IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLYDE BAILY WILLIAMS,

ORDER

Petitioner,

03-C-0549-C

v.

MARGARET A. MARONEY,

Respondent.

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This is a proposed civil action for declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Respondent was petitioner's court appointed public defense attorney. Petitioner alleges that respondent conspired with other unnamed public officials to cause him to be subjected to retroactive application of Wis. Stat. § 939.62, in violation of the ex post facto clause of the Wisconsin and United States Constitutions. 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 respondent believes 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).

From petitioner's complaint and the public record, I understand petitioner to be alleging the following facts.

ALLEGATIONS OF FACT

On July 16, 2001, petitioner was tried in Racine County, Wisconsin in case no. 00-CR-558 on two counts of First Degree Sexual Assault of a Child and two counts of Child

Enticement-Sexual Contact. He was convicted of the two counts of First Degree Sexual Assault of a Child on August 10, 2001, and sentenced to 50 years' imprisonment on each count. Respondent Margaret A. Maroney was appointed to be petitioner's defense attorney on December 27, 2002. At a post-conviction evidentiary hearing held on January 24, 2003, respondent moved to remit portions of the two sentences imposed upon petitioner in case no. 00-CF-558 to thirty years each, arguing that a thirty year sentence was the maximum allowed by law when the sentences were initially imposed and that the longer sentences violated petitioner's right to be free from ex post facto laws. The motion was granted and petitioner's sentences were remitted.

Respondent conspired with various public officials to intentionally violate plaintiff's constitutional right "to be free from the ex post facto clause Art. 1. § 10, cl; 1 And The 4th, 5th, 6th, and 14th Amendments."

Petitioner has been put on suicide watch four times and suffers from a great deal of anxiety. He believes his life is in danger because "men make expression statements about killing people like me," and "it is a fact when people have this kind of impression people get kill[ed]."

OPINION

A. Actions Under Color of State Law

To succeed under 42 U.S.C. § 1983, a petitioner must show that the respondent must have acted under color of state law in depriving petitioner of a right secured under the Constitution or laws of the United States. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970); Soldal v. County of Cook, 942 F.2d 1073, 1074 (7th Cir. 1991), rev'd on other grounds, 506 U.S. 56 (1992). It is well-settled that a public defender does not act under color of state law for the purpose of § 1983 when providing representation to an indigent client. Polk County v. Dodson, 454 U.S. 312, 317 (1981); Sceifers v. Trigg, 46 F.3d 701, 704 (7th Cir. 1995). In Polk County, the Court found that the attorney's functions and obligations were "in no way dependent on state authority" and stressed the fact that "except for the source of payment, [the] relationship became identical to that existing between any other lawyer and client." Id. at 318. In this case, plaintiff's contention implicates a lawyer's traditional functions when he contends that the state public defender failed to represent him adequately in his criminal proceedings.

The Supreme Court has held that public defenders act under color of state law and have no immunity from §1983 liability where they engage in a conspiracy with state officials that deprives the defenders' clients of their federal rights. Tower v. Glover, 467 U.S. 914, 916 (1984). Petitioner makes a bald assertion that respondent conspired with other public

officials to violate his constitutional rights. This assertion is inconsistent with his allegation that it was respondent who persuaded the court to remit his sentences. Further, petitioner's allegations of fact do not suggest that respondent did anything that could be construed as a violation of petitioner's constitutional rights. Liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Petitioner alleges only that respondent was responsible for rectifying any constitutional violation that may have occurred with respect to the initial imposition of the fifty-year sentences.

To the extent that petitioner is alleging that respondent's success in obtaining a reduction in his sentences is causing him anxiety and to fear for his safety at the prison, he has no valid claim. By themselves, petitioner's fears and anxieties do not amount to constitutional violations. If petitioner has more than a generalized fear for his safety at the prison, he is free to advise prison officials of that fact and seek protective custody status. However, he has no claim against his former lawyer.

ORDER

IT IS ORDERED that:

1. Petitioner's request for leave to proceed in forma pauperis on his claim that respondent violated his constitutional rights in her representation of petitioner at a post-conviction evidentiary hearing is DENIED and this case is DISMISSED with prejudice as legally frivolous;

2. The unpaid balance of petitioner's filing fee is $133.41; 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 20th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge