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

MICHEAL LOCKLEAR,

Petitioner, ORDER

v. 02-C-261-C

JON LITSCHER, Secretary, Wisconsin Department of Corrections,

Respondent.

This is an action for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The parties are presumed to be familiar with the procedural history of this case. On December 2, 2002, this court entered an order denying petitioner Micheal Locklear's motion to stay proceedings while he exhausts his state appeal of the Waukesha County Circuit Court's denial of his petition for a writ of certiorari. In the December 2 order, I concluded that the Waukesha County case, though arising from the same probation revocation proceeding, was separate from the Milwaukee County case that petitioner is challenging in the instant habeas petition; therefore, a stay was unnecessary. Petitioner has now filed a "Notice of Motion and Motion for Clarification of Court's Order Dated, December 2, 2002 and for Other Relief."

In his motion, petitioner seeks first to "clear up any confusion" this court may have about whether the state courts have found petitioner's Waukesha County action to be barred

by principles of *res judicata*, asserting that the state has never raised this defense in the state courts. Because this portion of petitioner's motion appears to be informational in nature, I will take no action on it. As explained in the December 2 order, the subject of the instant action is the Milwaukee County action, in which *res judicata* is not an issue. This court will deal with the specifics of the Waukesha County action if and when petitioner exhausts his state court remedies and properly files a federal habeas petition with respect to that case.

Second, petitioner asks whether, in the event he brings a future habeas action challenging the Waukesha County case, he will be able to raise claims that happen to be identical to claims he raised in the Milwaukee County case. Because a habeas petition challenging the Waukesha County case is not before this court at this time, I decline to answer petitioner's question. However, I refer petitioner to the December 2, 2002, order, in which I stated that I would treat a habeas petition challenging the Waukesha County certiorari action as a "free-standing" attack on a state court judgment that is separate from the Milwaukee County judgment.

Third, petitioner asks "whether his state/federal claims which were previously dismissed by this court for failure to exhaust [in Case No. 99-C-459-C, as clarified by this court in its opinion and order dated August 15, 2002, in the instant case] are now properly before this court for federal review, in this instant petition?" If petitioner means to ask whether the claims dismissed for failure to exhaust in 99-C-459-C were "automatically" revived by virtue of this court's August 15, 2002, opinion, the answer is no. Anticipating

this answer, petitioner seeks permission to amend his petition to include those now-unexhausted claims.

Petitioner's motion to amend his petition is denied for two reasons. First, petitioner has been aware since August 2002 of how this court was interpreting its opinion and order dismissing his claim in 99-C-459-C, yet he waited until December 16, 2002, to file his motion to amend his petition to include those claims previously dismissed in the 1999 case. Meanwhile, respondent filed a substantive response to the petition as originally filed and construed; petitioner filed a set of motions that required decision by the court; and time elapsed from the briefing schedule. Allowing petitioner to amend his petition at this late juncture would delay the proceedings unnecessarily and would prejudice respondent.

Second, the only claim at issue in 99-C-469-C was petitioner's claim that on January 19, 1997, the Wisconsin Department of Corrections usurped the functions of the circuit courts that sentenced him by improperly changing his various sentences. According to petitioner, the changes implemented unlawfully by the department resulted in his illegal detention. This appears to be the same as Claim #1 in the instant petition, which was dismissed summarily on the ground that it did not state a cognizable federal claim. See Orders, May 17, 2002 and June 13, 2002. It makes little sense to allow petitioner to amend his petition to include a claim that this court has already dismissed. (In any event, even if this court was to reconsider and construe petitioner's "unlawful modification of sentence" claim as stating a claim under the Constitution's separation of powers or due process clauses,

petitioner would still lose. Central to petitioner's claim is his contention that he had not completed his sentence in an underlying case by January 19, 1997, the date on which the department released him to begin serving the term of probation ordered by the Milwaukee circuit court. In the certiorari challenge to the probation revocation, the Milwaukee County circuit court disagreed, finding that petitioner had completed his sentence on the underlying case by January 19, 1997. See Answer, dkt. #21, exh. M, at 5-6. Petitioner has not presented any clear and convincing evidence to overcome the presumed correctness of the state circuit court's finding. See 28 U.S.C. § 2254(e)(1).)

Finally, petitioner asserts that this court has failed to address certain claims raised in his habeas petition. See Petr.'s Motion, dkt. #26, at 5-6. Of these claims, I find that only the first–his claim that he was denied a fundamentally fair revocation hearing because the evidence was insufficient to establish that he failed to attend drug and alcohol treatment in October 1997–has not yet been addressed by the court. Nonetheless, petitioner shall not be granted leave to proceed on that claim. In his September 16, 1998, decision, the administrative law judge stated that petitioner's failure to attend drug and alcohol treatment in October 1997 was not the basis for his decision to revoke petitioner's probation. See Sept. 16, 1998, Administrative Decision, attached to Petition, dkt. #2, exh. 4, at 4. Thus, even if the evidence was insufficient under the Constitution to show that petitioner committed the alleged rule violation, petitioner is not "in custody" as a result of that error.

As this court found in its orders entered May 17, 2002 and June 13, 2002,

petitioner's claim that the department lacked the authority, jurisdiction or competency to revoke his probation because it failed to follow its own rules regarding notice and time limits does not state a violation of the Constitution or any other clearly established federal law. Finally, I have already addressed petitioner's claim that the department unlawfully modified his sentence. Accordingly, there are now two claims to which the magistrate judge ordered the state to respond in his order of May 16, 2002: 1) the department denied petitioner a fundamentally fair revocation hearing as a result of its failure to produce his treatment and attendance records and other favorable evidence; and 2) the department violated petitioner's due process rights when it denied him the right to have a lawyer present at the revocation hearing.

I will grant petitioner one last extension of time to file his reply to the state's answer to these claims. Petitioner shall have until January 17, 2003, in which to file his reply. No further extensions shall be granted.

ORDER

IT IS ORDERED that the motion of petitioner Micheal Locklear, as construed by the court, to amend his petition for a writ of habeas corpus and for leave to proceed on his claim that the department lacked sufficient evidence to find that he committed Allegation #1 are DENIED.

Petitioner has until January 17, 2003, within which to file his reply to the state's answer to the petition.

Dated this 31st day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge