

21-10550

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

JEREMY JOHN WELLS,

Plaintiff-Appellant,

—v.—

WARDEN PHILBIN, CLIFFORD BROWN, and FNU FLUKER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

**BRIEF FOR *AMICI CURIAE* FLORIDA JUSTICE
INSTITUTE, SOUTHERN CENTER FOR HUMAN RIGHTS,
AND SOUTHERN POVERTY LAW CENTER IN SUPPORT
OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL
REHEARING AND REHEARING EN BANC**

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for *Amici Curiae* certifies that a list of interested persons, trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal (none of whom are publicly listed), including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party, known to *Amici Curiae*, are as follows:

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No publicly traded company or corporation known to *Amici Curiae* has an interest in the outcome of this appeal.

Dated: New York, New York
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INTEREST OF *AMICI CURIAE*¹

Amici curiae are nonprofit organizations that engage in litigation and other advocacy efforts to protect the constitutional rights of incarcerated people. Because of their efforts, *amici* are aware of the economic straits of incarcerated people and the financial costs that are imposed on them in connection with their incarceration.

The Florida Justice Institute (“FJI”), based in Miami, Florida, is a nonprofit, public interest law firm that conducts civil rights litigation and advocacy on behalf of incarcerated people. FJI represents incarcerated people and their families in cases to ensure adequate medical care, eliminate abuse and obtain redress for other unjust practices. FJI opposes financial impediments to access to courts for incarcerated people.

The Southern Center for Human Rights (“SCHR”), based in Atlanta, Georgia, is a nonprofit organization dedicated to protecting and advancing the rights of people impacted by the criminal legal system. SCHR has worked to ensure humane conditions of confinement in jails and prisons and end practices that criminalize people simply for experiencing poverty. In pursuit of those aims,

¹ No party’s counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4). *Amici* seek leave to file this brief under Fed. R. App. P. 29(b)(3).

SCHR has brought lawsuits, issued investigative reports and pressed for legislative reforms on behalf of indigent persons across the Deep South.

The Southern Poverty Law Center (the “SPLC”) is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The Economic Justice Project at the SPLC works creatively alongside, and under the leadership of, directly impacted community members to provide legal advocacy, support, and education to dismantle exploitative systems that deprive people of wealth on account of their race and economic status and to support equitable systems of self-determination and economic reinvestment, particularly in historically marginalized Black and Brown communities. Fees and costs imposed in association with the criminal justice system are among the exploitative practices the SPLC seeks to dismantle, as they unfairly drive individuals who lack financial resources deeper into poverty and often result in wealth-based detention and reduced access to courts.

STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT

Subject to exceptions not relevant here, the three-strikes rule of the Prison Litigation Reform Act (“PLRA”) forecloses *in forma pauperis* status for prisoners who have had three or more prior suits dismissed as being “frivolous, malicious, or [as] fail[ing] to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(g). If a prisoner with three strikes wishes to bring suit or pursue an appeal, he must pay the filing fee, in full, at the outset of the matter.

The panel in this case viewed itself as bound by Circuit precedent holding that dismissal of a prior action for failing to exhaust administrative remedies counts as a strike for purposes of the PLRA’s three-strikes rule. That decision gives the three-strikes rule a broader scope than permitted under *Jones v. Bock*, 549 U.S. 199 (2007). The panel’s decision conflicts with *Jones*, the PLRA’s text, and decisions from other Circuits. This Court should rehear this case *en banc* to bring the law in this Circuit into alignment with *Jones* and avoid undue burdens on indigent people’s right to access the courts.

This brief *amicus curiae* addresses the real-life consequences of the panel’s decision. The vast majority of incarcerated people are indigent. What limited funds they may have are often channeled to a host of expenses related to their incarceration. These prisoners lack the financial resources to pay filing fees in full. For most prisoners, being unable to sue *in forma pauperis* is tantamount to

being unable to sue at all. The effect of the panel's decision is that prisoners who should be allowed *in forma pauperis* status under *Jones* are effectively denied access to the courts solely because they are poor.

Economic realities underscore the harsh effect of the panel's decision. The vast majority of incarcerated people were impoverished prior to arrest. After they are arrested, defendants are charged certain costs related to pre-trial detention. During their incarceration, prisoners are charged for basic living expenses and costs related to their own confinement. Meanwhile, prisoners are paid a pittance as wages for prison jobs, if they are paid at all. As a result, the vast majority of prisoners cannot possibly amass the funds needed to pay courts' filing fees. By taking an unduly expansive view of the three-strikes rule, the panel decision thus prevents prisoners entitled to *in forma pauperis* status from being able to seek redress for violations of their constitutional rights.

ARGUMENT

I. Prisoners Are Charged a Host of Costs in Connection with their Incarceration

Over the past several decades, “[e]very aspect of the criminal justice process has become ripe for charging a fee.” Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Ctr. for Justice, 1 (2015).²

² <https://www.brennancenter.org/sites/default/files/publications/Charging%20Inmates%20Perpetuates%20Mass%20Incarceration.pdf>.

The imposition of costs begins before a person passes through the prison gates. Booking fees—fees imposed upon arrest, regardless of ultimate conviction—have become commonplace. *Id.* at 3. It is also routine for states to charge indigent defendants fees for legal representation. Forty-three states—including every state in this Circuit—use some form of cost recovery for work performed by public defenders. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying The Price*, NPR (May 19, 2014).³ States also impose miscellaneous “court fees” on defendants and use the proceeds to subsidize various expenses, including those far afield from criminal prosecution. Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Ctr. for Justice, 6 (Nov. 21, 2019).⁴

Incarcerated people face additional costs. Under so-called “pay-to-stay” policies, many institutions charge prisoners for room-and-board. These fees may take the form of per diem charges, which can exceed \$140 per day, or charges for necessities like meals and medical care. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 Loy. J. Pub. Int. L. 319, 325 (Spring 2014). And even in the absence of

³ <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

⁴ https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf.

explicit pay-to-stay charges, prisoners often must purchase essentials of everyday life—such as clothing and hygiene products—through the prison commissary.

Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 *Hastings Race & Poverty L. J.* 3, 17 (Winter 2020).

Phone calls to loved ones are another significant expense. The Federal Communications Commission (“FCC”) has capped interstate phone call rates at 12 cents per minute for prisons, 14 cents for jails with populations of 1,000 or more, and 21 cents for jails with populations of fewer than 1,000. 47 C.F.R. § 64.6030. But “80 percent of jail and prison calls are intrastate” and do not benefit from FCC regulation. Marie Feyche, *FCC Approves Plan to Lower Interstate and International Jail and Prison Phone Call Rates*, *Jurist* (May 23, 2021).⁵ And for incarcerated people whose work is compensated at rates of pennies per hour—if it is compensated at all—even 12 cents per minute is a substantial cost.

II. Incarcerated People Have Scant Access to Resources While Imprisoned

An estimated 80% of incarcerated people in America are indigent. *See Eisen, Charging Inmates Perpetuates Mass Incarceration*, at 6. Most people in prison have little income in the years prior to incarceration. Adam Looney &

⁵ <https://www.jurist.org/news/2021/05/fcc-approves-plan-to-lower-interstate-and-international-jail-and-prison-phone-call-rates/>.

Nicholas Turner, *Work and Opportunity Before and After Incarceration*, Brookings Institution, 8 (Mar. 14, 2018).⁶ This means that prisoners typically enter the system without a financial safety net to cover prison costs.

Moreover, wages for prison jobs are extraordinarily low: prisoners typically earn between 14 and 63 cents per hour for prison jobs. In the States of this Circuit, many prisoners are not paid at all for their labor. Wendy Sawyer, *How Much Do Incarcerated People Earn In Each State?*, Prison Policy Initiative (Apr. 10, 2017).⁷

For people with scant funds before incarceration who are unpaid or earn a pittance while incarcerated, the costs of incarceration are astronomical. For example, at the FCC's maximum rate for interstate phone calls, many incarcerated people would have to work *five hours* at a prison job to pay for a single five-minute phone call. And a \$5 per diem pay-to-stay fee—well within the typical range—exceeds the daily earnings of many prisoners.

In short, most incarcerated people lack the financial resources to meet the costs of daily prison life. “80 to 85 percent of inmates now leave prison” in debt. Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*. Those debts can

⁶ https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

⁷ <https://static.prisonpolicy.org/blog/2017/04/10/wages/>.

“trigger a cascade of debilitating consequences.” Karin D. Martin, Sandra Susan Smith & Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, Nat. Inst. of Justice & Harvard Kennedy School, Executive Session on Community Corrections, 9 (Jan. 2017).⁸ Indeed, debt is a significant contributor to re-incarceration, as failure to pay fines and fees can lead to the revocation of probation or re-arrest. *Id.* at 9-10.

III. Most Incarcerated People Cannot Afford to Pay Filing Fees

In view of their indigency and the costs imposed on them, most incarcerated people cannot possibly pay court filing fees in a lump sum at the outset of a case.

To be clear, the PLRA requires all prisoners to pay the full amount of courts’ filing fees. Even prisoners who are granted *in forma pauperis* status are required to pay court filing fees in full, albeit in installments. 28 U.S.C. § 1915(b). Prisoners with “three strikes” under the PLRA are subject to an even greater burden because they are denied *in forma pauperis* status and required to pay courts’ filing fees in full, up front. 28 U.S.C. § 1915(g). For most incarcerated people, paying this cost in a lump sum is simply impossible.

In federal district court, the initial filing fee is \$402. 28 U.S.C.

⁸ <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

§ 1914(a); U.S. Courts, *District Court Miscellaneous Fee Schedule*, ¶14 (Dec. 1, 2020).⁹ The filing fee for a federal appeal is even higher, at \$500. U.S. Courts, *Court of Appeals Miscellaneous Fee Schedule*, ¶ 2 (Dec. 1, 2020).¹⁰ A prisoner making 14 cents an hour—at the low end of average prison wages—would have to work more than 2,800 hours, or nearly an *entire year* of daily 8-hour shifts, without weekends or other interruptions. And a prisoner who works without pay—as is the case for many prisoners in this Circuit—has no income with which to pay a filing fee.

Other fees incident to litigation, such as transcripts and copies of the record on appeal, may cost “thousands of dollars.” *Maus v. Baker*, 729 F.3d 708, 709-10 (7th Cir. 2013) (Posner, J., sitting as motions judge). If a particular case were appealed, and necessitated \$1,000 in record costs, the total cost of litigation would rise to more than \$1,900. At 40 cents an hour, that price would require 4,755 hours of labor; at 14 cents an hour, it would rise further still, to 13,585 hours. Even assuming that an incarcerated person is paid for her labor and works 8-hour shifts, every day of the year, the cost would take years to pay—and during that time, the prisoner would still incur costs related to daily prison living.

⁹ <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

¹⁰ <https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule>.

Plainly and simply, most incarcerated people cannot afford to pay court filing fees. Yet the PLRA requires prisoners with three strikes to pay the entire court filing fee in full, up-front. For those prisoners, litigation to vindicate constitutional rights becomes entirely impossible, solely because of poverty.

IV. The Panel Decision Would Unduly Prevent Impoverished Inmates from Pursuing Valid Claims

The panel decision means that claims of serious constitutional deprivations may go unheard simply because incarcerated litigants are too poor to bring suit.

To take one recent example, COVID-19 has run rampant in America's jails and prisons since 2020. Eddie Burkhalter *et al.*, *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. Times (Apr. 10, 2021).¹¹ Thousands of prisoners have died. *Id.* But when prisoners brought suit to challenge these dire conditions, cases were barred solely because of the PLRA's three-strikes rule. *See, e.g., Johnson v. Wilcher*, No. CV 420-089, 2020 WL 2064935, at *2 (S.D. Ga. Apr. 28, 2020), *report and recommendation adopted*, 2020 WL 5807970 (S.D. Ga. Sept. 29, 2020) (relying on the three-strikes rule in dismissing suit alleging "[heightened] risk of contracting the virus [due to]

¹¹ <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html>.

proximity to other inmates that have tested positive for the disease and the failure of the Sheriff to provide masks, gloves, disinfecting products”).

In addition, the three-strikes rule has prevented prisoners from seeking redress for physical abuse and dangerous living conditions. *See, e.g., Johnson v. Pace*, No. 17-0504, 2018 WL 719048, at *1 (S.D. Ala. Jan. 11, 2018), *report and recommendation adopted*, 2018 WL 716609 (S.D. Ala. Feb. 5, 2018) (relying on the three-strikes rule in dismissing suit alleging that guards denied cleaning supplies when faulty sewage system resulted in human waste dripping into cell and beat plaintiff after complaints). In these and other cases, the three-strikes rule effectively blocks prisoners from seeking redress for violations of their constitutional rights.

* * *

The panel decision improperly extends the harsh consequences of the three-strikes rule to cases where, under *Jones*, prisoners should be entitled to proceed *in forma pauperis*. Under *Jones* and decisions in other Circuits, prisoners are not penalized under the three-strikes rule for dismissals for failure to exhaust administrative remedies. But the panel’s decision produces the opposite result. Under the panel’s decision, prisoners who deserve *in forma pauperis* status under *Jones* are deprived of it. And as a practical matter, they are left without recourse for violations of their constitutional rights.

CONCLUSION

By giving the three-strikes rule a broader scope than *Jones* permits, the panel's decision prevents prisoners from being able to seek redress for violations of their constitutional rights. This Court should rehear this case *en banc* to bring the law in this Circuit in line with the Supreme Court's decision in *Jones*.

Dated: February 14, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, as provided in Federal Rule of Appellate Procedure 29 because, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 2377 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I CERTIFY that on February 14, 2022, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system. Notice of this filing will be sent by mail to all parties by operation of the Court's electronic filings system.

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