

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60617



DAVID GRAY,

Plaintiff - Appellant

A True Copy
Certified order issued May 20, 2019

Styl W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

v.

PHIL BRYANT, Governor, State of Mississippi; JIM HOOD, Attorney General, State of Mississippi; BRIAN RICHARDSON, Mississippi Bureau of Investigations; CHRISTOPHER FREEZE, Federal Bureau of Investigations; ANDY GIPSON, Mississippi Department of Corrections Task Force; BILL KINKADE, Chairman, House Corrections Committee, Mississippi Department of Corrections; CARL MICKENS, Vice Chairman, Mississippi Department of Corrections; ANDY TAGARD, Co-Chairman, Mississippi Department of Corrections Task Force; ROUN S. MCNEAL, Mississippi Department of Corrections Committee; ANTHONY LAWRENCE, III, District Attorney, Greene County, Mississippi; MISSISSIPPI ETHICS COMMISSION; MARSHALL FISHER, Former Mississippi Department of Corrections Commissioner; PELICIA HALL, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; JERRY WILLIAMS, Mississippi Department of Corrections Deputy Commissioner; JAQUELYN BANKS, Superintendent, South Mississippi Correctional Institution-II; ANDREW MILLS, Warden, South Mississippi Correctional Institution-I and South Mississippi Correctional Institution-II; DAVID TURNER, Former Warden, South Mississippi Correctional Institution-II; G. WOODLAND, Doctor, South Mississippi Correctional Institution-II Infirmary; JAMES COOKSEY, Corrections Investigation Division, South Mississippi Correctional Institution-I and II; UNKNOWN HOUSTON, Corrections Investigation Division, South Mississippi Correctional Institution-I and II; JOSEPH COOLEY, Administrative Remedy Program Investigator, South Mississippi Correctional Institution-I and II; UNKNOWN EVANS, Captain, South Mississippi Correctional Institution-II; JANE DOE, South Mississippi Correctional Institution-I and II, Corrections Investigation Division,

Defendants - Appellees

Appeal from the United States District Court for the
Southern District of Mississippi

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of May 20, 2019, for want of prosecution. The appellant failed to timely pay the appellate filing fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit



By: _____
Dantrell L. Johnson, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

**IN THE UNITED STATES COURT OF APPEALS
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DAVID GRAY,

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v.

PHIL BRYANT, Governor, State of Mississippi; JIM HOOD, Attorney General, State of Mississippi; BRIAN RICHARDSON, Mississippi Bureau of Investigations; CHRISTOPHER FREEZE, Federal Bureau of Investigations; ANDY GIPSON, Mississippi Department of Corrections Task Force; BILL KINKADE, Chairman, House Corrections Committee, Mississippi Department of Corrections; CARL MICKENS, Vice Chairman, Mississippi Department of Corrections; ANDY TAGARD, Co-Chairman, Mississippi Department of Corrections Task Force; ROUN S. MCNEAL, Mississippi Department of Corrections Committee; ANTHONY LAWRENCE, III, District Attorney, Greene County, Mississippi; MISSISSIPPI ETHICS COMMISSION; MARSHALL FISHER, Former Mississippi Department of Corrections Commissioner; PELICIA HALL, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; JERRY WILLIAMS, Mississippi Department of Corrections Deputy Commissioner; JAQUELYN BANKS, Superintendent, South Mississippi Correctional Institution-II; ANDREW MILLS, Warden, South Mississippi Correctional Institution-I and South Mississippi Correctional Institution-II; DAVID TURNER, Former Warden, South Mississippi Correctional Institution-II; G. WOODLAND, Doctor, South Mississippi Correctional Institution-II Infirmary; JAMES COOKSEY, Corrections Investigation Division, South Mississippi Correctional Institution-I and II; UNKNOWN HOUSTON, Corrections Investigation Division, South Mississippi Correctional Institution-I and II; JOSEPH COOLEY, Administrative Remedy Program Investigator, South Mississippi Correctional Institution-I and II; UNKNOWN EVANS, Captain, South Mississippi Correctional Institution-II; JANE DOE, South Mississippi Correctional Institution-I and II, Corrections Investigation Division,

Defendants-Appellees

No. 18-60617

Appeal from the United States District Court
for the Southern District of Mississippi

O R D E R:

David Gray, Mississippi prisoner # 01440, is barred under the three-strikes provision in 28 U.S.C. § 1915(g) from proceeding in forma pauperis (IFP) in any civil action filed while incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. Gray has filed a motion for leave to proceed IFP on appeal from the district court's order denying his Federal Rule of Civil Procedure 59(e) motion challenging the denial of his IFP motion and the district court's judgment dismissing his 42 U.S.C. § 1983 action without prejudice.

In his appellate IFP motion, Gray argues that he was assaulted by an inmate in July 2017 and again in June 2018. His allegation that he has established imminent danger because he faced physical danger in the past is insufficient to show that he was under imminent danger of serious physical injury at the time he filed his appeal or his IFP motion for purposes of § 1915(g). *See Baños v. O'Guin*, 144 F.3d 883, 884-85 (5th Cir. 1998). His remaining arguments that he has established imminent danger are conclusional. *See Cloud v. Stotts*, 455 F. App'x 534, 535 (5th Cir. 2011). Further, Gray's argument that the court violated his right of access to the courts lacks merit. *See Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997).

Accordingly, Gray's motion for leave to proceed IFP is DENIED. Gray is advised that his appeal will be dismissed unless he pays the full appellate filing

No. 18-60617

fee within 30 days. The clerk of this court is DIRECTED to dismiss the appeal for want of prosecution if Gray fails to pay the appellate filing fee in a timely manner.



ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

DAVID RANDOLPH GRAY, # 01440

PLAINTIFF

v.

CIVIL ACTION NO. 1:18cv152-HSO-JCG

**PHIL BRYANT, JIM HOOD, BRIAN
RICHARDSON, CHRISTOPHER
FREEZE, ANDY GIPSON, BILL
KINKADE, CARL MICKENS, ANDY
TAGARD, ROUN S. MCNEAL,
ANTHONY LAWRENCE, III,
MISSISSIPPI ETHICS COMMISSION,
MARSHALL FISHER, PELICIA
HALL, JERRY WILLIAMS,
JACQUELYN BANKS, ANDREW
MILLS, DAVID TURNER, DR. G.
WOODLAND, JAMES COOKSEY,
OFFICER HOUSTON, JOSEPH
COOLEY, CAPTAIN EVANS, and
JANE DOE**

DEFENDANT

FINAL JUDGMENT

This matter is before the Court sua sponte. Pursuant to the Order issued this date and incorporated herein by reference,

IT IS, THEREFORE, ORDERED AND ADJUDGED that, this case is dismissed without prejudice.

SO ORDERED AND ADJUDGED, this the 16th day of August, 2018.

s/ Halil Suleyman Ozerden

HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

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WOODLAND, JAMES COOKSEY,
OFFICER HOUSTON, JOSEPH
COOLEY, CAPTAIN EVANS, and
JANE DOE**

DEFENDANTS

ORDER OF DISMISSAL WITHOUT PREJUDICE

This matter is before the Court sua sponte. Pro se Plaintiff David Randolph Gray is incarcerated with the Mississippi Department of Corrections. Gray initiated this action on April 26, 2018, when he mailed his Complaint.

On June 26, 2018, the Court found Gray was not in imminent danger of serious physical injury, denied him permission to proceed *in forma pauperis*, and ordered him to pay the \$400 filing and administrative fees by July 26, 2018. Order Den. *in Forma Pauperis* Status [4] at 2.

On July 20, 2018, Gray filed an Affidavit [5], claiming he is in imminent

danger because of an incident that occurred on June 29, 2018, and also claiming that, because he is bisexual, he will be in imminent danger as long as he remains housed in Area 2 of South Mississippi Correctional Institution. Pl.'s Aff. [5] at 3-4. Gray admits he had originally asked the Court not to transfer him from Area 2. *Id.* at 3. Finally, Gray ventures that "if" the contents of this civil action leak out, his life would be in danger. *Id.* at 5.

The Federal Rules of Civil Procedure provide that, a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(e). "Judgment" as used in these rules includes . . . any order from which an appeal lies." Fed. R. Civ. P. 54(a). An order denying *in forma pauperis* status is an immediately appealable order. *Roberts v. U.S. Dist. Ct.*, 339 U.S. 844, 845 (1950). Therefore Gray's Affidavit asking the Court to alter the Order Denying *in Forma Pauperis* Status will be considered under Rule 59(e), since the Affidavit was filed within 28 days of entry of the Court's Order.

A Rule 59(e) motion to alter a judgment should not be granted unless there is: (1) an intervening change in controlling law; (2) new evidence that could not have been diligently discovered earlier; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 696-97 (5th Cir. 2003); *Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 567-68 (5th Cir. 2003). Motions for reconsideration are not to be used to relitigate old matters or to present evidence that could have been raised prior to entry of

judgment. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003).

“Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.”

Atkins v. Marathon Le Torneau Co., 130 F.R.D. 625, 626 (S.D. Miss. 1990) (quoting *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977)).

Gray now argues he is in imminent danger based upon an incident that occurred more than two months after the Complaint was filed and that, contrary to his previous request to remain in Area 2, he is now in imminent danger there. Finally, Gray speculates that if others learn about this lawsuit, his life will be in imminent danger. Gray has not demonstrated, however, that the Court erred in determining that he was not in imminent danger of serious physical injury at the time the Complaint was filed. Gray fails to point to any error of law or fact in the Court’s Order Denying *in Forma Pauperis* Status. Gray presents no other basis for reconsideration under Rule 59(e).

To date Gray has not paid the filing fee, and he states in his Affidavit that he cannot. Pl.’s Aff. [5] at 5-6. The Court warned Gray that failure to comply may lead to the dismissal of his Complaint without further notice. Order Den. *in Forma Pauperis* Status [4] at 6. The Court has the authority to dismiss an action for a plaintiff’s failure to prosecute or to obey a Court order under Rule 41(b) of the Federal Rules of Civil Procedure and under the Court’s inherent authority to dismiss the action sua sponte. *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962).

The Court must be able to clear its calendars of cases that remain dormant because of the inaction or dilatoriness of the parties seeking relief, so as to achieve the orderly and expeditious disposition of cases. Such a sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the Court. *Id.* at 629-30. Since Defendants have not been called upon to answer the Complaint or appear in this action, and since the Court has not considered the merits of the claims, the case will be dismissed without prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons stated above, this case is **DISMISSED WITHOUT PREJUDICE** for failure to pay the filing fee and failure to obey an order of the Court. A separate final judgment will be entered pursuant to Federal Rule of Civil Procedure 58.

SO ORDERED AND ADJUDGED, this the 16th day of August, 2018.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

DAVID RANDOLPH GRAY, # 01440

PLAINTIFF

v.

CIVIL NO. 1:18cv152-HSO-JCG

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OFFICER HOUSTON, JOSEPH
COOLEY, CAPTAIN EVANS, and
JANE DOE

DEFENDANTS

ORDER DENYING IN FORMA PAUPERIS STATUS

BEFORE THE COURT is pro se Plaintiff David Randolph Gray's application [2] for leave to proceed *in forma pauperis*. Gray is incarcerated with the Mississippi Department of Corrections, and he challenges the conditions of his confinement. The Court finds that, while a prisoner, Gray has brought at least three civil actions or appeals that have been dismissed for failure to state a claim and as frivolous. *Gray v. Anderson*, 02-60622 (5th Cir. Feb. 10, 2003); *Gray v. Anderson*, 3:00cv9 (N.D. Miss. June 4, 2002); *Gray v. Williams*, 3:00cv82 (N.D. Miss. Apr. 11, 2001); *Gray v. Eubanks*, 2:99cv245 (S.D. Miss. Apr. 19, 2000); *Gray v.*

Turner, 2:99cv64 (S.D. Miss. Apr. 19, 2000). Further, Gray has failed to plead that he is in imminent danger. Therefore, Gray's *in forma pauperis* application in this civil action will be denied pursuant to 28 U.S.C. § 1915(g). If Gray wishes to proceed, he will be given thirty days to pay the filing and administrative fees.

I. DISCUSSION

The Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915, provides that a prisoner's privilege to proceed *in forma pauperis* will be denied if he has, on three prior occasions during detention, had an action or appeal dismissed as frivolous, malicious, or for failing to state a claim. 28 U.S.C. § 1915(g). Excepted from this bar are cases in which "the prisoner is under imminent danger of serious physical injury." *Id.* The Court must consider all actions which were dismissed as frivolous, malicious, or which fail to state a claim, whether dismissed before or after enactment of the PLRA. *Adepegba v. Hammons*, 103 F.3d 383, 386 (5th Cir. 1996).

Denial of *in forma pauperis* under the three strikes provision is a:

matter[] of procedure. Section 1915(g) does not affect a prisoner's substantive rights, and it does not block his or her access to the courts. A prisoner may still pursue any claim after three qualifying dismissals, but he or she must do so without the aid of the i.f.p. procedures. . . . Prisoners who are not allowed to proceed i.f.p. may pursue their substantive claims just as anyone else by paying the filing fee. This requirement is neither novel or penal. It does not increase a prisoner's liability, but merely puts prisoners who abuse a privilege on the same footing as everyone else.

Id. at 386-87.

Gray has, on at least nine prior occasions, brought civil actions under § 1915 in a court of the United States. These lawsuits were brought while he was

incarcerated with the Mississippi Department of Corrections. Three of these nine cases were dismissed for failure to state a claim. *Gray v. Williams*, 3:00cv82 (N.D. Miss. Apr. 11, 2001); *Gray v. Eubanks*, 2:99cv245 (S.D. Miss. Apr. 19, 2000); *Gray v. Turner*, 2:99cv64 (S.D. Miss. Apr. 19, 2000). Another case was dismissed as frivolous and for failure to state a claim. *Gray v. Anderson*, 3:00cv9 (N.D. Miss. June 4, 2002) (final dismissal); *Gray v. Anderson* 3:00cv9 (N.D. Miss. Feb. 6, 2001) (partial dismissal). One was dismissed as frivolous on appeal. *Gray v. Anderson*, 02-60622 (5th Cir. Feb. 10, 2003). These dismissals amount to five strikes under § 1915. Unless the present action satisfies the imminent danger exception, Gray must be denied pauper status.

The imminent danger exception allows a prisoner to proceed *in forma pauperis* in cases where he is in “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). According to the Fifth Circuit, “a prisoner with three strikes is entitled to proceed with his action . . . only if he is in imminent danger at the time that he seeks to file his suit in district court or . . . files a motion to proceed IFP.” *Banos v. O’Guin*, 144 F.3d 883, 884 (5th Cir. 1998). “Further, [b]y using the term ‘imminent,’ Congress indicated that it wanted to include a safety valve for the ‘three strikes’ rule to prevent impending harms, not those harms that had already occurred.” *Malik v. McGinnis*, 293 F.3d 559, 563 (2d Cir. 2002) (quoting *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315 (3d Cir. 2001)).

Gray mailed his Complaint on April 26, 2018. Gray complains about “events [that] transpired from late 2016 up until September 2017” at South Mississippi

Correctional Institution ("SMCI"). Compl. [1] at 20. Generally, Gray complains about lockdowns, denial of privileges, inmate assaults, failures to prosecute or investigate, and unsanitary kitchen conditions. Only the assault and sanitation claims implicate physical safety.

The first assault Gray mentions actually took place in 2012. *Id.* at 18.

Gray claims he was attacked by three gang member inmates in Unit 8 of Area 1.

Id. Gray complains that Defendant District Attorney Anthony Lawrence, III, never prosecuted the three alleged attackers. *Id.*

The next incident occurred five years later. Gray alleges that on July 16, 2017, while working in the kitchen, he got into an argument with inmate Robert Ludgood. *Id.* at 23. Allegedly Ludgood, who was drunk, then put Gray in a headlock and hit him three times on his head. *Id.* Plaintiff asserts that he complained to the Warden that Ludgood had twice smuggled contraband into the kitchen while Defendant Captain Evans was on duty. *Id.* at 24, 28. Plaintiff also allegedly asked the Warden to conduct a shakedown on Unit C-1, B Zone at Area 2, where Plaintiff was housed. *Id.* at 25-26.

Five days later, Gray claims he was attacked by Roy Lee, a gang member inmate on Unit C-1, B Zone. *Id.* at 24-25. Gray alleges that this particular housing zone, as well as Unit B-1, A-Zone, were both on lockdown due to gang violence. *Id.* at 12-14, 17, 28. Gray alleges that gang members and Captain Evans were behind this attack because of Gray's prior complaint about contraband. *Id.* at 26-29. After this alleged attack, Gray says Defendant Evans moved him to

Unit B-1, A Zone. *Id.* at 28.

Gray asked other Defendants to move him to either Unit C-2, D-1 or D-2, “where the gang members do not dictate who does what on the zone.” Compl. Ex. [1-1] at 9, 20. On or about September 21, 2017, Gray was moved to Unit D-1, where he is currently housed. *Id.* at 4.

At some point after this final move, Captain Evans saw Gray pointing at her, as she “made all kinds of negative threats to plaintiff stating that she did not know what plaintiff told the folks to get out of B-1, and that plaintiff best watch himself because he did not want to cross her.” Compl. [1] at 29. Captain Evans also has allegedly not called Gray back to work in the kitchen while she is on duty. *Id.* Gray sues for damages, injunctive relief, and asks the Court not to transfer him away from SMCI, Area 2. *Id.* at 54.

Plaintiff’s assault claims are confined to past incidents, the latest of which occurred over nine months prior to the filing of the Complaint. Gray admits that Defendants have since granted his request to be moved to Unit D-1. Although Gray alleges that Captain Evans threatened him on some unknown date after he pointed her out to another inmate, this allegation is vague and conclusory and does not suffice to show that Gray is in imminent danger.

As for the unsanitary kitchen claim, Gray alleges that the preparation area “is a pig pen” and the dishes are not being sanitized because they are being washed with tap water. *Id.* at 31. Gray claims some inmates have AIDS. *Id.* Even though Gray contends the events in his Complaint ceased in September 2017, he

describes the sanitation claims in the present tense. The Court will therefore assume that they are presently occurring. Nevertheless, Gray's allegations fail to demonstrate an imminent risk of serious physical danger.

Gray fails to allege any ongoing or future risk of imminent harm to his physical health or safety. Gray is not entitled to pauper status. Since the Court will deny him permission to proceed as a pauper, and since the Court has not received payment of the filing and administrative fees for this civil action, Gray will be given thirty days to pay them, or else the case will be dismissed without further notice.

II. CONCLUSION

Gray is not entitled to pauper status. Because the Court has not received payment of the \$400 filing and administrative fees for this civil action, Gray will be given thirty days to pay them. Failure to do so will result in the dismissal of the case without further notice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons stated above, pro se Plaintiff David Randolph Gray's application [2] to proceed *in forma pauperis* is hereby **DENIED**. Plaintiff shall pay the \$400 filing and administrative fees within thirty days of the entry of this Order. Otherwise the case will be dismissed without further notice, and this case will be closed.

SO ORDERED AND ADJUDGED, this the 26th day of June, 2018.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE