



An Expanding Strike Zone: *Coleman-Bey* and the Future of Civil Protections for Prison Inmates

For years, Alliance for Justice has [warned](#) of the conservative-led campaign to restrict access to justice.¹ From forced arbitration, to restricting medical malpractice claims, to overturning civil rights protections, Congress and many courts have worked to shut the courtroom doors and keep powerful wrongdoers from being held accountable. Everyday Americans, particularly our society’s most vulnerable, are losing their ability to stand up for their rights in court. This report highlights one of those attacks: the judicial effort to restrict justice for prison inmates.

Recent court decisions have expanded congressional restrictions on the right of inmates to access the courts. Today, inmates are losing more cases, winning fewer settlements, and going to trial less often than any time in the past two decades.² Yet, civil lawsuits are often the only way to hold prisons accountable for violence, overcrowding, and medical neglect.

And as with all burdens in the criminal justice system, these developments disproportionately burden people of color, particularly African Americans and Hispanics. Fifty-eight percent of all inmates in 2008 were African American or Hispanic, despite these groups only making up 25 percent of the general public.³ Recent events have shown how difficult it can be for members of these groups to find justice in all walks of life, but nowhere is it as difficult as in a prison.

This report details the ways courts have expanded nearly every element of the so-called “three-strikes” rule of the Prison Litigation Reform Act to keep inmates out of courts, in ways Congress never intended. Later this year, the Supreme Court will decide *Coleman-Bey v. Tollefson*, and with it, the future of inmate justice. AFJ calls on the Supreme Court to restore the right of all Americans to petition their courts. Access to justice is far too important an American value to take away from one of our country’s most vulnerable populations.

Background

Enacted in 1996, the Prison Litigation Reform Act (PLRA) was an attempt by Congress to limit what it perceived as runaway, frivolous inmate litigation. The law places additional procedural burdens on inmates seeking to file suit, blocks claims based only on mental or

¹ *Access to Justice*, ALLIANCE FOR JUSTICE (last visited Feb. 5, 2015).

² Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV., at *11 (forthcoming 2015), available at <http://ssrn.com/abstract=2506378>.

³ *Criminal Justice Fact Sheet*, NAACP (last visited Jan. 23, 2015), <http://www.naacp.org/pages/criminal-justice-fact-sheet>.

emotional injuries, restricts the ability of indigent inmates to bring claims, and limits the remedies available to inmates from courts.⁴ Its effect has been to entirely cut off access to civil justice for many inmates.

One of the most draconian of PLRA's provisions is the three-strikes rule. It provides that, once an inmate has had three civil cases dismissed by a court, he or she cannot have filing fees waived in future cases.⁵ And more realistically—given the meager incomes of most inmates and the \$400 filing fee in federal court⁶—once an inmate has three strikes, he or she can no longer bring civil lawsuits.

On February 23, 2015, the Supreme Court will hear oral argument in *Coleman-Bey v. Tollefson*. Andre Lee Coleman-Bey is an inmate in Michigan who brought a lawsuit against prison officials for interfering with his access to the courts. Coleman-Bey had brought two previous civil cases that were dismissed. He then brought a third case, which was dismissed by the trial court, and he appealed. That appeal is still pending. When Coleman-Bey brought his fourth and most recent suit, the district judge ruled that the three previous cases were strikes, and that he could not have his filing fees waived. The Supreme Court is reviewing the case to decide whether a district court's dismissal of a lawsuit can count as a strike—and effectively prevent an inmate from filing any more lawsuits—when it is still being appealed.

This case highlights a much greater trend of lower courts expanding the PLRA to hand out strikes based on technical errors, poor timing, and reasonable arguments that end up losing. Even inmates with law degrees, not just the “frequent filers” the PLRA was supposed to target, could now find themselves locked out of our civil justice system.

The Prison Litigation Reform Act: Rhetoric vs. Reality

Congress enacted the PLRA to “reduce the quantity and improve the quality of prisoner suits,”⁷ yet the claims of unbounded frivolous prison litigation that sparked its passage do not match reality. Inmates file roughly half as many lawsuits per capita as the general public,⁸ but are successful at a similar rate.⁹ Even as *pro se* litigants bringing cases without lawyers, inmates

⁴ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 28, 42 U.S.C.).

⁵ 28 U.S. Code § 1915(g).

⁶ See 28 U.S.C. § 1914 (2012) (\$350 filing fee); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, DISTRICT COURT MISCELLANEOUS FEE SCHEDULE (2014), available at <http://www.uscourts.gov/FormsAndFees/Fees/DistrictCourtMiscellaneousFeeSchedule.aspx> (additional \$50 administrative fee).

⁷ Porter v. Nussle, 534 U.S. 516, 524 (2002); see also McLean v. United States, 566 F.3d 391, 397 (4th Cir. 2009) (“The purpose of the PLRA was not, however, to impose indiscriminate restrictions on prisoners' access to the federal courts.”); 141 CONG. REC. S7526 (1995) (statement of Sen. Kyl) (noting the purpose of the PLRA was to “free up judicial resources for claims with merit by both prisoners and nonprisoners”); 141 CONG. REC. S14,627 (1995) (statement of Sen. Hatch) (“I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised.”).

⁸ Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1573–77 (2003).

⁹ Schlanger, *supra* note 2, at *13-14; see also Alexander Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 836 n.138 (2010) (finding a 15 percent success rate for prisoner *Bivens* cases).

have been successful in bringing and winning cases in the United States Supreme Court.¹⁰ And litigation has brought reform to prisons that desperately need it.¹¹ Recent lawsuits have successfully improved inmate medical care,¹² reduced violence¹³ and overcrowding,¹⁴ and reformed prison use of solitary confinement.¹⁵

During debate on the PLRA, the National Association of Attorneys General (NAAG) created lists of frivolous suits that it distributed to drum up congressional support for the bill. But these lists mischaracterized suits and, if anything, reinforced the need for civil justice in prisons.¹⁶

In one example, the NAAG cited the case of an inmate who allegedly sued because of a lack of salad bars and brunches in the prison. In reality, the case involved 43 inmates who sued the prison because of overcrowding, forced confinement of inmates with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents. It included only a fleeting mention that prison guards had access to a salad bar, while the inmates did not.¹⁷ In another case, the NAAG said an inmate had sued because he was given a white towel rather than beige. In reality, he claimed the prison had confiscated a towel and jacket his family had “work[ed] hard and [made] sacrifices to buy” for him.¹⁸

Finally, in a case that remains well-known today, the NAAG listed the inmate who sued because he received chunky peanut butter when he requested creamy. In reality, the inmate returned the wrongly ordered peanut butter, but he claimed the prison had refused to refund him. He had no way to recover the money prison guards had taken from him.¹⁹

That the PLRA was enacted based on faulty assumptions about prisoner lawsuits makes the expansive way in which it—and, in particular, its three-strike provision—has been interpreted all the more disturbing.

More At Bats

“ . . . brought an action or appeal in a court of the United States . . . ”

¹⁰ See, e.g., *Holt v. Hobbs*, No. 13-6827, 2015 U.S. LEXIS 626 (Jan. 20, 2015); *Millbrook v. United States*, 133 S. Ct. 1441 (2013); *Erickson v. Pardus*, 551 U.S. 89 (2007); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹¹ See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009); *Rosas v. Baca*, No. CV 12-00428 DDP, 2012 U.S. Dist. LEXIS 79344 (C.D. Cal. June 7, 2012); *Cajúne v. Lake County*, No. CV 09-164-M-DWM-JCL (D. Mont. filed Nov. 19, 2009).

¹² See generally *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009); *Cajúne v. Lake County*, No. CV 09-164-M-DWM-JCL (D. Mont. filed Nov. 19, 2009).

¹³ *Rosas v. Baca*, No. CV 12-00428 DDP, 2012 U.S. Dist. LEXIS 79344 (C.D. Cal. June 7, 2012).

¹⁴ *Brown v. Plata*, 131 S. Ct. 1910 (2011).

¹⁵ *Peoples v. Fischer*, No. 1:11-cv-02694-SAS (S.D.N.Y. filed March 6, 2013).

¹⁶ Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519, 520-22 (1996); see also Dennis C. Vacco et al., Letter to the Editor, *Free the Courts From Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A3.

¹⁷ Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519, 521 (1996) (citing *Tyler v. Carnahan*, No. 4 94 CV 0017WSB (E.D. Mo. filed Dec. 17, 1993)).

¹⁸ *Id.* (citing *Rivera v. State of New York*, No. 90811 (N.Y. Ct. Cl. filed Dec. 21, 1994)).

¹⁹ *Id.*

The first step in a three-strike analysis is to find all the times the inmate has “brought an action or appeal in a court of the United States.” In recent years, the first step has been drastically expanded to include a growing number of inmate cases.

The PLRA states that “an action or appeal” can constitute a strike, and every circuit court to have considered the issue has interpreted that language literally to give strikes for both the dismissal of the original action and the dismissal of an appeal of that action.²⁰ That means a single case, appealed all the way to the United States Supreme Court, could prevent an inmate from ever filing another civil lawsuit. He or she could get all three strikes—one strike from the trial court, one from the appeals court, and one from the Supreme Court—in just one case.

This interpretation creates an arbitrary system of justice for inmate litigants. In some courts, if an inmate is given a third strike in district court, he or she can be prevented from appealing the case.²¹ In other courts—and in Coleman-Bey’s case—an inmate can appeal a case after a third strike, but cannot bring any additional cases in the meantime. This system turns timing into everything. One day, an inmate can have three strikes and be unable to bring additional cases. Later, he or she could win an appeal of the third strike and be able to litigate again. Even later, a higher court could overturn the appeals court and reinstate the third strike. Inmates must be sure to litigate on the right day, or risk being locked out of the courthouse.

Courts have also given strikes in cases where inmates had no notice of the three strikes rule. In one case, an inmate was not allowed to file a lawsuit because he had three previous cases dismissed—all before the PLRA was even enacted.²² He had no way to hold the prison accountable for allowing him to be assaulted. Apparently, Congress was trying to deter him from bringing frivolous lawsuits after the fact.

By expanding the number of cases that can constitute a strike, courts have divorced the strike system from its original goal of deterring frivolous litigation. Strikes seem arbitrary, passed out to inmates with unlucky timing or unfriendly trial judges.

Creating More Dismissals “ . . . *that was dismissed* . . . ”

Once the judge has found all the actions and appeals brought by the inmate, he or she considers which of them were “dismissed.” A motion to dismiss is a well-established event under the Federal Rules of Civil Procedure. It describes a motion made very early in a lawsuit, before either side has requested evidence from the other. Normally, it occurs where the defendant asserts that the plaintiff could not win the case regardless of any possible evidence he or she could find.²³

²⁰ See, e.g., *Chavis v. Chappius*, 618 F.3d 162, 167-68 (2d Cir. 2010); *Jennings v. Natrona Co. Detention Center*, 175 F.3d 775, 780 (10th Cir. 1999); *Hains v. Washington*, 131 F.3d 1248, 1250 (7th Cir. 1997) (per curiam); *Henderson v. Norris*, 129 F.3d 481, 485 (8th Cir. 1997) (per curiam); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996).

²¹ *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002).

²² *Medberry v. Butler*, 185 F.3d 1189, 1192 (1999).

²³ See FED. R. CIV. P. 12(b).

Motions to dismiss serve as a gatekeeper to federal court. Only when a complaint fails to assert even a plausible claim will a court dismiss it. Yet, federal appeals courts have construed “dismissed” under the PLRA far beyond its plain meaning and congressional intent.

In some courts, inmates can acquire strikes from losing a case during summary judgment. The differences between a motion to dismiss and a motion for summary judgment are “well-established” and “a lesson learned in the first year of law school.”²⁴ Yet, in these courts, they are the same for inmates who risk losing their right to civil justice. Motions to dismiss occur immediately after a lawsuit is filed, while summary judgment comes immediately before trial. Motions to dismiss occur before the discovery process and usually have minimal amounts of evidence. It is an initial check on whether a case is baseless. Summary judgment motions come after discovery and involve all of the available evidence. They are a ruling on the merits of a case. Congress’s goal in passing the PLRA was to stop the frivolous cases, not all cases that end up losing. Under the PLRA, every lawsuit filed by an inmate goes through an initial screening process to see if it is frivolous. Congress could not have intended that cases surviving that process, and making it through discovery, could result in a strike.

Even a case dismissed after a successful settlement by the inmate may be a strike. In one egregious example, a court said a plaintiff “bears the burden of persuading the court that a case is not a strike,”²⁵ after he won a \$500 settlement with the prison after being placed in segregation for requesting to speak with his lawyer.²⁶ Settlements are very common in federal litigation. While they do not necessarily mean a case would be successful—parties settle for a variety of reasons—with the strong procedural protections already in place to protect prisons, it would be highly unlikely for one to settle a frivolous claim.

Win or lose, inmates now have to worry that every case they bring will be a strike against them. Rather than punishing inmates who bring frivolous cases, the three-strikes rule punishes those unable to find the evidence they need and even successful litigants who win settlements. These cases are far cries from the baseless, frivolous claims Congress intended to deter.

An Expanding Strike Zone

“ . . . on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ”

In the final step of a three-strikes analysis, a judge must decide whether the dismissal was “frivolous, malicious, or fails to state a claim.”

Courts have defined frivolous as lacking “an arguable basis in either law or in fact,”²⁷ and courts have been aggressive in applying this definition. In one notable case, an inmate brought an excessive force lawsuit with the help of a fellow inmate. Shortly before the statute of

²⁴ Blakely v. Wards 738 F.3d 607, 626 (2013) (en banc) (Motz, J. dissenting); *see also* Bradley Scott Shannon, *A Summary Judgment is not a Dismissal!*, 56 DRAKE L. REV. 1 (2007).

²⁵ Taylor v. First Med. Mgmt., 508 Fed. Appx. 488, 497 (2012).

²⁶ Lufti Talal v. Myers, No. 1:00-0059, 2000 U.S. Dist. LEXIS 23032, *2 (M.D. Tenn. Oct. 27, 2000), *recommendation adopted by* 2000 U.S. Dist. LEXIS 23031 (M.D. Tenn., Nov. 20, 2000).

²⁷ *See* Ball v. Butts, 445 Fed. Appx. 457, 458 (3d Cir. 2011) (per curiam); Dunson v. McKinney, 412 Fed. Appx. 196, 198 (11th Cir. 2011); McLean v. United States, 566 F.3d 391, 399 (4th Cir. 2009).

limitations was to expire, the inmate was transferred to another prison and his legal paperwork was confiscated. His friend filed an unsigned copy of the suit on his behalf before the limitation period had run, and then the inmate submitted his own signed copy shortly later. The court held the suit to be frivolous, and a strike against the inmate—not on its merits, but solely because the signed copy was not submitted on time.²⁸

Punishing inmates for these sorts of technical errors, especially errors caused by the prison itself, does nothing to deter frivolous lawsuits. It deters all lawsuits, even meritorious ones.

The interpretation of “fails to state a claim” has been similarly expansive. “Fails to state a claim” tracks the language of Federal Rules of Civil Procedure Rule 12(b)(6), which governs motions to dismiss, and has been interpreted the same way by the courts.²⁹ Traditionally, the language of the rule set a low bar for plaintiffs to move forward in their cases: they only needed to file a “short and plain statement” of facts entitling them to relief.³⁰ That all changed in 2007 and 2009 when the Supreme Court issued opinions in *Bell Atlantic v. Twombly*³¹ and *Ashcroft v. Iqbal*.³² These cases fundamentally and radically altered the standards by which litigants’ claims are reviewed in federal court. They established a heightened pleading standard for plaintiffs, requiring detailed, fact-intensive complaints to prove claims before they ever have the chance to request evidence. A recent law review article found that, since *Iqbal*, over two-thirds of civil rights lawsuits were dismissed for failure to state a claim.³³

As Alliance for Justice has [highlighted](#), these new pleading standards affect not only inmates, but all Americans seeking to access the civil justice system.³⁴ The cases have been used to dismiss lawsuits involving the environment, medical malpractice, dangerous drugs, investor protection, disability rights, civil rights, employment discrimination, and the taking of private property. They infringe on the right to a jury guaranteed by the Seventh Amendment and prevent plaintiffs from uncovering dangerous misconduct.

And now, under the PLRA, they are being used to stop inmate lawsuits. Strikes for failing to state a claim now even encompass legitimate claims that may have been successful a decade ago, before *Iqbal*.

A Shrinking Exception

“... unless the prisoner is under imminent danger of serious physical injury.”

²⁸ *Gonzales v. Wyatt*, 157 F.3d 1016, 1018-22 (5th Cir. 1998).

²⁹ *See, e.g., McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009); *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998).

³⁰ FED. R. CIV. P. 8(a).

³¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

³² *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

³³ Jonah B. Helbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2331 (2012).

³⁴ *Toyota Uses Iqbal/Twombly Supreme Court Decisions In Attempt to Escape Liability in Faulty Accelerator Cases*, ALLIANCE FOR JUSTICE (Sept. 17, 2010), <http://www.afj.org/blog/toyota-uses-iqbaltwombly-supreme-court-decisions-in-attempt-to-escape-liability-in-faulty-accelerator-cases>.

The PLRA includes a carve-out designed to protect the physical safety of inmates. When an inmate is under imminent danger of serious physical injury, he or she is still allowed to file a lawsuit without paying the filing fee. Yet, even this narrow protection has been eroded by some courts.

It's not enough to show that there was an imminent danger of serious physical injury at the time of the alleged incident, but rather the inmate must show that there remains an imminent danger at the time the lawsuit is filed.³⁵ And an inmate can only appeal a losing case if he or she remains in imminent danger.³⁶

This additional hurdle is particularly important because of our overburdened federal judiciary. The Judicial Conference of the United States, led by Chief Justice John Roberts, has called for the creation of 78 new permanent judgeships in 22 states,³⁷ yet Congress has not created a single new permanent judgeship in over a decade.³⁸ Additionally, there are dozens of federal judicial vacancies, some of which have languished for more than 1,000 days.³⁹ And some of these vacancies are in the same districts where, even if the existing judgeships were filled, new judgeships would still be necessary to manage the courts' caseloads.⁴⁰ Judges are facing crushing caseloads, and the average civil case now takes over two years to go to trial.⁴¹ With the slow pace of federal litigation, it is likely only inmates who remain in imminent danger of serious physical injury for long periods of time could take advantage of this exception.

