IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD PATRICK,

Petitioner,

ORDER

08-cv-98-bbc

v.

RICK RAEMISCH, Secretary of WI DOC,
MR. MARK K. HEISE, Bureau of Classification,
ALFONSO GRAHAM, Parole Board Chairperson,
STEVEN LANDREMAN, RCI's Parole Board
Member and DR. COLEMAN, RCI's Clinical Doctor,

Respondents.

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On April 29, 2008, I screened petitioner's proposed complaint pursuant to 28 U.S.C. § 1915(e)(2), which requires the court to deny a prisoner leave to proceed in forma pauperis if, among other things, the prisoner's complaint fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2). In performing the screening, I concluded that petitioner's allegations that respondents had deprived him of a chance to participate in sex offender treatment and receive discretionary and mandatory parole failed to state a claim under 42 U.S.C. § 1983. Therefore, I denied petitioner leave to proceed in forma pauperis and dismissed the case.

On May 14, 2008, petitioner filed a document entitled "supplement pleadings," which has been docketed as a motion to reopen the case (Dkt. #8), but that I construe as a timely motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may alter or amend a judgment "when there is newly discovered evidence or there has been a manifest error of law or fact." Harrington v. City of Chicago, 433 F.3d 542, 546 (7th Cir. 2006). For several reasons, petitioner's motion will be denied.

First, petitioner contends that it was error for this court to conclude that Heck v. Humphrey, 512 U.S. 477, 487 (1994), bars his claim that respondents improperly "changed" his mandatory release date. Petitioner cites Dotson v. Wilkinson, 329 F.3d 463, 469-70 (6th Cir. 2003) aff'd, Wilkinson v. Dotson, 544 U.S. 74 (2005), for the proposition that a plaintiff may bring a claim under § 1983 challenging his parole review. However, in that case, the court held only that Heck did not bar a § 1983 claim related to "the prisoner's chances of *discretionary parole*," not a claim related to "immediate or speedier release." Id. at 470 (emphasis added); see also Wilkinson, 544 U.S. at 81 (§ 1983 may be used only when success would not necessarily spell immediate or speedier release). Petitioner would necessarily be entitled to "speedier release" if he were successful on his claim that respondents violated his rights by extending his mandatory release date; therefore, such a claim must be raised in a petition for a writ of habeas corpus, not in a civil action under § 1983. Id.; see also Graham v. Broglin, 922 F.2d 379, 380-81 (7th Cir. 1991) (prisoner

seeking "freedom" of parole is "seeking what can fairly be described as a quantum change in the level of custody" and must bring suit under habeas corpus statute). It was not error for this court to conclude that petitioner's claim related to changes in his mandatory release date is not cognizable under § 1983.

Next, petitioner contends that it was error to dismiss his complaint without first allowing him an opportunity to amend the complaint. To support this argument, he points to new allegations in an 8-page affidavit and a brief with an appendix totaling 113 pages as sufficient to overcome the defects in his claims.

As an initial matter, petitioner cites several cases in support of his position that he has a "right" to amend his complaint before a court dismisses his case: Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998); Casteel v. Pieschek, 3 F.3d 1050, 1056 (7th Cir. 1993); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987) superseded by statute as stated in Lopez v. Smith, 160 F.3d 567, 571 (9th Cir. 1998). Although it is doubtful that any circuit should apply such a generous rule to prisoners following enactment of the 1996 Prison Litigation Reform Act, see, e.g., Lopez, 160 F.3d at 571, there is no doubt that the rule is otherwise in this circuit. James Cape & Sons Co. v. PCC Construction Co., 453 F.3d 396, 400-401 (7th Cir. 2006). In the Seventh Circuit, a district court is not required to grant leave to amend a complaint before dismissing it with prejudice, particularly when such leave is never sought. Id. (citing Coates v. Illinois State Board of Education, 559 F.2d 445

(7th Cir. 1977)). Petitioner never attempted to amend his complaint until it was dismissed; therefore, it was not error to dismiss petitioner's complaint for failure to state a claim without allowing him an opportunity to amend it.

At any rate, the new allegations contained in petitioner's "brief and appendix" show that even if I had granted petitioner permission to amend his complaint before dismissing the case, his amendment would have been futile. To overcome the defects in his complaint, petitioner would have to have alleged facts suggesting that: 1) he was subjected to an "atypical and significant hardship" (related to his due process claim); 2) there was no conceivable or plausible rational basis for respondents' decision to delay his entry into sex offender treatment or parole (related to his equal protection claim); and 3) he was subjected to treatment other than a mere lack of access to sex offender treatment or a parole hearing that could amount to cruel and unusual punishment (related to his Eighth Amendment claim). Instead, petitioner simply fills in minor details and suggests that respondents failed to follow certain state law procedures for determining his eligibility for sex offender treatment and discretionary parole. None of this additional information rectifies the flaws in petitioner's § 1983 claims. Therefore, even if I had allowed petitioner to amend his complaint, his case would have been dismissed. Because petitioner has failed to establish any "manifest error of law or fact," his motion to alter or amend the judgment will be denied.

ORDER

IT IS ORDERED that petitioner Richard Patrick's motion to alter or amend the judgment (dkt. #8) is DENIED.

Entered this 22nd day of July, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge