IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS E. JONES-EL, RUFUS L. LYNCH, RAYMOND MASSIE X, and FLOYD MORGAN, and all similarly situated persons subject to Wisconsin D.O.C.,

Petitioners,

ORDER

v.

02-C-125-C

S.E. GRADY, MR. STACY-SUPERINTENDENT, ST. CROIX CORRECTIONAL CENTER, TOMMY G. THOMPSON, MICHAEL J. SULLIVAN and JON E. LITSCHER,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioners Dennis E. Jones 'El and Rufus L. Lynch are presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, and petitioners Raymond Massie X and Floyd Morgan are presently confined at the North Fork Correctional Facility in Sayre, Oklahoma. Petitioners allege that respondents (1) violated their rights under the Fourteenth Amendment equal protection and substantive due process

clauses by implementing race and violent offender status as factors in determining eligibility for the Youthful Offender Challenge Incarceration Program and (2) conspired to discriminate against them on the same basis.

Petitioners seek 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 petitioners' proposed complaint, I conclude that petitioners are unable to prepay the full fees and costs of instituting this lawsuit. Petitioners Jones 'El, Lynch and Massie X have submitted the initial partial payment required under § 1915(b)(1). Because petitioner Morgan failed to submit an initial partial payment by March 25, 2002, as required in this court's order dated March 11, 2002, I assume he wishes to withdraw from this action voluntarily and I will dismiss him from the case.

As a preliminary matter, I note that petitioners' claims are properly addressed as a civil action rather than as a habeas corpus petition. At first glance, petitioners' complaint seems to implicate issues cognizable in habeas corpus: petitioners seek enrollment in the Youthful Offenders Program, which allows successful participants to serve only 180 days of their original sentences. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973) (habeas corpus actions cover any action implicating the fact or duration of confinement). However, a closer examination of the allegations of fact reveals that participants must complete the program successfully in order to take advantage of the shortened sentence. In

other words, enrollment in the program does not guarantee a reduced length of incarceration but only makes it a possibility. Therefore, petitioners' allegations do not implicate habeas corpus. I will address petitioners' claims as a civil action brought pursuant to 42 U.S.C. § 1983.

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. After reviewing petitioners' complaint, I conclude that petitioners' request for leave to proceed in forma pauperis on their equal protection claims, substantive due process claim and conspiracy claim will be denied because they fail to state a claim upon which relief can be granted.

In their complaint, petitioners make the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioners Dennis Jones 'El and Rufus L. Lynch are inmates at Supermax Correctional Institution. Petitioner Raymond Massie X is a Wisconsin inmate currently

housed at North Fork Correctional Facility in Sayre, Oklahoma. All petitioners are African-American. Respondent S.E. Grady is the assistant superintendent and respondent Mr. Stacy is the superintendent of the St. Croix Correctional Center and the Youthful Offender Challenge Incarceration Program. At all relevant times, respondent Tommy G. Thompson was Governor of the state of Wisconsin and respondent Michael Sullivan was Secretary of the Wisconsin Department of Corrections. Respondent Jon E. Litscher is the current Secretary of the Department of Corrections.

B. Challenge Incarceration Program for Youthful Offenders

The state of Wisconsin runs a Challenge Incarceration Program for Youthful Offenders (Wis. Stat. § 302.045), commonly known as "boot camp." An inmate may participate in this program if he volunteers to do so; is under age 30; is not incarcerated for a violation of certain sections of Wis. Stat. chap. 940 or 948; has been determined to have a substance abuse problem; and has no psychological, physical or medical limitations that would preclude participation in the program. Upon completion of the program, which lasts 180 days, the inmate is guaranteed a mandatory release regardless of the length of time he has served.

No social worker or other Department of Corrections staff mentioned or offered boot camp to any of the petitioners; staff has failed intentionally to inform eligible inmates of the

program under the pretense that those inmates are not eligible. Petitioners had to find out about the program through other inmates. After learning of the program, all petitioners volunteered to participate. All petitioners are under 30 years of age (or were when they volunteered); are not incarcerated for any of the listed crimes (or were not when they volunteered); have been cited by the Department of Corrections as having substance abuse problems; and have no psychological, physical or medical problems that prevent them from enduring the program. Currently, petitioner Jones 'El is 31 years old, petitioner Lynch is 25 years old and petitioner Massie X is 30 years old. All petitioners are ready, willing and able to participate in the boot camp.

On April 28, 1994, respondent Thompson issued a directive to the entire Department of Corrections to deny mandatory releases from prison to all allegedly violent offenders and to keep those offenders incarcerated as long as possible. This directive applies to all petitioners and is still in effect. All petitioners were told that they were denied early release solely on the basis of the crime for which they were incarcerated, a denial that also bars future participation during the same incarceration. By its statutory prescription, the boot camp program does not exclude all violent offenders. For example, it does not exclude armed robbers, armed burglars or armed drug offenders. Respondent Thompson included these offenses as violent offenses when he directed respondents to deny the release of violent offenders and keep them incarcerated as long as possible.

In denying prisoners access to a program such as "boot camp" on the ground that violent offenders were not allowed, respondents were acting in furtherance of respondent Thompson's directive. Respondents denied petitioners equal access to the program because of their classification as violent offenders. Petitioners Jones 'El and Lynch are incarcerated for armed robbery. Petitioner Massie X is incarcerated for a drug conviction, but was revoked for previous weapon assaults or battery. The revocation time on the weapon assaults or battery ended long ago; the sentences were consecutive and were completed without good time. Petitioner Massie X is currently incarcerated solely for drug offenses. None of the offenses for which petitioners are incarcerated are grounds for denying them admission to the boot camp program. Respondent Thompson's directive to respondents was a call for a collective collusion of the entire Department of Corrections to undermine petitioners' rights to a mandatory release and to keep them incarcerated as long as possible. Through this agreement, respondents have arbitrarily and unequally instituted a policy and practice of excluding violent offenders from the boot camp program under the pretense that such offenders can be barred solely because of their offense.

In furtherance of this agreement, respondents have also collectively and collusively implemented race as a factor in determining eligibility for the boot camp. The number of Caucasian inmates who are allowed entry into and graduation from the program far exceeds the number of African-American inmates by both number and proportion. Approximately

50% of Wisconsin inmates are African-American and 30% are Caucasian. African-Americans who have participated in the boot camp program, which is located in a rural, white area, have all reported that program staff engage in racism and use racial slurs openly.

As a result of respondents' systematic denial of access to the boot camp program, petitioners have been denied a mandatory release and several years of freedom, time with family, further education, employment, life, liberty, property and the pursuit of happiness.

DISCUSSION

A. Equal Protection

The equal protection clause of the Fifth Amendment guarantees that "all persons similarly situated should be treated alike," City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), and prohibits state actors from applying different legal standards to similarly situated individuals because of their membership in a suspect class or "definable minority" or because of the exercise of a fundamental right, Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996); see also Smith on behalf of Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997). If a petitioner demonstrates that he has been treated differently from similarly situated persons because of his membership in a suspect class or because he exercised a fundamental right, the court applies heightened scrutiny to the constitutionality of the act or statute. Nabozny, 92 F.3d at 454. Pursuant to this strict scrutiny, racial

classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (plurality opinion). Stated another way, strict scrutiny requires a showing that the racial classification is "motivated by a truly powerful and worthy concern and . . . is a plainly apt response to that concern." Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996).

1. Race

Petitioners contend that respondents have implemented race as a factor in determining eligibility for the boot camp in violation of the equal protection clause of the Fourteenth Amendment. In support of this contention, petitioners allege that the number of Caucasian inmates who are allowed entry into and graduation from the program far exceeds the total number of African-American inmates by both number and proportion: approximately 50% of Wisconsin inmates are African-American and 30% are Caucasian.

A plaintiff seeking relief on a claim of race discrimination under the equal protection clause must allege facts suggesting that a person of a different race would have been treated more favorably. Jafree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982) ("To sufficiently state a cause of action the plaintiff must allege some facts that demonstrate that his race was the reason for the defendant's inaction."); see also Jaffe v. Federal Reserve Bank of Chicago, 586 F. Supp. 106, 109 (N.D. Ill. 1984) ("[A plaintiff] cannot merely invoke his race in the course

of the claim's narrative and automatically be entitled to pursue relief."). Petitioners' cursory allegations that their race is the reason for respondents' action cannot sustain a claim that respondents violated their Fourteenth Amendment right to equal protection of the laws. In order to state a claim, petitioners would have to allege facts suggesting that the proportion of African-American inmates accepted into the boot camp program is significantly different from the proportion of total inmates *eligible* for the program. Comparing the relative proportions of boot camp participants to the inmate population at large is not the relevant inquiry: it does not suggest that respondents treated those of different races more favorably than petitioners. Petitioners' allegations do not suggest that they have been treated differently from similarly situated inmates on the basis of their race. Accordingly, petitioners will be denied leave to proceed on their equal protection claim as it relates to race because it fails to state a claim upon which relief can be granted.

2. Violent offenders

Petitioners allege that respondents denied them access to the boot camp program on the basis of their classification as violent offenders, in violation of the equal protection clause. To show an equal protection violation, a plaintiff must demonstrate intentional or purposeful discrimination. Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). If the claim does not involve a suspect class or a fundamental right, the court will apply a rational

basis standard. Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990). Initially, I note that prisoners are not a suspect class, United States v. Vahovick, 160 F.3d 395, 398 (7th Cir. 1998), that prisoners who are incarcerated for violent offenses are not a suspect class and that prisoners do not have a fundamental right to participate in the boot camp program. This means that as violent offenders, petitioners cannot make out a claim that respondents violated the equal protection clause by not selecting them for the boot camp program as long as respondents' action is rationally related to a legitimate penological interest. At least two rational bases for banning violent offenders from the boot camp are evident. First, violent offenders may have a stronger propensity to disrupt institutional security than non-violent offenders. Second, it does not serve the public interest to allow violent offenders to participate in programs that mandate a significant reduction in the length of their sentences. Accordingly, petitioners will not be granted leave to proceed in forma pauperis on their equal protection claim as it relates to their violent offender classification because it fails to state a claim upon which relief can be granted.

B. Substantive Due Process

Because it is difficult to place responsible limits on the concept of substantive due process, the Supreme Court has directed the lower courts to analyze claims under more specifically applicable constitutional provisions before moving on to a substantive due

process inquiry. Albright v. Oliver, 510 U.S. 266, 274 (1994). "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Id. (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). In light of the eligibility requirements and respondents' selection process under which petitioners allege they were treated differently (and unfairly), this aspect of petitioners' argument is more appropriately analyzed under the more specific provisions of the equal protection clause. Accordingly, petitioners will be denied leave to proceed on their claim that their non-selection for the boot camp program violates their right to substantive due process; the claim was previously addressed as a violation of their equal protection rights.

C. Conspiracy

To establish a claim of civil conspiracy, petitioners must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect

deprivations of civil or constitutional rights may be brought in federal court under § 1983. However, a bare allegation of conspiracy is insufficient to support a conspiracy claim. See Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts from which a trier of fact could reasonably conclude that a meeting of the minds occurred among all members of the conspiracy and that each member of the conspiracy understood its objective to inflict harm on the alleged victim. See Hernandez v. Joliet Police Dept., 197 F.3d 256, 263 (7th Cir. 1999).

Nothing in petitioners' complaint supports such an inference. Petitioners have provided no explanation of how respondents would have conspired to implement either race or violent offender classification as a factor in determining eligibility for the boot camp. In addition, plaintiff has failed to allege when the conspiracy was formed. See Ryan, 188 F.3d at 860 ("A conspiracy is an agreement and there is no indication of when an agreement between [defendants] was formed."). The basis for petitioners' conspiracy claim appears to be that respondents each played a role in discriminating against petitioners on the basis of their race and violent offender status by not allowing them to participate in the boot camp program. However, because I have found that petitioners' equal protection challenge fails to state a claim upon which relief can be granted, their claim for conspiracy must also fail. In a conspiracy claim, two or more persons must act in concert to commit an unlawful act or to commit a lawful act by unlawful means. Neither scenario is present in this case.

Petitioners will be denied leave to proceed on their conspiracy claim because it fails to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Petitioners Dennis E. Jones 'El, Rufus L. Lynch and Raymond Massie X's request for leave to proceed in forma pauperis on their equal protection claims, substantive due process claim and conspiracy claim is DENIED because the claims fail to state a claim upon which relief can be granted; this case is DISMISSED;

2. Petitioner Floyd Morgan is considered to have opted out of this case before this case was considered filed;

3. A strike will be recorded against petitioners Jones 'El, Lynch and Massie X in accordance with 28 U.S.C. § 1915(g);

4. The unpaid balance of petitioners Jones 'El, Lynch and Massie X's filing fee is $124.03; these petitioners are liable jointly and severally for this amount and are to pay it

in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 26th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge