IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HARRISON FRANKLIN, on behalf
of himself and all those similarly situated,

ORDER

Petitioners,

05-C-251-C

v.

GERALD BERGE, PETER HUIBREGTSE,
BURTON COX, JR., NURSE VICKY,
C/O MATHEW SCULLION, BRIAN KOOL,
M. HARPER, TIM HAINES, SHARON
ZUNKER, DR. DAVID BURNETT, JAMES
GREER, ANTHONY BROADBENT,
JOHN DOE/JANE DOE 1-100,

Respondents.

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Petitioner Harrison Franklin, a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has submitted a proposed civil action pursuant to 42 U.S.C. § 1983 and requests leave to proceed in forma pauperis. I have examined a certified copy of petitioner's trust fund account statement and reviewed this court's own financial records. I conclude that because petitioner is not paying the debt he incurred under the 1996 Prison Litigation Reform Act in connection with another lawsuit he filed in this district, he is not entitled to proceed in forma pauperis in this action.

Specifically, I find that on December 12, 2002, I granted petitioner leave to proceed in forma pauperis in Franklin v. McCaughtry, 02-C-618-C. In the order granting him leave to proceed, I noted that petitioner was not required to pay an initial partial payment of the filing fee because his certified trust fund account statement showed that he had no means to pay the initial payment. However, I advised petitioner that the unpaid balance of his filing fee was $150 and that he was obligated to pay this amount as described in 28 U.S.C. § 1915(b)(2) "at such time as funds exist[ed] in his prison account." Subsequently, on March 10, 2004, petitioner filed an appeal from the judgment entered in case no. 02-C-618-C. At that time, I found from his trust fund account statement that he could pay $1.70 as an initial partial payment of the $255 fee for filing an appeal. I did not note then that petitioner had paid only $12.95 toward the $150 he owed for filing his complaint in this court, and that payment had been submitted only one day earlier on March 9, 2004.

Petitioner paid the $1.70 initial partial payment for his appeal on March 29, 2004. On March 31, 2004, the court received a $20 payment from petitioner's prison account. Half of this payment was applied toward each of the filing fees petitioner owed in case no. 02-C-618-C. The only other payment appearing on this court's record was received on January 5, 2005 in the amount of $13.61. Again, the payment was split, and $6.81 was applied toward petitioner's fee for his complaint and $6.80 toward his appeal fee. Petitioner still owes a balance of $236.50 for his appeal and $120.24 for filing his complaint.

The trust fund account statement petitioner submitted in connection with this case

begins on September 20, 2004 and ends on March 14, 2005. It reflects that at least since November 29, 2004, petitioner has been receiving regular income to his account but that only 20% of his income is being taken for his filing fees in case no. 02-C-618-C. However, fees for filing more than one lawsuit or appeal accumulate. Newlin v. Helman, 123 F.3d 429, 436 (7th Cir. 1997), rev'd on other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) and Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000). Since at least January 2005, petitioner should have been paying 40% of his income toward the fees he owes in this court.

In Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit cautioned prisoner litigants to keep a watchful eye on their accounts and ensure that amounts owed under the Prisoner Litigation Reform Act are withdrawn on a monthly basis. "If in a given month the prison fails to make the required distribution from the trust account, the prisoner should notice this and refrain from spending funds on personal items until they can be applied properly." Id. at 776. Nonpayment of obligations a prisoner incurs under the Prisoner Litigation Reform Act for any reason other than destitution is to be understood as a voluntary relinquishment of the prisoner's right to file future suits in forma pauperis, just as if the prisoner had a history of frivolous litigation under § 1915(g). Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996), overruled on other grounds, Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000).

Petitioner does not qualify for the exception in § 1915(g) because he has not made the requisite showing that he is under imminent danger of serious physical injury. His

complaint is stuffed with allegations of wrongdoings, some of which he appears to wish to prosecute on behalf of a class of inmates at the Wisconsin Secure Program Facility. In particular, petitioner alleges that on one occasion, he was subjected to excessive force and injected with an "unknown substance" because he refused to take his medication; that on occasion he has been denied food for his refusal to take his insulin; that diabetics are given less food than non-diabetics; that his legal mail is opened outside his presence; that he has been hit in the back with a milk carton; that prison officials have interfered with his mail to lawyers and the courts; that staff discuss his medical status in the hallway in front of other inmates; that he was denied medical attention for pain and numbness he experienced after staff attacked him; and that inmates are deprived of sleep and given level demotions without due process "for exercising their rights to refuse medication and remain silent." The only claim that even remotely suggests the possibility that petitioner's physical health might be compromised if he is not allowed to file suit immediately is his claim that he should not be housed at the Wisconsin Secure Program Facility under the settlement agreement in Jones'El v. Berge, 00-C-421-C, because he was previously diagnosed with a mental illness. However, my tentative view is that petitioner will not be allowed to proceed on this claim in any event.

On numerous occasions, this court has advised members of the class in Jones'El v. Berge that if they believe the state is not abiding by the settlement agreement, they are to contact the monitor appointed in the case or bring their grievance to the attention of counsel for the class. This court cannot investigate in separate lawsuits each individual's contentions

that the Wisconsin Secure Program Facility is failing to implement one or another of the various provisions in the settlement agreement. If petitioner has a legitimate complaint about his status as a mentally ill inmate, it will be up to counsel for the class to bring to this court's attention in the context of the Jones'El case the state's failure to abide by the agreement unless the matter can be settled informally. Because petitioner has other more appropriate avenues for pursuing his claim regarding his placement at the Wisconsin Secure Program Facility, I cannot conclude that he faces a threat of serious physical injury if he is not allowed to present the claim immediately in the context of this lawsuit.

Petitioner's trust fund account statement does not show whether he had income added to his account between December 12, 2002 and March 9, 2004, or between March 31, 2004 and January 5, 2005. Therefore, it is impossible to determine precisely what petitioner should have paid toward his debt in case no. 02-C-618-C. What is clear is that at least since November 29, 2004, forty percent, not twenty percent, of petitioner's income should have been collected from petitioner's account and sent to this court to pay his fees in 02-C-618-C. The job of determining precisely what petitioner owes at this point belongs to petitioner and prison officials at the institutions in which he was confined during 2003, 2004 and 2005. See Hall v. Stone, 170 F.3d 706 (7th Cir. 1999) (order under 28 U.S.C. § 1915(b) directs warden as trustee of account to disburse amounts owed in accordance with statutory directive). Therefore the wardens of the prisons in which petitioner has been incarcerated since December 2002 or their designees will have to figure

the amount petitioner owes from the time he began to receive money into his account until the present and the warden at the Wisconsin Secure Program Facility or whatever warden is petitioner's custodian at the time will have to notify this court when petitioner's payments become current.

As soon as this court is notified that petitioner's payments for the filing fees in case 02-C-618-C are up to date, petitioner may renew his request for leave to proceed in forma pauperis in this case. However, he should take note that he will have to support his request for leave to proceed in this case with a certified trust fund account statement for the full six-month period immediately preceding the filing of his renewed request.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED.

FURTHER, IT IS ORDERED that until petitioner has paid the amounts of his arrears under § 1915(b)(2) in case no. 02-C-618-C, he may not apply for leave to proceed in forma pauperis in any future action in this district except under the circumstances permitted under 28 U.S.C. § 1915(g).

Finally, IT IS ORDERED that the warden of the Wisconsin Secure Program Facility or the warden of any other prison in which petitioner is confined at the time is to notify this

court when petitioner's debt in case no. 99-C-344-C becomes current.

Entered this 25th day of April, 2005.

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