

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

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CHRISTOPHER McSWAIN,

Petitioner,

v.

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

Respondents.  
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ORDER

05-C-360-C

Petitioner Christopher McSwain has filed a “Motion to Modify Order Under Support Systems International, Inc. v. Mack.” In this motion, petitioner asks that this court lift the Mack order imposed on him on June 22, 2005, for his failure to pay the filing fee in McSwain v. Wallintin, 03-C-150-C, a case in which I found on April 4, 2003 that petitioner did not qualify for pauper status because he had struck out under 28 U.S.C. § 1915(g).

In support of his motion, petitioner points to entries in his trust fund account statement covering the period between December 17, 2004 and ending June 17, 2005, that

show that each time a deposit has been made to his prison account, a portion of the deposit has been withheld for the purpose of paying his debt in case no. 03-C-150-C. Specifically, the trust fund account statement shows the following deposits and the following portions of the deposits that were withheld for payment of the filing fee in case no. 03-C-150-C:

Date of Deposit	Amount of Deposit	Amount Withheld for Case No. 03-C-150-C
2/15/05	\$50	\$5.08
2/16/05	\$524.19	\$77.33
3/16/05	\$2.40	\$.48
3/30/05	\$4.00	\$.80
4/13/05	\$4.00	\$.80
4/27/05	\$4.00	\$.80
5/11/05	\$4.00	\$.80
5/24/05	\$4.00	\$.80
6/8/05	\$3.60	\$.72

This clear indication that prison officials were aware of petitioner's debt in case no. 03-C-150-C and that they had collected a portion of petitioner's deposits for payment of that debt prompted a review of this court's financial records to determine why there was no record of petitioner having made any payment in case no. 03-C-150-C. Through the review, the court discovered an error in the procedure for entering prisoner obligations into the automated financial system for this court, which has now been corrected. In particular, the

court learned that no financial record was being created promptly for prisoners at the time they were told they could not proceed in forma pauperis because of their three-strike status, because those prisoners had been given the option of delaying payment of the filing fee to take an appeal of the district court order to the court of appeals. In case no. 03-C-150-C, petitioner did not file an appeal. When the time for filing an appeal expired without further action on petitioner's part, no one in the financial office was alerted to this fact. This meant that no record was created to track petitioner's filing fee obligation in case no. 03-C-150-C. The program simply showed that there was "no financial statement available for this case."

Meanwhile, the money that was being sent to this court in petitioner's name was being divided by the court's automated financial program between two of petitioner's other cases, McSwain v. McCaughtry, 02-C-91-C and McSwain v. Litscher, 02-C-525-C. The record reveals that payments were received in May, July, August, October, November and December of 2003, in June, October and November 2004, and in February 2005. If an electronic financial record had been created for case no. 03-C-150-C in May 2003 when it became apparent that petitioner did not intend to appeal the three-strike ruling, these payments would have been divided three ways, with one-third of the payments designated to petitioner's debt in case no. 03-C-150-C.

In Newlin v. Helman, 123 F.3d 429, 434 (7th Cir. 1997), the Court of Appeals for the Seventh Circuit stated expressly that although prisoners who have three strikes may not

proceed in forma pauperis under 28 U.S.C. § 1915, they nevertheless must pay the fee for any lawsuit or appeal they submit after they have earned three strikes. If they fail to pay the full amount promptly, then prison officials are authorized to collect the fee using the mechanism set out in § 1915(b), that is, withholding 20% of the income credited to the prisoner's account in a given month and sending it to the court each time the amount exceeds \$10 until the filing fees are paid. Id. Petitioner appears to have been in compliance with this requirement, even though this court's financial records did not reflect his compliance. Therefore, I will grant petitioner's motion and lift the Mack order imposed on him on June 22, 2005.

#### ORDER

IT IS ORDERED that petitioner Christopher McSwain's motion for reconsideration of the order entered herein on June 22, 2005 is GRANTED. The order entered under Support Systems International, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995) is LIFTED.

Further, IT IS ORDERED that petitioner remains disqualified from proceeding in this action in forma pauperis because of his status under 28 U.S.C. § 1915(g) and obligated to pay the \$250 fee for filing this case.

Finally, IT IS ORDERED that the clerk of court note petitioner's obligation to pay

the \$250 fee for filing this case in the court's financial records.

Entered this 29th day of July, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge