

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT A. HEIMERMANN,

Petitioner,

v.

JON E. LITSCHER, MICHAEL J.
SULLIVAN, CINDY O'DONNELL,
STEPHEN M. PUCKETT, STEVEN
B. CASPERSON, CLEO ASHWORTH,
TIMOTHY DOUMA, PHILIP KINGSTON,
JOHN DEHAAN and JOHN DOE and
RICHARD ROE,

Respondents.

ORDER

02-C-411-C

In an order entered on August 30, 2002, I denied petitioner Scott Heimermann's request for leave to proceed in forma pauperis in this case on the ground that he is not eligible for pauper status by virtue of 28 U.S.C. § 1915(g), the Prison Litigation Reform Act's three strikes provision. The court's discovery of Heimermann's three strikes did not occur, however, until after I had entered an order assessing Heimermann an initial partial payment of the filing fee in the amount of \$23.00, and Heimermann had paid it. In the August 30 order, I advised Heimermann that he could take one of three courses of action:

1) he could pay the balance of the filing fee and request that the court process his complaint; 2) he could pay the balance of the filing fee and advise the court he did not intend to pursue the lawsuit; or 3) he could file a notice of appeal challenging this court's finding that he has incurred three strikes and is no longer eligible to proceed in forma pauperis so long as he is a prisoner. I advised Heimermann that if he did none of these things, I would enter an order under Support Systems International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995), requiring the clerks of the courts within the circuit to return unfiled any civil complaints petitioner might submit until petitioner's debt to the judicial system has been paid. Instead of accepting options 1, 2 or 3, Heimermann filed a motion for reconsideration of the August 30 order, in which he argued that I should have found him eligible to proceed in forma pauperis under § 1915(g)'s "imminent danger" escape clause. I denied that motion in an order dated September 19, 2002. Now petitioner has filed a notice of appeal from both orders. Because he has not paid the \$105 fee for filing his notice of appeal, I construe the notice as including a motion for leave to file his appeal in forma pauperis.

Before addressing petitioner's notice of appeal, it is necessary to clarify the present posture of this case. Technically, it has not yet been closed. However, now that petitioner has made clear his intention to challenge this court's decisions in the court of appeals, I will direct the clerk of court to close this case. If the court of appeals concludes that this court erred in barring petitioner from proceeding in forma pauperis, the case will be reopened

promptly.

I turn then to petitioner's request for leave to proceed in forma pauperis on appeal. I conclude that petitioner is no more eligible to proceed in forma pauperis on appeal than he was to proceed in forma pauperis at the district court level. He does not challenge this court's ruling that he has struck out. His sole disagreement is with this court's refusal to disregard the holdings of the Seventh Circuit Court of Appeals and every other circuit to have considered the question, that the "imminent danger" exception applies to present circumstances, not to circumstances that existed at some time in the past. Not only is petitioner ineligible to proceed in forma pauperis because he has struck out, he is ineligible because the claim he wishes to raise on appeal is legally frivolous. Thus, I must certify the appeal as not taken in good faith.

Because petitioner is not eligible to proceed in forma pauperis on appeal, he owes the \$105 fee for filing his appeal immediately. If he does not have the full amount in his prison account at this time, then prison officials are required to calculate monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) and forward those payments to the court until the debt is satisfied. If petitioner has sufficient funds in his regular and release accounts to pay the full \$105, the prison must remit the money promptly to the clerk of court in one payment. One exception exists. Petitioner may delay payment of the fee, whether in payments because of insufficient funds or in full if, within thirty days of the date

he receives this order, he challenges in the court of appeals both this court's certification that his appeal is not taken in good faith and this court's determination that he is not eligible for § 1915(g)'s exception. In that instance, the court of appeals may decide that this court's holdings are improper, in which case the matter will be remanded to this court for collection of an initial partial payment of the fee. If the court of appeals determines that this court was correct that the appeal is not taken in good faith and that petitioner's circumstances do not warrant application of § 1915(g)'s exception, then petitioner will once again owe the fee for filing his appeal in full immediately. Whatever the scenario, petitioner is responsible for insuring that the required sum is remitted to the court at the appropriate time. Petitioner's failure to pay the fee for any reason other than destitution will be understood as a relinquishment of his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996).

ORDER

IT IS ORDERED that this case is CLOSED.

Further, IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED because petitioner is not eligible for in forma pauperis status under 28 U.S.C. § 1915(g) and because I certify that his appeal is not taken in good faith.

If petitioner intends to challenge this court's certification that his appeal is not taken

in good faith and that he does not qualify for the exception to § 1915(g), he has 30 days from the date he receives this order in which to file with the court of appeals a motion for leave to proceed in forma pauperis on appeal. His motion must be accompanied by a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

Entered this 10th day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge