IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SOUVANNASENG BORIBOUNE, ANTHONY CALIPH STEVENS'EL, DONDRAS L. HOUSE and EFRAIN CAMPOS,

ORDER

Petitioners,

04-C-0015-C

v.

GERALD BERGE, PETER HUIBREGSTE, VIKI SEBASTION, ELLEN K. RAY and KELLY COON, as does their individual capacities,

Respondents.

- -

In early 2004, I dismissed this group complaint without prejudice to petitioners' filing separate actions. Petitioners appealed this decision and the Court of Appeals for the Seventh Circuit vacated the judgment of dismissal and remanded the case for screening of plaintiffs' complaint. Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004). Following remand, plaintiffs promptly requested permission to amend their complaint. Their amended complaint became the operative pleading in the action.

On April 11, 2005, after screening petitioners' claims in the amended complaint, I

dismissed all but one claim as legally meritless. The only claim remaining in the lawsuit is one that petitioner Souvannaseng Boriboune raised in a single sentence in the amended complaint that reads, "Boriboune'El's 1st amendment was violated by being the only Muslim to be deprived of participating in Ramazdan as it is nearly mandatory in the practise of Islam." However, because it did not appear from the alleged facts that any of the named respondents personally participated in this alleged constitutional deprivation and it was impossible to determine from the allegations when or where the alleged violation occurred, I stayed a decision on Boriboune's motion for leave to proceed in forma pauperis on this claim to allow him to file a second amended complaint curing the defects. I advised petitioner Boriboune that if, by April 21, 2005, he failed to amend his complaint so as to give fair notice of his First Amendment claim to the respondent who was alleged to be responsible for interfering with his religious exercise, I would dismiss this claim for his failure to comply with the notice provisions of Fed. R. Civ. P. 8.

On April 20, 2005, petitioners filed a document titled "Motion for Reconsideration and Reargument Pursuant to Fed. R. Civ. P. Rule 59(e)." Petitioner Boriboune did not file an amended complaint as directed. It appears he has abandoned his religious freedom claim. Whatever the reason for his failure to respond to the directive that he provide a more definite statement of his claim, the claim will be dismissed from this lawsuit on the ground that petitioner's allegation is too sparse to give the notice required by Fed. R. Civ. P. 8 to the

alleged offending respondent, whoever he or she is.

. I turn then to petitioners' motion for reconsideration. In their motion, petitioners contend first that this court erred in stating that they did not exhaust their administrative remedies. It is unclear how petitioners derive such a finding from the April 11 order. The only reference I made to the exhaustion requirement in cases subject to the 1996 Prison Litigation Reform Act is on page 4 of the order. There, I stated,

> This court *will not* dismiss petitioners' case on its own motion for lack of administrative exhaustion, but if respondents believe that any petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

(Emphasis added). Nowhere did I dismiss any of petitioners' claims for their failure to exhaust administrative remedies. Therefore, petitioners' first argument in support of their motion for reconsideration is meritless.

Second, petitioners argue that I erred in holding that the doctrine of res judicata barred their Eighth Amendment claims concerning 24-hour illumination, denial of outdoor recreation and exposure to extreme temperatures in the summer and spring. Petitioners are members of the class in Jones'El v. Berge, 00-C-421-C, where the same claims were raised. Petitioners point out that in approving the settlement, I agreed that class members could bring individual lawsuits for money damages, because the class claims in Jones'El were strictly for injunctive and declaratory relief.

What petitioners appear not to understand is that individual actions for money damages are appropriate only where the petitioner is alleging that he was subject to the allegedly unconstitutional conditions of confinement *before* the settlement agreement was reached. As explained to petitioners in the April 11 order, when I approved the settlement agreement on March 28, 2002, I approved the fairness, reasonableness and legality of the modifications the defendants had agreed to make to the conditions that petitioners challenge as unconstitutional in this lawsuit. Petitioners are bound by that agreement. Moreover, I concluded that petitioner Boriboune could not pursue any claim for money damages for conditions that were challenged in Jones'El and existed at the Wisconsin Secure Program Facility before the settlement agreement was approved, because he had not been confined at the facility at that time. Therefore, he had no standing to bring a claim for money damages based on conditions that existed before March 28, 2002. In addition, I concluded that although petitioners Campos and Stevens'El had been confined at the facility before March 28, 2002, neither had been confined during the spring or summer months, which meant that they lacked standing to seek relief for alleged extreme cell temperatures that existed before the settlement was reached. As for petitioner Campos's and Steven El's claim that they had been subjected to 24-hour illumination in their cells in violation of their Eighth Amendment rights, I advised petitioners that they could not recover on that claim because I had determined in Warren v. Litscher, 2002 WL 32362656 (W.D. Wis.) that

respondents are entitled to qualified immunity for permitting cells to be illuminated all night with a 7-watt bulb. Moreover, I ruled that no petitioner can recover damages or injunctive relief for the night lighting that has existed since the settlement agreement was reached, because I found in Pozo v. Hompe, 2003 WL 23164580 (W.D. Wis.) that the 5-watt bulbs now in use do not amount to cruel and unusual punishment. Finally, I concluded that petitioners had failed to state a claim of constitutional proportion with respect to their claim that they had been denied outdoor recreation. As to all these matters, nothing in petitioners' motion for reconsideration shows that it was error to reach these conclusions.

Petitioners argue that I erred in dismissing their claim that their right of access to the courts is being denied by the limitations on time they may spend in the prison law library, the age of the reference materials available in the library and the fact that they must be shackled and cuffed while using the materials. In addition, they contend they should have been allowed to go forward on their claim that their right to equal protection under the laws is being denied because prisoners at the Wisconsin Secure Program Facility receive fewer privileges and are subject to harsher rules than prisoners in other maximum security institutions. Both of these arguments simply rehash arguments petitioners made in their complaint. Nothing they say in their motion for reconsideration persuades me that it was error to dismiss these claims.

Finally, petitioners' arguments in their motion pertaining to their Eighth Amendment

claims that they were denied outdoor recreation are simply reargument of the same issues I considered in ruling in the April 11 order that the claim is legally meritless. In sum, because petitioners have suggested no valid reason why this court's order of April 11, 2005 should not stand, their motion for reconsideration will be denied.

When petitioners filed their amended complaint, they also moved for a preliminary injunction, seeking an order prohibiting respondents from interfering with their ability to prosecute this lawsuit by enforcing rules about what types of documents will be photocopied using legal loan money, whether prisoners are allowed typewriters in their cells and whether they may have carbon paper. With the dismissal of this action, their motion for preliminary injunction is moot. If petitioners believe the policies violate their constitutional rights, they may file a separate lawsuit raising the claim.

One additional matter needs to be addressed. In the April 11 order, I recorded strikes pursuant to 28 U.S.C. § 1915(g) against petitioners Anthony Stevens'El and Efrain Campos, whose claims I had dismissed as legally meritless. With the dismissal of petitioner Boriboune's First Amendment claim, he, too, will receive a strike. Before closing this case, however, I have reviewed the remand order of the court of appeals to insure that I am applying the three-strike provision in the manner the court intends. In particular, I have re-read the court's discussion of the risks prisoners face under the 1996 Prison Litigation Reform Act when they engage in group litigation, paying particular attention to that part of

the opinion discussing the recording of strikes in group litigation. In relevant part, the court stated,

> A prisoner litigating on his own behalf takes the risk that one or more of his claims may be deemed sanctionable under Fed. R. Civ. P. 11, or may count toward the limit of three weak *forma pauperis* claims allowed by § 1915(g). A prisoner litigating jointly under Rule 20 takes those risks for *all* claims in the complaint, whether or not they concern him personally. Sharing works both ways; detriments as well as costs are parceled out among plaintiffs. Rule 11 requires all unrepresented plaintiffs to sign the complaint, and the signature conveys all of the representations specified by Rule 11(b) for the entire complaint. Likewise, § 1915(g) limits to three the number of IFP complaints or appeals that were "dismissed on the grounds that it is frivolous, malicious or fails to state a claim upon which relief may be granted." This language refers to the complaint or appeal as a whole; thus when any claim in a complaint or appeal is "frivolous, malicious, or fails to state a claim upon which relief may be granted," all plaintiffs incur strikes. . . When claims are related enough to be handled together, they are related enough for purposes of § 1915(g) as well.

Id. at 854-855. In light of this holding and the holding in the same opinion that group litigants *each* must pay a full filing fee, the court of appeals thought it wise for district courts "to alert prisoners to [the individual full filing fee payment] requirement--as well as the risk under Rule 11 and § 1915(g) that they will be held accountable for their co-plaintiffs' claims--and give them an opportunity to drop out."

Heeding this advice, I entered an order in this case dated January 12, 2005, explaining that if petitioners wished to proceed with their group lawsuit, each would have to pay a full filing fee. In addition, I told petitioners that because the specific language in

§ 1915(g) suggests that courts are to issue strikes when an "action or appeal" is dismissed, as opposed to when a particular "claim" in the complaint is dismissed, it is this court's practice is to issue strikes only when an entire action is dismissed for one of the reasons enumerated in § 1915(g). However, I cautioned petitioners that it might be that the court of appeals was anticipating a ruling in the future that interprets § 1915(g) as requiring district courts to issue strikes for legally meritless *claims* within an action and that petitioners might want to take that possibility into account in deciding whether to assume the risk of group litigation. Subsequently, petitioners Boriboune, Campos and Stevens'El confirmed their intention to proceed with the suit and each paid the initial partial payment required to proceed in forma pauperis.[1]

Having re-read the ruling of the court of appeals in Boriboune as it relates to the issuance of strikes, I am convinced that to give meaning to its holding that each petitioner in a group complaint assumes a risk of incurring the strikes of his co-petitioners, I must determine just what the court means an "action" is in the context of a group complaint. I can think of three possible meanings: 1) each claim in the lawsuit, as the term "claim" is typically defined, amounts to an "action"; (2) the whole lawsuit, complaint or case amounts

[1]The fourth petitioner, Dondras House, also advised the court that he wished to proceed with the action. However, when he failed to submit a copy of his trust fund account statement so that a determination could be made whether he qualified for indigent status, I dismissed him from the complaint before screening the claims of the remaining petitioners.

to an "action"; or 3) an "action" is the total accumulation of a particular litigant's claims within the group complaint. For several reasons, I do not believe that the court intended district courts to view each claim in a complaint as a separate action capable of earning a strike. In its previous opinions discussing the application of § 1915(g), the court of appeals has used the words "lawsuit," "case" and "complaint" interchangeably to mean "action" as described in § 1915(g). See, e.g., Ciarpaglini v. Saini, 352 F.3d 328, 329 (7th Cir. 2003) ("three previous *lawsuits* dismissed for reasons stated in . . . § 1915(g)"); Cage v. Lyons, 248 F.3d 1157 (7th Cir. 2000) ("five *complaints* dismissed . . . under § 1915(g), those *cases* count as strikes"); Evans v. Illinois Dept. of Corrections, 150 F.3d 810, 812 (7th Cir. 1998) (three actions . . . dismissed as frivolous"; courts must identify *cases* found to constitute strikes); Haines v. Washington, 131 F.3d 1248, 1250 (7th Cir. 1997) ("*suit* patently fails to state a claim"; "frivolous complaint . . . followed by frivolous appeal leads to two strikes"); Kalinowski v. Bond, 358 F.3d 978 (7th Cir. 2004) ("this *complaint* was Kalinowski's third strike"); Moore v. Pemberton, 110 F.3d 22 (7th Cir. 1997) (frivolous *case* counts as strike). All of these references are to an entire lawsuit or case or a whole complaint.

Never before Boriboune has the court of appeals used the word "claim" to mean an "action" in the context of § 1915(g). Indeed, it has recognized repeatedly that complaints can include many claims, some of which might be dismissed as legally meritless at the outset of the lawsuit and others that might progress to summary judgment or trial. See, e.g. Lekas

v. Briley, 405 F.3d 602, 614 (7th Cir. 2005) (addressing plaintiff's due process claim but finding plaintiff waived retaliation claim by not addressing it on motions to dismiss and for summary judgment); DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) (upholding district court's dismissal of excessive force and Eighth Amendment claims and remanding § 1983 race discrimination and retaliation claims); Walker v. Taylorville Correctional Center, 129 F.3d 410 (7th Cir. 1997) (claims relating to outcome of disciplinary proceedings barred, claims against warden frivolous, and sexual assault claim against correctional counselor sufficient to state a claim). It seems highly unlikely that the court of appeals would depart suddenly from this well-settled understanding of what a claim is in relation to a complaint without discussing its holding in considerably more detail than it did.

Moreover, if each legally meritless "claim" in the traditional sense were to be vulnerable to a strike, courts might bring down strikes against a prisoner simply by taking a liberal approach to the factual allegations in their complaints. It is the court's job in screening prisoner complaints to determine whether relief is possible under any set of facts that could be established consistent with the allegations. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The prisoner has no obligation to identify a legal theory or specify a correct legal theory. Bartholet v. Reischauer A.G. (Zurich), 953 F.2d 1073, 1978 (7th Cir. 1992). In this court's experience, it is often possible to identify both legally meritorious and legally meritless claims from the same facts alleged in a complaint. Thus, courts would have to take

extra care to avoid identifying legally meritless claims and recording individual strikes against prisoners who might never have intended to raise the claims in the first place.

In sum, I conclude that the court of appeals did not intend to suggest that courts are to issue strikes for legally meritless "claims" as that term is traditionally understood in the pleading context. If not, did the court of appeals intend the word "claim" to mean "action" in the traditional sense, that is, a whole complaint, an entire lawsuit? Clearly not. All one needs to do is substitute the words "entire lawsuit" where the court of appeals used the word "claim" in its opinion in Boriboune and the sentences are rendered meaningless. For example, the court's statement that "a prisoner litigating jointly under Rule 20 takes . . . risks for *all* claims in the complaint, whether or not they concern him personally," id. at 855, would read, "a prisoner litigating jointly takes . . . risks for the entire lawsuit in the complaint, whether or not they concern him personally." Boriboune, 391 F.3d at 855. And the sentence, "[w]hen claims are related enough to be handled together, they are related enough for purposes of § 1915(g) as well," id., would read, "when the entire lawsuit is related enough to be handled together, it is related enough for purposes of § 1915(g) as well." Thus, it is implausible to think that the court of appeals intended an "action" in a group complaint (or "claim" as the court puts it) to mean an entire lawsuit or case or a whole complaint.

The most reasonable interpretation of the court's holding is that an "action" within a group complaint is "the total accumulation of a particular litigant's claims within the

lawsuit." In other words, if there are five co-petitioners in a group prisoner complaint, there will be five actions. The actions may be identical to each other if the claims in the lawsuit are common to each petitioner. However, some of the actions within the complaint may be different. (If they are too different, Fed. R. Civ. P. 20 permits severance.) For example, in this case, the actions of petitioners Campos and Stevens'El were identical. Each raised the same claims in the lawsuit. Petitioner Boriboune's action was slightly different. He raised the same claims as petitioners Campos and Stevens'El, but he added a claim regarding his right to religious freedom.

Understanding the court of appeals' intent as defining an action in a group complaint as each individual litigant's particular set of claims is bolstered by the statement in its opinion that

> [a] per-litigant approach is a natural concomitant to a system that makes permission to proceed *in forma pauperis* (and the amount and timing of payments) contingent on certain person-specific findings, see § 1915(a), (c), § 1915A, including the number of unsuccessful suits or appeals the prisoner has pursued *in forma pauperis*, see § 1915(g), and the balance in the prisoner's trust account, see § 1915(b).

Id. at 856. Although it is true that the court made this observation about the per-litigant nature of the PLRA to justify its holding that each petitioner in a group complaint must pay a full filing fee, the reasoning is equally applicable to the assessment of strikes. Like the person-specific directive Congress provides in § 1915 for paying filing fees, § 1915(g) is

person-specific.

> 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.

28 U.S.C. § 1915(g). (Emphasis added.) It is entirely reasonable to assume that the court of appeals intended that each prisoner in a group complaint would receive a strike if his action, that is, the claims unique to him, is legally frivolous or malicious or fails to state a claim upon which relief may be granted. But the court made it clear that the risk of a strike in a group complaint was not the ordinary risk assumed by any prisoner litigant filing a lawsuit by himself. Rather, the risk of receiving a strike multiplies by the number of co-petitioners joining the suit. The reason this is so becomes apparent upon a close reading of the opinion.

> Sharing works both ways . . . Rule 11 requires all unrepresented plaintiffs to sign the complaint, and the signature conveys all of the representations specified by Rule 11(b) for the entire complaint. Likewise, § 1915(g) limits to three the number of IFP complaints or appeals that were "dismissed [for the reasons listed in § 1915(g)]." This language refers to the complaint or appeal as a whole; thus, when any [individual action] in a complaint is 'frivolous, malicious, or fails to state a claim upon which relief may be granted,' all plaintiffs incur strikes.

Bouriboune, 391 F.3d at 855. In other words, when a prisoner signs a group complaint, he not only vouches for the validity of his action within the complaint but the validity of the

individual actions of his co-plaintiffs as well. If one or more of those actions warrant a strike, then he and all the other prisoners who sign the complaint must accept responsibility for bringing the meritless action. Each will receive a strike for each action within the complaint that lacks legal merit or fails to state a claim.

With this understanding of the three-strike ruling in Boriboune, I conclude that the individual strikes recorded against petitioners Boriboune, Campos and Stevens'El must be recorded against the others as well. Petitioner Boriboune's action, which has been dismissed as legally meritless, requires a strike. This strike must be recorded against petitioners Campos and Stevens'El. The strike recorded against petitioner Campos must be recorded against petitioners Boriboune and Stevens'El and petitioner Stevens'El's strike must be recorded against petitioners Boriboune and Campos. That means that in the course of this one lawsuit, each petitioner has received three strikes. Each petitioner is thus barred under § 1915(g) from bringing any future lawsuit or appeal in forma pauperis unless his complaint or appeal qualifies for the exception to § 1915(g) set out in that statute.

Of course, there are questions that remain about the timing of the three-strikes bar in a group complaint. In Gleash v. Yuswak 308 F.3d 758, 762 (7th Cir. 2002), the court held that whether a prisoner is disqualified under § 1915(g) is determined by the court in which the fourth action or appeal is filed. In Kalinowski v. Bond, 358 F.3d 978 (7th Cir. 2004), the court reiterated, "Three suits or appeals that meet [the definition set out in §

1915(g)] require a prisoner to prepay all filing fees for most future civil suits." Finally, in Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996), the court held that "Section 1915(g) governs bringing new actions or filing new appeals – the events that trigger an obligation to pay a docket fee – rather than the disposition of existing cases."

If an "action" in a group complaint is the total accumulation of each individual litigants' claims within the lawsuit, then the order in which the court addresses the individual claims might make a difference. Take for example a group complaint filed by five prisoners in which three of the actions are legally frivolous and the other two raise at least one claim having legal merit. If the court dismisses the legally frivolous actions first and all the prisoners in the suit receive three strikes, are prisoners 4 and 5 barred from pursuing their actions until they pay a full filing fee? Gleash and Kalinowski suggest the answer would be yes, but Abdul-Wadood suggests the answer would be no. The bar would not take effect until the occurrence of the next event triggering an obligation to pay a filing fee. In the example given above, each petitioner will already have been found eligible to proceed in forma pauperis and will have made an initial partial payment of their individual $250 filing fees before the court screens the merits of their actions. Therefore, no event triggering a new obligation to pay a filing fee will have occurred.

Suppose Gleash and Kalinowski govern the timing of the bar, requiring it to be applied as soon as three frivolous actions are identified in a group complaint. What if under

the scenario described above the court switches the order of discussing the individual actions, finding first that two of the petitioners state a claim and next that the remaining three actions are legally meritless? Because the actions of prisoners 1 and 2 are already pending at the time the third strike is rendered, will any bar be warranted in the action? Perhaps not, given that the actions of prisoners 1 and 2 are in progress at the time they incur three strikes. Abdul-Wadood v. Nathan, 91 F.3d at 1025. Or perhaps regardless of the order in which the court decides the merits of the individual actions, a bar will not become effective until the petitioners file an entirely new lawsuit. Whatever the case, if the court of appeals has occasion to review this order, it would be helpful if the court would clarify this point.

One final minor matter concerning the implementation of the holding in Boriboune requires comment. In Evans v. Illinois Dept. of Corrections, 150 F.3d 810 (7th Cir. 1998), the court of appeals directed district courts to cite specifically the case names, case docket numbers, filing districts and dates of prior orders of dismissal upon which the court relies for its decision to refuse pauper status under § 1915(g). Here, one case has resulted in petitioners' accumulation of three strikes. In order to avoid confusing other courts in their attempts to determine a petitioner's three-strike status, it will now be necessary to include a notation next to case cites such as this one that the case was a group complaint in which three actions were dismissed for the reasons described in § 1915(g).

ORDER

IT IS ORDERED that

1. The motion filed by petitioners Souvannaseng Boriboune, Anthony Caliph Steves'El and Efrain Campos for reconsideration of the order entered in this case on April 11, 2005 is DENIED;

2. Petitioners' motion for a preliminary injunction is DENIED as moot;

3. This group lawsuit is DISMISSED in its entirety;

4. Three strikes are recorded against petitioners Souvannaseng Boriboune; three strikes against Anthony C. Stevens'El; and three strikes against Efrain Campos; and

5. The clerk of court is directed to enter judgment in favor of respondents Gerald Berge, Peter Huibregste, Viki Sebastion, Ellen K. Ray and Kelly Coon and close this case.

Entered this 1st day of June, 2005.

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