

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

HUMBERTO PACHECO,

Petitioner,

v.

HARLEY G. LAPPIN, Director,
Bureau of Prisons;
REGIONAL DIRECTOR, North
Central Region, BOP; and
JOSEPH SCIBANA, Warden of FCI OXFORD, WI,

Respondents.

ORDER

05-C-141-C

Judgment of dismissal was entered in this action on March 31, 2005, after I screened petitioner's complaint pursuant to 28 U.S.C. § 1915(e)(2) and concluded that it failed to state a claim upon which relief may be granted. Now petitioner has filed a notice of appeal. Because the notice is not accompanied by the \$255 fee for filing his appeal, I construe petitioner's notice to include a request for leave to proceed on appeal in forma pauperis.

Like petitioner's request for leave to proceed in forma pauperis on his complaint, petitioner's request for leave to proceed in forma pauperis on appeal is governed by the 1996 Prison Litigation Reform Act. This means that this court must determine first whether

petitioner's request must be denied either because he has three strikes against him under 28 U.S.C. § 1915(g) or because the appeal is not taken in good faith. Petitioner does not have three strikes against him, and I do not intend to certify that his appeal is not taken in good faith.

It may appear inconsistent to deny petitioner leave to proceed in forma pauperis in this court and then allow him to proceed in forma pauperis on appeal. However, this case raises a question whether any appropriate vehicle exists for a prisoner to challenge in federal court the Bureau of Prisons' interpretation of statutes or policies governing eligibility for inmate programs that allow for early release upon completion. In an earlier action, Pacheco v. Scibana, 04-C-919-C, I dismissed petitioner's challenge as improperly raised in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, relying on Richmond v. Scibana, 387 F.3d 602 (7th Cir. 2004). In this action, petitioner has attempted to raise his claim again either in mandamus or under Bivens or both, but I have concluded that no avenue is available to afford petitioner the relief he seeks. Because petitioner's appeal of the dismissal of this action cannot be deemed legally frivolous or meritless, I cannot certify that the appeal is not taken in good faith.

The only other hurdle to petitioner's proceeding with his appeal in forma pauperis is the requirement that he be found indigent and, if he is indigent, that he pay an initial partial payment of the filing fee that has been calculated from a certified copy of his trust

fund account statement for the six-month period immediately preceding the filing of his notice of appeal. 28 U.S.C. § 1915(a)(2). Petitioner has not submitted the necessary trust fund account statement, but the trust fund account statement he submitted with his complaint is sufficiently recent that I will use it to calculate his initial partial payment on the \$255 fee for filing his appeal. From the trust fund statement, I calculate petitioner's initial partial payment to be \$51.05.

ORDER

IT IS ORDERED that petitioner Humberto Pacheco's request for leave to proceed in forma pauperis on appeal is GRANTED. Petitioner may have until April 29, 2005, in which to submit a check or money order made payable to the clerk of court in the amount of \$51.05. If, by April 29, 2005, petitioner fails to pay the initial partial payment or explain his failure to do so, then I will advise the court of appeals of his noncompliance in paying

the assessment so that it may take whatever steps it deems appropriate with respect to this appeal.

Entered this 11th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge