

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

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MR. ERVIE GRAY,

Petitioner,

v.

GERALD A. BERGE, Warden;  
JEFFREY P. ENDICOTT, Warden;  
PETER A. HUIBREGTSE, Deputy Warden;  
GARY BOUGHTON, Security Director;  
SGT. J. HUIBREGTSE, Sergeant of Mailroom;  
JAMES GREER, Director of B.C.H.S.;  
S.M.C.I./W.S.P.F., I.C.R.S.;  
DEPARTMENT OF CORRECTION;  
RICHARD VERHAGEN, Administrator,

Respondents.

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ORDER

05-C-119-C

In an order dated March 3, 2005, I denied petitioner Ervie Gray's request for leave to proceed in forma pauperis in this action because he is ineligible for in forma pauperis status under 28 U.S.C. § 1915(g). I told him that unless, by March 24, 2005, he submitted a check or money order made payable to the clerk of court in the amount of \$250, I would direct the clerk of court to close his file. Now petitioner has written to say that he disagrees with this court's conclusion that he has three strikes because the cases cited as having been

dismissed as legally frivolous were terminated prior to enactment of the 1996 Prison Litigation Reform Act.

I construe petitioner's submission as a motion to alter or amend the March 3 order and will deny it. The Court of Appeals for the Seventh Circuit already has decided that federal courts may count as strikes cases filed by prisoners before the Prison Litigation Reform Act became law. See Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996) (application of the [Prisoner Litigation Reform Act and § 1915(g)] is not impermissibly retroactive).

Petitioner appears to suggest in his motion that if this court refuses to grant his motion to alter or amend the March 3 order, then he will appeal the ruling to the court of appeals. Because it is clear from petitioner's submission that he does not intend to prepay the \$250 fee for filing his complaint, I will direct the clerk of court to enter judgment closing this case.

In deciding whether he wishes to pursue an appeal, petitioner should be aware that he will have to prepay the \$255 fee for filing his appeal for the same reason that I have ruled he must prepay the filing fee for his action in this court. If he requests leave to proceed in forma pauperis on appeal, I will deny that request. However, in that instance, petitioner will have 30 days from the date of the order denying his request to proceed in forma pauperis on appeal to challenge that decision in the court of appeals. Fed. R. App. P. 24(a)(5). If the

court of appeals decides that it was improper for this court to apply the three strikes statute against petitioner, then the matter will be remanded to this court. However, if the court of appeals determines that this court was correct finding that § 1915(g) bars petitioner from proceeding in forma pauperis, then petitioner will owe both filing fees in full immediately.

ORDER

IT IS ORDERED that petitioner's motion modification of the March 2, 2005 order is DENIED.

Entered this 28th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge