

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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LEE H. CALHOUN, JR.,

Petitioner,

v.

MARYLN BACHHUBOR, KRISTY  
ZANDER, TOM MARQUARDT and  
MIKE WILLIAMS,

Respondents.  
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ORDER

08-cv-128-bbc

Petitioner Lee H. Calhoun, Jr., a prisoner at the Shawano County jail in Shawano, Wisconsin, has filed a complaint pursuant to 42 U.S.C. § 1983. He asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has paid the \$37.37 initial partial payment he was assessed in accordance with § 1915(b)(1).

Because petitioner is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915(e)(2). In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the

complaint if, even under a liberal construction, it is legally frivolous or 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. 42 U.S.C. § 1915(e).

I conclude that petitioner's claim that he is entitled to money damages from respondents for their failure to enroll him in an alcohol and drug treatment program does not state a claim upon which relief may be granted under § 1983, and that any claim petitioner might have that his current custody is illegal is not properly raised in this case. Rather, it is a claim that may be raised only in a habeas corpus action under 28 U.S.C. § 2254.

In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

### A. Parties

Petitioner Lee H. Calhoun, Jr. Is a prisoner at Shawano County jail in Shawano, Wisconsin.

Respondents Maryln Bachhubor, Kristy Zander, Tom Marquardt and Mike Williams are probation officers employed by the Wisconsin Department of Corrections in Marathon County.

### B. Petitioner's Incarceration History

In October 2004, petitioner was held in jail for ten days and then released into a transitional living program house. Respondent Bachhubor would not let petitioner move in with his wife or get his own residence. Four months later, petitioner was caught drinking and was put in jail for six months for violating his probation. Although petitioner's lawyer gave respondent Bachhubor numerous suggestions for rehabilitation programs in which petitioner could obtain alcohol treatment, Bachhubor refused to provide petitioner with any treatment during his six months in jail.

In December 2004, petitioner was allowed to transfer to Milwaukee to serve the probation portion of his sentence.<sup>1</sup> In March 2005, petitioner missed a scheduled visit with his probation officer because of a job related commitment. Respondent Bachhubor called petitioner and told him to report to his Milwaukee probation officer or face more jail time.

In October 2005, petitioner's mother was diagnosed with cancer. Petitioner was allowed to transfer to Ohio to continue to serve his probation. (Although petitioner does not allege as much, I infer that he transferred to Ohio to be closer to his mother.) In February 2006, proceedings were commenced to revoke petitioner's probation. Petitioner succeeded in defending the charges brought against him. Instead of allowing petitioner to

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<sup>1</sup>Although petitioner alleges that this date was December 2005, I infer from the remainder of his allegations that the December 2005 date was a writing error.

return to Ohio after his release, however, respondent Bachhubor placed him on work release for six months.

In November 2006, petitioner's probation officer was three and a half hours late for a home visit. Because the probation officer was so late, petitioner left for work before his probation officer arrived. This failed home visit between petitioner and his probation officer led to new revocation proceedings. For 134 days, petitioner contested his probation revocation. Respondent Bachhubor told petitioner that he would remain in jail if he did not agree to enter a transitional living program upon his release. Petitioner's probation was not revoked and he was released on the condition that he participate in a transitional living program.

Eventually, petitioner got a job and an apartment in Ringle, Wisconsin. His probation officer repeatedly made home visits at outlandish hours of the night despite knowing that petitioner worked at night. Petitioner is scheduled to finish his probation in May 2008. Now, however, he is involved in revocation proceedings for an alcohol related incident. He still has not been offered any alcohol treatment programs.

## DISCUSSION

It is difficult to understand precisely what petitioner is complaining about in this action. As nearly as I can make out his claim, he is unhappy that while he was released under probation status, his probation officers did not visit him on time or at what he would consider reasonable hours of the day, refused him certain freedoms he would have liked and failed to enroll him in an alcohol and drug treatment program that may have benefitted him. As compensation for these alleged shortcomings, petitioner asks in his complaint for “release from probation and parole to get on with [his] life,” and money damages for “loss of wages, stress and emotional damages.”

When a prisoner seeks a shortening of the length or duration of his confinement, his sole remedy is to file a petition for a writ of habeas corpus under 28 U.S.C. § 2254 after he exhausts his available state court remedies. Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)(habeas corpus under § 2254 is exclusive remedy for state prisoner seeking immediate or speedier release). Here, however, it is impossible to understand why petitioner is asking for such relief. Nothing in the facts he alleges suggests that his current custody is illegal. Indeed, he admits that he is being held in jail pending revocation proceedings for an “alcohol related incident,” that is, for an incident relating to his own actions, and not an allegedly improper action taken by one or more of the respondents. Nevertheless, to the extent that petitioner may believe he is entitled to release from his present custody for some reason he

has not adequately explained in his complaint, he will have to raise the claim in a petition for a writ of habeas corpus under 28 U.S.C. § 2254 after he exhausts his available state court remedies.

The primary injury alleged in this case appears to arise out of respondents' alleged failure to enroll petitioner in an alcohol and drug abuse treatment program when they had a chance to do so. A decision whether petitioner has a constitutional right to such treatment now or in the past would not call into question the validity of his confinement. Therefore, I may consider the claim in the context of this civil action. Clayton-El v. Fisher, 96 F.3d 236, 242 (7th Cir. 1996) (injury in suit determines whether claim is cognizable in habeas corpus or should instead be brought as civil action.)

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV, § 1. A procedural due process claim against government officials requires proof of inadequate procedures as well as interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The Supreme Court has held that a prisoner's liberty interests "will be 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." Sandin v. Conner, 515 U.S. 472,

483-484 (1995) (citation omitted). In other words, liberty interests are implicated when a prisoner's sentence is prolonged or he is subjected to conditions that are not the typical ones encountered by prisoners. In this case, petitioner appears to be contending that he was deprived of due process when he was denied access to a drug and alcohol treatment program. But the law regarding such claims runs squarely against petitioner. The Court of Appeals for the Seventh Circuit has held expressly that participation in a rehabilitative program "is a privilege that the due process clause does not guarantee." Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996). Without a valid liberty interest, petitioner has no procedural due process claim. Therefore, petitioner's request for leave to proceed in forma pauperis on his claim that the respondents violated his Fourteenth Amendment rights by failing to enroll him in a drug and alcohol treatment program will be denied and this case will be dismissed.

## ORDER

IT IS ORDERED that

1. Petitioner Lee H. Calhoun Jr. is DENIED leave to proceed in forma pauperis on his claim that he is entitled to money damages from respondents Maryln Bachhubor, Kristy Zander, Tom Marquardt and Mike Williams for their alleged violation of his Fourteenth Amendment rights because this claim fails to state a claim upon which relief may be granted.
2. Petitioner is DENIED leave to proceed in forma pauperis on his claim that he is

entitled to release from his current custody because that is a claim that may be raised only in a petition for a writ of habeas corpus after he exhausts his available state court remedies.

3. The unpaid balance of petitioner's filing fee is \$ 312.63; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2)

4. A strike is recorded against petitioner in accordance with 28 U.S.C. § 1915(g);

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

Entered this 18th day of March, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge