IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DARYL O. NORRIS,

Petitioner,

v.

SHERIFF DAVID MAHONEY,

Respondents.

OPINION and ORDER

16-cv-212-bbc

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Petitioner Daryl Norris has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the $5 filing fee and his petition is before the court for screening pursuant to Rule 4 of the Rules Governing Section 2254 cases. Rule 4 requires the court to examine a petition for a writ of habeas corpus and dismiss it if it "plainly appears" that petitioner is not entitled to relief. If the petition is not dismissed, then the court must order the respondent to file an answer, motion or other response within a fixed time.

From the petition, the supporting exhibits and the court records available electronically, I conclude that the following facts are relevant for Rule 4 screening purposes.

FACTS

In early 2010, petitioner was charged in Dane County Circuit Court with second degree recklessly endangering safety, kidnapping and second degree sexual assault. Pursuant to an agreement with the prosecution, petitioner pleaded "no contest" to the second degree

recklessly endangering safety charge and the state dismissed the charges for kidnapping and sexual assault. On April 23, 2010, plaintiff was sentenced to prison; subsequently he was released to community supervision on September 25, 2012. The day after his release, petitioner was taken to "the sex offender's office" in Madison, Wisconsin, where he met with his parole agent, Brit Wolfe. Agent Wolfe informed plaintiff that he was required to register as a sex offender and abide by various supervised release rules applicable to sex offenders. However, petitioner argued that requiring him to register as a sex offender was inconsistent with the terms of his plea agreement. Petitioner also asserted he was not afforded due process in connection with the requirement that he register as a sex offender.

Wolfe advised petitioner to file an "Offender Request for Administrative Review" challenging his status as a sex offender. Plaintiff's challenge to his sex offender status was unsuccessful and he exhausted his administrative remedies related to this challenge. On December 4, 2012, Denise Symdon, an administrator with the Division of Community Corrections, sent Wolfe a letter informing him that petitioner's challenge was unsuccessful and that he was required to remain "on Sex Offender rules." Corrections Field Supervisor Bill Lazar also wrote to petitioner on October 11, 2012 and informed him that the facts set forth in the criminal complaint supported a determination that he be required to register as a sex offender and abide by sex offender rules.

On December 13, 2012, petitioner met with Wolfe. During this meeting, petitioner refused to "participate in any recommended programming as directed by [Wolfe]" and refused to sign an agreement to abide by the sex offender rules. Petitioner also violated a

number of other community supervision rules and jail staff directives. Wolfe recommended that petitioner's supervision be revoked for these violations. A revocation hearing was held on May 13, 2013 and the administrative law judge, Robert G. Pultz, agreed with Wolfe's recommendation that petitioner's supervision be revoked. Petitioner was incarcerated at Stanley Correctional Institution for violating the sex offender supervised release rules. He was subsequently released in December 2013.

Since being released in December 2013, petitioner has been reincarcerated at least twice for failing to abide by the sex offender treatment requirements applicable to prisoners on supervised release. In both instances he maintained that labeling him a sex offender and requiring him to abide by the rules accompanying such a status violated his due process rights and the terms of his plea agreement. He is currently incarcerated at Stanley Correctional Institution for his failure to comply with the sex offender treatment rules in January 2016.

OPINION

Petitioner contends that he is entitled to habeas relief under 28 U.S.C. 2254 for four reasons: (1) he contends that the Wisconsin Department of Corrections has arbitrarily imposed a "sex offender" label in violation of his rights under the Fourteenth Amendment due process clause; (2) requiring him to register as a sex offender is inconsistent with the terms of his plea agreement; (3) his parole agent fabricated the grounds for revoking his release in December 2012 in an effort to prevent petitioner from filing a civil lawsuit

challenging his sex offender status; and (4) his May 2013 revocation hearing did not comport with the due process clause. I am ordering the state to respond to plaintiff's first argument, but dismissing his remaining arguments as failing to state a plausible claim that his constitutional rights were violated.

A prisoner may petition for a writ of habeas corpus when he is re-incarcerated for violating rules of supervised release that he contends are unconstitutional. Blackmon v. Hamblin, 436 Fed. Appx. 632, 2011 WL 3624819 at *1 (7th Cir. 2011) (petition for writ of habeas corpus is proper vehicle for challenging parole condition requiring petitioner to obtain a psychological evaluation); Henderson v. Bryant, 606 Fed. Appx. 301, 303-04 (7th Cir. 2015) (habeas is proper vehicle for challenging civil commitment based on petitioner's violation of unconstitutional terms of release) (citing Duncan v. Walker, 533 U.S. 167, 176 (2001); Spencer v. Kemna, 523 U.S. 1, 7 (1998)). (Petitioner previously attempted to obtain relief for this alleged violation of his constitutional rights by filing an action pursuant to 42 U.S.C. § 1983. However, this claim was dismissed on the ground that it was barred by the United States Supreme Court's decisions in Preiser v. Rodriguez, 411 U.S. 475 (1973) and Heck v. Humphrey, 512 U.S. 477 (1994)).

Petitioner contends that the supervised release rules requiring him to register as a sex offender and participate in sex offender treatment are unconstitutional because they were imposed without providing him due process. Relying on the United States Supreme Court's decision in Vitek v. Jones, 445 U.S. 480 (1980), a significant number of federal courts have held that such a claim is cognizable as either a habeas claim or a § 1983 claim, depending

upon the prisoner's custody status. See e.g. Coleman v. Dretke, 395 F.3d 216, 222-23 (5th Cir. 2004) (habeas); Chandler v. United States Parole Commission, 60 F. Supp. 3d 205, 215 (D.D.C. 2014) (habeas); Renchenski v. Williams, 622 F.3d 315 (3d Cir. 2010) (§ 1983); Kirby v. Siegelman, 195 F.3d 1285 (11th Cir. 1999). Because it is not clear what type of process, if any, petitioner was afforded before being labeled a "sex offender," I will order a response to this claim.

I am dismissing petitioner's remaining habeas claims. Petitioner's claim that he is entitled to habeas relief because his sex offender status violates the terms of his plea agreement fails because in negotiating and executing a plea agreement, the state is not required "to discuss all possible ramifications of a defendant's guilty plea." United States v. Jordan, 870 F.2d 1310, 1316 (7th Cir. 1989). When it comes to plea agreements, the Constitution only "prohibit[s] false representations and mandates compliance with promises made." Id. Petitioner does not allege that the plea agreement provided that petitioner's supervised release would not be accompanied by rules applicable to sex offenders. His only argument for such an interpretation rests on the state's agreement to drop the sexual assault charge it originally intended to pursue, which it did. However, the state's agreement to drop this charge cannot reasonably be construed as a representation or promise regarding the terms of his supervised release. E.g. Villanueva v. Anglin, 719 F.3d 769, 778 (7th Cir. 2013) (refusing to construe plea agreement's silence with respect to whether a term of mandatory supervised release would apply as representation that supervised release would *not* apply).

Plaintiff's third argument—that Wolfe fabricated the grounds for revoking petitioner's

supervision in December 2012—also fails because he has already served out the sentence he received as a result of the allegedly improper revocation. Habeas relief under § 2254 is appropriate only with respect to a current period of confinement. Spencer v. Kemna, 523 U.S. 1 (habeas corpus petition challenging parole revocation procedures was moot when reincarceration was finished). The fact that petitioner's reincarceration following his December 2012 revocation has ended also renders moot plaintiff's fourth argument that the May 2013 revocation hearing did not comport with due process because the hearing officer was biased. Unlike petitioner's claim that the sex offender conditions are unconstitutional, his claims related to the "fabrication" of grounds for revocation and the May 2013 revocation hearing are unrelated to his current period of incarceration.

ORDER

IT IS ORDERED that

1. 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 Warden Pollard.

2. Within 30 days after the entry of this order, respondent must file an answer to petitioner's claim that the state violated his constitutional rights by treating him as a "sex offender" for purposes of his extended release without first providing him due process.

3. Petitioner's remaining grounds for relief—that the state breached the plea agreement, "fabricated" charges in connection with his May 2013 revocation and exhibited bias during the May 2013 revocation hearing—are DISMISSED WITH PREJUDICE.

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, 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, 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. For the time being, 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.

Entered this 14th day of July, 2016.

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