

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT LEE JORDAN,

Petitioner,

v.

ORDER

06-C-607-C

ROBERT FLANCHER, D.A.;  
PEG LAUTENSCHLANGER, Att. Gen.; and  
MATTHEW FRANKS, Secretary, Corr.,

Respondents.  
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Petitioner Robert Lee Jordan, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, has filed a pleading on forms designed for use by state prisoners seeking money damages for alleged violations of their civil rights under 42 U.S.C. § 1983. He requests leave to proceed in the action under the in forma pauperis statute, 28 U.S.C. § 1915.

In his pleading, petitioner appears to be alleging that in 1965, at the age of 16, he was unlawfully convicted of crimes that resulted in a three-year term of imprisonment which, “because of parole violations” extended to 9 years. According to petitioner, his sentence was expunged on July 3, 1974 and, in a letter sent to him at the Green Bay Reformatory, he was

promised compensation for his wrongful conviction. However, “the state” did not pay the compensation. Petitioner asserts that although he lost the letter promising him compensation, he nevertheless made a claim for compensation some ten years ago. At that time, the State of Wisconsin Claims Board denied mailing a letter promising petitioner compensation. In 2004, petitioner obtained a copy of his expungement order and filed another request with the Claims Board for \$25,000 compensation. In June 2006, the State of Wisconsin Claims Board advised petitioner that he would have to submit clear and convincing evidence of his innocence. Also, it advised petitioner that there was no record of his having filed an earlier claim for compensation. Petitioner does not indicate that he has received any further response to his request for compensation from the Claims Board. In his pleading in this court, however, he seeks \$2 million dollars from the District Attorney for Racine County, the present Attorney General for the State of Wisconsin and the Secretary of the Department of Corrections for “hiding this injustice.” In addition, he asks that the court order his current term of his imprisonment shortened by 9 years to make up for his 1965 unlawful conviction.

The injury alleged in a claim, and not the relief sought, determines whether a claim is cognizable in habeas corpus or should instead be brought as a civil action. Clayton-El v. Fisher, 96 F.3d 236, 242 (7th Cir. 1996). Here, petitioner asserts that he is entitled to a shortening of his current sentence, a claim that must be raised in a petition for a writ of

habeas corpus brought pursuant to 28 U.S.C. § 2254 after he exhausts his available state court remedies. Prieser v. Rodriguez, 411 U.S. 475, 488-90 (1973)(habeas corpus under § 2254 is exclusive remedy for state prisoner seeking immediate or speedier release). However, if petitioner's claim is that he suffered a violation of his Fourteenth Amendment right to due process and false imprisonment long ago which can be compensated only with money damages, such a claim is cognizable in a civil action pursuant to 42 U.S.C. § 1983. (I express no opinion whether petitioner's claim would have to be dismissed immediately as having been filed well beyond the applicable statute of limitations.)

The Court of Appeals for the Seventh Circuit has given somewhat mixed signals regarding what district courts should do when a pro se prisoner mislabels his pleadings. In Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996), the court stated: A "district court [is] not authorized to convert a § 1983 action into a § 2254 action. . . . 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." However, in Valona v. United States Parole Commission, 165 F.3d 508 (7th Cir. 1998), the court held that the district court had erred in refusing to convert a habeas corpus action into a mandamus action if that was how the suit should have been styled. The court wrote, "If Valona is entitled to a writ of mandamus, then the district court should have provided him that relief in the suit he has filed, rather than requiring him to start over." Id. at 510. See also Williams v.

Wisconsin, 336 F.3d 576 (7th Cir. 2003) (considering merits of habeas corpus petition that was brought under § 1983).

One way that these cases can be reconciled is if they are interpreted not as setting forth rigid rules without exceptions but as general guidelines that should be followed when the reasons for doing so are present. In Moran v. Sondalle, 218 F.3d 647, 649 (7th Cir. 2000), the court noted that “[p]risoners may be tempted to choose one route rather than another to avoid limitations imposed by Congress.” See also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (noting different procedural requirements and consequences of § 1983 and habeas corpus statutes as reasons for refusing to convert action).

In this case, petitioner may be attempting to avoid a number of limitations by filing his civil rights claim in a petition for a writ of habeas corpus. The filing fee for an action under § 1983 is \$350 as opposed to \$5 for actions brought under 28 U.S.C. § 2254. The requirements for exhausting administrative remedies are slightly less strict in § 1983 suits than in § 2254 actions. Compare Massey v. Wheeler, 221 F.3d 1030 (7th Cir. 2000) (exhaustion in § 1983 suit affirmative defense that may be waived) with Gonzalez v. O’Connell, 355 F.3d 1010, 1016 (7th Cir. 2004) (no exception to statutory exhaustion requirements (such as those in § 2254)). In habeas corpus actions, the proper respondent is petitioner’s custodian, whereas in a § 1983 action, a petitioner may proceed against any state official who is alleged to have been personally involved in violating his constitutional

rights. Finally, actions under § 1983 are subject to the 1996 Prison Litigation Reform Act, whereas habeas corpus actions are not. Under the PLRA, the court must assess petitioner an initial partial payment of the filing fee, 28 U.S.C. § 1915(a)(2), screen his complaint before it is served on the respondents and dismiss it promptly if it 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, 28 U.S.C. § 1915(e)(2), and collect the remaining portion of the filing fee from his prison account even if his request for leave to proceed with his action is denied, 28 U.S.C. § 1915(b)(2). In addition, if petitioner's complaint is dismissed for one of the reasons listed above, he will earn a "strike" under the three strikes provision of § 1915, § 1915(g).

Therefore, although I will not dismiss this case, I decline to convert petitioner's action until he has clarified his intentions. It is possible that petitioner wishes to proceed in habeas corpus because he is interested in seeking release rather than money damages and he wishes to avoid an action that is subject to the Prison Litigation Reform Act and its many provisions. Therefore, I will give petitioner until November 6, 2006, in which to inform the court in writing whether he wants his case to be treated as a § 1983 action or as a petition for a writ of habeas corpus. Petitioner should bear in mind that if he chooses to proceed under § 2254, I will require him to pay \$4.01 of the \$5 filing fee (petitioner's trust fund account statement reveals that he is eligible for waiver of prepayment of only \$.99 of the \$5

fee for filing a habeas corpus action, Longbehn v. United States, 169 F.3d 1082 (7th Cir. 1999) and then I will promptly dismiss the case on the ground that petitioner has not alleged facts entitling him to habeas corpus relief. If he chooses to proceed in a civil action under § 1983, he is to so advise the court and arrange promptly to send \$4.01 as an initial partial payment of the \$350 fee for filing a civil complaint.

#### ORDER

IT IS ORDERED that petitioner Robert Lee Jordan may have until November 6, 2006, in which to inform the court whether he wishes this court to treat his pleading as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 or as a complaint in a civil action under 42 U.S.C. § 1983. If he chooses to proceed under the habeas corpus statute, he may have until November 13, 2006, in which to pay \$4.01 of the \$5 filing fee by submitting a check or money order made payable to the clerk of court in that amount. If he chooses to proceed under § 1983, he may have until November 13, 2006, to pay an initial partial payment of the \$350 filing fee in the amount of \$4.01. If petitioner fails to advise the court of his preference for treatment of his pleading and fails to pay \$4.01 by November 13, 2006, I will treat his action as a habeas corpus action and deny him leave to proceed in forma pauperis on the ground that he has not paid the \$4.01 payment the

court has determined he must pay in order to proceed with his habeas corpus action.

Entered this 26th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge