IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SEAN CASTON,

ORDER

Petitioner,

03-C-544-C

v.

FORMER GOVERNOR TOMMY G. THOMPSON,
FORMER ATTORNEY GENERAL JAMES E. DOYLE,
HON. JUDGE S. MICHAEL WILK,
DISTRICT ATTORNEY RICHARD A. GINKOWSKI,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. §§ 1983, 1985 and 1986, as well as the Fifth and Fourteenth Amendments under the United States and Wisconsin Constitutions and Wis. Stats. §§ 227.10 and 227.11. Petitioner, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. Of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

At all relevant times, respondent Tommy G. Thompson was governor of the State of Wisconsin. In 1997, he signed into law Wisconsin Act 283, which relates to sentences for felony offenses, parole and extended supervision, creates a criminal penalties study

committee, grants rule-making authority, makes an appropriation and provides penalties. At all relevant times, respondent James E. Doyle was the Attorney General for the state of Wisconsin, responsible for prosecuting Wisconsin state statutes and laws implemented in various criminal complaints; respondent S. Michael Wilk was a circuit court judge in Kenosha County responsible for applying the Wisconsin Constitution, statutes, and common law doctrine of stare decisis; and respondent Richard A. Ginkowski was a district attorney responsible for prosecuting Wisconsin state statutes and laws implemented in various criminal complaints. Respondents failed to take proper duty of care in their various roles and "knowingly, recklessly, intentionally and wantonly" discriminated against petitioner and violated his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

DISCUSSION

A petitioner need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. Doe ex rel. Doe v. St. Joseph's Hospital, 788 F.2d 411 (7th Cir.1986); Benson v. Cady, 761 F.2d 335 (7th Cir.1985) ("Although the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts upon which he bases his claim, . . . he must set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery.") (citations

omitted). Petitioner's allegations are too vague and conclusory to state a claim that any of the respondents have violated his constitutional rights. Although a complaint "cannot be dismissed on the ground that it is conclusory or fails to allege facts," it must give the respondents sufficient notice of the claim to file an answer. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). Petitioner fails to allege what event occurred to make him believe his rights have been violated and what role each individual respondent played in that event, making it impossible for respondents to file an answer. He merely refers generally to respondents' responsibilities in their roles as governor, attorney general, judge and district attorney. See Davis-El v. O'Leary, 668 F. Supp. 1189, 1190 (N.D. Ill. 1987) (complaint alleging violation of constitutional rights "must charge [defendants] with personal wrongdoing") (citing Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985)).

Petitioner concludes that respondents discriminated against him and violated his constitutional rights under the Fifth and Fourteenth Amendments. However, where the factual allegations narrated in the complaint are insufficient to outline a constitutional violation, attaching bare legal conclusions to the facts will not save the complaint. Benson, 761 F.2d at 338; see also Kunik v. Racine County, 946 F.2d 1574, 1579 (7th Cir. 1991) (A "pleading is insufficient to state a claim under [§ 1983] if the allegations are mere conclusions"). In sum, petitioner's allegations are insufficient to outline a claim that his constitutional rights have been violated by any of the respondents. Because petitioner's

complaint is devoid of factual allegations to even remotely support his request for relief, it must be dismissed as legally frivolous.

Petitioner should note that if he is questioning the validity of his confinement, rather than the *conditions* of his confinement, he would have to file a petition for habeas corpus. Under Preiser v. Rodriguez, 411 U.S. 475 (1973), a petition for habeas corpus under 28 U.S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser, 411 U.S. at 488-90). The Court of Appeals for the Seventh Circuit has held that "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" for failure to state a claim upon which relief may be granted rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F. 3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). If petitioner wishes to challenge the validity of his confinement, he may file a petition for habeas corpus pursuant to 28 U.S.C. § 2254 after he has exhausted his available state court remedies.

ORDER

IT IS ORDERED that:

1. Petitioner Sean Caston's request for leave to proceed in forma pauperis on his claims

against respondents Tommy G. Thompson, James E. Doyle, S. Michael Wilk, and Richard A. Ginkowski is DENIED and this case is DISMISSED as legally frivolous;

2. The unpaid balance of petitioner's filing fee is $146.83; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 27th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge