

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

KIM LEE  
MILLIGAN, SR.,

Plaintiff,

v.

CASE NO. 10-3112-SAC

JOHN P. BENNETT,  
et al.,

Defendants.

O R D E R

This civil rights complaint, 42 U.S.C. § 1983, was filed by an inmate of the Johnson County Adult Detention Center, Olathe, Kansas. Mr. Milligan sues John P. Bennett in "his official capacity as a judge" and Ted Baird in his official capacity as Assistant District Attorney (DA) for Johnson County, Kansas.

Having considered the complaint and attachments together with plaintiff's "Supplement to Complaint" and attachments (Doc. 4), the court finds as follows. On October 9, 2003, Mr. Milligan was convicted in Johnson County District Court (Case No. 01-CR-247) of "Attempted Obstruction of Legal Process (M)" and was placed on probation for twelve months on that date. His probation was revoked and reinstated on March 4, 2004, for a period of twelve months<sup>1</sup>. On June 18, 2004, a "Motion to Revoke Probation" was filed by Mr. Nordeen, who was then acting as an Assistant District Attorney for

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<sup>1</sup> A Motion to Revoke Probation filed by Mr. Nordeen on January 12, 2004, in Johnson County District Court Case No. 01-CR-247 is exhibited by plaintiff. Therein, Mr. Milligan was alleged to have "failed to report for intake since being placed on probation" and to make any payment as ordered as a condition of his probation.

Johnson County, Kansas<sup>2</sup>. Milligan was alleged to have violated conditions of his probation by consuming alcohol and testing positive for cocaine on April 20, 2004. In addition he "failed to return to the Residential Center as directed" on April 21, 2004, and was "declared Absent Without Leave (AWOL)" on that date. Plaintiff also exhibits an "Amended Warrant" issued from Johnson County dated March 12, 2010, which indicated that on April 21, 2004, he escaped from the Johnson County Department of Corrections Residential Treatment Center, where he was in custody upon conviction of a misdemeanor in Johnson County District Court case number 01-CR-247<sup>3</sup>.

On February 11, 2010, Mr. Milligan was arrested in Kansas City, Missouri, and confined in the Jackson County Detention Center. A detainer was lodged against him by Johnson County authorities "on two felony warrants". Milligan refused extradition, and defendant Johnson County DA Ted Baird<sup>4</sup> advised a judge in Missouri that his office was seeking a Governor's Warrant. At a hearing on February 17, 2010, the Missouri judge set a fugitive bond of \$50,000, and directed that court appearances be set every 30 days until Johnson County came to get plaintiff. The charges against Milligan were not

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<sup>2</sup> Plaintiff also exhibits a copy of a "Bench Warrant" issued out of Johnson County dated June 18, 2004, finding he was convicted of Obstruction in Johnson County District Court, he was placed on probation on October 9, 2003, and there was probable cause to believe that he violated conditions of probation. His arrest was ordered for hearing on the "motion to revoke said probation."

<sup>3</sup> Plaintiff alleges in his "Supplement to Complaint" that in September 2008 and January 2004, he was "also unlawfully extradited across state line" by another Assistant District Attorney on amended felony warrants from misdemeanor charges solely for extradition purposes. However, the only DA named as a defendant in this action is Ted Baird.

<sup>4</sup> Plaintiff spells this defendant's name as "Ted Baird" in the caption and initial paragraph in his complaint, but in attachments he refers to "Ted Bried". The court assumes this is one and the same person, and that Ted Baird is the correct spelling. If this is not correct, plaintiff must notify the court.

amended to felonies until March 15, 2010, which was 34 days after he had already been incarcerated.

Plaintiff lost his job, and is now being "housed with state and felony offenders" in a cell. He has never been charged with a felony crime in Johnson County or anywhere in Kansas, and his charge is a misdemeanor from six years ago.

Upon his arrival at the JCADC, plaintiff was booked on two misdemeanor counts. On April 8, 2010, he was appointed public defender Mr. Kelbreg to represent him on misdemeanor escape in Div. 1. He was also appointed now public defender Mr. Nordeen to represent him on a different count in Div. 18 before defendant Judge Bennett. Mr. Nordeen was the former district attorney who filed the motions to revoke his probation in 2004.

Mr. Nordeen advised plaintiff at their first meeting that he could request his withdrawal, and Nordeen withdrew as counsel ten days later. However, plaintiff was "informed" that Nordeen had gone "into his case history" and payment information and had talked to the Assistant District Attorney currently handling the case, even though Milligan had not asked that he do anything. Plaintiff was also "informed that some of (his) case files had been destroyed on August 15, 2008". On April 30, 2010, Judge Bennett allowed Nordeen to withdraw, and appointed Mr. Kelberg to represent plaintiff on both matters.

Based upon these facts, plaintiff claims that he was "illegally extradited" to Kansas due to misdemeanor offenses, probation violation, attempted obstruction legal process misdemeanor, and misdemeanor escape, which he contends are non-extradictable offenses that were improperly "amended to a felony warrant for the sole

purpose of extraditing" him. He also claims that defendant Baird misled the judge in Missouri "about charges being felonies." He further contends that he was "falsely imprisoned" from February 11, to March 15, 2010, by "Johnson County District Attorney Office and District Court;" and that his detention in Missouri to await the receipt of the governor's warrant was in "direct violation of Uniform Mandatory Disposition of Detainer Act." He asserts that his Fourth and Fourteenth Amendment rights were violated as a result.

Mr. Milligan seeks compensatory and punitive damages. He also seeks "immediate release from Johnson County custody" and dismissal of charges with prejudice.

#### **FILING FEE**

The fee for filing a civil rights complaint in federal court is \$350.00. Plaintiff has filed an Application to Proceed Without Prepayment of Fees. He is forewarned that under 28 U.S.C. § 1915(b)(1), being granted leave to proceed in this court without prepayment of fees does not relieve a plaintiff of the obligation to pay the full amount of the filing fee. Instead, it merely entitles an inmate to proceed without prepayment of the full fee, and to pay the filing fee over time through payments deducted automatically from his inmate trust fund account as authorized by 28 U.S.C. § 1915(b)(2)<sup>5</sup>. Furthermore, § 1915 requires that a prisoner seeking to bring a civil action without prepayment of fees submit a

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<sup>5</sup> In each month that the amount in the prisoner's account exceeds \$10.00, until the \$350.00 filing fee is paid, the agency having custody of the prisoner is authorized to assess, deduct from the prisoner's account, and forward to the Clerk of the Court an installment payment equal to 20% of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2).

"certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing" of the action "obtained from the appropriate official of each prison at which the prisoner is or was confined." 28 U.S.C. § 1915(a)(2). Plaintiff provides financial information only for the time he has been confined in the JCADC which is less than a one-month period. Based upon this very limited information, the court finds the average monthly balance in plaintiff's account is \$31.78, and the average monthly deposit is not provided. The court therefore assesses an initial partial filing fee of \$6.00, twenty percent of the average monthly balance, rounded to the lower half dollar. Plaintiff must pay this initial partial filing fee before this action may proceed further, and will be given time to submit the fee to the court. His failure to submit the initial fee in the time allotted may result in dismissal of this action without further notice.

#### **SCREENING**

Because Mr. Milligan is a prisoner, the court is required by statute to screen his complaint and to dismiss the complaint or any portion thereof that is frivolous, fails to state a claim on which relief may be granted, or seeks relief from a defendant immune from such relief. 28 U.S.C. § 1915A(a) and (b). Having screened all materials filed, the court finds the complaint is subject to being dismissed for the following reasons.

#### **HABEAS CORPUS CLAIM**

A petition for writ of habeas corpus is a state prisoner's sole

remedy in federal court for a claim of entitlement to immediate release. Preiser v. Rodriguez, 411 U.S. 475, 499 (1973); McIntosh v. United States Parole Commission, 115 F.3d 809, 811 (10<sup>th</sup> Cir. 1997); see Boutwell v. Keating, 399 F.3d 1203, 1209 (10<sup>th</sup> Cir. 2005) ("Habeas corpus is the only avenue for a challenge to the fact or duration of confinement, at least when the remedy requested would result in the prisoner's immediate or speedier release."). Thus, any challenge plaintiff has to the legality of his current confinement in the State of Kansas must be litigated in a habeas corpus action<sup>6</sup>. Moreover, any such claim must first be presented in an orderly fashion throughout the state judicial system and ultimately to the highest state court before it may be raised in federal court<sup>7</sup>. See 28 U.S.C. § 2254(b)(1). From the dates alleged in the pleadings, it appears that plaintiff could not have exhausted available state court remedies. It follows that his claims for immediate release and dismissal of state charges are not properly

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<sup>6</sup> Plaintiff is cautioned that he must timely and properly raise all factual bases for challenging any pending state charges or parole violation charges in the state court proceedings on those charges, or he may be found to have waived later review either on appeal in state court or in a federal habeas corpus petition.

<sup>7</sup> 28 U.S.C. 2254(b)(1) provides:

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -- (A) the applicant has exhausted the remedies available in the courts of the State. . . ."

"A state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). Generally, the exhaustion prerequisite is not satisfied unless all claims asserted have been presented by "invoking one complete round of the State's established appellate review process." Id. at 845. In this district, that means the claims must have been "properly presented" as federal constitutional issues "to the highest state court, either by direct review of the conviction or in a post-conviction attack." Dever v. Kansas State Penitentiary, 36 F.3d 1531, 1534 (10<sup>th</sup> Cir. 1994). In other words, petitioner must seek relief in the appropriate state district court; if relief is denied by that court he must appeal to the Kansas Court of Appeals; and if that court denies relief petitioner must file a Petition for Review by the Kansas Supreme Court.

raised in this civil rights complaint<sup>8</sup>, and if this action were construed as a habeas corpus petition, it would be dismissed for failure to exhaust state remedies.

#### **FAILURE TO STATE A § 1983 CLAIM**

"To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48-49 (1988); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978)); Northington v. Jackson, 973 F.2d 1518, 1523 (10<sup>th</sup> Cir. 1992). A pro se complaint must be given a liberal construction. See Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." Whitney v. New Mexico, 113 F.3d 1170, 1173-74 (10<sup>th</sup> Cir. 1997).

Plaintiff sues only two individuals, Judge Bennett and DA Baird, and he sues them in their official capacities for actions taken within those capacities. State judges and district attorneys, acting within the scope of their duties are absolutely immune to suit from money damages. See Pierson v. Ray, 386 U.S. 547, 554-55 (1967)(The common-law absolute immunity of judges for "acts

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<sup>8</sup> Plaintiff's claim of a violation of the Uniform Mandatory Disposition of Detainer Act is not grounds for habeas corpus relief in federal court, is not supported by sufficient allegations showing either a demand was made or a violation of that Act or exhaustion of state remedies. See Carchman v. Nash, 473 U.S. 716, 725-26 (1985). Moreover, the Interstate Agreement on Detainers Act has been held not to apply to detainers lodged for probation violations. Plaintiff does not allege facts showing an unreasonable delay or that no probable cause determination has been made with regard to the charges on which he is currently being held.

committed within their judicial discretion" found to be preserved under § 1983.); Imbler v. Pachtman, 424 U.S. 409, 422-25 (1976)(A prosecutor, acting within the scope of his or her duties in initiating and prosecuting a case, has absolute immunity from liability for damages under § 1983); Arnold v. McClain, 926 F.2d 963, 967 (10<sup>th</sup> Cir. 1991). Consequently, this action is plainly subject to being dismissed under 28 U.S.C. § 1915A(a) and (b) as seeking relief from defendant immune from such relief.

Furthermore, plaintiff's claim of false imprisonment is not supported by sufficient facts, given he exhibits a warrant that issued for his arrest. See United States v. Hauk, 412 F.3d 1179, 1190 (10th Cir. 2005)("An arrest warrant gives the police unquestioned authority to detain the suspect."). The court finds that plaintiff has failed to state sufficient facts to support a claim of federal constitutional violation.

Plaintiff is given time to show cause why this action should not be dismissed, without prejudice, for the reasons discussed herein. If he fails to file a satisfactory response within the time allotted, this action will be dismissed without further notice.

Plaintiff has filed a notice that under facility rules he was not provided copies of "some of the exhibits." That notice has been filed herein; however, plaintiff is advised that this court does accept hand-written copies.

**IT IS THEREFORE ORDERED** that plaintiff is granted twenty (20) days in which to submit to the court an initial partial filing fee of \$ 6.00. Any objection to this order must be filed on or before the date payment is due. The failure to pay the fees as required



herein may result in dismissal of this action without prejudice.

**IT IS FURTHER ORDERED** that within the same twenty-day period plaintiff is required to show cause why this action should not be dismissed, without prejudice, for the reasons stated herein.

**IT IS SO ORDERED.**

Dated this 8<sup>th</sup> day of June, 2010, at Topeka, Kansas.

s/Sam A. Crow  
U. S. Senior District Judge