IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAY THOMAS WIDMER-BAUM,

ORDER

Petitioner,

02-C-114-C

v.

JON E. LITSCHER, Secretary,
Wisconsin Department of Corrections;
THOMAS BORGEN, Warden, Fox Lake
Correctional Institution; PHIL KINGSTON,
Warden, Columbia Correctional Institution;
PAULETTE LOCKWOOD, Registrar, Fox
Lake Correctional Institution; ELEANOR
SWOBODA, Registrar, Columbia Correctional
Institution; DELORES KESTER, Assistant
Legal Counsel, Wisconsin Department of Corrections,

Respondents.

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This is a proposed civil action for declaratory and compensatory relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Jay Thomas Widmer-Baum, who is presently confined at the "I.M.C.C." facility in Oakdale, Iowa, was confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin and at the Columbia Correctional Institution in Portage, Wisconsin at all times relevant to this complaint. Petitioner alleges

that respondents violated his Fourteenth Amendment due process rights by not providing him with the proper forms when he was served a detainer to stand trial out-of-state. Specifically, petitioner alleges that respondents violated his due process rights as well as state laws by representing that he had been offered to Iowa authorities pursuant to Article IV (temporary custody) rather than Article III of the Interstate Agreement on Detainers and by not affording him the procedural protections due an inmate who is transferred pursuant to Article IV.

Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief.

Petitioner will be denied leave to proceed in forma pauperis on his Fourteenth

Amendment due process claim because claims of illegal confinement must be brought as a petition for habeas corpus pursuant to 28 U.S.C. § 2254.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioner Jay Thomas Widmer-Baum is a state of Wisconsin inmate currently housed outside Wisconsin. Respondent Jon E. Litscher is Secretary of the Department of Corrections. Respondent Thomas Borgen is Warden of Fox Lake Correctional Institution. Respondent Phil Kingston is Warden of Columbia Correctional Institution. Respondent Eleanor Swaboda is the registrar at Columbia. Respondent Paulette Lockwood is the registrar at Fox Lake. Respondent Dolores Kester is assistant legal counsel for the Wisconsin Department of Corrections.

B. State Warrants

On January 31, 2000, respondent Lockwood received and processed several out-of-state warrants originating from Iowa. The same day, respondent Lockwood received an Interstate Agreement on Detainers Form V from the Iowa prosecuting authority, asking for temporary custody of petitioner pursuant to Article IV of the Interstate Agreement on

Detainers. On February 5, 2000, respondent Lockwood presented petitioner with the Interstate Agreement on Detainers Form I that informed petitioner of the detainer and asked whether petitioner wished to demand disposition of the matter. Petitioner did not demand disposition of the matter at that time. Respondent Lockwood did not inform petitioner of the prosecuting authority's request for temporary custody.

On January 24, 2001, petitioner demanded disposition of the detainer by sending a letter to respondent Borgen, as required by Article III of the Interstate Agreement on Detainers. On February 5, 2001, respondent Lockwood notified the prosecuting authority in Iowa that petitioner had demanded disposition of the charges giving rise to the detainer. Neither respondent Borgen nor respondent Lockwood notified petitioner that the prosecuting authority had requested temporary custody under Article IV of the Interstate Agreement on Detainers.

On May 24, 2001, petitioner was transferred to the custody of Iowa authorities to stand trial on the charges underlying the detainer. Article III of the Interstate Agreement on Detainers provides that the state in which the outstanding charges lie has 180 days from the date it receives the inmate's demand for disposition to bring the inmate to trial. Article IV of the agreement provides that the state in which the outstanding charges lie has 120 days from the date the inmate arrives in the state to bring the inmate to trial if the prosecutor has made a request for temporary custody.

After receiving a telephone call from the prosecuting authority in Iowa, respondent Swoboda signed an affidavit on August 6, 2001, in which she stated that the Interstate Agreement on Detainers Form V had been received by respondent Lockwood on January 31, 2000. In the affidavit, respondent Swoboda stated further that she did not know why the form had not been processed. Respondent Swoboda agreed that petitioner had been released to the Iowa authorities pursuant to their Interstate Agreement on Detainers Form V request even though the request had never been processed. Petitioner was never informed about the Interstate Agreement on Detainers Form V request.

Petitioner was never afforded any of the procedural safeguards of Article IV that relate to the prosecutor's Form V request, including review by the governor, a pre-transfer hearing and a right to pursue habeas corpus relief if appropriate.

When respondent Lockwood completed the form offering temporary custody to Iowa authorities, the form stated clearly that the offer was in relation to petitioner's Article III request. Respondent Swoboda's assertion that petitioner was surrendered pursuant to the unprocessed Form V caused significant prejudice to petitioner. The time for bringing petitioner to trial under Article III (petitioner's request for disposition) had expired when respondent Swoboda asserted that he had been offered in relation to the Article IV, Form V request. None of the respondents were aware of the existence of the Article IV, Form V request until August 6, 2001, so it is not possible that petitioner was surrendered under its

provisions. Absent respondent Swoboda's assertion relating to the Form V request, all charges against petitioner would have been dismissed with prejudice as required by Article V.

Petitioner filed inmate complaints with officials at Columbia and Fox Lake. Respondent Kingston dismissed one complaint without explanation. Respondent Borgen dismissed the other complaint by remaining mute and not entering any decision. Petitioner appealed both complaints; both dismissals were affirmed.

Respondents Kingston and Borgen are the custodial authorities to whom matters relating to inmate detainers are addressed. At no time did respondents Kingston or Borgen inform petitioner of the Article IV, Form V request lodged by Iowa authorities. On several occasions, petitioner asked respondents Lockwood and Swoboda to forward him a copy of Form V after he had been transferred to Iowa. Neither respondent provided petitioner a copy of the form. Petitioner mailed a specific request to the records supervisor for the contract monitoring unit at Dodge Correctional Institution, asking for a copy of Form V. To date, petitioner has never received a copy of the Form V submitted by the prosecuting authority in Iowa under which respondent Swoboda states petitioner was surrendered.

After petitioner learned of respondent Swoboda's assertion that petitioner had been surrendered pursuant to an unprocessed Article IV, Form V request for temporary custody, petitioner filed a request for a declaratory ruling pursuant to Wis. Stat. § 227.41 to

respondent Litscher. Respondent Litscher informed petitioner that § 227 was not available to inmates because of limited resources. Litscher is not permitted to removed the availability of § 227 from inmates. Litscher has argued the availability of § 227 to inmates in state and federal courts consistently.

Assistant Attorney General John Glinski contacted respondent Kester several times regarding petitioner's situation. Kester chose to advise respondents to take no action to correct their errors. Through her actions, respondent Kester interfered with the inmate complaint review system procedure.

DISCUSSION

As a preliminary matter, it must be determined whether a civil action brought pursuant to 42 U.S.C. § 1983 is the appropriate vehicle for reviewing a matter relating to alleged pre-transfer violations of the detainer agreement. The Interstate Agreement on Detainers is an interstate compact that addresses the transportation of prisoners from one state to another state for the purpose of standing trial in the second state. The Interstate Agreement on Detainers provides that when a person is incarcerated in one state and extradited to another state to stand trial, he is due certain procedural protections, such as the right to a speedy trial.

Petitioner frames his argument as a violation of due process for which he seeks

monetary relief under 28 U.S.C. § 1983 by alleging that respondents violated his due process rights as well as state laws by representing that he had been offered to Iowa authorities pursuant to Article IV (temporary custody) rather than Article III of the Interstate Agreement on Detainers and by not affording him the procedural protections due an inmate who is transferred pursuant to Article IV. However, reduced to their essence, petitioner's allegations challenge the fact or duration of his confinement in Iowa. Illegal custody is not a cognizable claim under § 1983. Because petitioner is challenging the fact of his imprisonment, he must file a petition for a writ of habeas corpus under 28 U.S.C. § 2254.

Petitioner alleges that respondents represent that he was transferred to Iowa authorities under an Article IV, Form V that was never processed. Because his transfer was allegedly made pursuant to Article IV, Iowa authorities had 120 days from the day in which he was taken into custody by Iowa officials in which to bring him to trial. Petitioner asserts that he could not have been transferred under Article IV because he was never informed of the request for temporary custody. Instead, he argues that he was transferred pursuant to Article III, under which the receiving state must bring the inmate to trial within 180 days of the date on which he demands disposition of the detainer. According to petitioner, because he demanded disposition on January 24, 2001, he should have been brought to trial on or about July 23, 2001. Although he does not allege that he was not brought to trial by this date, I understand petitioner to be making this allegation because he asserts that all

charges against him would have been dismissed with prejudice under Article V if the Article III deadline of 180 days had been respected. In essence, petitioner alleges that he would not be held in Iowa custody but for respondents' representations regarding the Article IV, Form V request.

Petitioner relies on case law from the Court of Appeals for the Seventh Circuit, as well as other circuits, for the proposition that the failure to comply with extradition procedures before transferring an inmate across state lines creates a cause of action under § 1983. He cites McBride v. Soos, 594 F.2d 610, 613 (7th Cir. 1979), in which the court of appeals noted that a "complaint which charges abuse of the extradition power by noncompliance with applicable law states a cause of action under 42 U.S.C. § 1983." Although this case seems to support petitioner's position, it was decided before Sandin v. Conner, 515 U.S. 472, 483-484 (1995), in which the court reexamined liberty interests under the due process clause of the Fourteenth Amendment. Before Sandin, courts understood protected liberty interests to arise from statutory language that created a clear right to due process. In Sandin, id. at 484, the court redefined liberty interests as "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, [. . .] nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In the prison context, such freedoms from restraint are essentially limited to the loss of good

time credits because the loss of such credit increases the length of an inmate's incarceration despite his having earned an earlier release date. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997). Because the cases on which petitioner relies pre-date Sandin, they do not implicate protected liberty interests and, accordingly, do not save petitioner from the Heck doctrine.

Under Preiser v. Rodriguez, 411 U.S. 475 (1973), a petition for habeas corpus under 28 U.S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser, 411 U.S. at 488-90). The Court of Appeals for the Seventh Circuit has held that "when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice" for failure to state a claim upon which relief may be granted rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). Thus, petitioner's claim must be denied without inquiring into its merits. Petitioner may file a petition for habeas corpus pursuant to 28 U.S.C. § 2254 after exhausting available state court remedies if he wishes to challenge the validity of his confinement.

Petitioner's allegations could make out a claim that in relying on an invalid detainer and in not following certain procedural protections, respondents violated provisions of the

Interstate Agreement on Detainers, adopted in Wisconsin as Wis. Stat. §§ 976.05 and 976.06, or provisions of the Wisconsin Administrative Code. If so, petitioner may have a claim against respondents that he could pursue in state court. He cannot bring claims of violations of state statutes or administrative regulations in federal court under 42 U.S.C. § 1983, because the federal courts are prohibited under the Eleventh Amendment from entertaining such suits. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (Ex parte Young, 209 U.S 123 (1908) does not apply in suits asserting that state officials have violated state laws or administrative regulations).

ORDER

IT IS ORDERED that

1. Petitioner Jay Thomas Widmer-Baum's request for leave to proceed in forma pauperis on his due process claim is DENIED because the claim is one that may be heard only in a habeas corpus action only after petitioner has exhausted available state court remedies;

2. A strike will not be recorded against petitioner because the ground for dismissal is not one of the grounds enumerated in § 1915(g);

3. The unpaid balance of petitioner's filing fee is $145.11; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

4. The clerk of court is directed to close the file.

Entered this 14th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge