

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

JAMES KARLS,

Petitioner,

OPINION AND ORDER

v.

05-C-431-C

CATHERINE FERRY, Warden,
New Lisbon Correctional Institution,

Respondent.

This is an action for a writ of habeas corpus brought by James Karls, an inmate at the New Lisbon Correctional Institution. Before the court is petitioner's motion for reconsideration of this court's order of October 26, 2005 that dismissed the case without prejudice. For the reasons set forth below, the motion will be denied.

PROCEDURAL HISTORY

On July 25, 2005, Karls filed two habeas petitions simultaneously: one was labeled as a petition under 28 U.S.C. § 2241, the general habeas statute, and the other was labeled as a petition under 28 U.S.C. § 2254, the statute that applies to prisoners "in custody pursuant to the judgment of a State court." After reviewing the petitions, the magistrate judge concluded that petitioner's § 2241 application, which attacked the validity of an executive order by the governor commuting petitioner's sentence, was covered actually by

§ 2254 because petitioner's confinement was still "pursuant to the judgment" of the state court that sentenced him. Order, Oct. 5, 2005, dkt. #5, at 4. Noting that all claims attacking a single judgment must be set forth in a single petition or risk being barred as second or successive if brought later, the magistrate judge ordered the two petitions consolidated into a single petition covered by § 2254. Id. Although he noted that some of the claims appeared to be unexhausted, he ordered the state to respond to the petition because it was not clear from the petition whether any state remedies remained available to petitioner on these claims. Id., at 8-9.

On October 19, 2005, petitioner filed a motion objecting to the conversion of his § 2241 and to consolidation of the petitions; however, petitioner did not ask to withdraw or amend his § 2241 petition. In an order entered October 21, 2005, the magistrate judge declined to re-separate the petitions, but allowed petitioner 10 days in which to withdraw the petition filed under § 2241. The magistrate judge informed petitioner that "if he withdraws any of his claims currently before the court, it is likely that he will be barred from raising them later pursuant to 28 U.S.C. § 2244(b), which prohibits second or successive petitions." Order, Oct. 21, 2005, dkt. #9, at 2.

On October 24, 2005, petitioner filed a motion for voluntary dismissal of the consolidated petition, asserting that he wished to pursue exhaustion of his unexhausted claims in state court. On October 26, 2005, this court granted his motion, but warned

petitioner that dismissal could jeopardize the timeliness of any post-exhaustion federal habeas petition.

Petitioner now has filed a motion in which he asks this court to vacate its dismissal order, vacate the consolidation order, reinstate his § 2241 petition and dismiss the § 2254 petition without prejudice so he can exhaust his unexhausted claims in state court. Petitioner insists that the magistrate judge was wrong to recharacterize his § 2241 claim as a § 2254 claim and that the magistrate judge misled petitioner into thinking that he had to pursue all his claims simultaneously in the same forum. I construe petitioner's motion as a motion for relief from the judgment pursuant to Fed. R. Civ. P. 60(b).

DISCUSSION

Petitioner's claims and their underlying facts are covered in the magistrate judge's October 5 order and do not bear repeating here. Having reviewed that order and petitioner's submissions in this case, I am convinced that the magistrate judge was correct to characterize petitioner's § 2241 claim as a § 2254 claim. The magistrate judge's decision was dictated by Walker v. O'Brien, 216 F.3d 626, 633 (7th Cir. 2000), wherein the court made clear that any state prisoner "in custody pursuant to the judgment of a State court" must proceed under § 2254 even if the claims he seeks to raise do not stem from the underlying conviction or sentence that brought him there. As the court explained in Walker, "in effect [§ 2254]

implements the general grant of habeas corpus authority found in § 2241, as long as the person is in custody pursuant to the *judgment* of a state court, and not in state custody for some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms of custody *that are possible without a conviction.*” *Id.* at 633 (emphasis added).

I agree with the magistrate judge that United States v. Benz, 282 U.S. 304 (1931), defeats petitioner’s contention that his confinement stems solely from the governor’s commutation order independent of any underlying judgment of conviction. *Id.* at 311 (“To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment.”). Moreover, although petitioner insists that the governor’s commutation order somehow took the place of the underlying state court judgment, the fact remains that there would have been no sentence for the governor to have commuted had petitioner not been convicted first. Because petitioner’s current confinement would not have been possible without a conviction, he must proceed under § 2254. *See Godoski v. United States*, 304 F.3d 761, 763 (7th Cir. 2002) (saying a claim arises under a particular statute “does not make it so, any more than calling a donkey’s tail a ‘leg’ gives the animal five legs.”) The magistrate judge did not commit any error of law with respect to his characterization of the petition.

That said, the magistrate judge should have given petitioner notice that he was going to recharacterize his § 2241 petition, explained the ramifications of doing so, and allowed

petitioner the opportunity to amend or withdraw the petition. See Castro v. United States, 540 U.S. 375, 383 (2003) (before construing Rule 33 motion as motion under § 2255, court must provide notice to petitioner and opportunity to withdraw or amend petition); Martin v. Overton, 391 F.3d 710, 713 (6th Cir. 2004) (court must give petitioner notice before recharacterizing § 2241 petition as § 2254 petition). As these and other cases recognize, warning a litigant before recharacterizing his petition is important because “a prisoner is entitled to one, but only one, full and fair opportunity to wage a collateral attack.” O’Connor v. United States, 133 F.3d 548, 550 (7th Cir. 1998). Habeas law’s interest in the finality of state court criminal judgments requires a petitioner to present all of his known claims in his first petition; he cannot attack his conviction in piecemeal fashion. See McCleskey v. Zant, 499 U.S. 467, 489-92 (1991) (discussing abuse-of-the-writ doctrine); 28 U.S.C. § 2244(b)(2) (new claim not presented in prior application will be dismissed unless it depends upon new law or facts that could not have been discovered previously); Rule 2(c)(1) of the Rules Governing Section 2254 Cases (petition must “specify all the grounds for relief”). As a result of these rules, recharacterizing a pleading as a motion under § 2255 or a petition under § 2254 “may make it significantly more difficult for that litigant to file another such motion [or petition].” Castro, 540 U.S. at 382.

Although the magistrate judge did not warn petitioner of these consequences in the October 5 order, he cured this error in the October 21 order, wherein he warned petitioner

that withdrawal of his § 2241 claim could foreclose petitioner from bringing the claim later. Although the magistrate judge indicated that the bar on second or successive petitions would apply if petitioner withdrew “any of his claims,” I infer that the magistrate judge meant “any subset” of petitioner’s claims: if petitioner withdrew *all* of his claims before the state responded or the court adjudicated the merits, the bar on second or successive petitions would not apply. See Slack v. McDaniel, 529 U.S. 473, 487 (2000) (petition not second or successive if filed after “mixed” petition dismissed for failure to exhaust state remedies without adjudication on merits).

Indeed, it appears that petitioner understood the ramifications of withdrawing only a subset of his claims; instead of doing so, he moved for voluntary dismissal of all of his claims, including the one raised in the § 2241 petition. Although petitioner asserts in his motion that he requested dismissal of both petitions only because the magistrate judge “strongly insinuated that if Karls did not go back to state court he would run the ‘risk of being barred on second or successive’ petition [sic],” I find nothing in the magistrate judge’s orders to support this inference. To the contrary, the magistrate judge correctly pointed out that because both petitions would be treated as § 2254 petitions, going forward on only one would jeopardize the other.

The relief petitioner seeks in his § 2241 petition is not merely an order vacating the governor’s commutation order, but a declaration that his entire conviction is void under a

breach-of-contract theory. Thus, the claim raised in petitioner's § 2241 petition, like those raised in his § 2254 conviction, is directed at the validity of his underlying conviction and sentence. By consolidating the two petitions as petitioner should have done in the first place, the magistrate judge sought to insure that petitioner received a full and fair opportunity for federal review of his claims.

In sum, I find nothing in the magistrate judge's orders that was erroneous or misleading. Indeed, if I were to grant petitioner's motion for relief from the judgment and re-separate the two petitions, I would recharacterize the petition brought under § 2241 as a petition under § 2254, just as the magistrate judge did. This means that petitioner's single-claim petition contesting the governor's commutation order would "count" as his "first" § 2254 petition attacking his 1994 conviction and sentence; any subsequent federal petition attacking that conviction and sentence, including the 15-claim petition docketed as Case No. 05-C-0431-C, would be deemed a "second or successive" petition and subject to the rules governing such petitions. (Although petitioner filed his two petitions simultaneously, I infer from his submissions that the "§ 2241 petition" is the petition on which he places priority.) Practically speaking, proceeding solely on the commutation claim in 05-C-0570-C would preclude petitioner from obtaining federal review of any of his other challenges to his conviction and sentence. This is true even if petitioner withdraws 05-C-0431-C and pursues exhaustion of some of those claims in state court.

In short, granting petitioner's motion for relief from the judgment would not afford him the relief he seeks, which is to have his § 2241 petition maintained as a § 2241 petition. Petitioner has not suggested that he wants to go forward on either or both petitions in the event they are both characterized as § 2254 petitions. Accordingly, I see no basis on which to grant petitioner's motion.

ORDER

IT IS ORDERED that the motion of James Karls for an order vacating the October 26, 2005 judgment is DENIED.

Entered this 4th day of November, 2005.

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