IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FLOWERS,

Petitioner,

v.

JAMES DOYLE, Wis. Dept. of Justice;
JANE AND JOHN DOE, as employees of
the State of Wis.,

Respondents.

ORDER

02-C-0002-C

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This is a proposed civil action for declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, pursuant to 28 U.S.C. § 1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action 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. Petitioner's request for leave to proceed in forma pauperis on his claim that as applied to him Wis. Stat. § 301.45 violates the Constitution's ex post facto and double jeopardy clauses will be denied because he has not alleged facts from which it can be inferred that he has been subjected to the reporting requirements of that statute.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Flowers is confined at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin, pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stat. ch. 980. Respondent James Doyle is Wisconsin's attorney general. Respondents Jane and John Doe are state employees who allegedly participated in the violation of petitioner's constitutional rights detailed below.

Petitioner was convicted of two counts of sexual assault on May 25, 1989, and was sentenced to five years in prison and five years' probation. Petitioner was also convicted of sexual assault on September 27, 1990, and was sentenced to seven years in prison to be served consecutively to the sentence he was then serving. Petitioner's mandatory release date was December 24, 1996. However, the state of Wisconsin filed a petition under Wis. Stat. ch. 980, alleging that petitioner is a sexually violent person. While petitioner was confined at the Wisconsin Resource Center pending trial under chapter 980, he received a letter and form from

the Department of Corrections for registration as a sex offender pursuant to Wis. Stat. § 301.45(1g)(b) because of his May 25, 1989 and September 27, 1990 sexual assault convictions. On October 28, 1998, petitioner was committed under Wis. Stat. ch. 980. On October 6, 2000, petitioner received certificates of discharge from his May 25, 1989 and September 27, 1990 sexual assault convictions.

Petitioner was not ordered to comply with any registration requirements when he was sentenced on his May 25, 1989 and September 27, 1990 sexual assault convictions because Wis. Stat. § 301.45 was not enacted until after he was convicted. For the same reason, petitioner was never faced with the prospect of having to register as a sex offender during the prosecutions that led to his sexual assault convictions. Petitioner has never been afforded an opportunity to challenge the requirement that he register as a sex offender because such a requirement was not part of his sentences. There exists a threat that petitioner will be subject to further imprisonment based upon the same set of facts leading to his May 25, 1989 and September 27, 1990 convictions if he does not comply with Wis. Stat. § 301.45.

OPINION

I understand petitioner to allege that forcing him to comply with the requirements of Wis. Stat. § 301.45 would violate the ex post facto and double jeopardy clauses of the United States Constitution. Section 301.45 establishes a requirement that certain individuals who have committed a "sex offense," as defined by the statute, register periodically with the

Department of Corrections. A registrant must provide "information including his or her name and aliases, and physical characteristics such as date of birth, gender, race, height, weight, hair color, and eye color . . . [and] supply information regarding his or her conviction; supervision; and supervising agency; the addresses of the person's residence, workplace, and school; and the date the person's information was last updated." State ex rel. Kaminski v. Schwarz, 245 Wis. 2d 310, 324, 630 N.W.2d 164, 171-72 (2001) (citing Wis. Stat. § 301.45(2)(a)). The registration requirement is an ongoing obligation that can, under some circumstances, last a lifetime. See, e.g., Wis. Stat. § 301.45(5)(b).

Article I, § 10 of the Constitution provides that "[n]o State shall . . . pass any . . . ex post facto law." The ex post facto clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts." California Dept. of Corrections v. Morales, 514 U.S. 499, 504 (1995) (quoting Collins v. Youngblood, 497 U.S. 37, 43 (1990)). "Only measures which are both retroactive and punitive fall within the purview of the clause." Gilbert v. Peters, 55 F.3d 237, 238 (7th Cir. 1995). Wisconsin's sex offender registration law dates to 1993, when "Wisconsin Stat. § 175.45 (1993-94) [became] the first Wisconsin statute to require persons convicted of certain sex crimes to register with the State." Schwarz, 245 Wis. 2d at 331, 630 N.W.2d at 175. It was revised and renumbered in 1996 and public access and notification provisions were added at that time. The law's plain language indicates that under some circumstances it has retroactive effect. For instance, although the law dates only to 1993, it provides that a person who "[i]s in prison, a secured

correctional facility, a secured child caring institution or a secured group home or is on probation, extended supervision, parole, supervision or aftercare supervision on or after December 25, 1993, for a sex offense" must comply with the law's reporting requirements. Wis. Stat. § 301.45(1g)(b). Accordingly, a person like petitioner who was convicted in 1989, well before the law's effective date, would still be subject to the law if he remained incarcerated or under supervision after December 25, 1993. Indeed, petitioner has alleged that sometime between 1996 and 1998 the Department of Corrections sent him a sex offender registration form as a result of his 1989 and 1990 sexual assault convictions.

However, a statute's retroactive effect does not implicate the ex post facto clause unless it is also punitive, or, in other words, unless it retroactively imposes additional punishment for criminal acts. Determining whether a statute should be classified as punitive involves a two-step inquiry known as the "intent-effects test." A reviewing court first considers whether the legislature that enacted the statute indicated expressly or implicitly that the statute was intended to have a punitive effect. Doe I v. Otte, 259 F.3d 979, 985 (9th Cir. 2001), petition for cert. filed, 70 U.S.L.W. 3374 (U.S. Nov. 21, 2001) (No. 01-729). Even "[i]f . . . the legislature did not intend the statute to be considered punitive, or [if the statute's] intent is ambiguous, then [the court] must inquire whether the statute is 'so punitive either in purpose or effect' that it should be considered to constitute punishment." Id. (quoting United States v. Ward, 448 U.S. 242, 249 (1980)). Petitioner has alleged in conclusory fashion that Wis. Stat. § 301.45 is punitive. Petitioner's complaint alleges that the act is punitive because it has

"absolutely nothing to do with treatment" of sex offenders. However, the act need not advance the goal of treatment in order to avoid being deemed punitive. There are many non-punitive reasons why a legislature might choose to adopt a sex offender registration requirement, such as a desire to protect the public. Nevertheless, the "intent-effects test" requires an involved analysis of the statute in question and its legislative history. Some courts employing the test have upheld sex offender registry acts against ex post facto challenges while other courts have struck such laws down. Compare Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997) (upholding Washington's sex offender registration and notification law) and Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000) (upholding Utah's sex offender notification law) with Otte, 259 F.3d at 993-994 (invalidating Alaska's sex offender registration and notification law). In addition, determining whether Wis. Stat. § 301.45 violates the Constitution's double jeopardy clause, U.S. Const. amend. V, also hinges on whether the statute is punitive. Kansas v. Hendricks, 521 U.S. 346, 369 (1997); Femedeer, 227 F.3d at 1253-54; People v. Malchow, 739 N.E.2d 433, 442 (Ill. 2000). It would be inappropriate to conduct such a detailed analysis of Wisconsin's sex offender registry law at this early stage of the proceedings without the benefit of any briefing.

All of this suggests that petitioner has alleged facts sufficient to state a claim that Wis. Stat. § 301.45, as applied to him, violates the Constitution's ex post facto and double jeopardy clauses. However, petitioner has a more fundamental problem. Petitioner alleges that sometime between 1996 and 1998, while he was confined pending trial under Wis. Stat. ch.

980, he received from the Department of Corrections "a letter and form to fill out . . . for registration as a sex offender pursuant to § 301.45(1g)(b)." Although it is unclear from petitioner's complaint, he may have received this form in anticipation of his then impending release from prison (petitioner alleges that the mandatory release date on his sexual assault sentences was December 24, 1996). However, petitioner's release was forestalled by his commitment as a sexually violent person pursuant to Wis. Stat. ch. 980 on October 28, 1998. Accordingly, it is unclear whether petitioner was ever required to register as a sex offender. The law's requirements appear to mandate registration only when an offender's release from prison or some other institutional setting is imminent. See, e.g., Wis. Stat. § 301.45(2)(e), (3). In his complaint, petitioner alleges only that he received a form to fill out from the Department of Corrections. Petitioner does not allege that he actually filled the form out. He does not allege that he was ever registered by the state as a sex offender or that he has been required to comply with the act's periodic reporting requirements since he received the form several years ago. Nor does it allege that his release from confinement under chapter 980 and the concomitant requirement to register under § 301.45 as a sex offender is now imminent. Wis. Stat. § 301.45 (3)(a)3r. Because petitioner fails to allege that he has been registered as a sex offender in the past, is now registered as a sex offender or will be subject to the law's reporting requirements in the immediate future, he does not have standing to pursue the declaratory and injunctive relief he seeks. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (to demonstrate standing, plaintiff must allege facts showing injury that is concrete and

particularized and actual or imminent, not conjectural or hypothetical). Because petitioner has not alleged facts from which it can be inferred that he has ever been or soon will be subject to the reporting requirements of Wis. Stat. § 301.45, his complaint will be dismissed without prejudice to his filing a new complaint at such time as the requirement that he register as a sex offender is imminent.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis is DENIED and his ex post facto and double jeopardy claims are DISMISSED without prejudice to his filing a new complaint at such time as the requirement that he register as a sex offender is imminent.

Entered this 14th day of February, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge