

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

CHRISTOPHER McSWAIN,

Petitioner,

v.

STATE OF WISCONSIN,
WAUPUN CORRECTIONAL INSTITUTION,
PHIL KINGSTON,
MARC CLEMENTS,
MICHAEL THURMER, and
ANGELIA KROLL,

Respondents.

ORDER

05-C-360-C

Petitioner Christopher McSwain, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, has filed a proposed complaint and a request for leave to proceed in forma pauperis. The request will be denied, because petitioner does not qualify for in forma pauperis status under 28 U.S.C. § 1915(g). Moreover, because petitioner has ignored his obligation to pay the fee for filing an earlier action, McSwain v. Wallintin, 03-C-150-C, in which he was told he was ineligible for pauper status because he had struck out under §1915(g), I am required by the law of this circuit to enter an order under Support Systems

International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995), directing the clerks of the courts in this circuit to return unfiled any civil complaints petitioner might submit until his debt to the judicial system has been paid. Newlin v. Helman, 123 F.3d 429, 437 (7th Cir. 1997).

As petitioner is aware, § 1915(g) reads as follows:

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.

On April 4, 2003, I denied petitioner leave to proceed in forma pauperis in case no. 03-C-150-C. I explained to him then that he had been denied leave to proceed in forma pauperis on at least three prior occasions because his complaints were deemed to be legally meritless. On February 9, 1996, he was denied leave to proceed in forma pauperis in this district in McSwain v. Endicott, 96-C-84-C, because there was no arguable basis in fact or law for his claims. Subsequently, he received strikes in at least two cases filed in the Eastern District of Wisconsin, McSwain v. McCaughtry, 97-C-1133 (E.D. Wis. Aug. 21, 1998) and McSwain v. McCaughtry, 97-C-1129 (E.D. Wis. Aug. 21, 1998). I told petitioner that he could choose among three options: 1) pay the \$150 fee and ask the court to process the complaint; 2) pay the \$150 fee and advise the court that he does not intend to pursue the

lawsuit; or 3) file a notice of appeal. In addition, I told petitioner that if, within thirty days of the date of the order, he did none of these things, then an order under Support Systems International, Inc. v. Mack would be entered. Petitioner did not pay the fee or file a notice of appeal. This fact has escaped this court's attention until now.

A Mack order is an order directing the clerks of all federal courts in the circuit to return unfiled any papers that a litigant attempts to file, unless and until the litigant pays in full the fees that he owes. Exceptions are made for any criminal case in which the litigant is a defendant and any application for habeas corpus the litigant might wish to file. The sanction order is to remain in effect for at least two years, at which time the litigant may move to modify or rescind the order.

Had such an order been entered in May 2003, petitioner would now be beyond the two-year time restriction and free to request that the sanction be lifted. However, given petitioner's failure to pay one dime toward the fee he owes for filing case no. 03-C-150-C, and his obvious ability to make payments toward his debt as shown by the trust fund account statement he filed in this case, I would have denied his request.

In any event, even if I had timely entered the Mack order and then agreed to lift it, petitioner would not be allowed to proceed in forma pauperis in this action, because his complaint does not set forth any credible facts from which an inference may be drawn that he is under imminent danger of serious physical injury. The subject of petitioner's complaint

is that he is being forced to share a cell with black inmates, and that he fears all black people because in 1995 he was beat up and sexually assaulted by black inmates. Petitioner's assertions of fear of harm based upon his difficult and traumatic victimization in 1995 are inadequate to permit him to proceed under the exception in § 1915(g).

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis in this action is DENIED because petitioner is disqualified from proceeding in forma pauperis under § 1915(g).

2. Petitioner must pay the \$250 fee for filing this complaint and the \$150 fee for filing McSwain v. Wallintin, 03-C-150-C.

3. Until petitioner pays the fees he owes in these two cases, he is subject to an order under Support Systems International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995). In particular, with only two exceptions, the clerks of court of this circuit are to return to petitioner, without submitting them to any judge for review, any new civil lawsuit petitioner attempts to file in the courts of this circuit. The exceptions are permitted when petitioner's submission relates to a criminal case in which he is the defendant or concerns an application for habeas corpus relief.

4. Petitioner is authorized to submit to this court, no earlier than two years from the date of this order, a motion to modify or rescind that portion of this order that imposes the Mack restrictions.

Entered this 22nd day of June, 2005.

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