

DAKER V. JACKSON
THREE STRIKES AND BREATHING SPACE: DOES THE PLRA VIOLATE A
PRISONER'S RIGHTS TO ACCESS THE COURTS, BREATHING SPACE, AND
EQUAL PROTECTION?

Trent Testa*

In *Daker v. Jackson*,¹ the Eleventh Circuit Court of Appeals affirmed the decision of the district court to dismiss Waseem Daker's complaint, determining that Daker had at least three strikes under the Prison Litigation Reform Act (PLRA) and that Daker's challenge to the constitutionality of § 1915(g) failed.² In support of his first claim, Daker alleged that the seven dismissals used by the district court in determining his three strike status were errors.³ Second, Daker challenged the "three-strike" provision's constitutionality, asserting that it violates the First Amendment's "breathing space" principle because it does not provide a margin of error and punishes *pro se* litigants for honest mistakes.⁴ The court addressed both claims in turn.

Plaintiff, Waseem Daker, is a Georgia prisoner currently serving a life sentence for murder.⁵ The Eleventh Circuit is no stranger to Daker, having described him as a "serial litigant who has clogged the federal courts with frivolous litigation" by "submitt[ing] over a thousand *pro se* filings in over a hundred actions and appeals in at least nine different federal courts."⁶ Once again before the Eleventh Circuit, Daker appealed the district court's dismissal of his §1983 civil rights complaint alleging that "the Fulton County Jail's policy of banning hardcover books violated his rights under the First Amendment, due process, and the Religious Land Use and Institutionalized Persons Act."⁷ The district court dismissed Daker's complaint pursuant to the "three-strikes" bar of the PLRA.⁸

In his appeal of the court's "three strike" determination, Daker specifically argued that the court erred in counting a dismissal by the Second

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¹ *Daker v. Jackson*, No. 18-11989, 2019 U.S. App. LEXIS 34116 (11th Cir. Nov. 15, 2019).

² *Id.* at *8.

³ *Id.* at *2.

⁴ *Id.* at *4-5.

⁵ *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1281 (11th Cir. 2016).

⁶ *Id.*

⁷ *Daker*, 2019 U.S. App. LEXIS 34116, at *1. Daker alleged that his due process rights were violated because his property was destroyed pursuant to the book ban. *Id.* Daker also claimed that his right of access to the courts was violated because the mailroom returned his legal mail to sender. *Id.*

⁸ *Id.* at *1-2.

Circuit in *Daker v. NBC*⁹ as a strike “because the Second Circuit cited an order by the Northern District of Georgia determining [that Daker] had three strikes based on dismissals for want of prosecution”¹⁰ Based on the Eleventh Circuit’s decision in *Daker v. Commissioner*¹¹ Daker alleged that the prior dismissals may have been in error.¹² The PLRA’s “three strike rule” bars prisoners from bringing actions or appealing judgments in a civil action *in forma pauperis* (IFP) under §1915 if the prisoner “on three or more prior occasions while incarcerated or detained in any facility, brought an action . . . that was dismissed on grounds that it was frivolous, malicious, or fails to state a claim upon which relief may be granted”¹³ In *Daker v. Commissioner*, the Eleventh Circuit explained the three strike provision, stating that “[b]ecause lack of jurisdiction and want of prosecution are not enumerated grounds under §1915(g), such dismissals, without more, cannot serve as strikes.”¹⁴ The court in *Daker v. Commissioner* noted that it could not conclude that an action was dismissed as frivolous unless the dismissing court made some express statement to that effect.¹⁵

The Eleventh Circuit, addressing Daker’s appeal, held that his argument that the Second Circuit dismissal should not have counted as a strike was meritless.¹⁶ The Eleventh Circuit stated that “the case count[ed] as a strike because that court expressly dismissed the appeal as without arguable basis in law or in fact making the case frivolous.”¹⁷ The Eleventh Circuit noted that, aside from specific dismissal alleged by Daker, the district court identified six other separate dismissals based on frivolity.¹⁸ The hardcover book ban and return of mail did not constitute “imminent danger of serious physical injury” and therefore the Eleventh Circuit affirmed the district court’s finding of seven strikes against Daker at the time of the lawsuit.¹⁹

⁹ See *Daker v. NBC*, No. 15033, 2015 U.S. App. LEXIS 23230, at *1 (2d Cir. May 22, 2015).

¹⁰ *Daker*, 2019 U.S. App. LEXIS, at *2.

¹¹ See *Daker v. Comm’r, Ga. Dep’t of Corr.*, 820 F.3d 1278, 1281 (11th Cir. 2016).

¹² *Daker*, 2019 U.S. App. LEXIS, at *2.

¹³ 28 U.S.C.A. §1915(g) (West 2019). In effect, §1915 allows prisoners with indigent status (IFP) to proceed in court without payment of usual fees, subject to the limitations in §1915(g). See § 1915(a)(1).

¹⁴ *Daker*, 2019 U.S. App. LEXIS, at *3. (citing *Daker v. Comm’r, Ga. Dep’t of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016)).

¹⁵ *Id.* (citing *Daker v. Comm’r, Ga. Dep’t of Corr.*, 820 F.3d 1278, 1281 (11th Cir. 2016)).

¹⁶ *Id.* at *3.

¹⁷ *Id.* at *3–4 (citing *Daker v. NBC*, No. 15-330, 2015 U.S. App. LEXIS 23230 (2d Cir. May 22, 2015)) (internal quotation marks omitted).

¹⁸ *Id.* at *4.

¹⁹ *Id.*

The Eleventh Circuit next addressed Daker's constitutional challenge of §1915(g).²⁰ Daker alleged that the "three strikes" provision violates the "breathing space" principal of the First Amendment because it does not provide a margin of error and punishes *pro se* litigants for honest mistakes.²¹ Daker based his argument on *Rivera v. Allin*,²² alleging that although the challenges to §1915(g) were rejected, the court did not address the "breathing space" argument and therefore *Rivera* arrived at the incorrect conclusion.²³ The court concluded that the right to access the courts falls under Congress's Article III powers to set limits on federal jurisdiction.²⁴ Therefore, the decision to impose filing fees on three-strike prisoners is consistent with the Article III powers because Congress is not obligated to provide free or unlimited access to the courts.²⁵ Furthermore, the court clarified that §1915(g) does not prevent a three-strike prisoner from filing civil actions but rather prohibits the prisoner from using IFP indigent status.²⁶ Therefore, the court held that it was fair to impose "modest filing fees" on three strike prisoners because "Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them."²⁷

The Eleventh Circuit upheld its reasoning in *Rivera*, concluding that §1915(g) does not burden a fundamental right because the indigent prisoners do not form a suspect class.²⁸ Therefore, under rational basis review, the court held that §1915(g) is constitutional because the statute is rationally related to the goal of curtailing abusive litigation and the conservation of judicial resources.²⁹ By upholding the reasoning of *Rivera*, the Eleventh Circuit foreclosed Daker's claims of access to the courts and equal protection violations.³⁰

The "breathing space" principle upon which Daker based his challenges is the idea that for the First Amendment to meaningfully protect the freedom of speech, individuals must have some margin for error when discussing matters of public concern before they can be held liable for the effects their speech has on others.³¹ The Eleventh Circuit held the "breathing

²⁰ *Daker*, 2019 U.S. App. LEXIS, at *4.

²¹ *Id.* at *4–5.

²² *Rivera v. Allin*, 144 F.3d 719 (11th Cir. 1998), abrogated in part on other grounds by *Jones v. Bock*, 549 U.S. 199, 215 (2007).

²³ *Daker*, 2019 U.S. App. LEXIS, at *5.

²⁴ *Id.*

²⁵ *Id.* (citing *Rivera*, 144 F.3d at 723–24).

²⁶ *Id.* (citing *Rivera*, 144 F.3d at 723–24).

²⁷ *Id.* at *5–6 (quoting *Rivera*, 144 F.3d at 723–24) (internal quotation marks omitted).

²⁸ *Id.* at *6 (citing *Rivera*, 144 F.3d at 727).

²⁹ *Daker*, 2019 U.S. App. LEXIS, at *6 (citing *Rivera*, 144 F.3d at 727).

³⁰ *Id.*

³¹ *Id.* The "breathing space" principle protects the ability to advance insulting, outrageous, or inadvertently false speech. *Id.*

space” principle inapplicable in this case because, just as there is no First Amendment right to access the courts for free, there is no First Amendment right to speak in the courts for free.³² Furthermore, the court held that “the concern that justifies the breathing space principle—the desire to prevent a chilling effect on speech and thereby to promote public debate—is not implicated by a rule that determines whether an individual has to pay a filing fee to bring a lawsuit.”³³

Daker’s final argument was that the “three strikes” provision is unconstitutional as applied to him in the instant case.³⁴ Although case law indicates situations in which waiver of the filing fee is constitutionally required for three strike litigants if a fundamental interest is involved,³⁵ the Eleventh Circuit held that Daker’s claims did not warrant the waiver of the filing fee regardless of his three-strike status.³⁶ Because the ban on hardcover books, failure to forward legal mail, and access to the courts did not fit into the types of fundamental interests recognized, the court held that §1915(g) is constitutional as applied to Daker.³⁷

In affirming the district court’s decision, the Eleventh Circuit has clarified the standard courts should use to determine the “strike status” of an indigent prisoner under §1915(g). The Eleventh Circuit filled in the gaps not addressed by *Rivera* and once again affirmed the constitutionality of §1915(g).

³² *Id.* at *7.

³³ *Id.*

³⁴ *Daker*, 2019 U.S. App. LEXIS, at *7.

³⁵ *Id.* at *7–8. In *Rivera*, the Eleventh Circuit recognized state controls, intrusions on family relationships, and danger of serious bodily injury as fundamental interests that would warrant a waiver of the filing fee for three-strike litigants. See *Rivera*, 144 F.3d at 724.

³⁶ *Id.* at *8.

³⁷ *Id.*