

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

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CLEVELAND LEE, SR.,

Petitioner,

v.

JOHN PAQUIN, Warden,

Respondent.  
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ORDER

10-cv-681-bbc

Petitioner Cleveland Lee, a prisoner at the Prairie du Chien Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. In an order dated December 21, 2010, I allowed petitioner to proceed on a claim that respondent John Paquin has violated his rights under the Eighth Amendment and the due process clause by keeping him incarcerated beyond his mandatory release date of March 27, 2010. Respondent has filed an answer and the parties have filed briefs on the petition.

Petitioner's judgment of conviction, which is attached to respondent's answer, shows that on November 9, 2005, petitioner was sentenced for 15 counts of various felonies, some of which were committed before December 31, 1999 and some after. Dkt. #7-2. That date is important because it marked the transition in Wisconsin from indeterminate sentencing

to determinate sentencing. Crimes committed before December 31, 1999, are subject to Wis. Stat. § 302.11(1), which sets a presumptive mandatory release date after the prisoner has completed two-thirds of his sentence. However, with respect to “a felony that is committed on or after December 31, 1999,” the prisoner “is not entitled under this section to mandatory release on parole under that sentence.” Wis. Stat. § 302.11(1z).

With respect to those crimes committed after December 31, 1999, petitioner’s judgment of conviction shows that, in November 2005, he received a sentence of seven years of incarceration and six years of extended supervision. Although all sentences were concurrent, that does not mean that a mandatory release date is bootstrapped on to prisoner’s post-1999 felonies. It means only that petitioner will begin parole on his pre-1999 felonies when he finishes the prison term on his determinate sentence. Wis. Stat. § 973.15(2m)(d)1 (“If a court provides that an indeterminate sentence is to run concurrent with a determinate sentence, the person sentenced shall serve the period of confinement in prison under the indeterminate sentence concurrent with the period of confinement in prison under the determinate sentence and the parole portion of the indeterminate sentence concurrent with the term of extended supervision required under the determinate sentence.”).

Accordingly, even with petitioner’s 102 days of sentence credit, he will not be entitled to release before 2012. Petitioner fails to explain in any of his briefs how he calculated a

March 27, 2010 release date, and he cites no authority in support of a conclusion that he is entitled to release now. The cases he cites address a prisoner's due process rights, but none of them suggest that a prisoner is entitled to release before he completes his term or that he is entitled to a hearing to consider him for early release on a determinate sentence. Petitioner does not allege that respondent deprived him of good time credits as in Wolff v. McDonnell, 418 U.S. 539 (1974), or transferred him to segregation indefinitely, as in Wilkinson v. Austin, 545 U.S. 209 (2005).

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated, reasonable jurists would not debate the decision that Lee's petition should be denied. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

1. Petitioner Cleveland Lee's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED for his failure to show that he is in custody in violation of federal law.

2. Petitioner is DENIED a certificate of appealability. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 4th day of April, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge