IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDRÉ CALMESE,

Petitioner,

v.

DAVID H. SCHWARZ, ADMINISTRATIVE LAW JUDGE; LYNN HIGHTIRE, PROBATION OFFICER; JULIEANNE MEYERS, PROBATION OFFICER,

Respondents.

ORDER

02-C-0221-C

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner André Calmese, who is presently confined at the Jackson Correctional Institution in Black River Falls, Wisconsin, 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. On April 29, 2002, petitioner was assessed an initial partial payment of $6.38 pursuant to § 1915(b)(1). On May 28, 2002, petitioner informed the court that he had no

money in either his regular or release account and submitted prison financial documents showing that he has a negative balance of $3.88 at the prison. I am satisfied that petitioner presently has no means with which to pay an initial partial payment of the $150 fee for filing his complaint. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

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 has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or 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 alleges that respondents are responsible for the revocation of his parole in violation of his judgment of conviction, the sentencing court's order and an "Alternative to Revocation" agreement. Because a challenge to the validity of petitioner's confinement must be brought under 28 U.S.C. § 2254, I will dismiss petitioner's § 1983 claim without prejudice. His motion for appointment of counsel will be denied as moot. In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Calmese is a Wisconsin state inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin. Respondent Schwartz is Administrator of the Wisconsin Division of Hearings and Appeals. Respondents Hightire and Meyers are probation officers.

On April 4, 1999, petitioner was sentenced to probation in Wisconsin state court for manufacturing and delivering cocaine. Petitioner received a four year imposed and stayed sentence. As one requirement of his probation, petitioner was required to undergo random drug and alcohol screening. According to the terms of petitioner's sentence, his first dirty screen would result in a 30 day sentence to the House of Corrections; his second would garner a 60 day sentence; and his third would result in the revocation of his probation, requiring him to serve his four year sentence. On March 28, 2000, in the wake of his second dirty screen, petitioner was offered an "Alternative to Revocation" in which he was offered the opportunity to stay in a drug treatment facility for 90 days. The alternative-to-revocation program is a formal revocation diversion procedure that is implemented after the revocation process has begun. The Department of Corrections forced petitioner to sign this alternative-to-revocation agreement or have his probation revoked.

After signing the agreement, petitioner was taken by respondent Meyers to the Racine Correctional Institution where he stayed for nearly five months. Rather than being released from the 90 day agreement at this point, petitioner was then taken by respondent Meyers

to the drug treatment facility, the Joshua Glover Halfway House, where he was subjected to more rules and conditions, the violation of which could lead to the revocation of his probation. Petitioner stayed at the halfway house until September 15, 2000, when he was transferred to the House of Corrections and revocation proceedings were started against him because of his failure to comply with the rules and conditions of his treatment program. At this time, respondent was offered another alternative-to-revocation agreement by respondent Hightire. Petitioner was told that if he signed the agreement he would be placed into the M.I.C.A. treatment program. Petitioner signed the agreement because he was told that M.I.C.A. was a facility for drug and alcohol treatment but it was not. The Department of Corrections overrode the sentencing court's order and judgment of conviction. The sentencing court said that petitioner's probation would be revoked for his third dirty screen, not his second. The state cannot violate the orders the court imposed on petitioner. The state's violation of the sentencing court's order also led to the violation of its own alternative-to-revocation agreement by keeping petitioner in prison for five months and only then placing him at a treatment facility. Respondent Schwarz perpetuated the violations of petitioner's rights by sustaining an administrative law judge's decision ordering the revocation of petitioner's parole.

OPINION

Petitioner filed his complaint under 42 U.S.C. § 1983. A petition for a writ of 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 v. Rodriguez, 411 U.S. 475, 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).

Petitioner's complaint does not ask explicitly for his immediate release from confinement as the remedy for his claim of unconstitutional parole revocation. Rather, it requests as relief monetary damages and "that the 14th Amendment prevail with justice." However, petitioner "cannot bring a § 1983 claim that involves issues cognizable in habeas corpus until he complies with the procedural prerequisites for relief under § 2254." Clayton-EL v. Fisher, 96 F.3d 236, 242 (7th Cir. 1996). Petitioner's claim in this case involves issues cognizable in habeas corpus because a judgment in his favor would necessarily imply the invalidity of his confinement. Although the only relief petitioner seeks are money damages and an order ensuring that "the 14th Amendment prevail with justice" (which could be read as a request for an order that he be released), petitioner's asserted injury stems from

respondents' alleged violation of the terms of his judgment of conviction, sentencing order and alternative-to-revocation agreement. Simply put, petitioner believes he is in prison because his probation was revoked prematurely . It is "[t]he injury alleged in a claim – and not the relief sought in the claim – [that] determines whether a claim implicates issues cognizable in habeas corpus." Id. Thus, the mere fact that petitioner does not make an explicit request for an injunction ordering his release does not allow him to proceed under § 1983. Because petitioner's claim that respondents are violating his judgment of conviction, sentencing order and revocation agreement implicates the validity of his confinement, he cannot proceed under § 1983 until he shows that his confinement has already been invalidated or has been called into question by a federal court's issuance of a writ of habeas corpus under 28 U.S.C. § 2254. Heck, 512 U.S. at 486-87. If petitioner wishes to pursue his claim, he will have to do so in a petition for a writ of habeas corpus after he has exhausted all the state court remedies available to him. 28 U.S.C. § 2254(b)(1)(A). Because petitioner will not be granted leave to proceed on his § 1983 claim at this time, his motion for appointment of counsel will be denied as moot.

ORDER

IT IS ORDERED that:

1. Petitioner André Calmese's request for leave to proceed in forma pauperis on his

Fourteenth Amendment claim is DENIED without prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. Petitioner's motion for appointment of counsel is denied as moot;

3. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. Because dismissal of a claim based on petitioner's failure to bring suit challenging the validity of his confinement pursuant to 28 U.S.C. § 2254 as a writ of habeas corpus is not one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g); and

5. 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