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

AL R. CURTIS,

Petitioner, ORDER

v. 04-C-950-C

DANIEL BENIK, Warden, Stanley Correctional Institution,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Al R. Curtis, an inmate at the Stanley Correctional Institution, is serving a 51-year sentence for his May 26, 1992 convictions in the Circuit Court for Milwaukee County for two counts of first-degree reckless injury, first-degree recklessly endangering safety and possession of a short-barreled shotgun. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner contends that he is in custody in violation of the laws or Constitution of the United States because: 1) the portion of his sentence that was imposed on the basis of his status as a habitual criminal is void because petitioner never admitted the repeater allegation and the state did not prove it; 2) the state courts erred in finding that a post-sentencing change in the Department of Corrections' parole policy that has had the effect

of prolonging an inmate's release on discretionary parole was not a "new factor" that justified a reduction in petitioner's sentence because the trial court did not rely expressly on parole eligibility at sentencing; and 3) the department's change in policy constitutes an unconstitutional ex post facto law because it has deprived petitioner of the right to early release on discretionary parole.

Petitioner's second claim will be dismissed because it fails to state a cognizable constitutional claim. Even if petitioner is correct that the trial court accounted for the department's existing parole policy when it determined the length of petitioner's sentence, the Supreme Court has held that a judge's incorrect assumption about the future course of parole proceedings is not an error of constitutional magnitude that is cognizable in an action for habeas corpus. United States v. Addonizio, 442 U.S. 178, 186-87 (1979). As the Court explained:

> The claimed error here--that the judge was incorrect in his assumptions about the future course of parole proceedings--does not meet any of the established standards of collateral attack. There is no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the "fundamental" character that renders the entire proceeding irregular and invalid.

Id. at 186. Petitioner's claim is virtually indistinguishable from Addonizio's, who challenged the lawfulness of his sentence on the basis of a postsentencing change in parole policy by the United States Parole Commission that had made it more difficult for him to obtain release on parole than under the parole system in effect at the time of his sentencing. Id. at 182. Thus, as in Addonizio, even if petitioner is correct that the trial court implicitly assumed

that petitioner would be released early on discretionary parole pursuant to the department's policy at the time, subsequent actions by the department that arguably frustrated the judge's intent "do not retroactively affect the validity of the final judgment itself." Id. at 190.

Petitioner's first claim, that the repeater portion of his sentence is invalid, arguably states a valid due process claim. The state will be ordered to respond to it. However, I note that it appears from the petition that petitioner did not initiate state court proceedings with respect to that claim until well over one year after the Antiterrorism and Effective Death Penalty Act went into effect on April 24, 1996, meaning that his claim is likely to be barred by the one year statute of limitations set forth in 28 U.S.C. § 2244.

Petitioner's third claim, that the department's alleged change in parole policy infringes the constitutional proscription against ex post facto laws, also states a valid constitutional claim. See Mickens-Thomas v. Vaughn, 321 F. 3d 374, 386 (3rd Cir. 2003) (parole board violated ex post facto proscription when it applied new guidelines developed pursuant to statutory change emphasizing public safety to offender whose crime had been committed before parole board changed policy). But see Prater v. U.S. Parole Commission, 802 F.2d 948, 953-54 (7th Cir. 1986) (parole commission's interpretation of legislation lacked force of law sufficient to trigger ex post facto protection). Petitioner alleges in his petition that the department denied his release on discretionary parole in July 2004 only because he "hadn't served a sufficient amount of time." Petitioner suggests that the department's emphasis on length of time served reflects a 1994 change in parole policy

initiated by then-governor Tommy G. Thompson, who declared that it was the policy of his administration to "keep violent offenders in prison as long as possible under the law." Although he fails to allege it clearly in the petition, I infer that petitioner is contending that he would have been more likely to have been released on discretionary parole under the policies that were in effect before 1994.

Insofar as petitioner has actually been denied release on parole, his claim that the parole commission's decision violated the prohibition against ex post facto laws is brought properly in an action for habeas corpus under § 2254. See Moran v. Sondalle, 218 F.3d 647, 650 (7th Cir. 2000) (where petitioner contends that parole commission has unlawfully denied him release on parole as opposed to challenging procedures used by commission for making parole decisions, remedy lies in habeas corpus); Clark v. Thompson, 960 F.2d 663, 664-65 (7th Cir. 1992) (same); Walker v. Prisoner Review Bd., 694 F.2d 499, 501 (7th Cir. 1982) (same). However, like his second claim, his ex post facto claim might falter on procedural grounds. Namely, it is debatable whether petitioner has satisfied the requirement that he properly exhaust his state court remedies before seeking habeas relief in federal court. § 2254(b)(1)(A). In order to properly exhaust state court remedies, a petitioner must present "fully and fairly his federal claims to the state courts . . . ". Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001). This means that a petitioner must "give the state courts a meaningful opportunity to pass upon the substance of the claims later presented in federal court" by placing "both the operative facts and the controlling legal

principles before the state courts." Id. at 737-38 (internal citations omitted). Failure to do so "constitutes a procedural default," id. at 737, which bars federal review unless the petitioner demonstrates cause for the default and actual prejudice as a result of the violation, or demonstrates that the failure to consider the claims will result in a fundamental miscarriage of justice. See Rodriguez v. Scillia, 193 F.3d 913, 917 (7th Cir. 1999).

It appears that petitioner never brought a state court action to challenge the parole commission's July 2004 denial of his parole, even though he could have done so by filing a common law writ of certiorari. State ex rel. Britt v. Gamble, 257 Wis. 3d 689, 698, 653 N.W. 2d 143, 148 (Ct. App. 2002) (refusal to grant discretionary parole reviewable by common law certiorari). Moreover, it is too late for petitioner to file such a petition in state court now because a prisoner seeking review of a governmental decision by writ of certiorari must file an action within 45 days of the date of the challenged decision. State ex rel. Walker v. McCaughtry, 244 Wis. 2d 177, 183, 629 N.W. 2d 17, 20 (Ct. App. 2001). By failing to seek certiorari review of the denial of his release on parole, petitioner may have committed a procedural default that bars this court from considering the merits of his claim.

That said, petitioner did present his ex post facto claim to the state courts in the context of his challenge to the trial court's refusal to modify his sentence on the basis of the alleged change in parole policy, and the state courts considered the claim on the merits. This might be enough to allow this court to consider petitioner's claim on its merits. I will leave it to the state to address this issue more fully in its response to the petition.

Finally, petitioner has filed a motion for the appointment of counsel. The motion will be denied at this time. It is unclear at this stage of the proceedings whether this court will reach the merits of petitioner's two remaining claims. Any procedural defenses the state might raise are not likely to be so complex that petitioner will be unable to adequately address them without the assistance of counsel. This court is well-versed in the rules governing habeas corpus, will review the entire file carefully before making its decision and will construe petitioner's arguments liberally even if they are not supported by legal authority. In short, it does not appear at this stage of the case that the presence of counsel would make a difference to the outcome. See Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). However, if after receiving the state's response to the petition, petitioner remains convinced that the issues are too complex for him to address adequately on his own, he may renew his request for the appointment of counsel.

ORDER

IT IS ORDERED that:

1. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, Claim 2 of the petition is DISMISSED WITH PREJUDICE because it fails to state a cognizable constitutional claim.

2. The state is ordered to respond to Claims 1 and 3.

3. The clerk shall serve copies of the petition and this order by mail to Warden Benik and to the Wisconsin Attorney General.

4. The state shall file a response to petitioner's claims not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that all of petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations, it should file a motion to dismiss and all supporting documents within its 30-day deadline. The state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such 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 at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss,

then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims were unreasonable in light of the facts presented. See 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

5. Once the state has filed its answer or other response, 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 docket or consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

6. The federal mailbox rule applies to all submissions in this case.

7. Petitioner's request for the appointment of counsel is DENIED at this time.

Entered this 1st day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge