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

DONNA KIKKERT,

Petitioner, REPORT AND RECOMMENDATION

v. 07-cv-705-bbc

SUZANNE SCHMITT, Superintendent,
Robert E. Ellsworth Correctional Center,

Respondent.

This petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 is before me for report and recommendation to the district court. (Because Judge Shabaz will be convalescing from shoulder surgery for a period of not less than sixty days beginning February 1, 2008, Judge Barbara Crabb has assumed administration of the cases previously assigned to him, including this one.) Donna Kikkert, an inmate at the Robert E. Ellsworth Correctional Center in Union Grove, Wisconsin, was placed on probation pursuant to a judgment of conviction in the Circuit Court for Oneida County for one count of interference with child custody. Subsequently, petitioner's probation was revoked and she was sentenced to prison. Petitioner contends that she is in custody in violation of her constitutional rights because: 1) the Department of Corrections failed to adequately consider an alternative to revocation before it revoked her probation; 2) petitioner does not have a "criminal" character and is not a danger to society and therefore the circuit court erred in sentencing her to

prison; and 3) the "methodologies" employed in the underlying family court proceeding that led to petitioner's conviction were unconstitutional.[1] I am recommending that the court deny the petition. Petitioner's first and third claims fail to state a cognizable constitutional claim and her second claim fails because the state courts did not unreasonably apply clearly established federal law or unreasonably determine the facts in denying the claim.

As an initial matter, petitioner renews her contention that the petition should be granted because respondent failed to file her answer to the petition within 20 days after the petition was served, as ordered by Judge Shabaz on December 17, 2007. Judge Shabaz denied a previous identical motion by petitioner on January 16, 2008. Finding that the marshal's service had served respondent on December 27, 2007, Judge Shabaz found that respondent's answer was not due until January 18, 2008.

If respondent was served on December 27, 2007, as petitioner contends, then petitioner is correct that the answer should have been filed on January 16, 2008. However, according to a letter from respondent dated January 16, 2008, she was not served with the petition until January 9 or 10, making her response due on January 29 at the earliest. Respondent's assertion is consistent with the documentation from the marshal's service, which shows that it received the petition for service on December 27, 2007, but did not mail

[1]Petitioner also asserts that the district court has wide discretion in fashioning judgments to remedy state court errors (Ground 4) and that she has presented clear and convincing evidence to overcome the presumption of correctness afforded to state court findings by 28 U.S.C. § 2254(e) (Ground 5). Because these are legal arguments as opposed to independent grounds for relief, I do not address them in this report and recommend that they be dismissed summarily.

it until January 7, 2008. Process Receipt and Return, dkt. #10. Thus, respondent filed her answer early, not late.

From the petition and respondent's answer and documents attached thereto, I find the following facts.

FACTS

On August 28, 2003, petitioner entered a plea of no contest in the Circuit Court for Oneida County to one count of interference with the custody of a child, a class C felony, in violation of Wis. Stat. § 948.31(1)(b). (Petitioner's criminal conviction related to family court proceedings that resulted in petitioner's daughter being placed with the child's father.) On December 19, 2003, the circuit court withheld sentence and placed petitioner on probation for a period of eight years. Petitioner's right to appeal expired 20 days later, when she failed to file a notice of appeal. In November 2004, petitioner attempted to file an untimely appeal, but the court of appeals found no good cause for granting an extension. The Wisconsin Supreme Court affirmed this decision on April 6, 2005.

On December 12, 2004, petitioner signed rules of community supervision. In June 2005, the Wisconsin Department of Corrections began probation revocation proceedings against petitioner, alleging that she had failed to report for supervision, cooperate with a social services order and attend a court hearing. Plaintiff requested a revocation hearing, which was held on July 11, 2005. The administrative law judge ordered that petitioner's

probation be revoked and she be returned to court for the imposition of the withheld sentence.

Petitioner appealed the revocation order to the Wisconsin Division of Hearings and Appeals. On August 8, 2005, David Schwarz, division administrator, issued an order sustaining the administrative law judge's decision. Petitioner then filed a petition for a writ of certiorari in the Circuit Court for Oneida County, challenging the revocation decision. Petitioner argued that the decision of the Division of Hearings and Appeals was arbitrary and capricious because the division had not considered feasible alternatives to revocation, which included the obligation to reasonably accommodate petitioner's religious beliefs. The circuit court denied the certiorari petition on December 20, 2005. Petitioner did not appeal this decision.

On January 6, 2006, the circuit court held a sentencing-after-revocation hearing at which it sentenced petitioner to seven years' imprisonment, consisting of four years' initial confinement and three years' extended supervision. Petitioner's appointed lawyer filed a no-merit report in the Wisconsin Court of Appeals, finding no meritorious basis for appealing the circuit court's post-revocation sentence. Petitioner filed a response to the no-merit report in which she attempted to explain or justify the facts recited in the revocation summary that the trial court had used at the sentencing hearing.

Reviewing the record independently as mandated by Anders v. California, 386 U.S. 738 (1967), the court of appeals found no arguable merit to any issue that could be raised

on appeal. Opinion and Order, *State v. Kikkert*, 2006AP686-CRNM (Ct. App. Aug. 22, 2006), attached to Answer, dkt. #14, exh. G, at 1. Noting that its jurisdiction was limited to the sentence imposed following revocation, the court stated that it was not addressing petitioner's responses to the no-merit report to the extent they challenged the grounds for revocation: "The reasonableness of the conditions of probation and whether Kikkert's proposed religious counseling would or should have satisfied the conditions of her probation are not the subject of this appeal." *Id.*, at 2.

The court found no basis for challenging the seven-year sentence imposed by the circuit court. Noting that the court could have imposed a 15-year sentence, the appellate court found that the court had not considered improper facts or imposed a sentence so excessive as to shock public sentiment. *Id.* Insofar as petitioner was claiming factual errors in the revocation summary, the court noted that petitioner had failed to notify the trial court of such errors, thereby failing to properly preserve the issue for appeal. *Id.*, at 3. Further, found the court, petitioner's responses to the revocation summary attempted to minimize or justify her actions, underscoring the propriety of the trial court's finding that she did not accept responsibility for her wrongdoing. *Id.* The Wisconsin Supreme Court denied petitioner's petition for review on January 9, 2007.

REPORT

I. Ground One: Failure to Consider Alternative to Probation

Petitioner argues that the Department of Corrections failed to adequately consider an alternative to revocation before it revoked her probation. However, in order to obtain federal habeas review, a petitioner must first fully and fairly present the merits of her claims to the state courts by utilizing the proper state procedures. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). Petitioner did not do so. As respondent points out, the steps petitioner needed to take under state law to challenge the department's failure to adequately consider an alternative to revocation were the following: 1) exhaust her administrative remedies; 2) file a petition for a writ of certiorari in state circuit court; 3) appeal the denial of that petition to the Wisconsin Court of Appeals; and 4) file a petition for review in the Wisconsin Supreme Court. Petitioner exhausted her administrative remedies and then filed a petition for a writ of certiorari challenging the reasonableness of the revocation decision, but she never appealed the circuit court's order denying her certiorari petition. Although she tried to challenge the revocation decision on direct appeal from her post-revocation sentence, the court of appeals refused to address those challenges on the ground that they were outside the scope of the appeal, which was limited to challenges to the sentence imposed following revocation. The basis for the state court's action was an independent and adequate state ground that bars this court from considering her claim. *Perruquet*, 390 F.3d at 514 (procedural default doctrine precludes

federal court from reaching merits of federal claim if petitioner present claim to state courts but state court dismissed claim on state procedural ground independent of federal question and adequate to support judgment).

Even if petitioner had properly exhausted her claim in the state courts, the claim fails on the merits. She argues that the state department of corrections violated her right to due process by failing to consider an alternative to revocation. However, the department was under no constitutional obligation to do so. *Black v. Romano*, 471 U.S. 606, 613-14 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (citing *Morrissey v. Brewer*, 408 U.S. 471, 486-89 (1972)); *In re Commitment of Burris*, 2004 WI 91, ¶30, 272 Wis. 2d 294, 682 N.W. 2d 812 (noting that Wisconsin's requirement that department consider alternatives to revocation was imposed as matter of policy, not due process). Accordingly, petitioner cannot show that she is in custody in violation of her constitutional rights as a result of the alleged failure of the department to consider alternatives to probation revocation.

II. Ground Two: Propriety of Post-Revocation Sentence

As a second ground for relief, petitioner contends that the circuit court should not have sentenced her to prison. Federal courts may overturn a sentence imposed by a state court only if that sentence is unconstitutional. Although respondent has construed petitioner's claim as asserting that her sentence was grossly disproportionate to the offense committed, *see Solem v. Helm*, 463 U.S. 277, 290-92 (1983), petitioner denies in her reply

brief that she is making such a claim. Reply, dkt. #16, at 12. Although the basis for petitioner's challenge to her sentence is not entirely clear, the thrust of her argument is that she is not a "criminal" or a risk to others. Reading petitioner's argument liberally, I infer that she is arguing that she was sentenced on the basis of inaccurate information, *U.S. v. Tucker*, 404 U.S. 443, 447 (1972) (defendants have due process right to be sentenced on basis of accurate information); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Apart from her general assertions that she is not criminal and that her actions were motivated only out of love and concern for her daughter, petitioner has identified only a few specific facts upon which the circuit court allegedly relied that were inaccurate. First, she argues that her incarceration was based on inaccurate facts in the revocation summary. The Wisconsin Court of Appeals found that petitioner had waived this argument by failing to present it to the circuit court. This finding is an independent and adequate state procedural rule that bars this court from considering petitioner's challenges to the revocation summary. *State v. Hansford*, 219 Wis.2d 226, 243 n. 16, 580 N.W.2d 171 (1998) (appellate court does not consider arguments raised for first time on appeal); *State v. Holland Plastics Co.*, 111 Wis.2d 497, 504, 331 N.W.2d 320 (1983) (same).

Petitioner also contends that the circuit court relied during the post-revocation sentencing on an outdated, 2002 psychological evaluation by Dr. Galli. Although Dr. Galli's report is not in the record, the trial circuit court referred to it during sentencing, noting that Dr. Galli had found plaintiff to have "broad deficits in introspectiveness" and "patterns of

responding to stress which are often contradictory and difficult to fathom," to be likely to blame others when things go wrong and to demonstrate an interest in questioning social conventions and rules. Petitioner argues that Dr. Galli's findings were refuted by evidence from Thomas McGuire, who had counseled plaintiff from April to December 2004. The evidence submitted by plaintiff consists of a brief letter written by McGuire on December 21, 2004 in which he stated that plaintiff had successfully completed her counseling and that he did not consider her to be a flight risk.

A sentencing court may consider a broad range of information in the sentencing process, provided that the evidence contains a "sufficient indicia of reliability." *United States v. Polson*, 285 F.3d 563, 568 (7th Cir. 2002). Contrary to plaintiff's assertions, McGuire's letter does not show that Dr. Galli's report was not reliable. McGuire's letter says only that he did not consider plaintiff to be a flight risk; he offered no opinion of plaintiff's underlying personality traits or psychological conditions, as Dr. Galli had. Furthermore, as the trial court observed, plaintiff's behavior while on probation showed that Dr. Galli had been correct in his assessment of plaintiff's lack of insight and tendency to minimize her actions. Plaintiff's contention that Dr. Galli's report was not reliable is without merit. It follows that the state court of appeals did not unreasonably apply clearly established federal law when it upheld petitioner's sentence. Accordingly, petitioner's application for habeas relief on this ground is foreclosed by § 2254(d) (application for writ of habeas corpus on behalf of state prisoner shall not be granted as to any claim adjudicated on merits by state court unless adjudication of claim was contrary to clearly

established federal law, based on unreasonable application of such law or based on unreasable determination of facts).

III. Ground Three: Challenge to Propriety of Family Court Proceeding

In her third claim, petitioner attacks the propriety of a decision by the family court to place her daughter with the daughter's father rather than with petitioner. According to petitioner, the flawed "methodologies" employed by the family court to determine child custody played a "major role" in her criminal case. I understand petitioner to be arguing that if her daughter had not been (erroneously) placed with the father in the first place, petitioner would never have fled with her.

The federal courts lack jurisdiction over family matters. *See Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). Furthermore, to the extent petitioner attacks the state court decisions resulting in custody of her daughter being awarded to the child's father, the *Rooker-Feldman* doctrine bars this court's review. *T.W. by Enk v. Brophy*, 124 F.3d 893, 898 (7th Cir. 1997) (lower federal courts cannot review state court custody decisions); *Newman v. Indiana*, 129 F.3d 937, 940-41 (7th Cir. 1997)(same). Finally, petitioner is not "in custody" pursuant to the judgment of the family court. Accordingly, that judgment is not the proper subject of a habeas petition under § 2254. *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510-11 (1982). The district court should dismiss this claim.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully RECOMMEND that the petition of Donna Kikkert for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be DENIED.

Entered this 14th day of March, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

March 14, 2008

Donna Kikkert
Robert E. Ellsworth Correctional Center
21425-A Spring Street
Union Grove, WI 53182-9408

Aaron R. O'Neil
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707

Re: Kikkert v. Schmitt
Case No. 07-cv-705-bbc

Dear Ms. Kikkert and Mr. O'Neil

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before August 4, 2008, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 4, 2008, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**