IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. KAUFMAN,

Petitioner, ORDER

v. 03-C-27-C

MATTHEW FRANK, JON E. LITSCHER, GARY R. McCAUGHTRY, MARC W. CLEMENTS, SGT. McCARTHY, JAMES MUENCHOW, RENEE RONZANI, SANDY HAUTAMAKI, JOHN RAY, CYNTHIA L. O'DONNELL, DARILYN J. MARTHALER and JAMYI WITCH,

Respondents.

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In an order dated January 27, 2003, I gave petitioner Kaufman until February 7, 2003, in which to pay $5.67 as an initial partial payment of the $150 fee for filing his case. Now he has written to say that the business office at the prison has refused to disburse the money from his account because he has "insufficient funds" to cover the full $5.67. Separately, petitioner's prison has sent the court a check in the amount of $1.81, with a notation that the money has come from petitioner's release account.

Petitioner's trust fund account statement reveals that petitioner has several financial

obligations. He owes a balance of $383.86 toward filing fees in four lawsuits he filed besides this one (three of them in state court), "institution restitution" in the amount of $76.70, legal loans totaling $611.42, and canteen loans totaling $21.49. The statement shows as well that petitioner earns $6.40 every two weeks.

28 U.S.C. § 1915(b)(4) provides

> In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

In Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1977), rev'd on other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) and Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit held that

> Section 1915(b)(4) comes into play only when "the prisoner has no assets *and no means* by which to pay the initial partial filing fee." A prisoner with periodic income has "means" even when he lacks "assets." (Emphasis in original.)

According to Newlin, when a prisoner receives periodic income, the decision how much the prisoner owes and how it will be collected is "determined entirely by the statute and is outside the prisoner's and the prison's control." Id. at 436. Section 1915(b)(1) requires that an initial partial payment is to be collected when funds "exist."

Petitioner has means. As noted above, he earns $6.40 every two weeks. This means that since January 27, 2003, when I ordered him to pay a $5.67 initial partial payment of the fee for filing this case, funds have "existed" in his account. Under the law established

in Newlin, I am not free to use § 1915(b)(4) to excuse petitioner from making the initial partial payment he has been assessed. Indeed, dicta in Newlin suggest that prison officials are required by the statute to give federal court filing fees priority. Id. at 435-36 ("assessment should have come off the top of the next deposit of prison wages, followed by 20 percent of each succeeding month's income until $150 has been paid.").

In a recent case, Lindell v. McCallum, 02-C-473-C (W.D. Wis. slip op., Jan. 31, 2003), I denied the petitioner leave to proceed in forma pauperis in a new lawsuit because he had nine other cases pending, had shown by repeatedly exceeding the state's legal loan limits that he could not afford to prosecute yet another case and was not alleging a matter in his newest lawsuit that could be construed as exposing him to imminent danger of serious physical injury if the lawsuit was not allowed. I noted that the constitutional right of access to the court does not require that a petitioner receive unlimited access to the courts or access that is subsidized by state and federal taxpayers. See Bounds v. Smith, 430 U.S. 817 (1977); Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002).

Petitioner's situation is similar to the situation in Lindell. He owes a substantial amount of money for legal actions he chose to file before this one. One hundred percent of his income is being taken to pay for these actions. He will not be able to afford to pay the costs of litigating this case without complete dependence on the state's legal loan privilege. He has exceeded the limits of his legal loans for the past two years. His complaint is

accompanied by a request for 19 blank witness subpoena forms, suggesting he believes he will have to subpoena witnesses in order to prove the claims in his case. (He appears to have no understanding that he will have to find funds to pay his subpoenaed witnesses' fees up front.) His complaint challenges 1) the institution's refusal to extend him legal loans to write to the United States Civil Rights Commission and a person petitioner had designated as his "power of attorney" in a civil action; 2) the opening of a few pieces of alleged legal or privileged mail outside his presence, including a letter from a sheriff's office and returned mail from a court; 3) the validity of the rejection of a number of publications and communications on the ground they contain pornography; and 4) the refusal of prison officials to allow him to form an atheist group. Petitioner will not be in imminent danger of serious physical injury if this lawsuit is not allowed.

In the Lindell case, I was aware from the fact that the petitioner was actively litigating other lawsuits in this court that he would not be able to pursue those actions to resolution without exceeding his legal loan limits. In this case, I cannot tell whether petitioner is actively litigating one or more of his four previously filed lawsuits, because none was filed in this court. In addition, I cannot tell from petitioner's trust fund account statement whether he was advanced a fresh $200 legal loan on the first of the year and, if so, how much of that loan he already has spent. Therefore, I am unable to say unequivocally that he will not be able to prosecute this lawsuit without exceeding his legal loan limits.

Under the circumstances of this case, it seems prudent to offer petitioner a choice. He can advise this court that he intends to dismiss this case voluntarily, in which case I will close the case without prejudice to petitioner's filing it at a later date when he has the funds to see it through to the finish and I will return his check for $1.81 to the prison. Or, petitioner can advise the court that he believes he has the resources he will need to prosecute this case to the end, in which case the institution is directed to deduct the sum of $3.86 from petitioner's trust fund account and, within 30 days of the date of this order, forward that sum to the clerk of court in payment of the remainder of petitioner's initial partial payment of the filing fee.

A word of caution to petitioner if he chooses the latter route. It is doubtful that I will intervene on petitioner's behalf if, midway through this lawsuit, he finds that he has exceeded his legal loan limits and the institution is refusing to grant him extensions of the privilege. If respondents are required to defend this lawsuit beyond its initial stages and petitioner runs out of money to continue the prosecution, the case may have to be dismissed with prejudice for petitioner's failure to prosecute it.

ORDER

IT IS ORDERED that unless, on or before March 5, 2003, petitioner advises the court that he is withdrawing this lawsuit voluntarily, prison officials at the Waupun

Correctional Institution shall deduct the sum of $3.86 from petitioner's trust fund account and forward that sum to the clerk of court no later than March 12, 2003, to satisfy the initial partial payment petitioner has been assessed in this case. If, by March 5, 2003, petitioner advises the court that he is withdrawing this lawsuit voluntarily, the clerk of court is directed to return petitioner's check for $1.81 to the prison and close this file without prejudice to petitioner's filing his case at some later date.

Entered this 24th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge