

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

EDWIN F. CLAY,

Petitioner,

v.

JOSEPH SCIBANA, Warden,

Respondent.

ORDER

04-C-631-C

Petitioner Edwin Clay has advised the court that he wishes his pleading in this action to be treated as a civil complaint under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), challenging as legally invalid the Bureau of Prisons' decision to deduct 50% of his income each month for restitution. In addition, he asks for leave to proceed in forma pauperis, permission to supplement his complaint and appointment of counsel.

With respect to petitioner's request for leave to proceed in forma pauperis, because he is a prisoner, he is subject to the 1996 Prison Litigation Reform Act. This means that before this court may decide whether he can proceed with his complaint in forma pauperis, petitioner will have to pay an initial partial payment of the filing fee in the amount of \$21.58 and the remainder of the fee in monthly installments even if his request for leave to

proceed is denied. Because petitioner paid \$5 when he first submitted his complaint to this court, he still owes \$16.58 toward his initial partial payment.

Petitioner's motion for leave to supplement his complaint will be denied. A supplemental pleading is appropriate to set forth "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). As noted above, petitioner is challenging the decision of the Bureau of Prisons to take 50% of his income each month toward his restitution obligation. It is not necessary for petitioner to supplement his pleading each month as the money is withdrawn. It is assumed that the challenged procedure will continue to occur until the court rules on the validity of the Bureau's action.

Finally, a decision on petitioner's motion for appointment of counsel will be stayed. At the present time, it is not clear that petitioner's pleading will survive the screening required under 28 U.S.C. § 1915(e)(2). If it does, the court will consider his request for appointment of counsel at that time.

ORDER

IT IS ORDERED that at petitioner's direction, the pleading in this action is to be treated as a civil action under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

Further, IT IS ORDERED that petitioner is assessed \$16.58 as the remainder of the initial partial payment he owes in this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$16.58 on or before December 13, 2004. If, by December 13, 2004, petitioner fails to pay the initial partial payment or show cause for his failure to do so, he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice to petitioner's filing his case at a later date.

Further, IT IS ORDERED that petitioner's motion for leave to supplement his complaint is DENIED and his motion for appointment of counsel is STAYED pending the determination whether he may proceed further in this action under 28 U.S.C. § 1915(e)(2).

Entered this 23rd day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge