

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

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ERIC ALSTON,

Petitioner,

v.

JUDY SMITH,  
Warden, Oshkosh Correctional Institution,

Respondent.  
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ORDER

15-cv-325-bbc

In an order dated July 13, 2015, dkt. #7, I screened Eric Alston’s petition for a writ of habeas corpus under 28 U.S.C. § 2254 and concluded that he had complied with the requirement to exhaust his state court remedies with respect to only some of his claims. In particular, petitioner admitted that he raised only two issues in state court: (1) an assistant district attorney represented the state in petitioner’s probation revocation proceedings, even though there is no legal authority for an assistant district attorney to do that; and (2) the administrative law judge presiding over the proceedings was not “neutral” because she was “pressure[d]” by the Special Investigative Unit of the Madison Police Department and “other high profile law enforcement agencies.” (A review of the decision from the Wisconsin Court of Appeals suggested that petitioner’s second claim may have been even narrower. According to that court, petitioner’s second claim was that “his due process rights were violated because the hearing examiner attended [an] informational presentation on the

Special Investigative Unit program and thus was not impartial.” State ex rel. Alston v. Schwarz, 2014 WI App 71, ¶ 4, 354 Wis. 2d 622, 848 N.W.2d 903.) The petition filed in this court included numerous claims that petitioner did not raise in state court. For example, he alleged that state officials violated his right to due process by tampering with evidence and witnesses, that he was discriminated against because of his race and that his counsel provided ineffective assistance in various ways. In accordance with Rose v. Lundy, 455 U.S. 509 (1982) and Rhines v. Weber, 544 U.S. 269, 277 (2005), I directed petitioner to decide whether he wished to (1) dismiss his petition without prejudice so that he could finish exhausting his remedies in state court or (2) amend his petition and proceed with his exhausted claims only.

Unfortunately, petitioner did not choose either of those options. Instead, he filed an amended petition in which he raised the following claims:

(1) the Special Investigation Unit forced petitioner to participate in “their program” without holding a hearing, in violation of his right to due process and equal protection of the laws;

(2) the Special Investigation Unit had ex parte communication with the Division of Hearings and Appeals, in violation of petitioner’s right to due process and equal protection of the laws;

(3) the Division of Hearing and Appeals failed to provide a neutral hearing examiner;

(4) the Division of Hearing and Appeals permitted an assistant district attorney to represent the Department of Corrections at petitioner’s disciplinary hearing.

Taking the claims in reverse order, it is clear that petitioner raised claim (4) in state court. Claims (2) and (3) are really just one claim, which is that the administrative law judge was not neutral because the judge had *ex parte* communications with the police. Construed this way, there is a plausible argument that petitioner exhausted that claim as well. However, petitioner did *not* raise claim (1) in state court, so he cannot proceed with that claim.

Normally, I would give petitioner one more opportunity to decide whether he wants to dismiss his petition without prejudice to complete exhaustion of all of his claims or proceed with his exhausted claims only. However, it is unnecessary to do that because a “federal court now has the option of denying the [unexhausted] claim on its merits [under] 28 U.S.C. § 2254(b)(2).” Bolton v. Akpore, 730 F.3d 685, 696 (7th Cir. 2013). It would be pointless for petitioner to raise claim (1) in state court because habeas petitions are limited to challenges to a prisoner’s *custody*. 28 U.S.C. § 2254(a); Maleng v. Cook, 490 U.S. 488, 490 (1989). Although petitioner does not identify in his petition the nature of the program in which he was forced to participate, I know from a civil case that petitioner has filed, Alston v. City of Madison, No. 13-cv-635-bbc (W.D. Wis.), that it is the “Focused Deterrence” program, which places heightened scrutiny on certain individuals with a criminal history. Petitioner was not incarcerated at the time he was placed in the program. Although probation conditions can qualify as “custody” under § 2254, Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003), petitioner has not alleged that the program was part of his conditions of probation. In any event, because petitioner is proceeding on this

claim in a separate case, he gains nothing by trying to include it in his habeas petition.

This leaves petitioner's claims that the Division of Hearings and Appeals allowed the assistant district attorney to represent the Department of Corrections in the revocation proceedings and that the administrative law judge was biased in light of ex parte discussions the judge had with police officers and others. I can dismiss the claim about the assistant district attorney without extended discussion. In state court, petitioner argued that Wis. Stat. § 978.05 prohibits a district attorney from representing the Department of Corrections at a revocation hearing. He did not identify a federal law that prohibited the district attorney's conduct and he does not identify a federal law in his petition. Because § 2254 "is not a remedy for errors of state law," Montgomery v. Meloy, 90 F.3d 1200, 1206 (7th Cir. 1996), I must dismiss this claim.

Petitioner's remaining claim that the administrative law judge was biased arises under the due process clause, Morrissey v. Brewer, 408 U.S. 471, 485-87 (1972), so that claim may be brought in a federal habeas petition. (Although petitioner mentions the equal protection clause as well, he did not raise a claim under the equal protection clause in state court and he does not identify any reason to believe that the administrative law judge discriminated against him.) Accordingly, I will allow petitioner to proceed on his due process claim and direct the state to respond to the petition.

#### ORDER

- I. 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 Warden Judy Smith.

2. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Eric Alston's claim that the administrative law judge at petitioner's probation revocation hearing was not impartial because of ex parte communications, in violation of the due process clause. The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue.

3. **Dispositive motions.** If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If the court denies the motion to dismiss in whole or in part, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

4. **When no dispositive motion is filed.** If respondent does not file a dispositive motion, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of respondent's answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:
  1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,
  2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.
  - Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.
5. For the time being, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not consider any submission that has not been served upon the state. Petitioner should note on each of his submissions

whether he has served a copy of that document upon the state.

Entered this 10th day of August, 2015.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge