IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KEITH CADE

Petitioner, ORDER

v. 04-C-360-C

JOSEPH SCIBANA,

Respondent.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Petitioner Keith Cade, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, requests leave to proceed in forma pauperis under 28 U.S.C. § 1915. He contends that respondent Joseph Scibana is violating his rights under the Fourth, Fifth, Eighth and Ninth Amendments to the United States Constitution by failing to recalculate his good conduct time in accordance with White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 2004).

Although petitioner has styled his suit as one seeking monetary relief under Bivens, the nature of petitioner's claim suggests that this suit should have been brought as a petition for a writ of habeas corpus. The injury alleged in a claim, and not the relief sought in the

claim, determines whether a claim is cognizable in habeas corpus or should instead be brought as a civil action. Clayton-El v. Fisher, 96 F.3d 236, 242 (7th Cir. 1996). Petitioner asserts violations of his constitutional rights, but his claim is really the same as the petitioner in White, that the Bureau of Prisons is acting contrary to 18 U.S.C. § 3624(b) by calculating his good conduct time on the basis of the time he has served rather than his sentence. A statutory right does not become a constitutional right simply because there is a court order enforcing the statute. In any event, because petitioner is challenging the execution of his sentence, it is § 2241 and not Bivens that petitioner should be proceeding under. Kramer v. Olson, 347 F.3d 214, 217 (7th Cir. 2003).

The Court of Appeals for the Seventh Circuit has given somewhat mixed signals regarding what district courts should do when a pro se prisoner mislabels his pleadings. In Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996), the court stated: A "district court [is] not authorized to convert a § 1983 action into a § 2254 action. . . . When a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice." However, in Valona v. United States Parole Commission, 165 F.3d 508 (7th Cir. 1998), the court held that the district court had erred in refusing to convert a habeas corpus action into a mandamus action if that was how the suit should have been styled. The court wrote, "If Valona is entitled to a writ of mandamus, then the district court should have provided him that relief in the suit

he has filed, rather than requiring him to start over." Id. at 510. See also Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003) (considering merits of habeas corpus petition that was brought under § 1983).

One way that these cases can be reconciled is if they are interpreted not as setting forth rigid rules without exceptions but as general guidelines that should be followed when the reasons for doing so are present. In Moran v. Sondalle, 218 F.3d 647, 649 (7th Cir. 2000), the court noted that "[p]risoners may be tempted to choose one route rather than another to avoid limitations imposed by Congress." See also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (noting different procedural requirements and consequences of § 1983 and habeas corpus statutes as reasons for refusing to convert action).

In this case, petitioner avoided no limitations by filing his petition as a civil rights claim. The filing fee for Bivens actions is $150 as opposed to $5 for actions brought under 28 U.S.C. § 2241. Further, the requirements for exhausting administrative remedies are much stricter in Bivens suits than in § 2241 actions. Compare Massey v. Wheeler, 221 F.3d 1030 (7th Cir. 2000) (court must dismiss action for failure to exhaust administrative remedies once defendant raises the issue) with Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004) (court may waive exhaustion requirements in § 2241cases in some circumstances). Finally, unlike the situation in Copus, petitioner named his custodian as the respondent, so this action could proceed under § 2241 without substituting any parties.

Dismissing this case and requiring petitioner to file a new one would accomplish nothing but to waste both this court's and petitioner's time and resources. Graham v. Broglin, 922 F.2d 379 (7th Cir. 1991) (converting action permissible when "all [inmate] has done is mislabel his suit").

Although I will not dismiss this case, I decline to convert petitioner's action until he has clarified his intentions. Money damages are not available in habeas actions. It is possible that petitioner purposely filed a civil rights action because he is interested in seeking money damages rather than release. Therefore, I will give petitioner two weeks to inform the court in writing whether he wants his case to be treated as a Bivens action or as a petition for a writ of habeas corpus. Petitioner should bear in mind that if he chooses to proceed under Bivens, I will promptly dismiss the case as legally frivolous and he will be obligated to pay the $150 filing fee in full. In addition, I will record a strike under 28 U.S.C. § 1915(g). If he chooses to proceed in a habeas corpus action under § 2241, I will direct the clerk of court to refund him the amount over $5 that he has already paid.

If petitioner does choose to proceed under the habeas corpus statute, there are a few things he should know. Because respondent has appealed White, I have stayed most of the new petitions asserting the same issue pending a decision by the Court of Appeals for the Seventh Circuit. I have made exceptions for inmates who have provided sentence computation reports prepared by the bureau and who would have imminent release dates

after their good conduct time was recalculated in accordance with White. Petitioner alleges that his recalculated release date would be July 17, 2004, but he has not submitted his sentence computation from the bureau. Instead, he has attached to his petition a document entitled "Manual computation for Keith Cade" that does not indicate who prepared it. Even this document indicates only that petitioner is currently scheduled for release in March 2005. Because he is serving a sentence of 97 months, a recalculation of his good conduct time under the method employed in White would move his projected release date back approximately two months, a date that is not sufficiently near to justify a lifting of the stay.

July 17 may be the date petitioner believes he will be eligible to be transferred to a halfway house. In Caldwell v. Scibana, 04-C-342 (W.D. Wis.), I have ordered briefing on the issue whether stays are appropriate in cases in which inmates face a potential delay in being transferred to a halfway house. If July 17 is in fact the date that petitioner will be eligible for a halfway house transfer, petitioner should submit documentation prepared by the bureau showing this to be the case.

ORDER

IT IS ORDERED that petitioner Keith Cade may have until July 26, 2004, in which to inform the court whether he wishes this court to treat his pleading as a petitioner for a writ of habeas corpus 28 U.S.C. § 2241 or as a complaint in a civil action under Bivens v.

Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). If he chooses to proceed under the habeas corpus statute, he should submit documentation revealing the date of his sentence, his release date and the date he is eligible to be transferred to a halfway house as it is presently calculated by the Bureau of Prisons. If petitioner fails to respond to this order by July 26, 2004, I will dismiss the case.

Entered this 9th day of July, 2004.

BY THE COURT:
BARBARA B. CRABB
District Judge