IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY M. SCHREIBER,

Petitioner,

v.

COLUMBIA COUNTY, WISCONSIN, Columbia County Sheriff STEVE ROWE, Columbia County Sheriff's Department Officers DARREL KUHL, ANN FISCHER, DAVID DuVALL, JIM STILLSON, ROB ZANON, Columbia County Circuit Court Judges RICHARD REHM, JAMES MILLER, Columbia County District Attorney JANE KOHLWEY, Columbia County Corporation Counsel MARK BENNETT, Wisconsin Department of Corrections Probation Agent LORI VINGE, Wisconsin Department of Corrections Secretary LITSCHER, Director of Detention Facilities for Wisconsin Department of Corrections MARTY ORDINAS, Child Support Agent MARY ANN KAUFMANN, Public Defenders MARC GUMZ, DAVID KNAAPEN and the STATE OF WISCONSIN,

Respondents.

OPINION AND ORDER

03-C-178-C

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This is a proposed civil action for injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Jeffrey Schreiber requests leave to proceed in

forma pauperis, 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 fees and costs of instituting this lawsuit. In addressing any pro se litigant's complaint, the court must construe the complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), and grant leave to proceed in forma pauperis unless the action is frivolous or malicious, fails to state a claim upon which relief may granted or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

In his proposed complaint, petitioner alleges that from August 14, 2001, to February 3, 2002, respondents Darrel Kuhl and Steve Rowe "withheld information about the source and contents of a detainer [from Indiana] lodged against a prisoner and failed to inform the prisoner of the right to seek disposition of the underlying charges." He further alleges that the remaining respondents knew that he was seeking disposition of the charges but they "failed or refused to cooperate with the appropriate agencies, departments, or employees of the state and party states." As a result, petitioner alleges, he was "jailed under increased security," unable "to address the underlying charges in a timely fashion" and unable to participate in various rehabilitative programs.

In a letter accompanying his complaint, petitioner acknowledges that he submitted a similar complaint in case no. 02-C-351-C, which was dismissed because petitioner's allegations called into question the validity of his confinement in Indiana. See Schreiber v.

Kuhl, No. 02-C-351-C, Aug. 5, 2002 Order. However, petitioner has made it clear in his new complaint that he was never confined in Indiana or convicted there, but that the charges were dismissed "because of violations to time limits afforded through the State's rules of court regarding speedy trial time limits and violations of the agreement on detainers." Because a ruling in favor of petitioner would not call into question the validity of his confinement, he is not barred by Heck v. Humphrey, 512 U.S. 477 (1994), from bringing a claim under § 1983. The question is whether the allegations in petitioner's complaint state a claim upon which relief may be granted. In other words, I must decide whether there is any set of facts consistent with petitioner's allegations that would entitle him to relief. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002).

Petitioner contends that respondents' conduct violated his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Presumably, petitioner means to contend that respondents have violated his rights to due process, to a speedy trial and to be free from cruel and unusual punishment. In addition, he contends that they violated the Interstate Agreement on Detainers. As relief, petitioner seeks money damages and criminal prosecution of respondents. He cannot obtain the second category of relief in this court. Regardless whether petitioner succeeds on his claim, this court is not empowered to initiate criminal proceedings against respondents or anyone else. That decision is within the exclusive province of the prosecutor. Bordenkircher v. Hayes, 434

U.S. 357, 364 (1978). Thus, petitioner is limited to seeking monetary compensation for the violation of his rights.

Eighth Amendment

Petitioner's claim that respondents violated his right be free from cruel and unusual punishment has no merit. The Eighth Amendment prohibits the "wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Examples of this include handcuffing an inmate to a hitching post for seven hours in the hot sun, without bathroom breaks and with little water, Hope v. Pelzer, 536 U.S. 730 (2002), assaulting an inmate without provocation, Hill v. Shelander, 992 F.2d 714, 717 (7th Cir. 1993), and refusing to provide an inmate with prescribed pain medication. Walker v. Benjamin, 293 F.3d 1030, 1040 (7th Cir. 2002). If respondents refused to provide petitioner with information, jailed him under increased security or denied him participation in rehabilitation programs, their actions would not amount to an Eighth Amendment violation.

Speedy Trial

Petitioner's claim under the Sixth Amendment is slightly more complicated, but it fares no better. Although I have not identified any case in which a court held expressly that a plaintiff may recover money damages for speedy trial violations under 42 U.S.C. § 1983,

the court of appeals has implied that damages could be awarded in some circumstances. Blake v. Katter, 693 F.2d 677 (7th Cir. 1982), overruled on other grounds, Wilson v. Garcia, 471 U.S. 261 (1985). However, even assuming that petitioner could hold Wisconsin officials liable for the delay of his trial in Indiana, petitioner cannot show a violation of his Sixth Amendment right to a speedy trial. To establish a violation, petitioner must show that he was prejudiced by the delay. Reed v. Farley, 512 U.S. 339, 353 (1994). As a general rule, in this context, "prejudice" means prejudice to an individual's ability to present a defense and receive a fair trial. See, e.g., Barker v. Wingo, 407 U.S. 514 (1972) (concluding that prejudice to defendant was "minimal" because all of defendant's witnesses were still available and lapses in memory were minor, even though trial had been delayed more than four years and defendant spent ten months in jail before trial). Thus, it is difficult for petitioner to argue that he was prejudiced when the issue of the fairness of his trial became moot when his case was dismissed. Although the court of appeals has recognized that pre-trial incarceration may satisfy the prejudice requirement, Blake, 693 F.2d at 682 n.4, in petitioner's case, he would have been detained anyway because he was serving a sentence in Wisconsin.

Furthermore, even if I set aside problems of prejudice, petitioner must still show that he was subjected to an "unreasonable delay." United States v. Loud Hawk, 474 U.S. 302, 657 (1986). Petitioner alleges that respondents are responsible for the delay, but he also

alleges that they withheld information from August 2001 to February 2002, less than five months. The Supreme Court has rejected claims of speedy trial violations when the delay has been much longer. See United States v. Ewell, 383 U.S. 116 (1966) (19 months); Barker, 407 U.S. 514 (over four years). As a result, petitioner cannot show a violation of his Sixth Amendment right to a speedy trial. I will deny petitioner leave to proceed in forma pauperis on this claim.

Due Process

Petitioner contends that respondents violated his right to due process by withholding information about the contents of the detainer and by failing to inform him of his right to seek disposition of the charges. In the context of criminal proceedings, in certain circumstances the prosecutor's failure to provide the accused with evidence or other information may violate due process. See, e.g., Kyles v. Whitley, 514 U.S. 419 (1995) (accused's right to due process violated when prosecutor suppressed evidence that might have changed result of trial); Crivens v. Roth, 172 F.3d 991 (7th Cir. 1999) (prosecutor violated accused's right to due process when he failed to disclose criminal records of key eyewitnesses). These decisions are based on the principle that an accused does not receive a fair trial when exculpatory evidence is hidden from him and from the jury. However, I am unaware of any authority that has interpreted the Constitution as requiring a custodian to

inform an accused of the contents of another state's detainer. Although I have no doubt that receiving full disclosure of the nature of a detainer serves important interests, failure to provide such notice does not compromise an accused's right to prepare a defense in the same way as an inadequate charging instrument or the suppression of the identity of a witness who could provide helpful testimony. Thus, to the extent that respondents violated the law by withholding information, it is to the Interstate Agreement on Detainers that petitioner must look for a remedy.

Similarly, there are instances in which the Constitution requires public officials to inform an accused of his or her rights, see Miranda v. Arizona, 384 U.S. 436 (1966) (suspect in custody must be informed of right to remain silent and right to attorney before being interrogated); United States v. Ruiz, 536 U.S. 622 (2002) (before defendant pleads guilty he or she must be informed of right to jury trial), but only in instances in which there is a danger that lack of knowledge will lead to an unknowing waiver of a Constitutional right, such as the right to remain silent or the right to a trial by jury. In this case, however, there is no danger of a waiver. Regardless whether petitioner was told of his right to a speedy trial or to seek disposition of the charges against him in Indiana, he did not lose his ability to exercise either of these rights as a result of respondents' acts. Accordingly, I cannot conclude that respondents violated petitioner's constitutional rights by withholding information regarding the detainer or failing to inform him of his right to seek disposition of the charges

in the detainer.

Interstate Agreement on Detainers

The Interstate Agreement on Detainers is a compact among 48 states, including Wisconsin, and the federal government. Carchman v. Nash, 473 U.S. 716, 719 (1985); Wis. Stat. §§ 976.05 and 976.06. Under the agreement, when a state has pending charges against an individual who is already incarcerated in another state, the state with pending charges ("the receiving state") may file a request with the state where the accused is presently incarcerated ("the sending state") to hold the accused for the receiving state or to notify it when the accused's release is imminent. New York v. Hill, 528 U.S. 110, 111 (2000). Such a request is called a detainer. Once a detainer has been filed, the agreement requires the accused's present custodian to "promptly inform the prisoner of the source and contents of any detainer lodged against the prisoner" and to "inform the prisoner of the prisoner's right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." 18 U.S.C. app. 2, § 2, art. III(c). Once notice has been given, the prisoner may demand a trial on the charges identified in the detainer. 18 U.S.C. app. 2, § 2, art. III(a). If a receiving state chooses to accept custody, it has 180 days to bring the prisoner to trial. Id. The agreement recognizes the view of Congress and the party states that detainers "produce uncertainties which obstruct programs of prisoner treatment and

rehabilitation," 18 U.S.C. app. 2, § 2, art. I, and that an "inmate who has a detainer against him is filled with anxiety and apprehension," Carchman, 473 U.S. at 720. Thus, the purpose of the agreement is "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints." 18 U.S.C. app. 2, § 2, art I.

Because the agreement is sanctioned by Congress, its application and enforcement present federal questions of law. Carchman, 473 U.S. at 719; see also Reed, 512 U.S. at 347 (holding that violations of Interstate Agreement on Detainers are cognizable under 28 U.S.C. § 2254 in some circumstances). Further, in Cuyler v. Adams, 449 U.S. 433 (1981), the Court recognized that a violation of the agreement could form the basis of a cause of action under 42 U.S.C. § 1983, which imposes liability on persons who, under color of state law, deprive others of rights "secured by the Constitution and laws" of the United States. See also Cross v. Cunningham, 87 F.3d 586 (1st Cir. 1996) (stating that provisions of Interstate Agreement on Detainers may be enforced under § 1983). Since 1981 the Supreme Court has narrowed the availability of § 1983 as a remedy for non-constitutional violations. See, e.g., Gonzaga University v. Doe, 536 U.S. 273 (2002) (students may not bring claim under § 1983 for violations of the Family Educational Rights and Privacy Act). However, the Court has not revisited the holding in Cuyler or suggested that it was decided wrongly. Accordingly, I conclude that Cuyler is still controlling. See Rodriguez de Quijas

v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")

I understand petitioner to allege that respondents Rowe and Kuhl violated his rights under Article III(c), which required his custodian to"promptly" inform him of the "source and contents" of the detainer and his "right to make a request for final disposition." Although petitioner does not identify where he was being held in Wisconsin, from the list of respondents on his complaint, it is reasonable to infer that he was incarcerated at the Columbia County jail when the detainer was lodged. Thus, his custodian was respondent Steve Rowe, whom petitioner identifies as the sheriff of Columbia County. See Townsend v. Sain, 372 U.S. 393 (1963) (custodian of inmate in county jail is sheriff).

Petitioner alleges that he was kept in the dark about the source and contents of the detainer and his right to request final disposition for five months. If petitioner can prove this allegation, he may be able to show that respondent Rowe failed to "promptly inform" him of this information, in violation of Article III(c) of the agreement. Accordingly, I will grant petitioner leave to proceed on this claim against respondent Rowe. However, because respondent Kuhl was not petitioner's custodian, he had no duty under the agreement to promptly inform petitioner of his rights under Article III(c). Therefore, I will not allow

petitioner to proceed against respondent Kuhl on this claim.

With respect to the remaining respondents, petitioner alleges that they "failed or refused to cooperate with the appropriate agencies, departments, or employees of the state and party states." In order to state a claim, petitioner must allege sufficient facts to put respondents on notice of the claim so that they can file an answer. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). He has failed to provide the requisite notice because he does not explain what he means when he alleges that respondents would not "cooperate" with Indiana. However, allowing petitioner to amend his complaint to include more specific allegations regarding respondents' failure to cooperate would be futile. The Interstate Agreement on Detainers places obligations on a prisoner's custodian, not on public defenders, probation agents or anyone else that petitioner has named in his complaint. Accordingly, I will deny petitioner's request for leave to proceed against all respondents, with the exception of respondent Rowe.

ORDER

IT IS ORDERED that

1. Petitioner Jeffrey Schreiber's request for leave to proceed in forma pauperis on his claim that respondent Steve Rowe failed to promptly inform him of the source and contents of the detainer lodged against him in Indiana and of his right to make a request for a final

disposition of the complaint from Indiana, in violation of Article III(c) of the Interstate Agreement on Detainers, is GRANTED.

2. Petitioner is DENIED leave to proceed with respect to his remaining claims and these claims are DISMISSED for failure to state a claim upon which relief may be granted. Respondents Columbia County, Wisconsin, Darrel Kuhl, Ann Fisher, David DuVall, Jim Stillson, Rob Zanon, Richard Rehm, James Miller, Jane Kohlwey, Mark Bennett, Lori Vinge, Secretary Litscher, Marty Ordinas, Mary Ann Kaufmann, Marc Gumz, David Knaapen and the State of Wisconsin are DISMISSED from this case.

3. Petitioner is responsible for serving his complaint upon respondent Rowe. A memorandum describing the procedure to be followed in serving a complaint on a county official is attached to this order, along with a copy of petitioner's complaint and blank waiver of service of summons forms.

4. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to defendant or to defendant's attorney.

6. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his

documents.

Entered this 8th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge