

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

JERRY LEE LEWIS,

Petitioner,

v.

TIM HAINES,

Respondent.

OPINION AND ORDER

13-cv-122-bbc

Petitioner Jerry Lee Lewis, a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has filed a writ of habeas corpus under 28 U.S.C. § 2241. The petition challenges his placement in the supermax facility but does not challenge his conviction. He has paid the filing fee and the petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases, which the court may apply to other habeas corpus cases under Rule 1. Under Rule 4, I must dismiss the petition if it plainly appears from the petition and any attached exhibits that petitioner is not entitled to relief; otherwise, I will order respondent to file an answer. After reviewing the petition and plaintiff's brief, I find it appropriate to direct the state to respond to the petition.

Plaintiff has filed a motion for appointment of counsel, dkt. #3, which I will deny at this time. He has also filed a "motion for protection from retaliation," dkt. #6, which I interpret as a motion for preliminary injunction, and a motion for leave to file a

supplemental complaint. Dkt. #7. I will deny both motions at this time because they concern events distinct from those underlying this habeas petition.

FACTS

In 1996, petitioner pleaded guilty to kidnapping and transporting the victim across a state boundary in violation 18 U.S.C. § 1201(a)(1), and received a life sentence. United States v. Jerry Lee Lewis, 115 F.3d 1531 (11th Cir. 1997) (affirming plea and sentence).

In 2006, Lewis was convicted on “various charges” related to a prison fight and sentenced to an additional 78 months of incarceration. United States v. Lewis, 363 F. App'x 382, 386 (6th Cir. 2010) (affirming conviction).

For the last four years, petitioner has been held in isolation at the Wisconsin Secure Program Facility. The Federal Bureau of Prisons transferred petitioner to state custody pursuant to an interstate compact agreement because it alleged that (1) petitioner is a main player in a group known as “2-11 crew”; (2) he had pending charges for assault with serious injury and possessing a dangerous weapon; (3) he is an associate of a white supremacist group; (4) “CIM” concerns at every United States prison; and (5) he assaulted prison staff members.

Petitioner alleges that the reasons given by the Bureau of Prisons are false, no “due process clause hearing was ever conducted to determine the reason for the transfer” and he was denied access to any administrative procedure to challenge the transfer. He also alleges that at the Wisconsin Secure Program Facility, he has been denied access to any grievance

procedures to challenge his placement and he has been denied access to the Code of Federal Regulations and “the Rules governing Habeas Corpus Cases under § 2241.”

Ms. Halle, a staff member of the Federal Bureau of Prisons, visited petitioner in the summer of 2009 and said she would look into petitioner’s claims but never did. Another staff member visited in the summer of 2010. No Federal Bureau of Prisons staff members visited him in the summer of 2011. In the summer of 2012, Halle visited petitioner again and told him nothing would be done and he would remain in isolation at the Wisconsin Secure Program Facility.

Petitioner seeks injunctive relief placing him back into custody of the Federal Bureau of Prisons, an evidentiary hearing to present evidence about the allegations against him and to eliminate the false information about him in his file with the Federal Bureau of Prisons.

OPINION

A. Habeas Corpus Petition

Petitioner has sufficiently alleged that his transfer to the Wisconsin Secure Program Facility violated his right to due process. The Fourteenth Amendment prohibits states from depriving “any person of life, liberty or property without due process of law.” U.S. Const. Amend. XIV. To state a claim for a violation of procedural due process, petitioner must allege (1) inadequate procedures and (2) an interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

Prisoners have a due process liberty interest in avoiding indefinite detention in harsh

and isolated conditions. Wilkinson v. Austin, 545 U.S. 209, 223 (2005). The Court of Appeals for the Seventh Circuit has stated that prisoners may have a liberty interest in avoiding transfers from a general population facility to the Wisconsin Secure Program Facility, particularly for an indefinite period. Lagerstrom v. Kingston, 463 F.3d 621, 623 (7th Cir. 2006). Accordingly, due process requires that prisoners “receive notice of the factual basis leading to consideration for . . . placement [in the supermaximum facility] and a fair opportunity for rebuttal.” Wilkinson, 545 U.S. at 225-26. See also Lagerstrom, 463 F.3d at 624-25; Westefer v. Snyder, 422 F.3d 570, 588 (7th Cir. 2005).

Petitioner alleges that the Federal Bureau of Prisons failed to accord him a hearing before transferring him to state custody for placement in isolation at the Wisconsin Secure Program Facility. In the four years since, they have not reviewed his placement or allowed him to challenge it. These allegations are sufficient to suggest plaintiff’s right to due process under the Fourteenth Amendment was violated.

However, it is not clear whether petitioner may seek relief for this alleged violation through a habeas petition. A district court must independently evaluate petitioner’s claim to determine whether it properly arises under 28 U.S.C. § 2241. Bunn v. Conley, 309 F.3d 1002, 1006–07 (7th Cir.2002); Godoski v. United States, 304 F.3d 761, 763 (7th Cir. 2002).

If the prisoner is seeking what can fairly be described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy. But if he is seeking a different program or location, or environment, then he is

challenging the conditions rather than the fact of confinement and his remedy is under civil rights law.

Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991). Although prisoners cannot challenge their security classification or their transfer from one prison to another under 28 U.S.C. § 2241, Moran v. Sondalle, 218 F.3d 647, 650-51 (7th Cir. 2000) (claim seeking release from administrative segregation falls under § 1983 not § 2254); Graham, 922 F.2d at 381 (claim seeking work release falls under § 1983 not § 2254), the Court of Appeals for the Seventh Circuit has suggested that prisoners may use the writ to challenge a transfer to a more restrictive confinement. United States v. Harris, 12 F.3d 735 (7th Cir. 1994) (suggesting in dicta that prisoner confined in disciplinary segregation indefinitely could assert Sixth Amendment claims through habeas remedy).

Typically, due process claims challenging placement at a supermax facility have been brought under § 1983. Wilkinson, 545 U.S. at 218; Lagerstrom, 463 F.3d at 624-25. Moreover, it is not clear whether the remedies that petitioner seeks (transfer from state into federal custody and a hearing on his alleged security violations) would result in a “quantum change” in his level of custody. Plaintiff cannot use the writ to challenge his transfer between prisons of comparable security classifications, Pischke v. Litscher, 178 F.3d 497, 499 (7th Cir. 1999), his placement in Wisconsin state custody or his confinement in Wisconsin as opposed to another state. Moran v. Sondalle, 218 F.3d at 650-51 (holding that prisoners could not use habeas remedy to challenge transfer to out of state prisons). However, it appears that petitioner is challenging the decision to transfer him to segregation at a supermax facility and respondent’s decision to hold him indefinitely without reviewing

his security status. At this early stage, it appears that he is seeking a “quantum change” in his level of custody, Harris, 12 F.3d at 735, and I will order respondent to answer the petition. Respondent may still argue that petitioner’s claim is not properly brought under § 2241.

B. Motion for Appointment of Counsel

Under 18 U.S.C. § 3006A(a)(2)(B), a district court may appoint counsel to represent an indigent petitioner seeking relief under § 2241 if the court determines that “the interests of justice so require.” When deciding whether to appoint counsel to an indigent petitioner, a court must consider the difficulty of the case in relation to the prisoner’s ability to represent himself and whether counsel might make a difference to the outcome. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). The question is “whether the difficulty of the case—factually and legally—exceeds the particular [petitioner]’s capacity as a layperson to coherently present it to the judge or jury himself.” Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007).

Assuming without deciding that petitioner lacks the funds to hire a lawyer, I decline to appoint counsel for petitioner at this time. The single issue on which the court has authorized petitioner to proceed, whether he is being held at the Wisconsin Secure Program Facility without an opportunity to challenge the basis for his security classification, is not overly complex. The outcome of this case appears to turn on whether petitioner received adequate notice and opportunity to be heard. Petitioner will not need to make any extensive

legal arguments to make this showing. I am satisfied from petitioner's submissions so far that he has the intelligence and communication skills to make this presentation. If it turns out later that petitioner is unable to understand and respond to the state's arguments in opposition to his petition, he may renew his motion for appointment of counsel at that time.

C. Motions for Preliminary Injunction and to File Supplemental Complaint

In his motion for preliminary injunction, plaintiff alleges that staff members at the prison retaliated against him for filing this habeas petition by strip searching him, taking his property, including "legal paperwork," and leaving him in a room with just his clothes and linen. In his motion to file a supplemental complaint, he alleges that staff members denied him access to the law library on March 25, 2013, and the institutional complaint examiner denied his grievance related to this incident on false grounds.

When a prisoner alleges that prison staff have retaliated against him for bringing a lawsuit, it is the policy of this court to require the retaliation claim to be filed in a lawsuit separate from the one that allegedly provoked the retaliation. This prevents the complication of issues that often results from the ongoing accumulation of claims in one action. The events underlying a lawsuit and the alleged retaliation for filing that lawsuit are distinct. The court recognizes an exception to this policy only if it appears that the alleged retaliation directly and physically impairs the prisoner's ability to prosecute his lawsuit.

Although petitioner alleges that prison staff have retaliated against him in ways related to his legal research generally, these events were isolated occasions and have not

affected his ability to litigate this case. Petitioner does not allege any ongoing interference. If he wishes to bring a lawsuit based on these claims, he must file a civil action under § 1983. Petitioner's motions for preliminary injunction and leave to supplement the complaint will be denied.

ORDER

IT IS ORDERED that

1. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on respondent Tim Haines.

2. No later than 20 days from the date of service of the petition, respondent must file an answer to the petition showing cause, if any, why this writ should not issue with respect to petitioner Jerry Lee Lewis's claim that he was not given an opportunity to challenge the reasons for his transfer to the Wisconsin Secure Program Facility.

3. Petitioner may have 20 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.

4. Petitioner's motion for appointment of counsel, dkt. #3, is DENIED.

5. Petitioner's "motion for protection from retaliation," dkt. #6, is DENIED.

6. Petitioner's motion for leave to file a supplemental complaint, dkt. #7, is DENIED.

Entered this 12th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge