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

ALEXANDER KOTLOV,

Petitioner,

v.

L.C. WARD,

Respondent.

OPINION & ORDER

15-cv-671-jdp

Pro se petitioner Alexander Kotlov is a prisoner in the custody of the Federal Bureau of Prisons, currently housed at the Oxford Federal Correctional Institution (FCI-Oxford). Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, contending that the United States Marshals Service did not take him into federal custody to begin serving his federal sentence when they should have. In other words, petitioner contends that he should have been able to start serving his federal sentence earlier. Dkt. 1.

The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. (Courts may apply this rule to habeas petitions not brought pursuant to § 2254, including § 2241 petitions. Rule 1(b), Rules Governing Section 2254 Cases; *see also* 28 U.S.C. § 2243.) Under Rule 4, I will dismiss the petition only if it plainly appears that petitioner is not entitled to relief. Because it is not, I will direct respondent to show cause as to why I should not grant the petition.

ALLEGATIONS OF FACT

By checking nearly every option on the § 2241 form, petitioner summarily represents that he is challenging denial of parole, revocation of parole, revocation of good-time credits,

detainer, and calculation of good-time credits. Dkt. 1, at 1. But petitioner describes only one claim: that his federal sentence did not begin when it should have.

Publicly available court records indicate that on October 10, 2012, the United States District Court for the Western District of Texas sentenced petitioner to 36 months in prison and 5 years on supervised release for failure to register as a sex offender, in violation of 18 U.S.C. § 2250. It appears that the court ordered petitioner's sentence to run consecutive to some other sentence—presumably a state sentence—because the court denied petitioner's motions to run his federal sentence concurrently. But at this point, the details of the sentence are not clear.

I draw the remaining facts from the petition. On February 24, 2014, the Texas Department of Corrections released petitioner from custody and placed him on parole. Although petitioner had yet to serve his federal sentence, the United States Marshals Service did not take petitioner into federal custody at that time. Instead, petitioner was extradited to and jailed in Eau Claire, Wisconsin until September 24, 2014, for failure to pay child support. When he was released from jail in Eau Claire, Texas officials told petitioner that he had 72 hours to turn himself in at a secure facility in Houston; if petitioner did not voluntarily surrender, a court would issue a bench warrant for his arrest. And so petitioner drove to Houston, and the Marshals eventually took him into federal custody.

Petitioner contends that the Marshals should have taken him into federal custody as soon as he left the Texas state prison because he "[r]eceived [his] federal sentence 1st." Dkt. 1-1, at 1. Petitioner contends that "clerical errors" have created a situation that amounts to cruel and unusual punishment and double jeopardy.

ANALYSIS

A. Petition

Section 2241 provides that the "writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). The "essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Here, petitioner contends that the Marshals did not take him into federal custody when they should have. Construing petitioner's allegations generously, he appears to contend that his federal sentence should have started—and, accordingly, should end—seven months sooner that it did and will. He does not contend that he should not be serving his current sentence, nor does he contend that it is longer than it should be. Petitioner is not attacking the fact or the length of his confinement, only its start and end dates. That being said, petitioner *does* appear to seek speedier release from custody. He wants to know why the Marshals dawdled, so to speak, effectively lengthening his federal sentence by making it run consecutive to both his Texas sentence and his confinement in Eau Claire.

At this point, with only the limited record that petitioner has created, I do not have the full story about what happened to petitioner. It is not clear that petitioner is not entitled to relief. It is entirely possible that someone extradited petitioner to Eau Claire by mistake and, possibly, against the federal sentencing judge's wishes. I need more information to determine what exactly happened to petitioner and whether his current incarceration violations his constitutional rights. Accordingly, I will direct respondent to show cause as to why the writ should not issue.

B. Motions for counsel

Petitioner has also filed three motions for appointment of counsel. Dkt. 5; Dkt. 6; Dkt. 7. The Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), authorizes district courts to appoint counsel for petitioners seeking habeas relief under 28 U.S.C. § 2241. But first, the district court must determine that appointment of counsel would serve "the interests of justice" and that the petitioner is "financially eligible." 18 U.S.C. § 3006A(a)(2). Two additional considerations are relevant to the interests of justice consideration: whether petitioner has attempted to obtain representation on his own, *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992), and whether the difficulty of the case exceeds petitioner's ability to litigate his claims himself, *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). To determine a petitioner's competence to litigate his own case, the court considers his literacy, communication skills, educational level, and litigation experience. *Id.*

To be financially eligible for appointment of counsel, petitioner does not have to be indigent; he must demonstrate only that he is financially unable to obtain counsel. *United States v. Sarsoun*, 834 F.2d 1358, 1362 (7th Cir. 1987) ("The Criminal Justice Act . . . merely requires that a defendant be financially unable to obtain counsel—a lower standard than indigency."). Although petitioner bears the ultimate burden of demonstrating his financial eligibility, "[a]ny doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time." Admin. Office of the U.S. Courts, Guide to Judiciary Policies and Procedures, Vol. 7, pt. A, § 210.40.30(b), *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja.

At this point, I will deny petitioner's motions without prejudice. The case is in its early stages, and I have only just directed the respondent to show cause as to why the writ should not issue. After respondent responds and expands the record, petitioner may renew his motion if appropriate, keeping in mind the standard articulated here.

ORDER

IT IS ORDERED that:

1. Petitioner Alexander Kotlov's motions for appointment of counsel, Dkts. 5-7, are DENIED without prejudice.

2. The clerk of court is directed to send copies of this order and of petitioner's petition for a writ of habeas corpus, Dkt. 1, to respondent at FCI-Oxford, the local United States Attorney, and the United States Attorney General by certified mail, in accordance with Federal Rule of Civil Procedure 4(i).

3. Within 60 days from the date of service of the petition, respondent must file an answer to the petition, showing cause, if any, why this writ should not issue.

4. If respondent 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, then respondent may 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 may have 20 days following service of any motion to dismiss within which to file and serve his responsive brief and any supporting documents. Respondent may 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, then it will set a deadline within which respondent must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

5. If respondent does not file a dispositive motion, then the parties must adhere to the following briefing schedule regarding the merits of petitioner's claim:

   a. Petitioner must file a brief in support of his petition within 30 days after the respondent's answer is filed.

   b. Respondent must file a brief in opposition within 30 days.

c. Once respondent files a brief in opposition, petitioner may have 20 days to file a reply if he wishes to do so.

Entered June 17, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge