

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

ANTHONY CORDOVA,

Petitioner,

ORDER

v.

02-C-105-C

GANG MEMBER DENNIS JONES;
GANG MEMBER ARTHUR COX;
GANG MEMBER BERRELL FREEMAN;
GANG MEMBER ROBERT ORR;
RICHARD HOLLSTEN;
GANG MEMBER LOUIS MOORE;
GANG MEMBER ROY PATTERSON;
GANG MEMBER JOSEPH KOUTNIK;
GANG MEMBER AMOS CRAIG;
RAYMOND THOMAS;
GANG MEMBER REYNALDO CASTELLANO;
and GANG MEMBER EDDIE CANNON,
in their personal and individual capacities,

Respondents.

This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to state law, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that respondents are violating his

rights under the Eighth Amendment, RICO and various state laws and regulations by harassing and threatening him.

Petitioner 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. In addition, from his trust fund account statement, it appears 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, Fed. R. Civ. P. 12(h)(3) provides that "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Even construing the complaint liberally, I am convinced that this court lacks subject matter jurisdiction over petitioner's Eighth Amendment and RICO claims. Because respondents in this case are inmates and not state or federal officials, this court lacks jurisdiction to hear petitioner's Eighth Amendment cruel and unusual punishment claim under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Because petitioner's allegations do not suggest that he was

injured in his business or property or that respondents have engaged in a pattern of racketeering activity, this court lacks jurisdiction to hear his RICO claim. Finally, because I decline to exercise supplemental jurisdiction over petitioner's state law claims, they will be dismissed.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Anthony Cordova is an inmate at Supermax Correctional Institution. All respondents are inmates at Supermax who are members of various street and prison gangs, identify themselves as terrorists and are critical of the United States. In general, respondents support the terrorist bombings of the World Trade Centers on September 11, 2001. All respondents have been harassing petitioner and some have been threatening petitioner's life.

Respondent Dennis Jones fabricated a lie that petitioner had been the cause of some of his Muslim "brothers" receiving additional sentences for the purpose of harassing petitioner and causing him mental pain and suffering. After petitioner and respondent Jones were both moved from alpha to foxtrot units, respondent Jones called on other gang members to harass petitioner for no reason at all.

After petitioner and respondent Arther Cox were moved to foxtrot unit, respondent Cox was given an order by gang member Donald Lee to stop talking to petitioner and to

harass him or else Lee would have Cox assaulted by other gang members. When respondent Berrell Freeman was moved to petitioner's unit, he was also instructed by Lee to harass petitioner, which he did. Respondent Freeman had no reason to harass petitioner other than the fact that he had been ordered to do so by gang members who outnumbered him. Respondent Robert Orr was instructed by Tony Eppenger, a known gang member, to harass petitioner, which he did. Respondent Richard Hollsten was instructed by Lee to harass petitioner, or else Lee would have other gang members harass Hollsten. Respondent Hollsten chose to harass petitioner.

Respondent Raymond Thomas saw how the gang members treated petitioner for refusing to participate in harassing staff and other inmates and decided to harass petitioner. Respondent Thomas heard Lee and Glenn Turner calling other gang members names like "punk ass nigger" and other foul names. To be on the gang members' good side, respondent Thomas started harassing petitioner. To let the gang members know that he was helping them, he started calling petitioner names.

Petitioner never had contact with respondent Louis Moore before being moved to foxtrot unit. The same day petitioner moved into the foxtrot unit, respondent Moore began calling him foul names that would make his friends laugh. The name-calling is an everyday ritual.

Petitioner has known respondent Roy Patterson for a number of years. Respondent

Patterson sides with the gang that has the biggest membership. From the first day that petitioner was moved to foxtrot, respondent told other inmates that petitioner was a homosexual. Respondent Patterson did this because petitioner had filed a civil action against other gang members for harassing him.

Respondent Joseph Koutnik involves himself in gangs for protection. In return, he does what other gang members tell him to do. Respondent Koutnik helps gang members harass petitioner, making threats on petitioner's life.

Petitioner has known respondent Amos Craig since 1997. At the time, respondent Craig was chief of a prison gang and threatened to kill petitioner. Respondent Craig has joined the other inmates in calling him names to harass him.

Petitioner knows respondent Eddie Cannon from the time they both were incarcerated at Green Bay Correctional Institution. Respondent Cannon has been one of the instigators, harassing petitioner and convincing others to harass him.

Petitioner does not know respondent Reynaldo Castellano and he has not given respondent Castellano a reason to harass him. Respondent Castellano was given orders by inmates Glenn Turner and Anthony Dangerfield to harass petitioner, which he has done on a consistent basis. Respondent Castellano has called petitioner foul names.

Petitioner sent the sergeants on all three shifts an interview request informing them of the harassment. Even so, the harassment continues daily even as petitioner was writing

this complaint. On October 4, 2001, petitioner sent an interview request to clinical services. It's to the point that petitioner starts to shake uncontrollably each time respondents start to harass him. On October 5, 2001, petitioner filed a complaint with the inmate complaint examiner.

Petitioner sent each respondent a "notice" stating that if they continued to harass him, he would seek judicial redress in the courts. Respondents just laughed and said, "fuck you white bitch, go ahead and sue me." Respondents' harassment of petitioner has caused him to suffer mental anguish and has caused him to attempt suicide on three occasions: January 23, 2002, February 20, 2002 and March 8, 2002. Harassment is not synonymous with inconvenience or annoyance but is persistent.

DISCUSSION

A. Eighth Amendment Cruel and Unusual Punishment

Petitioner alleges that respondents violated his rights under the Eighth Amendment's prohibition against cruel and unusual by harassing him and seeks damages for this alleged violation under 42 U.S.C. § 1983. Petitioners in federal court actions may sue other citizens or entities for alleged constitutional violations only when those citizens or entities are state or federal actors. The defendant must be "acting under color of state law" in order for a petitioner to bring an action alleging a constitutional violation under 42 U.S.C. § 1983.

Federal officials may be sued for constitutional injuries under 28 U.S.C. § 1331. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). In other words, the Constitution protects citizens from unconstitutional acts performed by individuals and entities who are acting under state or federal authority only. Because respondents in this case are inmates and not state or federal officials, this court lacks jurisdiction to hear petitioner's Eighth Amendment cruel and unusual punishment claim under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. I note also that even if petitioner could implicate state actors by virtue of the allegation that he told three sergeants about the harassment and they failed to stop it, thereby conferring jurisdiction on the court, petitioner's allegations fail to suggest that respondents are violating the "contemporary standards of decency," Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986), required to make out a constitutional violation under the Eighth Amendment.

B. RICO Claim

Petitioner alleges that respondents are violating RICO, 18 U.S.C. §§ 1961-1968, by harassing him. Federal courts lack subject matter jurisdiction over a complaint if the claims are "wholly insubstantial and frivolous." Bell v. Hood, 327 U. S. 678, 682-83 (1946); Crowley Cutlery Co. v. United States, 849 F.2d 273, 276-77 (7th Cir. 1988); Malak v. Associated Physicians, Inc., 784 F.2d 277, 279-80 (7th Cir. 1986). Construing petitioner's

pro se complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), petitioner's allegations fail to suggest that his RICO claims are anything but wholly insubstantial and frivolous.

In order to bring a civil suit under RICO, a plaintiff must demonstrate that he has been "injured in his business or property," 18 U.S.C. § 1964(c), and that this injury was caused by a pattern of racketeering activity that constitutes a RICO violation. See, e.g., Bastian v. Petren Resources Corp., 892 F.2d 680, 686 (7th Cir. 1990). In general, this requirement bars tort and personal injury claims. In this case, petitioner has alleged that respondents' calling him names and threatening his life have caused him mental anguish and to attempt suicide on three occasions in the past two months. Although it is unfortunate that respondents are treating petitioner in this manner, petitioner's allegations do not suggest that his business or property has been damaged. Instead, petitioner is attempting to fashion a traditional personal injury claim as a RICO claim. In addition, other than broad allegations that respondents are gang members who support terrorist activity, petitioner's allegations do not suggest the pattern of racketeering activity required under RICO. Petitioner's allegations fall far short of making out a RICO claim: they are wholly insubstantial and frivolous. Petitioner's RICO claims will be dismissed because this court lacks subject matter jurisdiction over it.

C. State Law Claims

I understand petitioner to allege that respondents are violating various state laws and regulations by harassing and threatening him. Because petitioner will not be allowed to proceed on his constitutional and federal law claims, I decline to exercise jurisdiction over his various state law claims. Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) ("a district court ha[s] the discretion to retain or to refuse jurisdiction over state law claims").

ORDER

IT IS ORDERED that

1. Petitioner Anthony Cordova's Eighth Amendment cruel and unusual punishment claim and his RICO claims are DISMISSED because this court lacks subject matter jurisdiction over the claims;
2. I decline to exercise jurisdiction over petitioner's state law claims;
3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted" Because the state law claim does not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g);
4. 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) when the funds become available;

5. The clerk of court is directed to enter judgment for respondents and close this case.

Entered this 15th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge