IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BADI A. SALAMA,

Petitioner,

v.

JOSEPH SCIBANA,

Respondent.

ORDER

04-C-783-C

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This purported petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 was dismissed on November 1, 2004, for petitioner's failure to show that he is in custody in violation of the constitution or laws of the United States. Specifically, I found that because petitioner is challenging the procedure he was afforded in connection with a disciplinary hearing at the Federal Correctional Institution in Oxford, Wisconsin, under the Administrative Procedure Act and the United States Constitution, his claim could not be considered in a habeas corpus action. Rather, his claim must be raised in a civil action brought under this court's general jurisdiction statute, 28 U.S.C. § 1331, and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

Now petitioner has filed a notice of appeal. Because the notice is not accompanied by the $255 fee for filing a notice of appeal, I construe petitioner's notice as including a

request for leave to proceed in forma pauperis on appeal. That request will be denied both because petitioner has not shown that he is financially eligible for pauper status and, even if he had made such a showing, his appeal must be certified as not taken in good faith. 28 U.S.C. § 1915(a)(3).

Petitioner's appeal is not subject to the 1996 Prison Litigation Reform Act. See Walker v. O'Brien, 216 F.3d 626, 628-629 (7th Cir. 2000) ("the PLRA does not apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255"). Nevertheless, in determining whether a petitioner is eligible for indigent status on appeal under § 1915, the court must find both that the petitioner does not have the means to pay the $255 fee for filing his appeal and that the appeal is taken in good faith. See 28 U.S.C. § 1915(a)(1) and (3).

In determining whether a habeas corpus petitioner is eligible for pauper status, it is my practice to apply the formula set out in 28 U.S.C. § 1915(b)(1). Specifically, from the petitioner's trust fund account statement for the six- month period immediately preceding the filing of his appeal, I add the deposits made to petitioner's account and calculate 20% of the greater of the average monthly deposits or the average monthly balance in the account. If the 20% figure is more than the fee petitioner owes for filing his appeal, he may not proceed in forma pauperis. If the 20% figure is less than $255, he must prepay whatever portion of the fee the calculation yields. In this case, petitioner has not submitted a trust fund account statement. Therefore, he has failed to show that he is financially eligible for

pauper status.

Even if petitioner were to have made such a showing, however, I would deny his request for leave to proceed in forma pauperis on appeal because I must certify that his appeal is not taken in good faith. Although petitioner's notice of appeal is not accompanied by a statement of the issues he intends to raise on appeal, I presume that he wants the court of appeals to rule on whether his claim may be raised in a habeas corpus action. This is not an appropriate use of the appellate process. The function of the court of appeals is to determine whether the district court made legal or factual errors in deciding a case. Here, petitioner neither contends that this court misunderstood the nature of his claim nor points to law suggesting that it was legal error to require him to raise his claim in a Bivens action. Indeed, petitioner would be hard pressed to find legal precedent to support a view contrary to the view expressed in this case. See, e.g., Richmond v. Scibana, 2004 WL 2339763 (7th Cir. 2004) (citing Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974) (challenge to rules affecting conditions of custody and potentially affecting duration of a particular kind of custody proceeds as ordinary civil suit unless conditions of custody change so substantially that challenge really is to "fact" of custody); Bunn v. Conley, 309 F.3d 1002 (7th Cir. 2002) (pro se action seeking to prevent warden from notifying law enforcement personnel that prisoner was convicted of violent crime is properly raised in Bivens action, not petition for writ of habeas corpus); DeWalt v. Carter, 224 F.3d 607, 617 (7th Cir. 2000) (habeas corpus relief not available to prisoner-litigant challenging only conditions of confinement rather

than fact or duration of confinement); Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (habeas relief restricted to claims for which the prisoner "is seeking to 'get out' of custody in some meaningful sense"); Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991) (proper remedy for prisoner challenging conditions of confinement is under civil rights law, not federal habeas). Therefore, petitioner's request for leave to proceed in forma pauperis on appeal will be denied.

If petitioner intends to challenge this court's finding that he is ineligible for pauper status on appeal, he has 30 days from the date he receives this order in which to file with the court of appeals a motion for leave to proceed in forma pauperis on appeal. His motion must be accompanied by a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on

appeal is DENIED and I certify that petitioner's appeal is not taken in good faith.

Entered this 17th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge