IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROY LEE RUSSELL,

Petitioner,

v.

HARLEY G. LAPPIN, Director, Bureau of Prisons; and MICHAEL K. NALLEY, Regional Director, Bureau of Prisons; STEPHEN R. HOBART, Warden, F.C.I. Oxford; G. JONES, Health Service Administrator, Oxford; and M. McKINNON, Physical Assistant, Oxford,

Respondents.

ORDER

06-C-19-C

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Petitioner Roy Lee Russell, a prisoner at the Federal Correctional Institution in Oxford, Wisconsin, has filed a proposed complaint for 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 has been denied leave to proceed in forma pauperis in lawsuits or appeals that were legally frivolous. See Russell v. Attorney General, 04-CV-159-HC-ESH, decided January 21, 2005 (E.D. Texas); Russell v. Hawks, 01-CV-560, decided December 18, 2001 (E.D. Texas); Russell v. Hawks, 02-40172, decided October 23, 2002 (5th Cir.).

Moreover, petitioner's complaint does not allege facts from which an inference may be drawn that he is under imminent danger of serious physical injury. 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)). Claims of physical injury ordinarily arise in the context of lawsuits alleging Eighth Amendment violations. This is a lawsuit alleging a purported Eighth Amendment violation, but it is not possible to infer from petitioner's allegations that he faces a real and proximate threat of

physical injury.

In his complaint, petitioner alleges that respondents have implemented a policy requiring prisoners who have income sufficient to cover the cost of over-the-counter drugs to buy drugs for minor ailments from the prison commissary with their own funds rather than receive prescribed medications at government expense. Petitioner alleges that he has acid reflux disease and that before the commissary policy was implemented, he was receiving free of charge 150 mg Ranitidine which he was to take twice daily to manage his symptoms. The commissary does not sell Ranitidine in over-the-counter products in a dosage exceeding 75 mg, and the recommended dosage on the package is one tablet twice daily. This means that petitioner has to exceed the recommended dose if he is to achieve relief for his symptoms. Although petitioner has been assured that prison health officials have determined it is permissible for him to double the dosage without risking harm, petitioner disagrees with this determination and objects as well to having to pay the financial costs of doubling the dosage. Therefore, he is refusing to double the dosage and pay for the necessary quantity of the drug, which results in his taking insufficient amounts of the drug to relieve his symptoms. Petitioner suggests his situation is similar to one where a prisoner is required to pay for food, simply because it is available at the commissary. In petitioner's view, prison officials can no more refuse to provide food to prisoners simply because they have money to buy food from the prison commissary than they can refuse to provide free

prescription drugs.

In Ciarpaglini v. Saini, 352 F.3d 328 (7th Cir. 2003), the Court of Appeals for the Seventh Circuit overturned a district court's determination that the petitioner did not qualify for the exception to § 1915(g). In that case, the petitioner had alleged in his complaint that he was being denied prescribed medication for attention deficit hyperactivity disorder and panic disorder and that as a result, he was suffering severe symptoms related to those conditions. Because petitioner's allegations made it clear he was suffering physical harm at the time he filed his complaint, the court concluded he had met the imminent danger requirement. Id. at 330 (citing Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)).

Petitioner Russell's complaint is distinguishable. In this case, the harm petitioner is suffering is harm of his own choosing. Because he disagrees with the commissary policy and differs with health officials about the viability of doubling the dose of medication recommended on the packaging of commissary over-the-counter drugs, he is experiencing symptoms related to his acid reflux disease. To escape the harm, he needs only to begin taking the medication in the dose recommended by health officials at the prison. Accordingly, 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 February 10, 2006. 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 February 10, 2006, 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 full 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 Federal Correctional Institution at Oxford of petitioner's obligation to pay the fee so that 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 February 10, 2006, in which to submit a check or money order made payable to the clerk of court in the amount of $250. If, by February 10, 2006, petitioner fails to pay the fee, the clerk of court is directed to close this file. However, in this event, the clerk is directed to insure that the court's financial records reflect that petitioner owes the $250 fee for filing this case.

Entered this 19th day of January, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge