

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

EDWIN F. CLAY,

Petitioner,

v.

JOSEPH SCIBANA, Warden,

Respondent.

ORDER

04-C-631-C

In this civil action, petitioner challenges the Federal Bureau of Prisons' practice of deducting 50% of his monthly income under the Mandatory Restitution Act. He contends that the practice violates 18 U.S.C. § 3572(d), which has been interpreted to bar a sentencing court from delegating the task of setting a restitution payment schedule. In an order dated October 27, 2004, I held that petitioner could not challenge the legality of the sentencing judge's alleged delegation of authority in this court. Such a challenge calls into question the legality of plaintiff's sentence and for that reason, can be brought only in the court that sentenced plaintiff and only pursuant to 28 U.S.C. § 2255. However, I also held that petitioner could bring a challenge to the Bureau's action in setting a withholding schedule on the ground that the Bureau was usurping judicial authority. Such a challenge

would attack the execution rather than the imposition of a sentence and would not be subject to the jurisdictional requirements of § 2255.

Generally, challenges to the execution of a sentence are brought under 28 U.S.C. § 2241, a statute governing petitions for writs of habeas corpus. However, unlike the normal case where the habeas challenge relates to a sentence of incarceration, petitioner's claim relates to a sentence of restitution. In order to obtain a writ of habeas corpus, a petitioner must show that he is custody in violation of the Constitution or laws of the United States. A prisoner may not use a habeas corpus statute to challenge the manner in which his monthly restitution payments are made. (Literally, habeas corpus means having the body, not having the money.) I gave petitioner until November 22, 2004, in which to inform the court whether he wished to have his complaint construed as a petition for habeas relief under § 2241, in which case I would deny his petition, or a civil action under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), in which case his filing fee would be \$150 rather than the \$5 filing fee for habeas petitions.

In response, petitioner submitted a motion indicating that he wished his petition be treated as a Bivens action. In an order dated November 23, 2004, I accepted petitioner's choice and provided him until December 13, 2004, in which to make his first partial payment of \$16.58 toward the filing fee. After filing this motion, petitioner wrote the court a letter dated November 17, 2004, questioning the determination that his claim could not

be maintained under § 2241. I will construe this letter as a motion for reconsideration and deny it.

Plaintiff notes that in Matheny v. Morrison, 307 F.3d 709, 712 (8th Cir. 2002), the Court of Appeals for the Eighth Circuit held as follows:

The remaining claims of the petitioners challenge the IFRP's payment schedule for their respective financial obligations. These claims concern the execution of sentence, and are therefore correctly framed as § 2241 claims brought in the district where the sentence is being carried out. Therefore, the district court erred in holding it did not have jurisdiction on these claims.

Matheny, 307 F.3d at 712. The court drew a distinction between claims which are and are not subject to the jurisdictional limitation in § 2255; it did not discuss the distinction between actions brought under § 2241 and those brought under Bivens. The statement reflects the general rule that challenges to the validity of a sentence must be brought under § 2255 while challenges to the execution of a sentence are brought under § 2241. As noted above, however, this is an unusual case because plaintiff's challenge relates to the execution of a sentence of restitution, not to his incarceration. In terms of identifying the proper vehicle for bringing his challenge, this distinction is significant because habeas petitions are appropriate only for challenges of illegal confinement. White v. Henman, 977 F.2d 292, 295 (7th Cir. 1992).

In any event, Matheny is binding only in the Eighth Circuit. Because this court is

located in the Seventh Circuit, I am bound by the law of this circuit. The Court of Appeals for the Seventh Circuit has held that challenges to the fact or duration of custody must proceed in habeas corpus while challenges to rules affecting conditions of custody proceed as ordinary civil suits. Richmond v. Scibana, 387 F.3d 602, 606 (7th Cir. 2004). Because petitioner's claim falls into the later category, it must be maintained under Bivens.

I have stayed petitioner's motion for appointment of counsel pending payment of the initial partial payment of the filing fee. At the conclusion of his letter of November 17, petitioner argues that the complicated nature of this suit demonstrates the need for appointment of counsel. Although I will continue the stay on petitioner's motion, I note that plaintiff has demonstrated an ability to locate appropriate legal authority, comprehend distinctions in a rather archaic area of the law and advance coherent arguments. His work to date suggests that he is not in need of counsel.

IT IS ORDERED that plaintiff Edwin F. Clay's letter dated November 17, 2004, is construed as a motion for reconsideration and is DENIED. The order dated November 23, 2004, remains in effect.

Entered this 1st day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge