

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

KENNETH J. MCFADDEN #182616,
Petitioner,

OPINION and ORDER

v.
DEPARTMENT OF CORRECTIONS
LEGAL DEPT. and AGENT JENNIFER
LAWRENCE,

08-cv-239-slc

Respondents.

Petitioner Kenneth J. McFadden is a prisoner at the Dane County jail in Madison, Wisconsin. In this lawsuit brought under 42 U.S.C. § 1983, petitioner contends that several of the Wisconsin administrative rules regarding the revocation of probation or parole are invalid. He requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915. However, because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Kenneth McFadden is incarcerated and is presently housed at the Dane County jail in Madison, Wisconsin. He is being detained for the “alleged violation” of rules governing his extended supervision in Dane County criminal case number 03-CF-165.

DISCUSSION

Petitioner contends that the Wisconsin Department of Corrections administrative rules regarding “Supervision Governing Clients on Probation, Extended Supervision, Parole and Community Supervision” are invalid under Wis. Stat. § 227 because they were never promulgated properly. Therefore, he asserts his probation is being revoked wrongfully because he cannot be held for violations of these “invalid” rules.

Petitioner’s complaint is problematic for a host of reasons. As an initial matter, I note that § 1983 is not a proper vehicle for challenging the validity of Wisconsin administrative rules on the ground that they violate Wisconsin law. Such a challenge must be presented in state court, not federal court. Even more important, petitioner is challenging the legitimacy of his confinement, a contention that cannot be resolved in the context of a lawsuit brought under § 1983. Instead, 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.” Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)). 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 his confinement, the court should dismiss the suit without prejudice” 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. at 477). Petitioner’s challenge to the legitimacy of the rules that form the basis of his pending probation revocation involve issues cognizable in habeas corpus because a judgment in his favor would necessarily imply the invalidity of his current confinement. Heck, 512 U.S. at 487. Accordingly, petitioner will be denied leave to proceed and his complaint will be dismissed. If petitioner wishes to pursue his claim, he will have to do so in a petition for a writ of habeas corpus after he has exhausted all state court remedies available to him. 28 U.S.C. § 2254.

ORDER

IT IS ORDERED that

1. Petitioner’s request for leave to proceed is DENIED 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 respondents 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 \$250.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 28th day of May, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge