IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEAN BRIGGS,

Petitioner, ORDER

v. 03-C-278-C

DONALD W. GUDMANSON; PHIL KINGSTON;
PEGGY S. THRAN; DONNA L. BRUGGE;
LYN JENKINS; THERESA ANDERSON;
MICHAEL BAENEN; BRIAN MILLER;
STEPHEN PUCKETT; TIMIOTHY McALLISTER;
JON E. LITSCHER; BONNIE UTECH, and
GLORIA THOMAS, sued in their individual capacities,

Respondents.

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Dean Briggs, who is currently confined at the Redgranite Correctional Institution in Redgranite Wisconsin, requests leave to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915. He alleges that respondents violated his constitutional rights by extending his mandatory release date. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the 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, on three or more previous occasions, the prisoner has 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.

I conclude that petitioner's claim must be dismissed because his claim is legally frivolous. Even assuming that petitioner may seek relief under § 1983, there is no set of facts consistent with his allegations that would entitle him to relief under that statute. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). At the very most, petitioner's allegations support a state law claim, which may not be brought in federal court.

Petitioner's grievance is that he was "held a total of a Hundred and Sixty-Four (164) days in prison, against his will. The plaintiff should have been released from defendants' custody without delay on April 17, 1999." The crux of petitioner's claim is contained in paragraph 25 of his complaint:

> That on or about February 4, 1999, the plaintiff and defendant Anderson met to discus[s] his scheduled Program Review (PRC) Hearing. Defendant Anderson informed the plaintiff that she would be chan[g]ing his [mandatory release] date from

> April 17, 1999, to July 28, 1999. The plaintiff asked defendant Anderson why she was making such a change, and defendant Anderson stated, "Because Peggy Thran, in the Records Office has per-calculated 90 days of your program segregation time to exten[d] your [mandatory release] date." The plaintiff informed defendant Anderson that, defendant Thran was acting outside her authority according to s. 302.11(2) Wis. Stats. Which prohibits the computation of any program segregation time, prior to the inmate's release from program segregation. Defendant Anderson stated that she would need to discuss the matter with defendant Thran.

Petitioner's remaining allegations all stem from respondent Thran's alleged miscalculation of petitioner's mandatory release date. (Petitioner alleges that the other respondents refused to correct the mistake and that further extensions of his mandatory release date were invalid because they were made in response to conduct occurring after petitioner's original mandatory release date.)

Generally, lawsuits challenging the duration of a prisoner's confinement may not be brought under 42 U.S.C. § 1983. Heck v. Humphrey, 512 U.S. 477 (1994); Preiser v. Rodriguez, 411 U.S. 475 (1973). Rather, the appropriate device for challenging unlawful imprisonment is a petition for habeas corpus. Heck, 512 U.S. at 486-87. However, in this case, petitioner was released from prison in October 1999. A writ of habeas corpus is available only to those that are "in custody" within the meaning of 28 U.S.C. § 2241. Jones v. Cunningham, 371 U.S. 236, 238 (1963). Although a petitioner may be "in custody" even though he is no longer incarcerated, see, e.g., Maleng v. Cook, 490 U.S. 488, 491 (1989) (petitioner on parole is "in custody"), generally, one who has fully served his sentence

cannot bring a petition for habeas corpus. Crank v. Duckworth, 905 F.2d 1090 (7th Cir. 1990). In such a case, when habeas corpus is unavailable as a remedy, some authority suggests that an action under § 1983 is permissible. See Heck, 512 U.S. at 500 (Souter, J., concurring); Spencer v. Kemna, 523 U.S. 1, 23 (1998) (Ginsburg, J., concurring); DeWalt v. Carter, 224 F.3d 607, 617 (7th Cir. 2000) ("The concurring and dissenting opinions in Spencer reveal that five justices now hold the view that a § 1983 action must be available to challenge constitutional wrongs where federal habeas is not available.")

The allegations in petitioner's complaint do not reveal whether he has fully served the sentence he is challenging. Petitioner is incarcerated again and it may be as a result of a parole violation. Assuming, however, that plaintiff may no longer seek a writ of habeas corpus and assuming that actions under § 1983 are permitted in such a case, I must still dismiss petitioner's claim as legally frivolous. First, I note that to the extent the exception identified by Justices Souter and Ginsburg is the law, it applies only when a petitioner is unable to discover the constitutional violation until after full expiration of his sentence. Heck, 512 U.S. at 500 (Souter, J., concurring). In this case, plaintiff's allegations are clear that he was aware of the alleged constitutional violations at the time they occurred because he protested them vigorously. His knowledge is further demonstrated by his allegation that he filed a state petition for habeas corpus while he was still incarcerated in 1999. (This previous action could create problems for petitioner in terms of claim and issue preclusion.

Petitioner says that the issues he raises in this case "were never addressed due to plaintiff's release." Because I am dismissing petitioner's claims on its merits, it is unnecessary to determine the effect of his previous lawsuit on this case.)

However, even assuming that petitioner is not barred from seeking relief under § 1983, his allegations fail to state a claim upon which relief may be grated. In Wisconsin, prisoners sentenced between 1994 and 1999 are entitled to a presumptive mandatory release date after they serve two-thirds of their sentence. Wis. Stat. § 302.11(1). However, under Wis. Stat. § 302.11(2), this date may be pushed back for violations of prison rules. Because inmates in Wisconsin have a protected liberty interest in not having their mandatory release date extended, due process applies to disciplinary actions that result in the loss of good time credits. Santiago v. Ware, 205 Wis. 2d 295, 556 N.W.2d 356 (Ct. App. 1996); see Sandin v. O'Connor, 515 U.S. 472 (1995). Disciplinary proceedings comply with due process when the inmate receives notice of the charges, an opportunity to dispute the charges and a written statement by the factfinder of the evidence relied on and the reasons for the decision. Superintendant, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 454 (1985). In addition, the decision must be supported by "some evidence." Id.

Petitioner does not allege that any of these requirements were lacking when he was disciplined. Rather, his contention is that respondents violated Wisconsin statutes and regulations when they calculated changes in his mandatory release date before he was

released from segregation. Even assuming that plaintiff is correct that respondents violated state law, § 1983 applies only to violations of *federal* law. Hamlin v. Vaudenberg,95 F.3d 580, 583 (7th Cir. 1996). Absent facts indicating a violation of petitioner's constitutional rights, this court cannot exercise jurisdiction over his claim.

ORDER

IT IS ORDERED that petitioner Dean Briggs' request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED as legally frivolous. A strike is recorded against plaintiff pursuant to 28 U.S.C. § 1915(g). The unpaid balance of petitioner's filing fee is $145.03; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

Entered this 26th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge