

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

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MR. ERVIE GRAY,

Petitioner,

v.

GERALD A. BERGE, Warden;  
JEFFREY P. ENDICOTT, Warden;  
PETER A. HUIBREGTSE, Deputy Warden;  
GARY BOUGHTON, Security Director;  
SGT. J. HUIBREGTSE, Sergeant of Mailroom;  
JAMES GREER, Director of B.C.H.S.;  
S.M.C.I./W.S.P.F., I.C.R.S.;  
DEPARTMENT OF CORRECTION;  
RICHARD VERHAGEN, Administrator,

Respondents.

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ORDER

05-C-119-C

Petitioner Ervie Gray, a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has filed a proposed complaint for declaratory, injunctive, and monetary relief and a request for leave to proceed in forma pauperis. The request will be denied, because petitioner does not qualify for in forma pauperis status under 28 U.S.C. § 1915(g).

Section 1915(g) reads as follows:

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.

On at least three prior occasions, petitioner was denied leave to proceed in forma pauperis in lawsuits that were legally frivolous. See Gray v. Murphy, 89-C-889-C, decided October 26, 1989; Gray v. Kasten, 91-C-363, decided April 16, 1991; and Gray v. Murphy, 92-C-201-C, decided March 23, 1992. Moreover, petitioner's complaint does not allege credible facts from which an inference may be drawn that he is under imminent danger of serious physical injury.

Petitioner's complaint contains a vast array of allegations of unconstitutional conditions of confinement at the Wisconsin Secure Program Facility. For example, petitioner challenges respondents' hand-cuffing procedure, cell searches resulting in damage to his property, destruction of his legal documents, back of cell restrictions, failure to provide him toilet paper and his legal documents within 5 hours of his transfer to a new cell on level 2, verbal harassment, policies on pornography and nudity, and placement in control segregation following his destruction of a television. He alleges he was subjected to an abusive strip search and is unable to leave his cell for visits, recreation or use of a law library. He claims that the inmate complaint review system is flawed and unfair. He alleges that he

has been subjected to sensory deprivation and social isolation, cell temperatures that are extreme, and 24-hour surveillance. He claims abuses in the processing of his mail and violations of his free speech rights. In addition, petitioner alleges that respondents are engaged in a conspiracy “to biologically and psychologically experiment . . . to inflict lethal diseases to bring about [petitioner’s] untimely demise.”

In order to meet the imminent danger requirement of 28 U.S.C. § 1915(g), a petitioner must allege a physical injury that is imminent or occurring at the time the complaint is filed, and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, slip op. 01-2657, (7th Cir. Dec. 11, 2003) (citing Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) and Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)).

Three of petitioners’ claims suggest that he is presently suffering injuries that threaten his physical well-being. However, with respect to petitioner’s claims that respondents are attempting to infect him with legal diseases and are fracturing his forearms and causing deformed limbs by the manner in which they handcuff him are simply too fantastical to merit credence. Petitioner’s third claim, that he is subject to sensory deprivation and social isolation and cell temperatures that are extreme, is barred to the extent that petitioner seeks injunctive and declaratory relief, by the March 28, 2002, settlement agreement in the class action lawsuit of Jones’El v. Berge, 00-C-421-C, in which petitioner is a member of the class.

When I approved the agreement, I concluded that the agreement was fair, reasonable and lawful. Jones 'El, 00-C-421-C, Order dated March 28, 2002, dkt. #207, at 8. Therefore, petitioner is bound by that agreement and cannot obtain injunctive or declaratory relief for those issues covered by the settlement agreement. To the extent that he may wish to recover money damages for conditions addressed by the agreement that occurred prior to the agreement, he is not entitled to proceed under the exception to § 1915(g).

Accordingly, I conclude that petitioner's complaint is not a complaint requiring application of the exception to § 1915(g). Because petitioner is disqualified from proceeding in forma pauperis under § 1915(g), he may choose to pursue this case as a paying litigant. If so, he must submit a check or money order made payable to the clerk of court in the amount of \$250 and he must do so no later than March 24, 2005. If he does this, however, petitioner should be aware that the court then will be required to screen his complaint under 28 U.S.C. § 1915A, and dismiss his case if the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief.

If petitioner does not pay the \$250 filing fee by March 24, 2004, I will consider that he does not want to pursue this action. In that event, the clerk of court is directed to close this file. However, even if the file is closed, petitioner will still owe the \$250 filing fee and he must pay it as soon as he has the means to do so. Newlin v. Helman, 123 F.3d 429, 436-

437 (7th Cir. 1997). From petitioner's trust fund account statement, it is clear that he does not presently have the means to pay the fee from his prison account. Therefore, unless he is successful in obtaining the money from some other source, I will be required to advise the warden of the Wisconsin Secure Program Facility of petitioner's obligation to pay the fee so that if and when funds do exist in petitioner's account, the fee can be collected and sent to the court in accordance with 28 U.S.C. § 1915(b)(2).

#### ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED because petitioner is ineligible for in forma pauperis status under 28 U.S.C. § 1915(g).

Further, IT IS ORDERED that petitioner may have until March 24, 2005, in which to submit a check or money order made payable to the clerk of court in the amount of \$250.

If, by March 24, 2005, petitioner fails to pay the fee, the clerk of court is directed to close this file.

Entered this 3rd day of March, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge