IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAHEED TAALIB'DIN MADYUN (Spokesperson), McKINLEY RILEY, and JEFFREY JONES, et al.,

ORDER

Plaintiffs,

02-C-0043-C

v.

JON E. LITSCHER, DEIDRA MORGAN, LAWRENCE STAHOWIAK, BUD WALDRON, SUE SCHMEICHEL, MICHAEL SULLIVAN, MICHAEL BARRON, TOMMY G. THOMPSON, CINDI O'DONNELL, PATRICIA LIPTON, GEORGE LIGHTBOURN, JEAN C. LEDFORD, JOHN RAY and ERIC O. STANCHFIELD, et al.,

Defendants.

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This is a proposed civil action for injunctive and declaratory relief brought pursuant to 42 U.S.C. § 1983. Plaintiffs Madyun, Riley and Jones are presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, and wish to bring this suit as a class action, on behalf of themselves and other prisoners similarly situated. Although plaintiffs have paid the full $150 filing fee, because they are prisoners the court must screen

the complaint, identify the claims and dismiss any claim that is frivolous, malicious or is not a claim upon which relief may be granted. See 28 U.S.C. §§ 1915A(a), (b). Also before the court are plaintiffs' motions for appointment of counsel and class certification.

In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this finding in the present action for two reasons. First, plaintiffs are not represented by an attorney, and it appears from the complaint and from the circumstances that the named plaintiffs are not attorneys. Because absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. See Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Craig v. Cohn, 80 F. Supp. 2d 944, 946 (N.D. Ind. 2000); Ethnic Awareness Org. v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512, 514-15 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Second, even lawyers may not act both as class representative and as counsel for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the lawyer on behalf of the class members. See, e.g., Sweet v. Bermingham, 65 F.R.D. 551, 552 (1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 n.5

(7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978); Conway v. City of Kenosha, 409 F. Supp. 344, 349 (E.D. Wis. 1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, class certification will be denied. In addition, because I find that all of plaintiffs' constitutional and federal statutory claims are either legally frivolous or fail to state a claim upon which relief may be granted, plaintiffs claims will be dismissed and their motion for appointment of counsel will be denied.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). In their complaint, plaintiffs make the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Plaintiffs Madyun, Riley and Jones are state inmates at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Defendant Litscher is Secretary of the Department of Corrections. Defendant Stahowiak is the prison registrar at Oshkosh Correctional Institution. Defendant Barron is a Milwaukee County Circuit Court judge. Defendant Schmeichel is the prison registrar at Green Bay Correctional Institution, where defendant Waldron is a social worker. Defendant Sullivan is the former parole chair of Wisconsin's Department of Corrections. Defendant Morgan is a member of the parole commission.

Defendant Thompson is a former Wisconsin governor. Defendant Ray is a corrections complaint examiner. Defendants Stanchfield, Lipton, Lightbourn and Ledford are all trustees of the Wisconsin Investment Board. Defendants Stanchfield and Lightbourn are also members of the Wisconsin Retirement System, where defendant Lipton is the executive director and defendant Ledford is chief investment officer.

B. Parole Issues

Plaintiff Madyun was convicted in state circuit court and sentenced to life plus 170 years' imprisonment on March 3, 1983. Plaintiff Madyun was not present when defendant Barron sentenced him. At sentencing, defendant Barron sent a personal message to the court commission that plaintiff Madyun be denied his minimum parole eligibility dates. Plaintiff Madyun was supposed to begin serving his life sentence on the afternoon of sentencing and serve 11 years and three months until parole eligibility, at which point he would begin serving his other sentences, but this did not happen. Plaintiff Madyun's sentence credit was carried over from 1982 for the time he spent in the Milwaukee County jail. In November 1994, after he had served 11 years and three months and was therefore eligible for parole on his life sentence, plaintiff Madyun wrote prison registrar Pamela S. Knick to ask why he was being denied a parole hearing. On November 30, 1994, Knick informed plaintiff that he was being denied parole and was doing mandatory release on all his sentences in accordance with

the sentencing judge's orders.

On April 28, 1994, before plaintiff Madyun wrote to Knick, defendant Thompson wrote a confidential letter to defendant Sullivan, then secretary of the parole commission, in which Thompson informed Sullivan that he was to implement a policy of ending parole for prisoners retroactively. In the letter, defendant Thompson noted that his legal counsel had warned him that such a policy would be unconstitutional but Thompson nevertheless instructed defendant Sullivan to do whatever it took to implement the policy.

Plaintiff Madyun next wrote defendant Barron asking that he clarify the sentence he imposed on Madyun and whether he intended that Madyun's parole eligibility be arbitrarily denied. Defendant Barron never responded. Plaintiff Madyun wrote several letters to the parole clerk at the Green Bay Correctional Institution, where Madyun was then incarcerated, asking for clarification of his sentence and pointing out that the parole commission would lose jurisdiction over him after June 3, 1998. The parole commission responded to these letters by telling plaintiff Madyun to discuss the matter with his social worker. Plaintiff Madyun did this, but his social worker, defendant Waldron, never clarified or investigated the matter.

In January 1999, plaintiff Madyun filed a petition for a writ of habeas corpus in the Milwaukee County Circuit Court asking the sentencing judge to clarify whether he intended the parole commission to take away his parole eligibility or whether this was just a non-

binding statement or wish expressed during the course of sentencing. On February 1, 1999, the court denied plaintiff Madyun's petition, explaining that Madyun should file any challenge to the Department of Correction's implementation of his sentence in the circuit court of the county where he was confined and that he should direct any requests for modification or clarification of his sentence to the sentencing court. The court also noted that the Wisconsin Supreme Court was then reviewing a denial of a previous petition for a writ of habeas corpus filed by plaintiff Madyun. On February 4, 1999, plaintiff Madyun filed another petition for a writ of habeas corpus in Milwaukee County Circuit Court that was summarily denied because Madyun's petition was "the latest in a series of writs that have been filed by [Madyun] raising the same issues and requesting the same relief." Plaintiff Madyun's appeals of these decisions were denied by the court of appeals and the Wisconsin Supreme Court denied review.

On March 26, 1999, after defendants Schmeichel and Waldron were asked by an assistant attorney general to demonstrate how they calculated plaintiff Madyun's sentences, plaintiff Schmeichel prepared a document showing that plaintiff Madyun's parole eligibility date was June 3, 1999. This was a self-serving attempt by defendants Schmeichel and Waldron to cover up their efforts to hold plaintiff Madyun to mandatory release as suggested by the sentencing court. Documents in plaintiff Madyun's file show that prior to this effort to doctor his records, he would have been forced to serve all of his sentence until mandatory

release. Plaintiff Madyun's sentences were calculated in such a way that he would do 35, 65 and 70 years and life imprisonment even though transcripts show that he was given no sentence higher than 20 years with mandatory minimum parole eligibility after serving six months on each of his consecutive sentences and 11 years and three months on his life sentence.

Defendant Waldron told plaintiff Madyun that defendant Sullivan of the parole commission said that plaintiff would never be allowed to see the parole board if plaintiff did not drop his (unspecified) court action. Nor would he be allowed to submit any evidence that he wanted the parole board to consider during a hearing. The Wisconsin court of appeals ignored this information. Ever since his appeals were denied by the court of appeals and the Wisconsin Supreme Court the parole commission has refused to see plaintiff Madyun.

Before he was sentenced to life plus 170 years, plaintiff Madyun saw the parole board on another sentence in March 1983. At that time, the board informed Madyun that it had decided to grant him parole on a separate sentence of five years, seven months and two weeks so that plaintiff could start serving his new sentences. This information remained in plaintiff Madyun's files until defendant Waldron discovered that someone had "erred" and that Madyun was actually required to serve the entire five years, seven months and two weeks before he could begin serving his new sentences. Plaintiff Madyun was denied parole

or good time on the five year sentence. Defendants Schmeichel and Waldron removed information from plaintiff Madyun's file relating to his parole on the five-year sentence to cover their own errors.

On November 26, 2001, plaintiffs Madyun, Riley and Jones filed an inmate complaint objecting to the 1994 reduction of parole board members from no less than three to one by defendants Thompson and Sullivan; the denial of timely parol hearings; and the denial of inmates' right to be present, offer evidence and testify at their parole hearings. The complaint is still pending with defendants O'Donnell and Litscher. After receiving the complaint on November 27, 2001, and while reviewing other inmates, the parole commission called plaintiff Madyun in for an obviously late hearing at which he was denied parole. The commission gave him a 12-month deferral until his next review with instructions to the program review committee that the commission was willing to have Madyun placed at a minimum security facility to determine whether to parole him. Plaintiff relayed his various complaints about the parole procedures at this time, but to no avail.

On July 1, 2001, plaintiff Riley spoke with a social worker about the possibility of being considered by the program review committee for participation in the "Special Action Release" program and about his upcoming parole hearing. The social worker told Riley that policy did not allow his participation in the program. In addition, after plaintiff Riley's request he was told he would be transferred to a private prison in Minnesota. On August

16, 2001, plaintiff Riley completed his parole plan for his upcoming parole hearing and gave it to a social worker. Because plaintiff Riley insisted on a hearing in September by a parole board with the required number of members, he was denied a timely parole hearing. On August 18, 2001, plaintiff Riley was ordered by security staff to pack his belongings for his impending transfer to the Minnesota prison.

Plaintiff Jones was due to be reviewed by the parole commission in March 2001. A month went by without a hearing. Plaintiff Jones wrote to the prison records office to ask why no hearing was held and he was informed that he had been overlooked erroneously. On June 21, 2001, plaintiff Jones received a parole commission action sheet explaining why he would not be paroled and that his next parole hearing would be deferred for 12 months. The decision was made by only one member of the parole commission. On June 16, 2001, petitioner wrote to defendant Morgan objecting to the fact that he was not present when the commission decided to give him a 12-month deferral. On June 26, 2001, defendant Morgan or an aid responded, explaining that a decision based on a file review was not illegal.

On November 28, 2001, plaintiff Madyun wrote to defendant Stahowiak asking him which sentence Madyun was then serving and why he was being forced to serve until his mandatory release date in the absence of a parole commission recommendation to that effect. The letter was never answered. On December 6, 2001, plaintiffs Madyun, Riley and Jones wrote a letter to defendants Morgan and Litscher reiterating their belief that the parole

commission was violating the law.

C. State Pension Fund Investments in Private Prisons

At some point, plaintiff Madyun complained to the Department of Corrections about the conflict of interest that existed as a result of the governor, police, legislators, state judges and Department of Corrections staff having their retirement pensions invested in private prison corporations whose prisons are populated by Wisconsin inmates. Plaintiff Madyun believes defendant Thompson had a deliberate plan to over-crowd Wisconsin's prison system and then invest in private prisons whose profitability he could insure by stocking them with Wisconsin inmates serving long sentences. Part of this plan involved doing away with parole opportunities. The letter defendant Thompson wrote to defendant Sullivan in 1994 set this scheme in motion. All judges, legislators, police, prosecutors and Department of Corrections employees have an incentive to keep prisoners incarcerated longer because it will increase their pensions. Defendants Stanchfield and Lightbourn, who are members of the Wisconsin Retirement System, are responsible for avoiding such obvious conflicts of interest. Defendants Lipton and Ledford oversee the investments of defendants Stanchfield and Lightbourn and should have spotted this conflict. On July 24, 2000, defendant Ray recommended that plaintiff Madyun's complaint regarding this conflict of interest be dismissed without investigating it and defendant O'Donnell affirmed the decision on behalf

of defendant Litscher. In addition, on August 20, 2001, plaintiff Riley wrote to defendants Litscher and Morgan to complain about his impending transfer to a private prison whose investors included Wisconsin legislators, judges, prosecutors and corrections staff.

OPINION

A. Parole Issues

To the extent that plaintiffs are challenging the fact or duration of their imprisonment, they must file a petition for a writ of habeas corpus, 28 U.S.C. § 2254, after exhausting available state court remedies.

> [W]hen a prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

Preiser v. Rodriguez, 411 U.S. 475, 484 (1973); see also Viens v. Daniels, 871 F.2d 1328, 1330-31 (7th Cir. 1989). Many of the factual allegations relating to plaintiff Madyun indicate that he is challenging the fact or duration of his imprisonment. For instance, I understand plaintiff Madyun to allege that his sentence has been calculated incorrectly in that "the sentences were calculated to doing 35, 65, 70 and life imprisonment even though the transcripts show that the Court gave the plaintiff no sentence higher than 20 years." Compl., dkt. #1, at 11. Similarly, plaintiff alleges that he was granted parole on a five year

sentence but that someone removed this information from his prison records. Id. at 12. In addition, plaintiffs ask for a declaratory judgment that "in cases like [plaintiffs'] . . . reduction of the sentence is the only proper remedy." Id. at 35. Such relief must be sought under § 2254. District courts are not authorized to convert a § 1983 action into a 2254 action. See Copus v. City of Edgerton, 96 F.3d 1038 (7th Cir. 1996).

On the other hand, plaintiffs may challenge the process by which a parole decision was rendered in a § 1983 action such as this one. Clark v. Thompson, 960 F.2d 663, 665 (7th Cir. 1992). I understand plaintiffs to allege that their rights under the due process clause of the Fourteenth Amendment are violated when the parole board holds late parole hearings; provides only a file review rather than allowing an inmate to be present, testify and introduce evidence; and when parole decisions are made by fewer than three parole board members. Establishing that government officials have violated procedural due process requires proof of inadequate procedures *and* interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). There is no independent constitutional right to parole, see Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998), and Wisconsin has not created such a right through its parole statute, Wis. Stat § 304.06, because under the statute parole is discretionary rather than mandatory. See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (whether state creates protected liberty interest in parole

depends upon whether parole is discretionary or mandatory under state law); State v. Borrell, 167 Wis. 2d 749, 772, 482 N.W.2d 883, 891 (1992) ("The possibility of parole does not create a claim of entitlement nor a liberty interest."). Because plaintiffs' parole was discretionary and they have no liberty interest in discretionary parole, they fail to state a claim upon which relief may be granted under the due process clause of the Fourteenth Amendment.

In contrast, Wisconsin's mandatory release provision, Wis. Stat. § 302.11(1), provides that subject to enumerated exceptions "each inmate is entitled to mandatory release on parole by the department [when he has completed two-thirds of his sentence]." Citing the mandatory language in this provision, the Wisconsin Court of Appeals has concluded that "under Sandin, [an inmate] retains a liberty interest in not having his mandatory release date extended." Santiago v. Ware, 205 Wis. 2d 295, 315, 556 N.W.2d 356, 364 (Ct. App. 1996) (citing Sandin v. Connor, 515 U.S. 472 (1995)). However, plaintiffs have not alleged that they are being incarcerated beyond their mandatory release dates. Indeed, plaintiff Madyun objects to the fact that he is being held *until* his mandatory release date. Compl., dkt. #1, at 33. ("Defendants . . . holding Madyun to mandatory release . . . is a violation of Madyun's constitutional right[s]."). Accordingly, plaintiffs have failed to state a due process claim. Plaintiffs' complaint also mentions the Fourteenth Amendment's equal protection clause. Because nothing in the complaint suggests why plaintiffs believe their

equal protection rights have been violated, plaintiffs will be denied leave to proceed on their equal protection claim as well.

B. Out-of-State Prison Transfers

Plaintiffs ask the court to declare that the Constitution and federal law "forbids inmates from being sent out-of-state to private prisons, and [that] all Wisconsin inmates must be returned back to the State of Wisconsin, effective immediately." Id. at 34. The only allegations in the complaint discussing a possible transfer to an out-of-state prison involve plaintiff Riley, who does not allege that he has actually been transferred out of Wisconsin. In any case, the Court of Appeals for the Seventh Circuit has held that "[a] prisoner has no due process right to be housed in any particular facility." Whitford v. Boglino, 63 F.3d 527, 532 (7th Cir. 1995); see also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (a prisoner has no legally protected interest "in [his] keeper's identity"). In Pischke, the court of appeals concluded that the housing of Wisconsin prisoners in private prisons in other states did not violate the Thirteenth Amendment. 178 F.3d at 500. In addition, the court stated that it could not "think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government." Id. Thus, plaintiffs' claim that such a transfer is unconstitutional will be dismissed as legally frivolous.

Plaintiffs also allege that the federal "Public Safety Act" forbids their transfer to private prisons outside Wisconsin. I am aware of no such law, and other courts have recognized that "'neither the United States Constitution nor any federal law prohibits the transfer of an inmate from one state to another,'" including to private facilities. Montez v. McKinna, 208 F.3d 862, 865-66 (10th Cir. 2000) (quoting Barr v. Soares, No. 99-1003, 1999 WL 454364, at *1 (10th Cir. July 6, 1999)). Plaintiffs may be referring to proposed legislation introduced in both the United States House of Representatives and Senate which aims "[t]o ensure that the incarceration of inmates is not provided by private contractors or vendors and that persons charged or convicted of an offense against the United States shall be housed in facilities managed and maintained by Federal, State, or local governments." Public Safety Act, H.R. 1764, S. 842, 107th Cong. (2001). The Public Safety Act is of no help to plaintiffs because it remains proposed legislation, not law.

This legislation may also explain why plaintiffs want a declaration that the Wisconsin Department of Corrections and the parole commission "all receive federal funding and are 'Programs or Activities' as defined under 42 U.S.C. 2000d-4a(1)(A)." Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-d7, prohibits "discrimination under any program or activity receiving Federal financial assistance" on the basis of a persons "race, color, or national origin." Plaintiffs have not alleged they have been victims of racial discrimination and they do not seek to invoke Title VI. However, under some circumstances section three

of the proposed Public Safety Act would require recipients of certain federal funds to certify that they do not contract with private vendors for "core correctional services related to the incarceration of an inmate." Again, because the Public Safety Act is not law, it is irrelevant whether the Department of Corrections or parole commission receive federal funds.

C. State Pension Fund Investments in Private Prisons

Plaintiffs allege that defendants have deliberately overcrowded Wisconsin's prison system to enhance the value of the state's pension fund, which is invested in private prisons. Additionally, plaintiffs allege that all judges, legislators, police, prosecutors and Department of Corrections employees have an incentive to keep prisoners incarcerated longer because it will increase their pensions. None of the plaintiffs allege that any particular judge, legislator, police officer or Department of Corrections employee has delayed plaintiffs' release from prison or transferred them to a private prison in an effort to enhance the value of their own pension. Indeed, none of the plaintiffs allege that they are incarcerated in a private prison. Accordingly, even if this claim had any merit, plaintiffs lack standing to bring it.

D. Appointment of Counsel

Plaintiffs have filed two motions for appointment of counsel. Because plaintiffs will be denied leave to proceed on all of their claims, these motions will be denied.

ORDER

IT IS ORDERED that

1. Plaintiffs Madyun, Riley and Jones' due process and equal protection claims are DISMISSED pursuant to 28 U.S.C. § 1915A for plaintiffs' failure to state a claim upon which relief may be granted.

2. Plaintiffs' constitutional and federal statutory claims relating to out-of-state prison transfers are DISMISSED as legally frivolous.

3. Plaintiffs' motions for class certification and appointment of counsel are DENIED.

4. The clerk of court is directed to enter judgment for defendants and close this case.

5. A strike will be recorded against plaintiffs in accordance with 28 U.S.C. § 1915(g).

Entered this 8th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge