United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 13, 2018
Decided September 20, 2018

Before

FRANK H. EASTERBROOK, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 18-1482

ROGER L. KAUFMAN,
Petitioner-Appellant,

v.

PAUL S. KEMPER,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 16-C-1587

Lynn Adelman,
Judge.

ORDER

Roger Kaufman has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Kaufman's motion to expedite his appeal is DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 18, 2018

By the Court:

ROGER L. KAUFMAN,
Petitioner-Appellant,

No. 18-1482 v.

PAUL S. KEMPER, Warden,
Respondent-Appellee.

] Appeal from the United States District Court for the Eastern District of Wisconsin.
]
] No. 2:16-cv-01587-LA
]
] Lynn Adelman,
] Judge.

ORDER

Petitioner-appellant filed a petition for rehearing and rehearing en banc on October 3, 2018. No judge in regular active service has requested a vote on the petition for rehearing en banc*, and both of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore **DENIED**.

* Judge Sykes did not participate in the consideration of the petition for rehearing en banc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROGER L. KAUFMAN,
Petitioner,

v. **Case No. 16-C-1587**

PAUL KEMPER, Warden,
Racine Correctional Institution,
Respondent.

DECISION AND ORDER

On April 21, 1989, Roger Kaufman shot and killed his mother-in-law. Following a jury trial in Juneau County, Wisconsin, he was convicted of one count of first-degree intentional homicide and one count of theft while using a dangerous weapon. On the homicide count, the trial court sentenced Kaufman to life in prison plus five years. On the theft count, the trial court sentenced him to one year in the county jail, to be served consecutively to the life sentence. The trial court determined that Kaufman would be eligible for parole after serving 25 years of his sentence. A judgment of conviction was entered on December 15, 1989.

On November 29, 2016, Kaufman filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. In his petition, Kaufman alleges that he did not receive a parole hearing by the date on which he believes he completed 25 years of his sentence, April 21, 2014. *See* Pet. at 6, ECF No. 1. He further alleges that the Wisconsin Department of Corrections and the Wisconsin Parole Commission "changed" his parole-eligibility date to October 16, 2015, but then refused to provide him with a parole hearing on that date. *Id.* Kaufman contends that the DOC and the Parole Commission

still refuse to provide him with a parole hearing and that they have effectively changed his sentence to life in prison without the possibility of parole. *Id.* Kaufman contends that these actions have denied him his federal rights under the Due Process Clause of the Fourteenth Amendment and the Ex Post Facto Clause applicable to the states, U.S. Const. art. I, § 10, cl. 1.

I.

Before I consider Kaufman's claims, I must address a preliminary issue concerning subject-matter jurisdiction. *See, e.g., Olson v. Bemis Co., Inc.*, 800 F.3d 296, 300 (7th Cir. 2015) (federal courts have independent obligation at each stage of the proceedings to ensure that they have subject matter jurisdiction over the dispute). In his petition, in addition to the claims described above, Kaufman alleges a second "ground" for habeas relief that might be construed as a claim involving his sentence. *See* Pet. at 7. In this second ground, Kaufman appears to allege that his sentence violates that Ex Post Facto Clause because the trial judge set his parole-eligibility date using a statutory provision, Wis. Stat. § 973.014, that, at the time of Kaufman's crime, had only recently been added to Wisconsin's parole scheme.[1] However, if Kaufman's

[1] Before Wis. Stat. § 973.014 was enacted, Wisconsin law provided that persons serving life terms would be eligible for parole after 20 years. *See* 1987 Wis. Act 412, § 3 (modifying text of Wis. Stat. § 57.06(1)(b), which, before modification, provided that inmates serving life terms were eligible for parole after serving 20 years). Section 973.014 modified this approach in that it required a trial court sentencing a person to a life sentence to choose between setting parole eligibility under the old law (i.e., at 20 years) or delaying parole eligibility until the person serves more than 20 years. In Kaufman's case, the trial court chose the latter option and made him eligible for parole after serving 25 years. In state court, Kaufman argued that the trial court's use of Wis. Stat. § 973.014 violated the Ex Post Facto Clause. However, that argument made little sense, as the Act creating Wis. Stat. § 973.014 was enacted in June 1988, became effective on July 1, 1988, and applied to crimes committed on or after July 1, 1988. *See* 1987 Wis. Act 412, §§ 6–7 & enactment date & publication date. Kaufman

second claim were construed as a challenge to his sentence, then I would not have jurisdiction to consider it. This is because, in 2004, Kaufman filed a federal habeas petition challenging his conviction and sentence, and that petition was dismissed on the merits. *See* Br. in Supp. of Mot. to Dismiss, Ex. 3, ECF No. 9-3. Therefore, any subsequent petition attacking the conviction or sentence would qualify as a "second or successive" application within the meaning of 28 U.S.C. § 2244(b). Absent authorization from the court of appeals, a district court lacks jurisdiction to consider a second or successive habeas petition. *See Benton v. Washington*, 106 F.3d 162, 165 (7th Cir. 1996).

Before he commenced the present case, Kaufman sought permission from the court of appeals to file a second or successive habeas petition. *See* Seventh Circuit Order of Sept. 15, 2015, ECF No. 1 at 14. The court noted that Kaufman sought to raise two grounds in a successive petition: (1) that the sentencing court relied on the wrong statute to set his parole-eligibility date, in violation of the Ex Post Facto Clause; and (2) that the Wisconsin Department of Corrections and the Wisconsin Parole Commission failed to schedule a parole hearing on April 21, 2014, which according to him was the date on which he completed 25 years of his sentence. As to the first ground, the court noted that it was "based on conduct at the time of [Kaufman's] sentencing and does not rely on a new Supreme Court decision or newly discovered evidence, as is required for authorization." The court therefore denied authorization to file a successive petition raising the first ground. As to the second ground, the court

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did not commit his crime until April 21, 1989, nearly a year after § 973.014 became law. Thus, he was sentenced in accordance with the law as it existed at the time of his crime.

found that it challenged conduct that occurred in 2014, and that therefore a petition raising that ground would not be successive to Kaufman's original petition. The court concluded that Kaufman did not require authorization to file a petition raising the second ground, and it stated that Kaufman could file a § 2254 petition challenging the denial of a timely parole hearing in the district court.

Because the court of appeals did not grant Kaufman permission to file a successive habeas petition challenging the trial court's use of § 973.014 during sentencing, I would lack jurisdiction to consider it. Moreover, if ground two in Kaufman's petition were construed as a challenge to the sentence, then I would likely lack jurisdiction to consider *any* claim in the petition, including Kaufman's challenge involving the ongoing denial of parole, because Kaufman's "application" would be second or successive. *See* 28 U.S.C. § 2244(b)(3)(A); *Pennington v. Norris*, 257 F.3d 857 (8th Cir. 2001) (holding that district court may not consider any claims in a petition where claims that require § 2244(b) authorization are "mixed" with claims that do not). However, construing Kaufman's pro se petition liberally, as I must, *Haines v. Kerner*, 404 U.S. 519 (1972), I conclude that Kaufman is not actually challenging his sentence. Rather, Kaufman's ground two is more properly viewed as an extension of his claim that the DOC and the Parole Commission failed to hold a parole hearing at the 25-year mark. *See* Pet. at 7 (alleging that sentence has "led to two different administrative agencies of WI to further change that PED to a greater date and then to no date at all"). In his briefs in this court, Kaufman does not develop an argument challenging the original, 25-year parole-eligibility date. Instead, he focuses on his claim that the DOC and the Parole Commission violated his federal rights by failing to grant him a parole

hearing at the 25-year mark. For these reasons, I construe the petition as not raising a challenge to Kaufman's sentence and find that it is not a successive petition.

II.

The claims that Kaufman pursues in this case arise out of his belief that his parole-eligibility date should have been April 21, 2014. Kaufman believes that, after properly accounting for the credit he received at sentencing for time served, he would have served 25 years of his sentence as of that date. Kaufman did not receive a parole hearing by April 21, 2014, and he alleges that he has not received one since.

Here, I note that Kaufman could have brought his claims regarding the denial of a parole hearing under 42 U.S.C. § 1983 rather than the federal habeas corpus statutes. In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Supreme Court held that a prisoner may bring an action under 42 U.S.C. § 1983 for an injunction requiring prison officials to grant him or her an immediate parole hearing. The Court found that the prisoner was not limited to bringing a claim for a parole hearing in a petition for a writ of habeas corpus. The Court noted that if the district court granted the relief sought—an injunction requiring an immediate parole hearing—the prisoner would not necessarily be released from custody, since at the conclusion of the hearing the relevant parole authorities could, in their discretion, decide to deny parole.

In accordance with *Wilkinson*, Kaufman could have filed a complaint under § 1983 against the members of the Wisconsin Parole Commission and requested an injunction ordering the Commission to provide him with an immediate parole hearing. *Accord Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006). Instead, however, Kaufman chose to file a petition for a writ of habeas corpus. The respondent does not

argue that this was improper. Moreover, *Wilkinson* does not hold that a prisoner may *not* bring a claim involving the denial of a parole hearing under the habeas statutes, and thus I do not believe Kaufman was limited to bringing a claim under § 1983. I also note that the relief Kaufman requests is not an injunction requiring an immediate parole hearing. Rather, he asks to be "resentenced" to "the minimum amount of time he would have had to serve to be eligible for parole" and then to be granted "time served." Pet. at 12. Reading this request in light of Kaufman's subsequent filings, I understand it as a request for immediate release from custody. In a subsequent document entitled "motion for order granting summary judgment," Kaufman states that "[t]he Respondent cannot ever take the Petitioner back in time to grant him his timely hearing by law or a timely parole, thus the only relief is to Grant the Writ and Order Petitioner's immediate release." Mot. at 4, ECF No. 17. In other words, Kaufman argues that the appropriate remedy for the respondent's failure to provide him with a timely parole hearing is to order his immediate release from prison. This remedy is only available under the habeas statutes. (As discussed in Section V.C, however, it is not a remedy that I would grant in this case.)

Because the state has not objected to Kaufman's raising his claim involving the denial of a parole hearing in a petition for habeas corpus, and because Kaufman requests immediate release from custody, I conclude that his claim is properly brought under the federal habeas corpus statutes rather than under 42 U.S.C. § 1983.

III.

I next describe the relevant factual and procedural history of this case. On July 20, 2015, Kaufman filed a petition for a writ of habeas corpus with the Juneau County

Circuit Court in which he noted that he did not receive a parole hearing on April 21, 2014. *See* ECF No. 22-1 at 3–12. However, in this same habeas petition, Kaufman also alleged that his original sentence violated the Ex Post Facto Clause because the trial court, using the newly enacted Wis. Stat. § 973.014, set his parole-eligibility date at 25 years. According to Kaufman, he should have been sentenced under the old law—that is, under Wis. Stat. § 57.06 as it existed before it was amended in 1988. He further alleged that, under the old law, he would have been eligible for parole after serving only 13 years and 4 months of his sentence.[2] *Id.* at p. 7 of 20.

The trial court denied Kaufman's state habeas petition, giving two reasons. *See* ECF No. 14–2 at 65–67. First, the court found that state law required habeas petitions to be notarized, yet Kaufman had failed to notarize his petition. Second, the court found that Kaufman was trying to attack his sentence, which, in Wisconsin, is not a proper use of a habeas petition. The trial court did not discuss Kaufman's allegation that the Parole Commission had failed to give him a parole hearing at the 25-year mark.

Kaufman appealed to the Wisconsin Court of Appeals. In that court, Kaufman focused primarily on his argument that the trial judge committed an *ex post facto* violation at sentencing when it set his parole-eligibility date at 25 years rather than at 13 years and 4 months. *See generally* Kaufman's Br. in Wis. Ct. App., ECF No. 14-2. However, he also made several references to his belief that, even if his eligibility for parole was correctly set at 25 years, the Parole Commission did not afford him a

[2] I do not understand why Kaufman believes that under the old law he would have been eligible for parole after serving only 13 years and 4 months of his sentence. Under the version of Wis. Stat. § 57.06 that existed before it was amended in 1988, a person serving a life sentence was not eligible for parole until he or she served 20 years. *See* Wis. Stat. § 57.06(1) (1985–86).

hearing at the 25-year mark. *See* Br. at 4–5, 9–11, 26–28. The warden's response brief focused on Kaufman's challenge to his sentence (along with other issues not relevant here) and did not address Kaufman's references to being denied a parole hearing at the 25-year mark. *See generally* Warden's Response Br. in Wis. Ct of App., ECF No. 14-3. The Wisconsin Court of Appeals, in its written order deciding the appeal, likewise did not mention Kaufman's references to being denied a parole hearing at the 25-year mark. *See State ex rel. Kaufman v. Kemper*, No. 2015AP1723 (Wis. Ct. App. May 20, 2016), ECF No. 14–5. Instead, the court understood Kaufman to be arguing only "that his sentence violated the ex post facto clause of the U.S. Constitution." *Id.* at 1. As to that claim, the court determined that because Kaufman could have raised it during his direct appeal in 1990 or in a motion to modify his sentence he filed in 1996, he was prohibited from raising it in a petition for a writ of habeas corpus. *Id.* at 2–4. The court therefore affirmed on state procedural grounds and did not reach the merits.

Kaufman sought review of the court of appeals's decision in the Wisconsin Supreme Court. In his petition for review, Kaufman again focused primarily on his claim that the trial court violated the Ex Post Facto Clause when it set his parole eligibility at 25 years. *See generally* Pet. for Review, ECF No. 14–6. But Kaufman also pointed out that he did not receive a parole hearing after serving 25 years. *See id.* at 3. On October 11, 2016, the Wisconsin Supreme Court denied Kaufman's petition for review. Kaufman filed his federal petition for a writ of habeas corpus on November 29, 2016.

As the above summary indicates, the state courts did not address Kaufman's assertion that the Parole Commission failed to grant him a parole hearing at the 25-year mark. Rather, they only addressed his claim that his sentence violated the Ex Post

Facto Clause because it set eligibility for parole at 25 years rather than at 13 years and 4 months. As a result, the factual record developed in state court does not contain evidence that would enable me to determine whether Kaufman received a parole hearing at the 25-year mark, and, if not, the reason why he did not receive one. However, in the respondent's response to Kaufman's federal petition and in the respondent's brief in opposition to the petition, respondent's counsel states that he contacted the Department of Correction's records director to determine when Kaufman became eligible for parole. *See* Resp. to Pet. at 5 n.2, ECF No. 14 & Br. in Opp. at 19–20. The records director told counsel that the Parole Commission had scheduled a parole hearing for Kaufman on September 23, 2015, and that Kaufman failed to appear at that hearing. Attached to the respondent's brief is a document entitled "Parole Commission Action" dated September 23, 2015. The document states in relevant part as follows: "When called for today's parole review, Inmate Kaufman refused to appear. This action is considered a withdrawal from parole consideration. Should inmate wish to be considered for parole in the future, he will need to formally reapply for same." Br. in Opp., Ex. 1, ECF No. 20-2. Respondent asks me to take judicial notice of this document. In his reply brief, however, Kaufman objects to my doing so and claims that the document is "fraudulent." Reply Br. at 12, ECF No. 21. Kaufman also states in an affidavit he submitted with his reply brief that he "was never provided or called for a parole hearing on 9-23-2015, or any other 'fabricated' date by the Respondent." Kaufman Aff. at 2, ECF No. 22.

In his response to the petition and response brief, respondent's counsel also represents that the DOC's records director told him that the DOC had made an error in

computing Kaufman's parole-eligibility date. Resp. to Pet. at 5 n.2, ECF No. 14 & Br. in Opp. at 19–20. The DOC had set Kaufman's parole-eligibility date as October 16, 2015. The DOC now concedes that this was an error and that Kaufman's parole-eligibility date was actually July 16, 2014. However, because Kaufman's parole status remains "withdrawn" following his failure to appear at the September 23, 2015 hearing, the Parole Commission will not set another parole hearing for Kaufman until he reapplies for parole.

IV.

The respondent contends that I should not reach the merits of Kaufman's due-process and *ex post facto* claims because the Wisconsin Court of Appeals decided them on an independent and adequate state procedural ground, and because Kaufman did not "fairly present" those claims to the state courts.

A.

The respondent contends that the Wisconsin Court of Appeals disposed of Kaufman's claims on an independent and adequate state procedural ground, namely, that Kaufman should have raised his argument that his sentence violates the Ex Post Facto Clause during his direct appeal or in his subsequent motion to modify his sentence. But as discussed above, the claims at issue in Kaufman's federal petition do not relate to his sentence. Instead, they relate to his failure to receive a parole hearing on his parole-eligibility date. The Wisconsin Court of Appeals, in its opinion, did not in any way address Kaufman's claim that he did not receive a timely parole hearing. It thus could not have disposed of that claim on the ground that he should have raised it during his direct appeal in 1990 or during proceedings on his motion for modification of

his sentence in 1996. Obviously, Kaufman could not have raised the claim at those times, as he had not yet served 25 years of his sentence. Thus, the independent-and-adequate-state-ground doctrine does not apply to Kaufman's claim that he was denied a timely parole hearing.

B.

The respondent next argues that Kaufman did not "fairly present" his claim involving the denial of a parole hearing to the state courts. The fair-presentment requirement relates to a petitioner's obligation to exhaust the remedies available to him in state court before filing a federal petition. *See* 28 U.S.C. § 2254(b)(1)(A); *Thomas v. Williams*, 822 F.3d 378, 384 (7th Cir. 2016). The petitioner must give the state courts an opportunity to act on his federal claims by "fairly presenting" the federal issue for the state courts to review. *Thomas*, 822 F.3d at 384. If the petitioner does not fairly present his federal claims to the state courts, and the state courts would now deem it too late for the petitioner to do so, the federal court will deem the federal claims procedurally defaulted. *Id.*

A claim is fairly presented where "the state court was sufficiently alerted to the federal constitutional nature of the issue to permit it to resolve that issue on a federal basis." *Ellsworth v. Levenhagen*, 248 F.3d 634, 639 (7th Cir. 2001) (quotation marks omitted). An inmate must present "both the operative facts and the legal principles that control each claim to the state judiciary." *Id.* In determining whether a petitioner has fairly presented his federal claim to the state judiciary, the Seventh Circuit examines four factors:

> 1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) whether the petitioner relied on state cases

> which apply a constitutional analysis to similar facts; 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation.

Id.

In the present case, it is hard to say that Kaufman fairly presented his claims involving the denial of a parole hearing to the state courts. During proceedings on his state habeas petition, Kaufman asserted that the Parole Commission failed to provide him with a parole hearing after he served 25 years of his sentence. However, Kaufman did not develop this assertion into a freestanding federal claim. He did not cite federal or state cases supporting the notion that the failure to provide him with a parole hearing in April 2014 violated due process or the Ex Post Facto Clause. Rather, he only mentioned, during the course of arguing that his original sentence violated the Ex Post Facto Clause, that he did not receive a parole hearing after serving 25 years. Kaufman essentially entangled his claim involving the denial of a parole hearing with his challenge to his sentence, and therefore the state courts reasonably construed his arguments as being directed only at his sentence.

For these reasons, Kaufman likely did not fairly present his federal claim involving the denial of a parole hearing in 2014 to the state courts. However, I will not dispose of his federal petition on this ground. For one thing, I am not entirely convinced that Kaufman did not fairly present his claims to the state courts. But more importantly, it is clear that Kaufman is not entitled to habeas relief on the merits, and therefore it makes sense to dispose of his claims on that ground. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

V.

Turning to the merits, Kaufman contends that the denial of a parole hearing in 2014 violates both the Due Process Clause and the Ex Post Facto Clause applicable to the states. Because the state courts did not adjudicate either of these claims on the merits, I do not review them under 28 U.S.C. § 2254(d)(1). *See Campbell v. Reardon*, 780 F.3d 752, 762 (7th Cir. 2015) ("AEDPA's deferential standard of review applies only to claims that were actually 'adjudicated on the merits in State court proceedings.'"). Rather, I dispose of the matter "as law and justice require," which is essentially de novo review. *Caffey v. Butler*, 802 F.3d 884, 894 (7th Cir. 2015).

A.

Kaufman first contends that the Parole Commission's ongoing failure to provide him with a parole hearing violates the Due Process Clause. However, the Seventh Circuit has held that a person serving a life sentence in Wisconsin (and who, like Kaufman, was sentence before Wisconsin adopted Truth-In-Sentencing in 1998) has no "liberty or property interest in an opportunity to be released on parole." *Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006). Because Kaufman has no liberty or property interest in an opportunity to be released on parole, he "has no entitlement to a hearing under the due process clause." *Id.* Accordingly, Kaufman's due-process claim fails on the merits.

B.

The analysis of Kaufman's *ex post facto* theory is slightly more complicated. Statutes and regulations governing parole are "laws" for purposes of the Ex Post Facto Clause. *Grennier*, 453 F.3d at 444. Thus, if the Parole Commission's alleged failure to

provide Kaufman with a parole hearing is based on a statute or regulation adopted after he committed his crime in 1989, Kaufman would have a good *ex post facto* claim. *See Garner v. Jones*, 529 U.S. 244 (2000). However, Kaufman does not allege that the Parole Commission's failure to provide him with a hearing is based on any statute or regulation adopted after April 21, 1989, the date on which he committed his crime.[3] Indeed, Kaufman does not even attempt to identify the reason or reasons why the Parole Commission failed to provide him with a parole hearing in 2014 or at any point thereafter. He seems to assume that because the Parole Commission has not provided him with a hearing, it must have illegally "changed" his sentence to life without the possibility of parole. But there are many potential explanations for the Parole Commission's failure to hold a hearing that would have nothing to do with a statute or regulation passed after he committed his crime.

One potential explanation is the twofold explanation offered by the respondent: First, the DOC miscalculated Kaufman's initial parole-eligibility date, which explains why he did not receive a hearing until September 2015. Second, when Kaufman was called for his parole hearing in September 2015, he did not appear, which constituted a withdrawal from parole eligibility. Because Kaufman withdrew from parole eligibility, he must now reapply before the Parole Commission will schedule another hearing. No part of the respondent's explanation is based on a "law" passed after 1989. Rather, the initial delay was caused by a mistake in computing his parole-eligibility date, and the

[3] As noted, in state court, Kaufman alleged that his *sentence* violated the Ex Post Facto Clause because it set parole based on a new law, Wis. Stat. § 973.014. As I have already explained, this allegation is not relevant to the claims that Kaufman now pursues in his federal petition. Moreover, as I have already noted, Wis. Stat. § 973.014 was passed and became law *before* Kaufman committed his crime.

remainder was caused by Kaufman's failure to appear at his parole hearing and failure to reapply for parole. Thus, if the respondent's explanation is accurate, Kaufman would not have a claim under the Ex Post Facto Clause.

As noted above, Kaufman disputes that the respondent's explanation is accurate, in that he claims he was never called for a parole hearing in September 2015. In light of this factual dispute, I will not accept the respondent's account of what happened as true. But even if the respondent's version is not true, it would not follow that the Parole Commission's failure to hold a hearing resulted from its application of a statute or regulation that did not exist when Kaufman committed his crime. And because Kaufman has not even alleged that the Parole Commission applied any such statute or regulation to him, I cannot find that the Parole Commission's ongoing failure to hold a hearing violates the Ex Post Facto Clause.

In short, whatever is causing the delay in providing Kaufman with a parole hearing, there is no evidence in this case to suggest that the cause is the Parole Commission's application of a law enacted after April 21, 1989. Accordingly, I reject Kaufman's *ex post facto* claim on the merits.

C.

Finally, I note that even if Kaufman could show that the Parole Commission's failure to hold a hearing violates either due process or the Ex Post Facto Clause, he would not be entitled to a writ of habeas corpus ordering his immediate release. If Kaufman established a constitutional violation, the appropriate remedy would be to give the respondent a choice between releasing him and granting him a parole hearing within a certain time. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (recognizing

that federal courts may delay the release of a successful habeas petitioner to provide the state an opportunity to correct the constitutional violation). Kaufman seems to believe that this remedy would be inadequate, since it would not account for the time he spent in prison past the 25-year mark without being afforded a parole hearing. And of course it is impossible to turn the clock back to April 21, 2014 (or whenever he was first eligible for parole) and provide him with a parole hearing on that date. But this does not mean that Kaufman, if he prevailed on his federal claims, would be entitled to immediate release. If Kaufman prevailed, all that he would have established is that he was entitled to an earlier parole hearing. But because at that hearing the Parole Commission could have denied him parole, Kaufman would not have established that he was entitled to be released. Thus, the proper remedy would be to order that Kaufman receive a parole hearing, not to order that he be released from prison altogether. (This is the reason why Kaufman could have brought his claims under § 1983 rather than the habeas statutes, as I explained in Section II of this opinion.)

Here, I note that the respondent has represented to the court that the Parole Commission stands ready to provide Kaufman with the only remedy that he could obtain in this action if he prevailed on his federal claims. That is, the respondent has represented that all that Kaufman needs to do to have a parole hearing scheduled is reapply for parole. *See* Br. in Opp. at 20 (stating that Kaufman would be eligible for parole consideration if he reapplied for parole). Thus, I advise Kaufman to immediately reapply for parole. If he reapplies and does not receive a hearing shortly thereafter, he may consider seeking relief in the state courts through a petition for a writ of habeas corpus that clearly states he is challenging the denial of a parole hearing rather than the

parole-eligibility date set by the trial court in 1989. *See State v. Johnson*, 101 Wis. 2d 698, 702 (Ct. App. 1981) (stating that habeas corpus is right way for a prisoner to raise a claim challenging the execution of his sentence). But as things stand, Kaufman has no right to relief from the federal courts.

VI.

For the reasons stated, **IT IS ORDERED** that Kaufman's petition for a writ of habeas corpus, his motion for summary judgment, and his motion for order granting summary judgment are **DENIED**. The Clerk of Court shall enter final judgment. Pursuant to Rule 11 of the Rules Governing § 2254 Cases, I find that the petitioner has not made the showing required by 28 U.S.C. § 2253(c)(2), and therefore I will not issue a certificate of appealability.

Dated at Milwaukee, Wisconsin, this 15th day of February, 2018.

/s Lynn Adelman
LYNN ADELMAN
District Judge