

FILED

JUL 7 2016

U.S. COURT OF
FEDERAL CLAIMS

No. 16-360C

Defendant.

Mr. Zhuckkahosee, is a convicted sex offender currently imprisoned in Federal prison in Marianna, Florida. In March, Mr. Zhuckkahosee, acting *pro se*, filed suit in this Court. His original complaint did not name the United States as a defendant, but instead named 13 different individuals, who are either Wisconsin state officials, Federal officials, or officials of the Menominee Indian Tribe, of which Mr. Zhuckkahosee apparently is also a member. *See* Dkt. No. 1. His original complaint also raised various allegations, including violations of five constitutional amendments, and the “1854 Wolf River Treaty.” At bottom, however, Mr.

Zhuckkahosee's suit appears based upon his (allegedly unlawful) transfer from Menominee Tribal custody to Federal custody for imprisonment for sexual assault.

In response to our motion to dismiss (Dkt. No. 7), Mr. Zhuckkahosee filed an amended complaint. Dkt. No. 9 (Amended Compl.). Mr. Zhuckkahosee's amended complaint, which now names the United States as defendant, identifies a number of Federal statutes and state or tribal orders that he claims he was subjected to, which purportedly served to violate his rights under various Constitutional Amendments.¹ None of the allegations described in his amended complaint give rise to the Court's jurisdiction.

According to the amended complaint, "the United States acting in their [sic] official capacity under federal law" illegally took Mr. Zhuckkahosee from the jurisdiction of the Menominee Tribal Court to face various Federal criminal charges. Amended Compl. at 1. The amended complaint further alleges that the United States "wrongfully and illegally" applied "contract provisions of the vague and invalid Adam Walsh Child Protection and Safety Act of 2006" to Mr. Zhuckkahosee. Amended Compl. at 2. The amended complaint also alleges that the United States violated Mr. Zhuckkahosee's rights under the "Wolf River Treaty," but does not explain either the terms of that treaty or how the United States purportedly violated the treaty. The only explanation provided seems to be that, because Mr. Zhuckkahosee was subjected to various Federal sex offender statutes and sentenced to 135 months of prison, his rights were violated. *See* Amended Compl. at 2.

¹ Claim 1 of Mr. Zhuckkahosee's amended complaint alleges violation of the "5th Amendment through the 14th Amendment" as well as "under 6th and 8th Amendments." Amended Compl. at 1. Although it is unclear whether Mr. Zhuckkahosee alleges that his rights were violated under the 5th *and* 14th amendments, nothing in his amended complaint provides jurisdiction to this Court under *any* Constitutional amendment.

Mr. Zhuckkahosee demands, among other things, \$10 million dollars in compensatory damages for wrongful imprisonment, and injunctive relief. As described above, this Court lacks jurisdiction over all of Mr. Zhuckkahosee's claims, and his suit should therefore be dismissed.

ARGUMENT

I. Standard Of Review

A plaintiff seeking to have claims heard by this Court must set forth a jurisdictional basis for those claims in the complaint. RCFC 8(a)(1) ("A pleading that states a claim for relief must contain a short and plain statement of the grounds for the court's jurisdiction[.]"). The existence of subject matter jurisdiction is a threshold issue to be decided by the Court. *De Maio v. United States*, 93 Fed. Cl. 205, 209 (2010) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998)). The plaintiff bears the burden of proving, by a preponderance of the evidence, that the Court has subject matter jurisdiction. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *BearingPoint, Inc. v. United States*, 77 Fed. Cl. 189, 193 (2007). This burden of proof applies to *pro se* litigants, even though the Court affords such plaintiffs considerable leeway in presenting their claims. *De Maio*, 93 Fed. Cl. at 209; *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995) (recognizing that *pro se* litigants are not exempt from meeting this Court's jurisdictional requirements).

If a Rule 12(b)(1) motion challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations – that is, the movant presents a "facial" attack on the pleading – then those allegations are taken as true and construed in a light most favorable to the complainant, but if the Rule 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction, the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993);

5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1363, at 456–57 (1990). In such a case, the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion. *Id.* (citing *Gibbs v. Buck*, 307 U.S. 66, (1939)).

The allegations in the complaint must also be construed in the manner most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In determining whether it possesses jurisdiction, the Court looks first at the complaint, which “must be well-pleaded in that it must state the necessary elements of the plaintiff’s claim, independent of any defense that may be interposed.” *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997). If the Court determines that a plaintiff has failed to establish subject matter jurisdiction, the Court must dismiss the action. *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); RCFC 12(h)(3).

II. The Amended Complaint Pleads No Claims Within The Jurisdiction Of This Court

The amended complaint should be dismissed because it does not properly invoke subject matter jurisdiction and a requisite waiver of sovereign immunity. *See* RCFC 12(b)(1), 12(h)(3). It is well-established that the Court of Federal Claims is a court of limited jurisdiction. *Bath Iron Works Corp. v. United States*, 27 Fed. Cl. 114, 122 (1992), *aff’d*, 20 F.3d 1567 (Fed. Cir. 1994); *Souders v. South Carolina Public Service Authority*, 497 F.3d 1303, 1307 (Fed. Cir. 2007). The Court’s authority to grant relief is limited by the extent to which the United States has waived its sovereign immunity as set forth in the Tucker Act, 28 U.S.C. § 1491(a)(1). *Accord United States v. Testan*, 424 U.S. 392, 399 (1976).

Pursuant to the Tucker Act, the Court’s jurisdiction is limited to claims against the United States founded upon the United States Constitution and money-mandating statutes, regulations, or contracts. *See* 28 U.S.C. § 1491(a)(1); *United States v. Mitchell*, 463 U.S. 206, 215-18 (1983).

The Tucker Act does not, by itself, however, create a right to money damages against the United States. *Searles v. United States*, 88 Fed. Cl. 801, 803 (2009). Rather, the substantive right to money damages must extend from the constitutional provision, statute, contract, or regulation giving rise to the claim. *Id.* (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998) (“What this means is that a Tucker Act plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.”)). Further, a waiver of sovereign immunity by the United States “cannot be implied and must be unequivocally expressed.” *United States v. King*, 395 U.S. 1, 4 (1969).

Mr. Zhuckkahosee’s amended complaint, even when viewed in the most deferential light possible, fails to articulate a claim that is within this Court’s jurisdiction. To the extent that Mr. Zhuckkahosee takes issue with his Federal sentence and imprisonment, this Court does not possess the authority to review or to overturn convictions, or to review in detail the facts surrounding a conviction or imprisonment. *Humphrey v. U.S.*, 52 Fed. Cl. 593, 596 (2002) (explaining that the only evidence that this Court may receive regarding an unjust conviction and imprisonment shall be limited to either a certificate of the district court or a pardon containing the required factual recitations). In fact, this Court may not review the merits of the decision by the United States District Court for the Eastern District of Wisconsin, which sentenced Mr. Zhuckkahosee. *Shinnecock Indian Nation v. U.S.*, 782 F.3d 1345, 1352 (Fed. Cir. 2015) (“Binding precedent establishes that the Court of Federal Claims has no jurisdiction to review the merits of a decision rendered by a federal district court.”) (citing *Joshua v. U.S.*, 17 F.3d 378, 380 (Fed. Cir. 1994)).

Although Mr. Zhuckkahosee cites a number of constitutional amendments that he claims provide jurisdiction, none does in his case. It is well established, for example, that the Due Process clauses of both the Fifth and Fourteenth Amendments do not mandate the payment of money, and thus do not provide a cause of action under the Tucker Act (and corresponding jurisdiction in this Court). *Smith v. U.S.*, 709 F.3d 1114, 1116 (Fed. Cir. 2013) (citing *LeBlanc v. U.S.*, 50 F.3d 1025, 1028 (Fed. Cir. 1995)). Nor do the Sixth or Eighth Amendments that Mr. Zhuckkahosee cites in his amended complaint confer jurisdiction in this Court. *See, e.g., Ogden v. U.S.*, 61 Fed. Cl. 44, 47 (2004) (no jurisdiction to entertain claims based upon the Sixth or Eighth Amendments).

By contrast, this Court does possess jurisdiction to hear Fifth Amendment takings claims. *Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005). However, to state a takings claim, a plaintiff must concede the lawfulness of the Government's actions: the allegation must assert that a *valid* exercise of the Government's sovereign authority resulted in the taking of private property for public use without just compensation. *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001); *Crocker v. United States*, 37 Fed. Cl. 191, 195-96 (1997). Although Mr. Zhuckkahosee, after reviewing the Government's initial motion to dismiss, attempts to cure his original complaint's problems by asserting that the United States took action "through a valid exercise of the United States sovereign authority" (Amended Compl. at 1), in the same sentence he alleges that these actions were wrongful and illegal. He also fails to specify in any way how some Federal Government action satisfies the above requirements, and he thus does not state a takings claim within this Court's jurisdiction.

Furthermore, to the extent Mr. Zhuckkahosee seeks monetary damages for unjust imprisonment, this Court is without jurisdiction to hear this claim. This Court only possesses

jurisdiction to hear claims regarding unjust imprisonment if (1) a court has reversed or set aside a plaintiff's conviction on the grounds that he is not guilty; or (2) the plaintiff has been pardoned. *Lott v. United States*, 11 Cl. Ct. 852, 853 (1987); *Salman v. United States*, 69 Fed. Cl. 36, 39 (2005). As Mr. Zhuckkahosee remains in Federal prison in Marianna, Florida, it is clear that his conviction has not been overturned nor has he been pardoned.

Although this Court does possess jurisdiction over breach of contract claims against the United States, in this case, Mr. Zhuckkahosee does not allege the existence of any contract with the United States. Rather, he merely claims that various "contract provisions" of the Adam Walsh act were illegally applied to him, and that his rights under the Wolf River Treaty have been violated. Amended Compl. at 2. This vague inclusion of the word "contract" does not serve to articulate a claim that might provide jurisdiction in this Court.

Mr. Zhuckkahosee's amended complaint continues to reference a Wolf River Treaty as a basis for relief. Amended Compl. at 2. The United States did, in fact, enter into a treaty with the Menominee Tribe in 1854, commonly known as the Wolf River treaty. *See, e.g.* 10 Stat. 1064.² Although he has removed references to a "Bad Men Clause" that appeared in his original complaint, he failed to provide any explanation of how this Court may exercise jurisdiction over his suit based on the Wolf River Treaty, which has no bearing on his claim.

III. Transfer Is Not Appropriate

The transfer statute, 28 U.S.C. § 1631, permits transfer of a case when 1) the transferor court does not possess jurisdiction to entertain the claims, 2) the transfer is in the "interest of justice," and 3) the transferee court is one in which the action could have been brought at the time the claim was filed. *Rodriguez v. v. United States*, 862 F.2d 1558, 1559-60 (Fed. Cir.

² An image of the text of the treaty may be found at: <http://digital.library.okstate.edu/kappler/vol2/treaties/men0626.htm> (last accessed July 7, 2016).

1988). As explained above, the Court does not possess jurisdiction to entertain Mr. Zhuckkahosee's claims because his claims allege violations of non-money-mandating Federal statutes or constitutional provisions. Lack of jurisdiction, however, is not the only consideration set forth in 28 U.S.C. § 1631. If transfer would "be futile given the weakness of plaintiff's case on the merits, the deciding court may decline to transfer the case and dismiss it." *Faulkner v. United States*, 43 Fed.Cl. 54, 56 (1999) (internal quotations omitted).

Transfer of this case to any Federal district court would be futile and therefore not in the interest of justice, because Mr. Zhuckkahosee's amended complaint does not meet the minimum pleading standard of RCFC 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." This standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" is insufficient. *Id.* (quoting *Bell Atl.*, 550 U.S. at 557). Mr. Zhuckkahosee's amended complaint alleges wrongdoing by the U.S. District Court for the Eastern District of Wisconsin apparently simply for exercising criminal jurisdiction over Mr. Zhuckkahosee. *See* Amended Compl. at 1-2. In any event, Mr. Zhuckkahosee presumably had the opportunity to be heard before that court.

Because Mr. Zhuckkahosee's amended complaint implicates no identifiable money-mandating statute, regulation, contract, or constitutional provision, the Court should dismiss this case for lack of subject matter jurisdiction.

Respectfully submitted,

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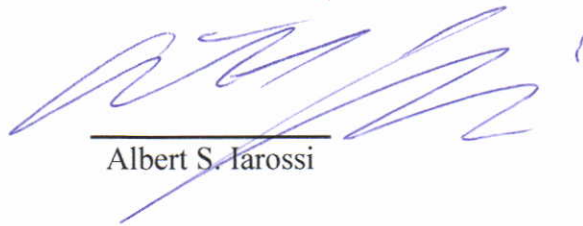
July 7, 2016

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 7th day of July, 2016, I caused to be placed in the United States mail (first-class, postage prepaid), copies of "DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT" addressed as follows:

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Albert S. Iarossi