

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD EUGENE ROSE,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

Case No. 2:21-cv-12198

HONORABLE STEPHEN J. MURPHY, III

**OPINION AND ORDER DISMISSING THE PETITION FOR A WRIT OF
HABEAS CORPUS [1], DENYING A CERTIFICATE OF APPEALABILITY,
AND DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL**

Petitioner Donald Eugene Rose filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 and named the State of Michigan as the respondent. ECF 1. Upon an initial review, the Court found the petition procedurally deficient. As a result, the Court will deny the petition.

BACKGROUND

While Petitioner addressed sentences imposed by Michigan state courts in his petition, he appears to be incarcerated in the California state prison system. ECF 1, PgID 1 (listing Petitioner's place of confinement as the California Institution for Men); *see also* Exhibit 1 (listing Donald Eugene Rose as an inmate in the California Institution for Men with an admission date of October 2018 and a parole eligible date in July 2022). The petition states that in 2013 Petitioner pleaded nolo contendere to attempted second-degree criminal sexual conduct, felonious assault, and domestic violence in Genesee County Circuit Court. *Id.* The Genesee County Circuit Court

register of actions for Petitioner's case lists the attempted second-degree criminal sexual conduct charge as under Mich. Comp. Laws § 750.520C1F, the felonious assault charge as under Mich. Comp. Laws § 750.82, and the domestic violence charge as under Mich. Comp. Laws § 750.812. Exhibit 2. The register of actions also states that Petitioner pleaded guilty rather than nolo contendere. *Id.* Petitioner was sentenced to seventeen months' imprisonment and did not appeal the convictions or sentence. ECF 1. Petitioner also needed to register as a sex offender under Michigan law. Exhibit 2.

Petitioner appears to have now fully served the seventeen-month term of imprisonment. The Genesee County Circuit Court register of actions listed Petitioner's sentence as beginning on November 25, 2013. Exhibit 2. A seventeen-month term beginning at that time would have long since expired. And the Michigan Department of Corrections, which removes offender information from the department's website three years after an offender's discharge date, no longer lists Petitioner as an offender. *See* Michigan Department of Corrections, Offender Tracking Information System (last accessed Sept. 29, 2021) <https://bit.ly/3ikGygC> [<https://perma.cc/KM7B-8RHZ>] ("In 2008, the Michigan Legislature permitted removal of offender's information from OTIS after three years had elapsed from the discharge date."); Exhibit 3 (listing all offenders, including parolees, with the name Donald Rose in the Michigan Department of Corrections Offender Tracking Information System without having Donald Eugene Rose included).

Even though Petitioner's imprisonment term for the attempted second-degree criminal sexual conduct conviction terminated years ago, in September 2021 Petitioner filed the present petition for a writ of habeas corpus requesting that the Court dismiss the conviction. *Id.* at 15. Petitioner claimed that Mich. Comp. Laws § 750.520 was repealed in 2015 and that there was legal precedent addressing how convictions and sentences under the old statute should be handled. *Id.* at 5.

For the following reasons, the Court will dismiss the petition for a writ of habeas corpus. The Court will also deny a certificate of appealability and leave to proceed in forma pauperis on appeal.

LEGAL STANDARD

After the filing of a habeas petition, the Court must undertake a preliminary review of the petition to determine whether "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts*; 28 U.S.C. § 2243. If, after preliminary consideration, the Court determines that the petitioner is not entitled to relief, the Court must dismiss the petition. *Id.*; *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) ("Under [Section 2243] the District Court has a duty to screen out a habeas corpus petition which should be dismissed for lack of merit on its face."). A dismissal under Rule 4 may apply to both "petitions that raise legally frivolous claims" and petitions that "contain[] factual allegations that are palpably incredible or false." *Carson v. Burke*, 178 F.3d 434, 436–37 (6th Cir. 1999).

A federal court may entertain a habeas petition on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Here, the custody requirement is at issue. A prisoner need not be physically confined in jail or prison to challenge his or her conviction or sentence in a federal habeas proceeding. *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963) ("While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute."); *see also Garlotte v. Fordice*, 515 U.S. 39, 41 (1995) (holding that a prisoner serving consecutive sentences is in custody for all of those sentences in the aggregate, and may attack the sentence scheduled to run first, even after it has expired, until all of the consecutive sentences have been served).

But once a sentence for a conviction has fully expired, a habeas petitioner is no longer "in custody" for that offense and cannot bring a habeas petition directed solely at that conviction. *See Maleng v. Cook*, 490 U.S. 488, 490–92 (1989) (citing *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)); *Lackawanna Cty. Dist. Att'y v. Coss*, 532 U.S. 394, 401 (2001). The United States Supreme Court has "never held [] that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed." *Maleng*, 490 U.S. at 491 (emphasis in original). In fact, "[t]he federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are *in custody* in violation of the Constitution or laws or treaties of the United

States." *Id.* at 490 (emphasis supplied by Supreme Court) (quoting 28 U.S.C. § 2241(c)(3)).

Finally, a requirement that a petitioner register as a sex offender does not, alone, create custody for habeas review when the registration law does not place a restraint on a registrant's freedom of movement. *See Leslie v. Randle*, 296 F.3d 518, 522–23 (6th Cir. 2002) (holding that Ohio's sex offender registration law did not create custody for the petitioner because petitioner's ability to move to another community or residence and to engage in legal activities and employment was not conditioned on government approval). Michigan's sex offender registration law does not restrain a registrant's movement to the extent that custody is created. *Hamama v. Michigan*, No. 2:13-CV-14096, 2013 WL 5745281, at *2 (E.D. Mich. Oct. 23, 2013) (Battani, J.).

DISCUSSION

Here, as discussed, Petitioner has fully served his seventeen-month sentence, which was imposed in 2013, and has been discharged from Michigan custody. *See* Exhibit 2; Exhibit 3. While Petitioner does not discuss whether he contests his sex offender registration status, or even mention if he still must register under his conviction, the Court lacks jurisdiction regardless given that Michigan's sex offender registration statute does not restrain a registrant's freedom of movement so as to create custody. *See Hamama*, 2013 WL 5745281, at *2; *Leslie*, 296 F.3d at 522–23. Thus, the Court lacks subject matter jurisdiction in the case. Federal habeas relief is therefore unavailable and unwarranted.

Before Petitioner may appeal the Court's decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). Under the current statutory scheme, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). When a federal court denies a habeas claim on procedural grounds without addressing the merits, a certificate of appealability should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). Here, reasonable jurists could not debate the correctness of the Court's procedural ruling. The Court will therefore deny Petitioner a certificate of appealability.

Finally, the Court finds that an appeal from the Court's decision cannot be taken in good faith. *See* Fed. R. App. P. 24(a). The Court will therefore deny leave to proceed in forma pauperis on appeal.

ORDER

WHEREFORE, it is hereby **ORDERED** that the petition for a writ of habeas corpus [1] is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that leave to proceed in forma pauperis on appeal is **DENIED**.

SO ORDERED.

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: September 30, 2021

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on September 30, 2021, by electronic and/or ordinary mail.

s/ David P. Parker
Case Manager

EXHIBIT 1



Inmate Information

The information displayed below is subject to change and may update daily

Inmate Name	ROSE, DONALD EUGENE
CDCR Number	BH7063
Age	61
Admission Date	10/31/2018
Current Location	California Institution for Men
Location Link	Directions
Parole Eligible Date (Month/Year)	07/2022
Parole Eligible Date Information	<p>The Parole Eligible Date displayed above is subject to change.</p> <p>The date shown above is the earliest possible release date for this inmate at this time. This is the earliest date the inmate is expected to be released, based on current information. Inmates may earn credits for participating in rehabilitative programming, which may move their parole eligible dates to an earlier date. Inmates could also be found guilty of an institutional rules violation, which could result in a loss of credits that may move their parole eligible dates further into the future. Parole eligible dates may also change based on a variety of other reasons, including court orders, changes in law, and routine audits. Parole eligible dates displayed on this website are updated regularly.</p>
Additional Information	<p>VICTIM NOTIFICATION: Victims who would like to request notice of this inmate's release must register with CDCR's Office of Victim and Survivor Rights and Services. For further information, or to inquire about court ordered restitution, please visit CDCR's Office of Victim and Survivor Rights and Services website or call toll-free 1-877-256-6877</p>

