

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

JAMES R. SCHULTZ,

Petitioner,

v.

PAM WALLACE, Warden,
Stanley Correctional Institution; and
P. NICHOLS, Chippewa Valley
Treatment Facility,

Respondents.

ORDER

05-C-751-C

In an order entered in this case on January 5, 2006, I denied petitioner's request for leave to proceed in forma pauperis in this action after concluding that he had struck out under the three strikes provision of the 1996 Prison Litigation Reform Act, 28 U.S.C. § 1915(g). Subsequently, on January 17, 2006, petitioner filed a motion for reconsideration pursuant to Fed. R. Civ. P. 59, which was denied on January 26, 2006. Now petitioner has filed a notice of appeal. Because petitioner did not pay the \$255 filing fee when he submitted his notice of appeal, I construe the notice to include a request for leave to proceed on appeal in forma pauperis. That request will be denied for the same reason petitioner's

request for leave to proceed in forma pauperis in the district court was denied. Specifically, petitioner has accumulated three strikes. Therefore, so long as he is incarcerated he cannot file any new lawsuit or an appeal without prepaying the filing fee unless he can show that he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g). In this court's January 5 order, I found that petitioner did not qualify for the imminent danger exception to § 1915(g) and nothing in his notice of appeal suggests that such an exception should be granted. Therefore, petitioner cannot take advantage of the initial partial payment provision of § 1915 to prosecute his appeal. He owes the \$255 fee in full immediately.

I am aware from the trust fund account statement petitioner filed in this court that he does not presently have sufficient funds in his regular prison account to pay a full filing fee. Nevertheless, prison officials will be required to monitor petitioner's account and collect monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) if and when such funds do exist.

Aside from his destitution, petitioner may delay payment of the \$255 fee under one other circumstance; that is, if he challenges in the court of appeals within thirty days of the date he receives this order the decision to deny his request for leave to proceed in forma pauperis on appeal because of his § 1915(g) status. Fed. R. App. P. 24(a)(5). If the court of appeals decides that it was improper for this court to have found petitioner ineligible to proceed because of his § 1915(g) status, then the matter will be remanded to this court for

a determination whether petitioner's appeal is taken in good faith. If the court of appeals determines that the district court was correct in finding that § 1915(g) bars petitioner from taking his appeal in forma pauperis, the \$255 filing fee payment will be due in full immediately. Whatever the scenario, petitioner is responsible for insuring that the required sum is remitted to the court at the appropriate time.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED because three strikes have been recorded against petitioner under 28 U.S.C. § 1915(g). The clerk of court is directed to insure that the court's financial records reflect that petitioner owes the \$255 fee for filing this appeal whether or not petitioner

actively pursues his appeal.

Entered this 8th day of February, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge