

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

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ROGER F. MARSHALL,

Petitioner,

v.

KATHLEEN SUTTIE,  
MARK HIESE, MATTHEW  
FRANKS and WISCONSIN  
DEPARTMENT OF CORRECTIONS,<sup>1</sup>

Respondents.  
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ORDER

08-cv-485-slc

Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the

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<sup>1</sup>Although petitioner lists Kathleen Suttie and the Wisconsin Department of Corrections as defendants in the caption of his complaint, in another section of the complaint form requesting the names of defendants he includes Mark Hiese and Matthew Franks. Therefore, I have changed the caption to include the names of all of the defendants as Fed. R. Civ. P. 10(a) requires.

Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner Roger Marshall, who is presently confined at the Oakhill Correctional Institution in Oregon, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has paid the initial partial payment of \$7.75 as 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, because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if his 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. I conclude that petitioner is challenging the conditions of his probation. Therefore, his claims must be dismissed without prejudice because he must bring them as a collateral attack under a writ for habeas corpus and not under 42 U.S.C. § 1983.

In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

### A. Parties

Petitioner Roger Marshall is a prisoner at the Oakhill Correctional Institution in Oregon, Wisconsin. Respondent Kathleen Suttie is a probation/parole agent employed by the Wisconsin Department of Corrections. Respondent Mark Hiese is the Director of the Bureau of Classification and Movement and respondent Matthew Franks is the Secretary of the Department of Corrections.

### B. Petitioner's Revocation

On April 24, 2007, petitioner pleaded guilty to violating Wis. Stat. § 301.45(2)(e), "Fail/Provide Sex Offender Information." On June 8, 2007, petitioner was sentenced to two years in prison and two years of extended supervision, but that sentence was stayed and a sentence of two years of probation was imposed. A condition of petitioner's probation was that he "[o]bey all of the rules and regulations of supervising probation agent."

Following his sentencing, petitioner reported to his probation agent, respondent Suttie. Suttie gave petitioner a set of rules to agree to and sign, which included all of the rules that someone who is on probation for committing a sex offense would have to follow. Some

of the rules required petitioner to (1) not work in any residential area; (2) pay for and attend sex-offender therapy; (3) not visit shopping malls or any other public gathering; and (4) not cross the state line without three days' prior approval from Suttie. Petitioner told Suttie that many of the rules did not apply to him because he had not been convicted of a sex offense in Wisconsin. Petitioner had committed and been convicted of a sex offense in Michigan and had completed his sentence regarding that offense in 1998. Petitioner agreed to sign the rules provided by Suttie, but they agreed that at their next meeting he would let her know if he was going to follow the rules or not.

On June 12, 2007, petitioner met with Suttie and told her that he could not agree to the rules she provided because following those rules would require him to quit his full-time job and stop helping his landlord prepare rental units, which allowed him to pay reduced rent. Suttie told petitioner that he must quit his job and stop helping his landlord. Petitioner responded that he could not comply with her rules and Suttie had petitioner arrested for refusing to follow the rules of community supervision, which he had signed on June 8. Petitioner was held initially in the Kenosha County jail.

On June 18, 2007, petitioner met with Suttie again and reminded her that he had not been convicted of a sex offense in Wisconsin and that revoking his probation was punishing him a second time for a crime for which he had already been punished, that is, a sex offense in Michigan. Suttie told petitioner that he was mistaken and when he asked to let a judge

decide whether he was mistaken, Suttie responded, "I have more power than any Judge." Petitioner asked Suttie what the fastest way was to get his case before a judge and she told him that if he waived his revocation hearing he could see a judge in approximately 10 days.

Petitioner waived his revocation hearing and while he waited to have his case brought before a judge, Suttie compiled a Violation/Revocation Summary. Suttie's summary contained a number of errors, such as petitioner's having denied being a sex offender. Before he was brought before a judge, petitioner was transferred to the Dodge Correctional Institution. While he was housed in Dodge, Dr. DeYoung told petitioner that he did not need sex offender treatment and that none would be offered to him. While at Dodge, petitioner also filed an appeal regarding his revocation.

On March 3, 2008, petitioner was brought before the Probation Review Committee. Petitioner explained his circumstances and the committee asked that he send his paper work to respondent Hiese for review. Petitioner waited until April 29, 2008 for a reply. When no reply came, he sent a letter to Hiese explaining his circumstances in detail. On May 12, 2008, petitioner received a response from Hiese. On May 30, 2008, petitioner received a final decision from Hiese. In the decision, Hiese admitted that petitioner did not need sex offender treatment but failed to address the other issues petitioner had raised.

## DISCUSSION

Petitioner contends that having to submit to probation rules that generally govern those convicted of a sex offense is a second punishment for an offense for which he had already been punished and that such double punishment is a cruel and unusual punishment. I understand petitioner to be attacking the conditions of his probation, specifically, the conditions that treat him as a sex offender on probation. Causes of action that question either conditions of probation or necessarily imply the invalidity of a probation revocation cannot be addressed under 42 U.S.C. § 1983 unless the petitioner first succeeds in a habeas corpus proceeding challenging the probation conditions or revocation proceedings. Heck v. Humphrey, 512 U.S. 477, 487 (1994); Spencer v. Kemna, 523 U.S. 1, 17 (1998) (application of Heck to parole revocation hearing); Williams v. Wisconsin, 336 F.3d 576, 579 -580 (7th Cir. 2003) (conditions of parole define perimeters of confinement and therefore challenge to restrictions imposed by parole should be brought as writ of habeas corpus, not under § 1983) (quoting Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977)). Because petitioner has not established the invalidity of either the conditions of his probation or his probation revocation by showing that he succeeded in a habeas corpus proceeding challenging the conditions or revocation proceedings, he cannot seek relief under § 1983.

Although petitioner may still seek relief by filing a habeas corpus action, this court cannot convert this action into one for habeas corpus on its own motion. The Court of Appeals for the Seventh Circuit has held that “[w]hen 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” rather than convert it into a petition for habeas corpus. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). Therefore, petitioner’s Fifth Amendment and Eighth Amendment claims will be dismissed without prejudice. Petitioner may raise his claims in a petition for a writ of habeas corpus but he should be aware that such a petition would have to be dismissed immediately unless petitioner can show that he has presented his claims to the Wisconsin courts and has been denied relief at the trial and appellate levels, 28 U.S.C. § 2254(b)(1)(A), or that there is no state corrective process available to him, § 2254(b)(1)(B).

#### ORDER

IT IS ORDERED that:

1. Petitioner Roger Marshall’s request for leave to proceed in forma pauperis on his Fifth and Eighth Amendment claims is DENIED without prejudice to his raising his claims in a petition for a writ of habeas corpus.
2. The unpaid balance of petitioner’s filing fee is \$342.25; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2).
3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an “action” is dismissed “on the grounds that it is frivolous, malicious, or fails to state a claim upon which

relief may be granted.” Because failure to choose the correct procedural vehicle for raising a claim is not one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g).

Entered this 23rd day of September, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge