IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLEVELAND LEE, SR.,

Petitioner,

v.

JOHN PAQUIN, Warden,

Respondent.[1]

ORDER

10-cv-681-bbc

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Petitioner Cleveland Lee, a prisoner at the Prairie du Chien Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 and has paid the filing fee. He alleges that his mandatory release date passed on March 27, 2010, and that respondent John Paquin is violating his rights under the due process clause, the equal protection clause, the Eighth Amendment and state law by refusing to release him, give him a hearing or consider him for parole. In addition, petitioner alleges that prison officials have interfered with his mail.

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[1] Petitioner named several additional respondents, but I have omitted them from the caption because the warden is the only proper respondent in a habeas corpus petition. Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996).

Incarceration of a prisoner beyond his mandatory release date may violate the prisoner's rights under the Eighth Amendment and the due process clause. Campbell v. Peters, 256 F.3d 695, 700-01 (7th Cir. 2001); Armstrong v. Squadrito, 152 F.3d 564, 577 (7th Cir.1998); Felce v. Fielder, 974 F.2d 1484, 1490 (7th Cir. 1992); Russell v. Lazar, 300 F. Supp. 2d 716 (E .D. Wis. 2004). Accordingly, I will allow petitioner to proceed on those claims.

Petitioner's remaining claims will be dismissed. His claim regarding mail interference cannot be brought in a petition under § 2254 because that claim relates to the *conditions* of his confinement and to the *validity* of his confinement. Brown v. Watters, 599 F.3d 602, 611 (7th Cir. 2010) ("As in all habeas corpus proceedings under 28 U.S.C. § 2254, the successful petitioner must demonstrate that he 'is in custody in violation of the Constitution or laws or treaties of the United States.'") (quoting 28 U.S.C. § 2254(a)). His claims under state law must be dismissed because § 2254 is limited to challenges under *federal* law. Estelle v. McGuire, 502 U.S. 62, 67 (1991).

With respect to his claim under the equal protection clause, petitioner does not allege that he was treated differently because of his race or another characteristic that requires heightened scrutiny. In fact, petitioner does not suggest that he was singled out for being a member of a particular group or possessing a particular characteristic. Under these circumstances, it is doubtful whether the equal protection clause applies. United States v.

Moore, 543 F.3d 891, 898-99 (7th Cir.2008) (stating that class-of-one challenges "may be inapplicable to any governmental action that is the product of a highly discretionary decisionmaking process"). In any event, petitioner's claim must be dismissed because he has failed to "allege facts sufficient to overcome the presumption of rationality that applies to government classifications." St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir. 2007) (quoting Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992)). He alleges that he "was treated differently than other inmates entitle[d] to parole eligibility and mandatory release," dkt. #1, at 7, but he does not identify the other prisoners who received more favorable treatment, the reason he believes he was subjected to discrimination or even the way the others were treated differently. That is not enough to state a claim. Swanson v. Citibank, N.A., 614 F.3d 400, 405 (7th Cir. 2010) ("[A]bstract recitations of the elements of a cause of action or conclusory legal statements do nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law.") (Citations and internal quotations omitted).

Petitioner raises a second claim under the due process clause that Wis. Stat. § 304.06(1)(b) entitled him to be considered for parole as soon as he served more than 25% of his sentence. States may create liberty interests in being granted parole, Felce, 974 F.2d at1490, but this is so only when the state creates a presumption of release, as with the mandatory release provision. Wis. Stat. 302.11(1) ("each inmate is entitled to mandatory

release on parole by the department [when he has completed two-thirds of his sentence]"). Wis. Stat. § 304.06(1)(b) provides that "the parole commission *may* parole an inmate . . . when he or she has served 25% of the sentence imposed." (Emphasis added). Under the statute's non-mandatory terms, the parole commission has complete discretion to grant or deny parole. Discretionary parole schemes do not create protected liberty interests. Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998) ("A state creates an expectation of release that rises to the level of a liberty interest within the meaning of the Due Process Clause if its parole system requires release whenever a parole board or similar authority determines that the necessary prerequisites exist.") (Emphasis added). Accordingly, if petitioner does not prevail on his claim that respondent violated his right to due process by moving his mandatory release date, he cannot use as a "fallback" position a claim that he is entitled to parole consideration under § 304.06.

I note that petitioner admits that he did not appeal the decision of the state circuit court denying the petition in which he raised the claims that he filed in this court. Generally, a "petitioner's failure to fairly present each habeas claim to the state's appellate and supreme court in a timely manner leads to a default of the claim, thus barring the federal court from reviewing the claim's merits." Smith v. McKee, 598 F.3d 374, 382 (7th Cir. 2010). However, a "federal court may excuse a procedural default if a petitioner can show either cause for the default and actual prejudice as a result of the alleged violation of federal

law, or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." Id. In this case petitioner alleges that he could not file an appeal because he did not receive the circuit court's decision until his deadline for filing an appeal had passed. Accordingly, I decline to dismiss petitioner's claim at this stage for failure to exhaust his remedies in state court. However, respondent is free to raise this issue again if he believes he can show that petitioner does not have adequate cause to justify his failure to file an appeal.

ORDER

IT IS ORDERED that

1. Petitioner Cleveland Lee is GRANTED leave to proceed on his claim that respondent John Paquin moved petitioner's mandatory release date, in violation of the Eighth Amendment and the due process clause. The petition is DISMISSED as to all other claims.

2. 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 Paquin.

3. Within 30 days of the date of service of this order, respondent must file an answer to the petition. 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.

4. **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. If the state contends that the petition presents a mix of exhausted and unexhausted claims, then it must address in its supporting brief whether petitioner meets the criteria for a stay announced in Rhines v. Weber, 544 U.S. 269 (2005), in the event he opts to pursue his unexhausted claims in state court. 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.

5. **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 the 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).

NOTE WELL: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims dismissed for his failure to meet his burden of proof.

- 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.

6. 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 note on each of his submissions whether he has served a copy of that document upon the state.

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

Entered this 21st day of December, 2010.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge