh Circuit's decisions in *Daker* and *Andrews* does not further the PLRA's cause,[125] the opinions provide welcome news for prisoner litigants. In fact, the court's interpretation in *Daker* "means that a prisoner can file unlimited frivolous appeals and avoid getting strikes by declining to prosecute the appeals after his petitions to proceed in forma pauperis are denied."[126] This decision could possibly lead to the opening of the proverbial floodgates in the Eleventh Circuit.

The Eleventh Circuit has undoubtedly created more work for itself as prisoner litigation will not be further deterred by its decisions in *Daker* and *Andrews*. Actions dismissed for non-enumerated grounds will continue to allow prisoner litigants to pursue their claims, meritorious or otherwise. This notion will lead to continued filing by inmates and do little to advance or achieve the goals of the PLRA, as well as continue to burden the courts with prisoner litigation. This actuality may call for future reformation of the Act, possibly making it more restrictive by including more grounds for dismissal that qualify as strikes or by developing further constraints.

C. Need for Further Deterrence

The three-strike provision of the PLRA has been applied narrowly by most courts, doing little to curb frivolous litigation by prisoners and creating a need to further restrict and deter prisoner litigants. Applying the logic of Federal Rule of Civil Procedure 11[127] to frivolous filings could serve as an effective deterrent of frivolous litigation. It has long been recognized that the central purpose of Rule 11 is to curb meritless filings and prevent abuse of the judicial system.[128]

Rule 11 allows for the imposition of sanctions on attorneys and parties who file pleadings that are frivolous, not warranted by law, or are filed for an improper purpose.[129] Courts are given wide latitude in determining

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124. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 162 (2015).

125. *Daker*, 820 F.3d at 1285.

126. *Id.* at 1286.

127. FED. R. CIV. P. 11 (b)-(c).

128. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). "It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts." *Id.*

129. FED. R. CIV. P. 11 (b)-(c); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 69 (1997).

the appropriate sanction for a Rule 11 violation, allowing fines, injunctions, suspensions, and more.[130] The imposition of monetary sanctions may prove to be ineffective because prisoners presumably do not have the money to pay such fines.[131] However, temporary injunctions could effectively discourage "frequent filers." In *Farguson v. MBank Houston*,[132] the Fifth Circuit upheld an injunction imposed against a pro se litigant who had filed and refiled the same "manifestly and patently frivolous" claims against the same defendant three times.[133] The court held that an injunction against future filings is an appropriate sanction under Rule 11 so long as it is specifically tailored and limited as to protect the courts from meritless claims, while still allowing a litigant meaningful access to the courts.[134] Here, the Fifth Circuit determined that an injunction aimed at the same claims against the same defendant is sufficiently tailored to protect the interests of the court and the litigant.[135] Applying this practice to prisoner litigation could effectively deter frivolous claims where a litigant is repeatedly filing baseless claims.

Since the enactment of the PLRA in 1996, courts have been presented with varying issues regarding the statute's three-strike provision. Many circuits have adhered to the language of the statute, deciding not to extend or enlarge the grounds for qualifying strikes. In keeping with that trend, the Eleventh Circuit declined to consider dismissals for want of prosecution and lack of jurisdiction as strikes within the PLRA in *Daker*. The PLRA was enacted with the intention of curtailing significant amounts of filings by prisoners in federal courts. However, the decisions in many circuits, including the Eleventh Circuit, are limiting the statute's application and doing little to further the PLRA's objectives. The need for further deterrence, such as the imposition of Rule 11 sanctions, may become necessary as these interpretations are not exactly carrying out the purpose of the PLRA.

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130. FED. R. CIV. P. 11(c)(4).

131. *But see* Mallory Yontz, *Amending the Prison Litigation Reform Act: Imposing Financial Burdens on Prisoners Over Tax Payers*, 44 J. MARSHALL L. REV. 1061 (2011). Yontz proposes the imposition of a fine for prisoners' frivolous filings. A set percentage deducted from inmates' commissary accounts could serve as an effective deterrent. *Id.* at 1079-81.

132. 808 F.2d 358, 359 (5th Cir. 1986).

133. *Id.* at 359.

134. *Id.* at 360.

135. *Id.*