

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

WARREN GAMEAL LILLY, JR.,

Petitioner,

v.

PAMELA WALLACE, Individually and as SCI Warden;
MICHAEL McNEIL, Individually and as SCI
Acting Director of Security; BECKY DRESSLER,
Individually and as SCI Director of Health
Services Unit; CAPTAIN JENSEN, Individually
and as SCI Security Staff; LIEUTENANT BRAD
LUNDMARK, Individually and as SCI Security Staff;
OFFICER P. WALTER, Individually and as SCI
Security Staff; OFFICER HAIDER, Individually
and as SCI Security Staff; OFFICER WALIA,
Individually and as SCI Security Staff; OFFICER
TEMPSKI, Individually and as SCI Security Staff;
OFFICER WILLIAMS, Individually and as SCI
Security Staff; OFFICER GRIGGS, Individually and
as SCI Security Staff; OFFICER JENKINS, Individually
and as SCI Security Staff; SERGEANT TABER,
Individually and as SCI Security Staff; SERGEANT
KACZMAREK, Individually and as SCI Security Staff;
FNP DAVID ROCK, Individually and as SCI
Medical Staff; RN DEBRA ARNEVIK, Individually
and as SCI Medical Staff; LPN BARB KRUMEANAUER,
Individually and as SCI Medical Staff; and UNNAMED
ACTORS, Individually and as SCI Staff,

Respondents.

ORDER

06-C-692-C

Petitioner Warren Gameal Lilly, Jr., a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin, has filed a proposed complaint for money damages and a request for leave to proceed in forma pauperis. However, petitioner does not qualify for indigent status because, while he was a prisoner, he has brought three actions or appeals in a court of the United States that were dismissed on the ground that they were legally frivolous or failed to state a claim upon which relief may be granted. In particular, petitioner earned two strikes in Busk v. Frank, 06-C-575-CNC, decided Sept. 28, 2006, a legally meritless action filed by petitioner and inmate Busk, Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004)(when one petitioner's "action" in a group complaint warrants strike, all petitioners receive the strike); and Lilly v. Torhorst, 06-C-08-C, denial of leave to proceed in forma pauperis on meritless appeal # 06-1536 decided on Apr. 20, 2006. Therefore, he does not qualify for in forma pauperis status under 28 U.S.C. § 1915(g) unless his complaint concerns a matter suggesting he is "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

The vast majority of petitioner's complaint does not allege facts from which an inference may be drawn that he is under imminent danger of serious physical injury. Petitioner focuses much of his complaint on a claim that the twelve respondents he identifies as security staff denied him his Eighth Amendment right to be free of cruel and unusual punishment in connection with an incident of alleged use of excessive force occurring on June 7, 2006. Petitioner alleges also that this same incident offended his Fourteenth

Amendment right to bodily integrity and was followed by placement in temporary lockup in violation of his Fourteenth Amendment procedural due process rights. In addition, he alleges that in determining the amount of force to be used on petitioner on June 7, 2006, certain respondents conspired to interfere with his civil rights. None of these claims meet the imminent danger requirement of 28 U.S.C. § 1915(g).

In order to meet the imminent danger requirement of 28 U.S.C. § 1915(g), a petitioner must allege a physical injury that is imminent or occurring at the time the complaint is filed and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, slip op. 01-2657 (7th Cir. Dec. 11, 2003) (citing Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) and Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)). Ordinarily, claims of physical injury arise in the context of lawsuits alleging Eighth Amendment violations. Here, however, the vast majority of petitioner's Eighth Amendment claim is for a wrongdoing that occurred last June. I can conceive of no factual scenario under which I could find that petitioner faces imminent danger of a serious physical injury with respect to his claims of the use of excessive force, denial of bodily integrity, failure to provide procedural due process and conspiracy.

Petitioner does allege one set of facts, however, that may qualify for the exception to § 1915(g). On page 21 of his complaint, petitioner alleges that "from June through the filing of this complaint," he has complained of head, neck and wrist injuries he suffered on June 7

as a result of the use of excessive force, and that although he is being prescribed pain medication and has been scheduled for further examination at the UW-Madison hospital since June, he has yet to be taken to the UW-Madison hospital for examination or treatment. With respect to this claim, petitioner offers little factual information to suggest precisely what his medical needs are, who at the Stanley Correctional Institution is responsible for delaying his UW-Madison appointment or even what his appointment is for. He simply states broadly in his request for relief that he wants a million dollars from each of respondents Wallace, Dressler and Rock “for the deliberate indifference in response to [his] health and life threatening medical needs” and “an immediate physical examination by a non-DOC physician.”

Because the vast majority of petitioner’s complaint is not a complaint requiring application of the exception to § 1915(g), I am denying petitioner leave to proceed in forma pauperis without prejudice to his filing an amended complaint raising his claim of deliberate indifference to a serious medical need only and naming as respondents only those persons who are presently personally involved in denying him necessary medical care.

Alternatively, petitioner may choose to pursue this case in its entirety as a paying litigant. If so, he must submit a check or money order made payable to the clerk of court in the amount of \$350 and he must do so no later than December 22, 2006. If he does this, however, petitioner should be aware that the court then will be required to screen his

complaint under 28 U.S.C. § 1915A, and dismiss his case or any portion of it that is determined to be frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief.

If petitioner does not file an amended complaint as described above or pay the \$350 filing fee by December 22, 2006, I will assume that he does not want to pursue this action. In that event, the clerk of court is directed to close this file. However, even if the file is closed, petitioner will still owe the \$350 filing fee and I will advise the warden of the Stanley Correctional Institution of petitioner's obligation to pay the fee so that the fee can be collected and sent to the court in accordance with 28 U.S.C. § 1915(b)(2).

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED because petitioner is ineligible for in forma pauperis status under 28 U.S.C. § 1915(g) with respect to all of his claims except his claim that he is presently being denied medical care for a serious medical need. A decision whether petitioner may proceed in forma pauperis under the exception to § 1915(g) is STAYED with respect to petitioner's claim that he is being denied medical care for a serious medical need. Petitioner may have until December 22, 2006, in which to file an amended complaint raising his claim concerning his medical needs claim or to submit a check or money order made payable to the clerk of court

in the amount of \$350. If, by December 22, 2006, petitioner fails to pay the fee or submit a proposed amended complaint limited to his medical needs claim only, the clerk of court is directed to close this file. However, even in that event, the clerk of court is to insure that petitioner's obligation to pay the \$350 fee for filing this case is reflected in this court's financial records and that the warden of the Stanley Correctional Institution is advised of petitioner's obligation to pay the fee pursuant to 28 U.S.C. § 1915(b)(2).

Entered this 4th day of December, 2006.

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