

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

STEPHEN W. JONES,

Petitioner,

v.

GERALD BERGE, et al,

Respondents.

ORDER

03-C-99-C

In an order entered in this case on March 4, 2003, I denied petitioner Stephen Jones' request for leave to proceed in forma pauperis on the ground that petitioner is not eligible for in forma pauperis status under 28 U.S.C. § 1915(g), the "three-strike provision" of the 1996 Prisoner Litigation Reform Act. Judgment was entered on March 6, 2003.

On April 2, 2003, petitioner filed a notice of appeal of the March 4, 2003, order and March 6, 2003, judgment. On April 3, 2003, petitioner filed a revised notice of appeal, together with a motion to proceed in forma pauperis on appeal and a jurisdictional statement. Both notices document petitioner's decision to appeal from the March 4 order and the March 6, 2003, judgment. Therefore, petitioner's April 3, 2003, notice is construed as an amended notice of appeal and will be docketed as such. (Petitioner should be aware

that no additional fee is required to file an amended notice.) See F.R. A.P. 4(a)(4)(B)(iii).

The district court's role with respect to an appeal is limited under § 1915(a)(3). I first must consider whether petitioner has three strikes under 28 U.S.C. § 1915(g) and, if not, whether he is indigent and whether his appeal is taken in good faith. See Newlin v. Helman, 123 F.3d 429, 436 (7th Cir. 1997), (once district court invokes § 1915(g), there is no further role for § 1915(a)(3) to play).

Petitioner has three strikes under § 1915(g). In this court's order dated March 4, 2003, I listed the cases petitioner had filed in this court and the United States District Court for the Eastern District of Wisconsin on three prior occasions while he was incarcerated that had been dismissed as legally meritless, that is, as frivolous, malicious or failing to state a claim upon which relief may be granted. The "Certification as to Three or More Dismissals" that petitioner received from the Wisconsin Department of Justice stating that the department does not have records reflecting those dismissals does not mean that the dismissals did not occur. Moreover, I reiterate in connection with petitioner's request to proceed in forma pauperis on appeal my conclusion that he does not qualify for the exception to the three-strike rule set out in § 1915(g), because he has not made a showing that he is under imminent danger of serious physical injury.

Accordingly, petitioner's request for leave to proceed in forma pauperis on appeal will be denied because petitioner is barred under 28 U.S.C. § 1915(g) from proceeding as a

pauper. He cannot take advantage of the initial partial payment provision of § 1915. Instead, he owes the \$105 fee in full immediately.

I am aware from the trust fund account statement petitioner filed in this court that he does not presently have any money in his prison account or the means to pay a filing fee. Nevertheless, prison officials will be required to monitor petitioner's account and collect monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2), if and when such funds do exist.

Aside from his destitution, petitioner may delay payment of the \$105 fee under one other circumstance that is, if he challenges in the court of appeals within thirty days of the date he receives this order the decision to deny his request for leave to proceed in forma pauperis on appeal because of his § 1915(g) status. Fed. R. App. P. 24(a)(5). If the court of appeals decides that it was improper to find petitioner ineligible for pauper status under § 1915(g), then it will remand the matter to this court for a determination whether petitioner's appeal is taken in good faith. If the court of appeals determines that the district court was correct in finding that § 1915(g) bars petitioner from taking his appeal in forma pauperis, the \$105 filing fee payment will be due in full immediately. Whatever the scenario, petitioner is responsible for insuring that the required sum is remitted to the court at the appropriate time.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED because three strikes have been recorded against petitioner under 28 U.S.C. § 1915(g) and petitioner does not qualify for the exception to § 1915(g).

Entered this 11th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge