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'DONNEL, 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 dated August 30, 2002, I denied petitioner's request for leave to proceed in forma pauperis because 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. I concluded that petitioner had accumulated too may strikes under § 1915(g) for filing frivolous lawsuits and that his proposed complaint made it clear that he could not take advantage of § 1915(g)'s escape clause for indigent litigants "under imminent danger of serious physical injury." Presently before the court is petitioner's motion to reconsider the August 30, 2002 order.

Petitioner does not dispute that he has accumulated at least three strikes. Rather, the thrust of

petitioner's motion is that his complaint deals with events that transpired between June 1998 and June 2000 and that during that period of time he was in danger of imminent harm because guards and fellow inmates knew he was a prison snitch, thus making him eligible under § 1915(g)'s "imminent danger" escape clause. Petitioner argues that "the court should . . . determine whether Mr. Heimermann's allegation of imminent danger is credible, *as of the time the alleged incident occurred*," Plt.'s Reconsideration Mot., dkt. #3, at 6 (emphasis in original), and goes on to "stress[] that the proper focus when examining an inmate's complaint filed pursuant to § 1915(g) must be the imminent danger faced by the inmate at the time of the alleged incident (i.e., June 1998 through June 2000 as it pertains to Mr. Heimermann)." Id. at 6-7. Petitioner is wrong.

28 U.S.C. § 1915(g) denies prisoners who have accumulated at least three strikes the ability to bring a civil action in forma pauperis "unless the prisoner *is* under imminent danger of serious physical injury." (emphasis added). As the statute's use of the present tense indicates, § 1915(g)'s escape clause has no application to prisoners who *were* under danger of imminent physical harm at some point in the distant past, as petitioner would have it. Indeed, the Court of Appeals for the Seventh Circuit has noted that the "imminent danger language must be read . . . as having a role in those cases where time is pressing" and when "a threat or prison condition is real and proximate." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002). The fact that petitioner allegedly was in imminent danger between June 1998 and June 2000 does not allow him to now take advantage of § 1915(g)'s escape clause. This is the understanding of every court of appeals to consider the issue. See Malik v. McGinnis, 293 F.3d 559, 562-63 (2nd Cir. 2002) ("[T]he danger must exist at the time the complaint is filed."); Abdul-Akbar v.

McKelvie, 239 F.3d 307, 311 (3rd Cir. 2001) (en banc) ("[C]ourt should assess 'imminent danger' as of the time the prisoner's complaint is filed and . . . a prisoner's allegation that he faced danger in the past is insufficient."); Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999) ("[P]risoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed *in forma pauperis* pursuant to the imminent danger exception to the statute."); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (same); Banos v. O'Guin, 144 F.3d 883, 884 (5th Cir. 1998) (same). Accordingly, petitioner's motion to reconsider the August 30, 2002 order is DENIED.

Entered this 19th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge