No. 21-1332

ORIGINAL

In The
Supreme Court of the United States

WASEEM DAKER,
Petitioner,
v.
TIMOTHY WARD, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WASEEM DAKER
Petitioner, *pro se*

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QUESTIONS PRESENTED

Petitioner alleged that Georgia Department of Corrections (GDC) officers place him in imminent danger of contracting hepatitis or HIV by forcibly shaving him with a damaged, unsanitized razor on a semi-monthly basis in a prison system where both blood-borne diseases are endemic. The Eleventh Circuit panel held that those allegations were "too speculative" to satisfy the exception because petitioner "has not contracted an infectious disease" or alleged the same of another prisoner despite the "longstanding custom." No other circuit follows this rule. Judge Rosenbaum dissented, explaining that the correct test is whether the allegations "allow a court to draw reasonable inferences" of future "danger." Five circuits follow this rule.

The panel also held that Petitioner's lawsuit was duplicative of two prior, similar lawsuits that were based on different forcible shaving instances, and therefore, malicious. Although other circuits hold that duplicative lawsuits are subject to dismissal as malicious, the panel's decision is a notable outlier. No other circuit would hold that petitioner's challenge is malicious. All other circuits hold that duplicative means nearly identical.

The questions presented are as follows

I. Whether an incarcerated person must allege presently occurring or certain-to-occur serious physical injury in order to successfully invoke the "imminent danger of serious physical injury" exception to the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g)?

II. Whether three cases challenging three chronologically distinct episodes of forcible shavings, but motivated by the same long-standing department policy are "duplicative," and therefore subject to *sua sponte* dismissal under the Prison Litigation Reform Act (PLRA) provision authorizing pre-service dismissal of "malicious" complaints, 28 U.S.C. § 1915A?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Allen, Marty, Respondent;

Ammons, Jennifer, Respondent;

Anderson, Michael, Respondent;

Black, Nathan, Respondent;

Bobbitt, Trevonza, Respondent;

Brooks, Timothy, Respondent;

Bryson, Homer, Respondent;

Chatman, Bruce, Respondent;

Daker, Waseem, Petitioner;

Doe, John [GDC Director of Internal Affairs], Respondent;

Dozier, Gregory, Respondent;

Evans, Ms. [First Name Unknown ("FNU")], Respondent;

Foulk, Rodney, Respondent;

Fountain, Lisa, Respondent;

Geiger, Dr. [FNU], Respondent;

Georgia Department of Corrections, Respondent;

Hartmeyer, Ashley, Respondent;

Hutcheson, Joseph L., Respondent;

James, Carrie, Respondent;

Jones, Terry L., Respondent;

Kilgore, Shirley, Respondent;

Koon, Jack, Respondent;

Lewis, Dr. Sharon, Respondent;

Lyte, Valiant, Respondent;

Mendez, Michael, Respondent;

Mikell, Marcus, Respondent;

Mitchell, Jason, Respondent;

Moye, Terry Deon, Respondent;

Myrick, Ricky L., Respondent;

Nobilio, Wade Garrett, Respondent;

Ogden, Sheldon, Respondent;

Shuemake, Ronnie, Respondent;

Smith, Calvin Milton, Respondent;

Smith, Cindy L., Respondent;

Stanton, Otis, Respondent;

State of Georgia, Respondent;

Toole, Robert, Respondent;

Turner, Dr. Steven A., Respondent;

Upton, Steve, Respondent;

Ward, Timothy, Respondent;

Williams, Curmit, Respondent;

Wilson, Fred, Respondent;

Wright, Arsenio, Respondent;

LIST OF RELATED CASES

Daker v. Dozier, No. 5:17-CV-00025, U. S. District Court for the Middle District of Georgia. Judgment entered July 18, 2017.

Daker v. Ward, No. 17-13384, U. S. Court of Appeals for the Eleventh Circuit Judgment entered June 7, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Waseem Daker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Daker v. Ward, et al.*, No. 17-13384.

OPINIONS BELOW

The Opinion of the Court of Appeals is published and reported at *Daker v. Ward*, 999 F3d 1300 (11th.Cir. June 7, 2021.)

JURISDICTION

The Court of Appeals affirmed Petitioner's appeal from the dismissal of Petitioner's Complaint on June 7, 2021. (App. ___.) The Court of Appeals denied a petition for rehearing on August 30, 2021. (App. ___.) On December 7, 2021, Justice Thomas granted an application for extension of time to file Petition for Writ of Certiorari until December 28, 2021. Application No. 21A206. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This Court involves Title 28, United States Code ("U.S.C.) § 1915(g) of the Prison Litigation Reform Act ("PLRA"), commonly known as the "three-strikes provision, which provides in pertinent part:

> (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.

This Court involves Title 28, United States Code ("U.S.C.) § 1915A, which provides in pertinent part:

> (a) Screening.—
>
> The 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.

(b) Grounds for Dismissal.—

On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

STATEMENT OF THE CASE

Petitioner is a devout Muslim who, like many people of faith, wears a religiously mandated beard. *See Holt v. Hobbs*, 574 U.S. 352, 362 (2015) ("Petitioner's belief is by no means idiosyncratic"). For nearly a decade, GDC personnel at various prisons have employed dangerous means to coerce petitioner's compliance with rules that infringe on his religious practice. Their methods include the use of tasers and chemical spray, ECF 1-1 at 10; prolonged solitary confinement in cells covered in human excrement and teeming with the vermin attracted to it, ECF 1-1 at 22; and potential exposure to hepatitis and HIV through nearly monthly forced shaving with unsanitized communal razors in a prison system rife with those communicable diseases,

ECF 1-1 at 6-7. As a result, petitioner has consistently suffered serious injury, from chemical burns on his genitals, ECF 1-1 at 9-10; ECF 45 at 11; to infection from exposure to human waste, ECF 1-1 at 20; to wounds from the razors themselves, ECF 1-1 at 7. And GDC personnel frequently threaten to unleash even worse, one going so far as to pledge to "bury [petitioner] before [he] retire[s]." ECF 45 at 10.

This case is about the forced shavings and resulting injuries that occurred at Georgia State Prison (GSP) from December 21, 2016, through January 10, 2017. Weeks before that period, Petitioner reminded GSP officers that his beard was essential to his religious exercise. ECF 1-1 at 8. GSP personnel responded with a promise to "beat" petitioner and then forcibly shave him. ECF 45 at 5-6. When petitioner still refused to voluntarily remove his beard, GSP personnel did not hold back.

On December 21, 2016, GSP personnel sanctioned petitioner with solitary confinement, where he was denied his religious property and access to worship services. ECF 1-1 at 8, 23-24. On January 3, 2017, when petitioner again refused to remove his beard, GSP personnel transferred him to another solitary confinement cell, this one caked with a prior occupant's feces. ECF 1-1 at 9. Because GSP personnel refused petitioner's repeated requests for cleaning supplies, ECF 1-1 at 9, 22, he was exposed to this fecal matter for more than three months, ECF 16 at 18. Contemporaneously denied out-of-cell exercise, petitioner had no break from

the filth, ECF 1-1 at 25, and the prolonged exposure led to several sinus infections, ECF 1-1 at 29; ECF 14 at 2.

On January 10, 2017, GSP personnel stormed petitioner's cell and deployed a taser and K9 spray, leaving him with chemical burns, ECF 1-1 at 9-10. GSP personnel then dragged petitioner to the barber's chair, pinned his arms, causing nerve and muscular damage, ECF 1-1 at 10, and forcibly shaved him, id. They employed an unsanitized, communal razor notwithstanding the fact that blood-borne diseases like hepatitis and HIV are endemic behind bars and easily transmissible via shared shaving implements. ECF 1-1 at 6-7. To make matters worse, GDC razors allegedly have "broken guards or other damage that exposes the skin to sharp edges," Op. 29-30, Rosenbaum, J., dissenting, and which cut petitioner on numerous occasions, each time augmenting the risk of contracting a potentially deadly disease, ECF 1-1 at 7-8. And since the January 2017 incident, little has changed—the beatings and forcible shavings are largely distinguishable from one another only on the bases of dates, perpetrators, and location. ECF 45 at 7-13.

On January 19, 2017, petitioner filed a civil rights complaint. As relevant, petitioner raised individual-capacity as-applied claims under the Eighth Amendment, RLUIPA, and the Free Exercise clause, against the GSP personnel who extracted and then forcibly shaved him on January 10, 2017, as well as facial challenges under RLUIPA and the Free Exercise clause to the GDC policies restricting his religious liberty. ECF 1-1 at

25-27. An indigent three-striker, he sought to invoke the imminent danger exception, including on the bases that (1) forcible shaving exposed him to an intolerable risk because it was a vector for deadly blood-borne pathogens like hepatitis and HIV, and (2) prolonged solitary confinement in a cell filthy with another prisoner's excrement was similarly dangerous. ECF 1-1 at 28-29; ECF 16 at 9-33; ECF 45 at 7-15, 17-19.

Prior to service, the district court sua sponte dismissed petitioner's complaint on two primary grounds. First, it concluded that petitioner was not in imminent danger of serious physical injury and therefore could not pay the filing fee in installments. App. ___. Second, it held that petitioner's claims were duplicative of two others and therefore subject to pre-service dismissal under a provision of the PLRA concerning malicious filings. App. ___. The Eleventh Circuit affirmed.

To start, the Eleventh Circuit held that *Daker v. Owens*, No. 5:12-cv-459 (M.D. Ga.) (*Daker I*)—originally filed November 20, 2012 and amended on September 6, 2016—and *Daker v. Bryson*, No. 5:16-cv-538 (M.D. Ga.) (*Daker II*)—filed December 4, 2016—were duplicative of the January 19, 2017, complaint in this matter. App. ___. *Daker I* and *Daker II* were filed prior to the January 10, 2017, forcible shaving at issue in this case; were premised on episodes of forcible shaving occurring in 2012-2013 at the Georgia Diagnostic and Classification Prison (GDCP) and November 9-10, 2016, at GSP, respectively; and did not reflect prolonged exposure to excrement-smeared solitary confinement cells. The Eleventh Circuit nonetheless

concluded that this case, *Daker I*, and *Daker II* "raised 'essentially the same' allegations and claims" because all three raise facial challenges to GDC's policy restricting religious beards and as-applied challenges to specific incidents of forcible shaving with unsanitary communal razors. App. ___. Further, this matter described the prior forcible shavings that were a focus of *Daker I* and *Daker II*, and *Daker II* likewise described the forcible shavings that were a focus of *Daker I*—that is, all three complaints contextualized GDC's long-standing practice of enforcing restrictions through forcible shaving. Id. These similarities were fatal, the majority held.[1] App. ___.

Next, a majority of the Eleventh Circuit held that the risk of "expos[ure] . . . to an infectious disease like HIV or hepatitis" from "being forcibly shaved with damaged and unsanitary clippers" is "too speculative to establish" that petitioner was "under imminent danger." App. ___. In light of "GDC's longstanding custom to use damaged and unsanitary clippers," the majority reasoned that petitioner "arguably would have contracted an infectious disease" if the practice "truly posed an

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[1] The panel described a prior unpublished opinion of the Eleventh Circuit as holding that *Daker II* was duplicative of *Daker I*. Op. 20, n.9 (citing *Daker v. Bryson*, 841 F. App'x 115, 120-21 (11th Cir. 2020)). But that's not quite right. The *Daker II* Court, like the district court in that case, found that some, but not all, of the claims raised in *Daker II* were duplicative of those raised in *Daker I*. *See* 841 F. App'x at 121.

imminent danger" and he did not allege that anyone else had. App. ___.

Judge Rosenbaum dissented from this holding. Authoritative and comprehensive research from the Centers for Disease Control and Prevention (CDC), the American Barber Institute (ABI), and other sources confirmed what petitioner alleged—hepatitis and other blood-borne viruses are spread through communal razors and clippers, which pose a significant risk of infection. App. ___. "And that's when the clippers were actually cleaned"—at GSP, though, the communal clippers "are not disinfected in any way, they are damaged, and they are used on a population statistically known to include those with bloodborne disease at significantly greater rates than in the general population." App. ___. Enhancing this risk, GDC does not track hepatitis infections, and thus "prison barbers may not know when they have used clippers on an infected person"; the frequency of forced shavings "necessarily augments the chances" of petitioner becoming infected; and the GDC itself "must recognize this real risk because its standard operating procedures require . . . clean[ing] and sanitize[ing] clippers after each use." App. ___.

Beyond faulting the majority for "second-guess[ing] the CDC" and disregarding the serious risk to petitioner, Judge Rosenbaum dissented on the basis that the majority erected an erroneous legal standard—"an impossible hurdle to clear"—by requiring petitioner to show either that he or another prisoner "actually contract[ed] HIV or hepatitis" from GDC's "use of unsanitized, damaged clippers." App. ___. To start, petitioner could not divine the

source of an HIV or hepatitis infection. Id. The correct test, in any event, is whether "as a matter of scientific knowledge, the allegations allow a court to draw reasonable inferences that there is a *danger* that a prisoner repeatedly shaved with unsanitized, damaged clippers used previously on other prisoners . . . will contract hepatitis." App. ___. (emphasis added). Employing that rule, adopted by other circuits, petitioner adequately alleged imminent danger of serious physical injury. App. ___.

REASONS FOR GRANTING THE PETITION

I. Whether an incarcerated person must allege presently occurring or certain-to-occur serious physical injury in order to successfully invoke the "imminent danger of serious physical injury" exception to the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g)?

A. There is a Circuit conflict on the question presented.

Every other circuit to have reached the issue sides with Judge Rosenbaum— the test is whether the "allegations allow a court to draw reasonable inferences that there is a danger" of suffering serious physical injury. App. ___. Alleging presently occurring or certain-to-occur serious physical injury is not required. *Gibbs v. Cross*, 160 F.3d 962, 965 (3d Cir. 1998) (three-strikers can proceed IFP "without waiting for something to happen to them"); *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 587 (6th Cir. 2013) ("We reject the notion that the inclusion of the word 'imminent' in §

1915(g) allows us to grant IFP status only after a plaintiff's condition has deteriorated."); *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002) ("[O]nce the beating starts, it is too late to avoid the physical injury."); *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (exception in § 1915(g) may be premised upon "a pattern of misconduct evidencing the likelihood of imminent serious physical injury"); *Andrews v. Cervantes* 493 F.3d 1047, 1056 (9th Cir. 2007) (credible risk of future harm satisfies § 1915(g); requiring more would "create an untenable Catch-22, in which filings would always be either too early or too late to invoke the provision").

The Third Circuit's rationale is illustrative. In *Gibbs*, the plaintiff alleged that "dust, lint and shower odor" emanated from his cell vent "for some time" and caused him to suffer "severe headaches, change in voice, mucus that is full of dust and lint, and watery eyes." 160 F.3d at 964. Hoping to invoke the imminent danger exception, plaintiff alleged that "depending on the nature of the particles he is breathing, there is a significant possibility that he is under imminent danger of serious physical injury." *Id.* at 965. The Third Circuit was "unimpressed" with the prison officials' argument that the allegation was too speculative, holding that incarcerated people "ought to be able to complain about 'unsafe, life-threatening condition[s] in their prison' without waiting for something to happen to them." *Id.* In so holding, the Third Circuit relied upon "common knowledge that improper ventilation and the inhalation of dust and lint particles can cause disease." *Id.* at 966.

The Tenth Circuit also follows Judge Rosenbaum's formulation in an unpublished opinion, *see, e.g., Fuller v. Wilcox*, 288 F. App'x 509, 511 (10th Cir. 2008) (unpublished), but has not issued a published opinion.

B. The issue presented is of exceptional public importance.

The panel majority demands that someone "actually contract[] HIV or hepatitis" before a federal court entertain petitioner's challenge to a policy of shaving him semi-monthly under circumstances that the scientific establishment has consistently described as potentially deadly. Op. 25. By that time, of course, "it is too late to avoid the physical injury" he fears. *Lewis*, 279 F.3d at 531. The panel majority has turned the imminent danger safety valve into a "chimerical, [] cruel joke on prisoners." *Id.*

The public has a great interest in preventing the spread of infectious diseases such HIV and hepatitis in prison. And, because most prisoners will eventually be released back into society, the issue is of great importance to the public health as well.

II. Whether three cases challenging three chronologically distinct episodes of forcible shavings, but motivated by the same long-standing department policy are "duplicative," and therefore subject to sua sponte dismissal under the Prison Litigation Reform Act (PLRA) provision authorizing pre-service dismissal of "malicious" complaints, 28 U.S.C. § 1915A?

A. There is a Circuit conflict on the question presented.

The Eleventh Circuit holding is exceptionally important to revisit for a second reason. The Court held that petitioner's lawsuit was "duplicative" of two prior cases and therefore subject to dismissal under the PLRA provisions authorizing sua sponte dismissal of "malicious" actions. App. ___, citing 28 U.S.C. §§ 1915 and 1915A. The Eleventh Circuit erred in two ways, one creating a lopsided circuit split. As an initial matter, although several other circuits have held that duplicative suits are subject to *sua sponte* dismissal under sections 1915 and 1915A, see App. ___, that conclusion would likely surprise the PLRA's drafters. Regardless, the panel's decision is an outlier among the circuits. Start with the statute. In concluding that "duplicative" complaints are subject to sua sponte dismissal under the provision of the PLRA reserved for "malicious" and "frivolous" complaints, those that "fail[] to state a claim," and those against immune defendants, the Eleventh Circuit ignored this Court's three-part approach to statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283 (11th Cir. 2016). There are four enumerated grounds for dismissing an incarcerated person's complaint *sua sponte* prior to service. 28 U.S.C. §§ 1915 and 1915A. Duplicative complaints are not among them. "Under the negative-implication canon, these [four] grounds are the only grounds" upon which sua sponte dismissal may be grounded at the screening stage. *Daker*, 820 F.3d at 1283-84. The Court "must interpret the statute that Congress enacted, not rewrite the text to match

[its] intuitions about unstated congressional purposes." *Id.* at 1285-86 (emphasis added).

Assuming *arguendo* that Congress meant "duplicative" when it wrote "malicious," there is another problem with the Eleventh Circuit's holding: Every other circuit to have examined this issue in a published opinion interprets duplicative to mean nearly identical. *See, e.g., Curtis v. Citibank, N.A.*, 226 F.3d 133, 136, 140 (2d Cir. 2000) (dismissal appropriate only if suits are "entirely duplicative"; it is an abuse of discretion to dismiss complaints concerning "events arising after" previously filed complaint); *Pittman v. Moore*, 980 F.2d 994, 994 (5th Cir. 1993) (defining duplicative complaints as those where the "claims [a]re the same"); *Smith v. S.E.C.*, 129 F.3d 356, 361 (6th Cir. 1997) (for two cases to be considered "truly duplicative" of one another they must be "materially on all fours"); *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 689, 693 (9th Cir. 2007) ("duplicative" complaints are those where "the causes of action and relief sought, as well as the parties or privies to the action, are the same"; noting that it would be an abuse of discretion to dismiss as duplicative a "second suit . . . based on events occurring subsequent to the filing of [plaintiff's] complaint in the first action"); *cf. also Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 285 (3d Cir. 2017) (in the context of "parallel" proceedings, defining "truly duplicative" complaints as those where "the parties and the claims are identical").

Unpublished circuit opinions also break from the panel's definition. *See, e.g., Cottle v. Bell*, 229 F.3d 1142, 2000 WL 1144623, *1 (4th Cir. 2000)

(two complaints are "not duplicative" of each other although they challenged the same conduct— here, exposure to environmental tobacco smoke—at two different prisons, each managed by different DOC personnel); *Brown v. Davids*, No. 19-1557, slip op. at 45 (6th Cir. Nov. 12, 2019) (claims not duplicative although the arose from the same events, turned on the same allegations, and raised the same claims considering that they challenged chronologically distinct incidents).

The Seventh Circuit's unpublished opinion in *Njie v. Yurkovich*, 720 F. App'x 786, 789 (7th Cir. 2018), is particularly instructive. There, a practicing Rastafarian filed two complaints, each raising RLUIPA, Free Exercise, and Eighth Amendment claims against prison officials who enforced a religious grooming policy through forcible shaving, denials of contact visits, and retaliatory conduct. *Id.* The Seventh Circuit held that the lawsuits were not duplicative despite the "overlap," because they (1) concerned chronologically distinct denials of contact visits; (2) were brought against different defendants; and (3) the second case concerned an incident of forced shaving and additional retaliatory acts that were not at issue in the first case. *Id.*

So it is here. Petitioner's three complaints concern chronologically distinct events, are brought against different defendants with only minimal overlap, and each raises claims the others do not. As just one example, only this matter challenges exposure to human feces. Apart from this Court, petitioner's complaint would not have been subjected to dismissal as malicious. To be sure, petitioner's cases raise facial challenges to longstanding

GDC policies animating distinct episodes of unlawful behavior. But because the as-applied claims are different—involving different incidents of forced shaving, different defendants, unique claims, and sometimes different prisons—this suit was not duplicative of *Daker I* and *Daker II*.

B. The issue presented is of exceptional public importance.

As shown above, Petitioner's three complaints concern chronologically distinct events, are brought against different defendants with only minimal overlap, and each raises claims the others do not. As just one example, only this matter challenges exposure to human feces. Apart from this Court, petitioner's complaint would not have been subjected to dismissal as malicious. To be sure, petitioner's cases raise facial challenges to longstanding GDC policies animating distinct episodes of unlawful behavior. But because the as-applied claims are different—involving different incidents of forced shaving, different defendants, unique claims, and sometimes different prisons—this suit was not duplicative of *Daker I* and *Daker II*.

The Eleventh Circuit approach here would penalize prisoners for filing multiple lawsuits arising from a policy or custom even where those lawsuits are based on different instances where the policy or custom or enforced or implemented. Thus, the issue presented is of exceptional public importance.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully Submitted,

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Petitioner, *pro se*

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