IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLYDE BAILY WILLIAMS,

ORDER

Petitioner,

03-C-740-C

v.

ROBERT REPISCHAK,

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 Winnebago Correctional Institution in Winnebago, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Respondent is an assistant district attorney who helped prosecute petitioner's criminal conviction. Petitioner alleges that respondent subjected him to vindictive prosecution by instituting additional criminal charges against him because he refused to accept a plea bargain in a pending criminal matter. 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). 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

Petitioner is an inmate at the Winnebago Correctional Institution in Winnebago, Wisconsin. Respondent is an assistant district attorney in Racine County, Wisconsin. On

September 3, 1996, respondent filed a criminal complaint against petitioner in Racine County, Wisconsin, case no. 96-CF-826, alleging first degree sexual assault of a child. In June 2000, respondent told petitioner that if he did not enter into a plea agreement in that case, he would file additional criminal charges based on incidents that had taken place nearly ten years earlier. The prosecuting attorney who investigated the possibility of charging petitioner for the earlier incidents did not believe he had enough evidence to prove petitioner's guilt. Petitioner refused to accept a plea bargain. Respondent then filed two additional charges of first degree sexual assault of a child and two counts of child enticement for an incident that had taken place in 1990. The two counts of child enticement were dismissed, but a jury found petitioner guilty on the two counts of sexual assault. During the trial, respondent commented on petitioner's refusal to take the stand in his own defense. On August 10, 2001, petitioner was sentenced to two consecutive sentences of 50 years' imprisonment. These cases were reopened on January 24, 2003 and each sentence was reduced to 30 years.

OPINION

I understand petitioner to allege that respondent subjected him to malicious prosecution by instituting criminal charges against him solely because of his refusal to accept a plea agreement in a pending criminal matter. The Court of Appeals for the Seventh Circuit

has interpreted the United States Supreme Court's opinion in Albright v. Oliver, 510 U.S. 266 (1994) to preclude "constitutional torts of malicious prosecution when state courts are open to such challenges." Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001). Petitioner does not contend that he has no recourse in state court. Moreover, petitioner's claim is at its core a challenge to the fact of his confinement rather than to a condition of his confinement. In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that a petition for a writ of 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." 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).

Although petitioner does not request immediate release, deciding the issue of the constitutionality of respondent's actions would necessarily involve an inquiry into the validity of petitioner's confinement. Thus, petitioner's claim must be denied without inquiring into its merits. If petitioner wishes to pursue the claim, he will have to do so in a petition for a writ of habeas corpus after he has exhausted all the state court remedies

available to him. 28 U.S.C. § 2254(b)(1)(A).

ORDER

IT IS ORDERED that

1. Petitioner Clyde Baily Williams is DENIED leave to proceed in forma pauperis against respondent Robert Repischak and this action is DISMISSED pursuant to 28 U.S.C. § 1915(e)(2) because the claim in the complaint is not cognizable in a civil action pursuant to 42 U.S.C. § 1983.

2. The clerk of court is directed to enter judgment for respondent and close this case.

3 A strike will not be recorded against petitioner in accordance with 28 U.S.C. § 1915(g), because dismissal of an action for failure to use the proper avenue for relief is not a ground listed in § 1915(g) for recording a strike.

4. The unpaid balance of petitioner's filing fee is $136.66; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

Entered this 1st day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge