IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL HILL,

Petitioner, ORDER

v. 04-C-657-C

JOSEPH SCIBANA,

Respondent.

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Petitioner Michael Hill, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, has filed a pleading on forms designed for use by prisoners seeking modification of their sentences under 28 U.S.C. § 2255. He requests leave to proceed in the action under the in forma pauperis statute, 28 U.S.C. § 1915.

In his pleading at page 4, petitioner states that he does not intend his petition to be considered as a § 2255 motion. Rather, petitioner states,

> This is a matter of "conditions of confinement" which are properly addressed on a § 2241 [habeas corpus petition] instead of a § 2255 [motion]. In this instant case, the respondent and several federal officers – both in the Buraeu of Prisons and Oxford FCI – have subjected the [petitioner] to racially discriminatory pay advancement, impartiality, and harassment in the Unicor Industries of Oxford FCI.

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). Here, petitioner asserts that his "sentence is being improperly executed because the Unicor Officers have created racial and intimidating conditions of confinement for him." However, even if petitioner were to prove that he has been subject to racial discrimination and harassment in his job, he would not be entitled to release or modification of his sentence. The injury he alleges is race discrimination, which is a claim that must be raised in a civil action brought pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

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 [or Bivens] 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 may be attempting to avoid a number of limitations by filing his civil rights claim in a petition for a writ of habeas corpus. 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). In habeas corpus actions, the proper respondent is petitioner's custodian, whereas in a Bivens action, a petitioner may

proceed against any federal officer who is alleged to have been personally involved in violating his constitutional rights. Finally, actions under Bivens are subject to the 1996 Prison Litigation Reform Act, whereas habeas corpus actions are not. Under the PLRA, the court must assess petitioner an initial partial payment of the filing fee, 28 U.S.C. § 1915(a)(2), screen his complaint before it is served on the defendants and dismiss it promptly if it is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief, 28 U.S.C. § 1915(e)(2), and collect the remaining portion of the filing fee from his prison account even if his request for leave to proceed with his action is denied, 28 U.S.C. § 1915(b)(2). In addition, if petitioner's complaint is dismissed for one of the reasons listed above, he will earn a "strike" under the three strikes provision of § 1915, § 1915(g).

Therefore, although I will not dismiss this case, I decline to convert petitioner's action until he has clarified his intentions. It is possible that petitioner purposely filed a habeas corpus action because he is interested in seeking release rather than money damages or injunctive relief and he wishes to avoid an action that is subject to the Prison Litigation Reform Act and its many provisions. Therefore, I will give petitioner until September 30, 2004, in which 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 § 2241, I will require him to pay the $5 filing fee in full

(petitioner's trust fund account statement reveals that he would not be eligible for pauper status for the purpose of paying a $5 filing fee) and then I will promptly dismiss the case on the ground that petitioner has not alleged facts entitling him to habeas corpus relief. If he chooses to proceed in a civil action under Bivens, he is to so advise the court and arrange promptly to send $43.39 as an initial partial payment of the $150 fee for filing a civil complaint.

ORDER

IT IS ORDERED that petitioner Michael Hill may have until September 30, 2004, in which to inform the court whether he wishes this court to treat his pleading as a petition 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 may have until September 30, 2004, to pay the $5 filing fee by submitting a check or money order made payable to the clerk of court in that amount. If he chooses to proceed under Bivens, he may have until September 30, 2004, to pay an initial partial payment of the $150 filing fee in the amount of $43.39. If petitioner fails to respond to this order by September 30, 2004, I will treat his action as a habeas corpus action

and deny him leave to proceed in forma pauperis on the ground that he fails to qualify for indigent status.

Entered this 9th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge