

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

ROY LEE RUSSELL,

Petitioner,

v.

HARLEY G. LAPPIN, Director,
Bureau of Prisons; and
MICHAEL K. NALLEY, Regional
Director, Bureau of Prisons;
STEPHEN R. HOBART, Warden,
F.C.I. Oxford; G. JONES, Health
Service Administrator, Oxford; and
M. McKINNON, Physical Assistant,
Oxford,

Respondents.

ORDER

06-C-19-C

In an order dated January 19, 2006, I denied petitioner Roy Lee Russell leave to proceed in forma pauperis in this action after finding that he has struck out under 28 U.S.C. § 1915(g). I told petitioner that he would have until February 10, 2006, in which to submit a check or money order made payable to the clerk of court in the amount of \$250 and that, if he failed to pay the fee, the clerk of court would close this file. Now petitioner has filed a document titled "Plaintiff's Motion Pursuant to Fed. R. Civ. P. 60(a)," which I construe

as a motion for reconsideration of the January 19 order.

In support of his motion, petitioner contends that he does not have three strikes yet because one of the decisions upon which this court relied in finding that he had struck out is still pending in the court of appeals. In particular, petitioner argues that the decision of the District Court for the Eastern District of Texas to dismiss Russell v. Attorney General, 04-CV-159-HC-ESH as legally meritless should not count as a strike unless and until the Court of Appeals for the Fifth Circuit upholds the district court's determination. Petitioner is mistaken.

28 U.S.C. § 1915(g) reads,

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 at 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.

The statute expressly identifies an “action” and an “appeal” as separate proceedings that, if legally meritless, will warrant a strike. Nowhere in the statute is there a directive that district courts ignore an action dismissed on one of the grounds enumerated in § 1915(g) while that action is being appealed. The district court's decision is the law of the case until it has been disturbed by an appellate court's decision. Thus, if petitioner wins his appeal, he will be free to refile his lawsuit and request pauper status. Until he wins, however, it is not erroneous

for this court to count the district court's dismissal of his action as a strike.

Accordingly, IT IS ORDERED that petitioner's motion for reconsideration of the order entered herein on January 19, 2006, is DENIED.

Entered this 6th day of February, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge