

*WHITE V. LEMMA*—THE THREE-STRIKES PROVISION DOES NOT PRECLUDE  
DISMISSAL ON THE MERITS AND WITH PREJUDICE

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If a prisoner’s claim requires dismissal under the “three-strikes provision”<sup>1</sup> but is also frivolous or unmeritorious, must the court dismiss the claim without prejudice or may it opt to dismiss the claim on the merits with prejudice instead? This question was presented to the Eleventh Circuit in *White v. Lemma*.<sup>2</sup> The Eleventh Circuit concluded that “though a court must procedurally dismiss without prejudice the claim of a prisoner who has struck out under the three-strikes provision and failed to pay the filing fee, the court may also consider the merits to dismiss the case with prejudice instead.”<sup>3</sup>

The three-strikes provision is a common nomenclature for 28 U.S.C § 1915(g)—Proceedings in Forma Pauperis.<sup>4</sup> Generally, a grant of in forma pauperis status (“IFP”) to a prisoner allows that prisoner to file a civil case or an appeal without paying the typical court filing fee.<sup>5</sup> However, IFP relief from paying a filing fee is limited by the three-strikes provision in subsection (g):

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, 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, unless the prisoner is under imminent danger of serious physical injury.<sup>6</sup>

Thus, any prisoner who previously had three claims dismissed, as outlined in subsection (g), and is not under imminent danger of serious physical injury is unable to proceed with a claim with IFP status.<sup>7</sup> Courts must dismiss IFP

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<sup>1</sup> 28 U.S.C § 1915(g) (2012).

<sup>2</sup> *White v. Lemma*, 947 F.3d 1373 (11th Cir. 2020). *White*’s abuse of process claim is not at issue in this article.

<sup>3</sup> *Id.* at 1379.

<sup>4</sup> *Id.* at 1377.

<sup>5</sup> 28 U.S.C § 1915(a)(1) (2012).

<sup>6</sup> 28 U.S.C § 1915(g) (2012).

<sup>7</sup> *White*, 947 F.3d at 1376.

claims if a prisoner with three strikes fails to pay the filing fee.<sup>8</sup> However, the court's dismissal is without prejudice, not on the merits.<sup>9</sup>

The three-strikes provision is part of the Prison Litigation Reform Act (PLRA) that Congress enacted to "curtail abusive prisoner litigation."<sup>10</sup> In effect, "the PLRA contains procedural safeguards that prevent prisoners from misusing the legal system."<sup>11</sup> Another safeguard is the early screening provision of 28 U.S.C § 1915A<sup>12</sup> which provides that

[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.<sup>13</sup>

In review, the court should identify any "cognizable claims"<sup>14</sup> and "dismiss the complaint or portions that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from that relief."<sup>15</sup> Unlike dismissal under the three-strikes provision, a dismissal under the early screening provision "is no different from a dismissal under Federal Rules of Civil Procedure 12(b)(6)."<sup>16</sup> In other words, a dismissal under the early screening provision is a dismissal on the merits and with prejudice.<sup>17</sup>

The appellant, William White, is noted as "no stranger to the courts."<sup>18</sup> White "has long peppered federal and state officials with prison-related lawsuits."<sup>19</sup> White's initial complaint asserted a variety of claims, all of which arise from his time in the custody of the Sheriff of Seminole County, Dennis Lemma.<sup>20</sup> Upon filing, White failed to pay the required court filing fee and did not request leave to proceed IFP.<sup>21</sup>

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<sup>8</sup> *Id.* at 1377 (citing *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002)). "We have construed this language to mean that a district court must dismiss a prisoner's claims when the prisoner has three strikes but failed to pay the filing fee when the suit began." *White*, 947 F. 3d at 1376 (citing *Dupree*, 284 F.3d at 1236).

<sup>9</sup> *Id.* (citing *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002)).

<sup>10</sup> *Dupree*, 284 F.3d at 1236.

<sup>11</sup> *White*, 947 F.3d at 1376.

<sup>12</sup> *Id.*

<sup>13</sup> 28 U.S.C. § 1915A(a) (2012).

<sup>14</sup> 28 U.S.C. § 1915A(b) (2012).

<sup>15</sup> *White*, 947 F.3d at 1376 (citing 28 U.S.C. § 1915A(b) (2012)).

<sup>16</sup> *White*, 947 F.3d at 1377 (citing *Jones v. Bock*, 549 U.S. 199, 215–216 (2007)).

<sup>17</sup> *Id.* (citing *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990)).

<sup>18</sup> *White*, 947 F.3d at 1375.

<sup>19</sup> *Id.* at 1376.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

The district court dismissed White's complaint for two reasons.<sup>22</sup> First, the court dismissed the complaint on the merits for failure to state a claim after screening White's complaint under 28 U.S.C. § 1915A. The trial court found White's claims frivolous.<sup>23</sup> Second, the court dismissed White's claim under the three-strikes provision without prejudice. The Trial Court reasoned that White "had previously filed three prisoners'-rights cases that were dismissed as frivolous, malicious, or for failure to state a claim, and . . . had failed to allege that he was under imminent danger of serious injury."<sup>24</sup> The Eleventh Circuit affirmed dismissal of White's complaint *on the merits with prejudice*, "even though [the district court] determined that White had struck out under the three-strikes provision and had not paid the filing fee."<sup>25</sup>

The Eleventh Circuit addressed a dichotomy in justification for dismissal in White's case. On one hand, White's complaint could be dismissed under the three-strikes provision.<sup>26</sup> On the other hand White's complaint was also subject to dismissal with prejudice under the early-screening provision as frivolous, without merit, and for failing to state a claim.<sup>27</sup> Thus the Eleventh Circuit evaluated whether White's claim must be dismissed without prejudice under the three-strikes provision, or if a district court may skip the three-strikes provision of Section 1915(g) and dismiss the case on the merits with prejudice under the early-screening provision.<sup>28</sup>

The Eleventh Circuit evaluated whether "the rule requiring dismissal of a prisoner suit under Section 1915(g) is a jurisdictional rule, or a procedural one that a court can skip to dismiss on the merits."<sup>29</sup> Reasoning from Eleventh Circuit case law<sup>30</sup> and persuasive authority,<sup>31</sup> the court held that "failure to qualify under the three-strikes provision and pay the filing fee

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *White*, 947 F.3d at 1376.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *White*, 947 F.3d at 1378. The court notes that it previously determined that the three-strikes provision is non-jurisdictional and may be skipped in order to dismiss on the merits, although in a different context, in *Lloyd v. Benton*. *White*, 947 F.3d at 1378; *see* *Lloyd v. Benton*, 686 F.3d 1225, 1228 (11th Cir. 2012).

<sup>31</sup> *White*, 947 F.3d at 1378. The court references other circuits that agree Section 1915(g) is not a jurisdictional limitation. *See* *Isby v. Brown*, 856 F.3d 508, 520 (7th Cir. 2017); *Lisenby v. Lear*, 674 F.3d 259, 263 (4th Cir. 2012); *Piggs v. F.B.I.*, 106 F.3d 1497, 1497 (10th Cir. 1997). The Eleventh Circuit also noted that the Seventh and Tenth Circuits have held that a court may hear a three-strike prisoner's claims on the merits even if the prisoner failed to pay the filing fee. *See* *Smith v. Veterans Admin.*, 636 F.3d 1306, 1309 (10th Cir. 2011); *See Isby*, 856 F.3d at 521.

warrants . . . procedural dismissal, not a jurisdictional [dismissal].”<sup>32</sup> Therefore, a court may “choose to dismiss a struck-out prisoner’s case on the merits with prejudice, even if the prisoner failed to pay the filing fee.”<sup>33</sup>

The court adopted this interpretation because it “tracks the policy driving the PLRA”<sup>34</sup>—curtailing abusive prisoner litigation.<sup>35</sup> If the three-strikes provision is an “absolute procedural bar” to a court’s authority to dismiss on the merits, “a court would have to dismiss a case without prejudice whenever a prisoner has more than three strikes and fails to pay the filing fee, no matter how frivolous the case.”<sup>36</sup> This would achieve “precisely the opposite of the PLRA’s aim” by bogging down the courts with repeat litigation.<sup>37</sup> Therefore, the Court held “the PLRA’s three-strike provision is non-jurisdictional.”<sup>38</sup> Consequently, even though “a court must procedurally dismiss without prejudice the claim of a prisoner who has struck out under the three-strikes provision and failed to pay the filing fee,” that court is not precluded from “consider[ing] the merits to dismiss the case with prejudice.”<sup>39</sup> In sum, courts may dismiss frivolous, unmeritorious claims on the merits with prejudice even if that claim is also subject to dismissal without prejudice under the three-strikes provision.

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<sup>32</sup> *White*, 947 F.3d at 1379.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (citing *Dupree*, 284 F.3d at 1236).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *White*, 947 F.3d at 1379.

<sup>39</sup> *Id.*