In passing the PLRA, Congress put in restrictions to make the use of the safety exception rare. The danger must be imminent, it must be serious, and it must be a physical injury, rather than mental or emotional. There is no reason to believe Congress was also requiring the danger to last for years.

³⁵ See *Andrews v. Cervantes*, 493 F.3d 1047, 1052-53 (9th Cir. 2007); *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003); *Malik v. McGinnis*, 293 F.3d 559, 562-63 (2d Cir. 2002); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 311 (3d Cir. 2001); *Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998); *Banos v. O'Guin*, 144 F.3d 883, 884-85 (5th Cir. 1998).

³⁶ See *Williams v. Paramo*, No. 13-56004, 2014 U.S. App. LEXIS 24694, *13 (9th Cir. May 15, 2014); *Ball v. Famiglio*, 726 F.3d 448, 467 (3d Cir. 2013); *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003); *Banos v. O'Guin*, 144 F.3d 883, 884-85 (5th Cir. 1998).

³⁷ JUDICIAL CONFERENCE OF THE UNITED STATES, JUDICIAL CONFERENCE JUDGESHIP RECOMMENDATIONS (Mar. 2013).

³⁸ JUDICIAL CONFERENCE OF THE UNITED STATES, AUTHORIZED JUDGESHIPS (Mar. 2013).

³⁹ *Judicial Selection*, ALLIANCE FOR JUSTICE (last updated Feb. 5, 2015), <http://www.afj.org/our-work/judicial-selection>.

⁴⁰ In Texas, for example, the Judicial Conference has recommended the creation of eight new permanent judgeships, and the state has more current and upcoming judicial vacancies than any state in the country—10 in district courts and two in the circuit court. One of these vacancies has been empty for nearly four years. *Id.* The Eastern District of Texas, which will soon have two vacancies, has the highest caseload of any district court in the country, when weighted for the complexity of the cases, at 1,510 criminal and civil cases per judge, per year. *As Workloads Rise in Federal Courts, Judge Counts Remain Flat*, TRAC, SYRACUSE UNIVERSITY (Oct. 14, 2014), <http://trac.syr.edu/tracreports/judge/364/>. And Texas is home to 10 percent of the incarcerated population nationwide. *Interactive Map*, THE SENTENCING PROJECT (last visited Feb. 6, 2015), <http://www.sentencingproject.org/map/map.cfm>.

⁴¹ *As Workloads Rise in Federal Courts, Judge Counts Remain Flat*, TRAC, SYRACUSE UNIVERSITY (Oct. 14, 2014), <http://trac.syr.edu/tracreports/judge/364/> (finding civil cases took a median of 26.1 months to go from filing to trial in 2013).

Conclusion

The effect of all of these legal developments is to curtail the civil justice system for the more than two million incarcerated people living in the United States.⁴² More cases are “strikeable” and seemingly every case an inmate loses can be a strike.

Worse, the strike criteria can vary widely court-by-court, with many courts yet to weigh in on any given topic. Inmates, who nearly always litigate *pro se*, face an uphill battle in figuring out the law. And any misstep could bar a claim and give an additional strike.

The clear trend of courts is toward restricting inmates’ rights to seek civil justice far beyond what was envisioned by the Prison Litigation Reform Act. And the trend is dangerous. Litigation is one of the only ways to hold prisons accountable for violence, unsanitary conditions, and abuse of authority that is rampant in many places.⁴³

Coleman-Bey presents the Supreme Court with its first opportunity to interpret the three-strikes provision of the PLRA. Although the case addresses only one of many legal issues identified by this report, the Court has the opportunity to set the stage for future challenges. It should make clear that the constitutional rights of inmates to access the courts cannot be eroded. The three-strikes rule must be interpreted to stop only frivolous suits, not to be a burden on every inmate seeking civil justice.

⁴² *Interactive Map*, THE SENTENCING PROJECT (last visited Feb. 6, 2015), <http://www.sentencingproject.org/map/map.cfm>.

⁴³ *See generally Prisoners’ Rights*, AMERICAN CIVIL LIBERTIES UNION (last visited Jan. 23, 2015), <https://www.aclu.org/prisoners-rights>.