Information current as of: 09/29/2021

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Gavin Newsom

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CDCR Secretary

Kathleen Allison

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EXHIBIT 2

Register of Action

Num	Date	Judge	Chg/Pty	Event Description/Comments
1	10/14/13	NEITHERCUT		SET NEXT DATE FOR: 10/21/13 1:16 PM ARRAIGNMENT HON. GEOFFREY L. NEITHERCUT CT. I-CSC-2ND DEGREE. CT. II-FELONIOUS ASSAULT. CT. III-DOMESTIC VIOLENCE. BINDOVER RECEIVED ON 10-10-13. ARRESTING AGENCY: CITY OF FENTON P.D. (25FEP 2013-7421) JUDGE ODETTE
2	10/21/13			PRE-TRIAL HEARING ATTORNEY PRESENT: CHILDERS PROCEED DIGITAL RECORDED-DEF IN JAIL THE COURT ADJOURNED THE ARRAIGNMENT DATE AT THE REQUEST OF DEFENSE COUNSEL. DEFENDANT REMANDED.
3				NOTICE SENT FOR: 11/04/13 1:16 PM ARRAIGNMENT HON. GEOFFREY L. NEITHERCUT CT. I-CSC-2ND DEG. CT. II-FELONIOUS ASSAULT. CT. III-DOMESTIC VIOLENCE. (ADJ. FROM 10-21-13.
4				INFORMATION FILED AND CERTIFICATE OF SERVICE FILED.
5	11/04/13		00099	ARRAIGNMENT ATTORNEY PRESENT: CHILDERS PROCEED DIGITAL RECORDED-DEF IN JAIL PLEAD GUILTY INFORMATION READ. PLEA: GUILTY PURSUANT TO A PLEA AGREEMENT REACHED IN DISTRICT COURT. PLEA AGREEMENT: THE DEFENDANT WAS ORIGINALLY CHARGED IN DISTRICT COURT WITH CT. I-CSC-2ND DEG.; CT. II- STRANGULATION; CT. III- FELONIOUS ASSAULT; AND CT. IV- DOMESTIC VIOLENCE. THE PROSECUTOR AGREED TO DISMISS COUNT TWO AND AMEND COUNT ONE TO ATTEMPT FOR GUILTY PLEAS TO COUNT ONE AS AMENDED AND COUNTS THREE AND FOUR AS CHARGED. THERE WILL BE NO COBBS OR SENTENCE AGREEMENT, NO DRUG OR SENTENCE ENHANCEMENT, NO CONSECUTIVE SENTENCING, NO REQUESTS FOR HYTA OR 7411 STATUS, AND RESTITUTION AS DETERMINED. THE COURT ACCEPTED THE PLEA AND SET A SENTENCE DATE. DEFENDANT REMANDED.
6				SET NEXT DATE FOR: 11/25/13 3:00 PM SENTENCING HON. GEOFFREY L. NEITHERCUT

Register of Action

CT. I-ATT. CSC-2ND DEGREE.
 CT. II-FELONIOUS ASSAULT.
 CT. III-DOMESTIC VIOLENCE.
 7 ORDER FOR DNA SAMPLE FILED.
 8 PEOPLE'S EXHIBIT NO. 1 FILED.
 9 ADVICE OF RIGHTS FORM FILED.
 10 11/05/13 CERTIFICATION AND RETURN OF ORDER
 FOR DNA SAMPLE FILED
 11 11/25/13 00001 SENTENCING
 CHARLES EGELER RECEPTION AND
 GUIDANCE CENTER-JACKSON. THE
 COURT RECOMMENDS AN ALCOHOL
 PROGRAM, A MENTAL HEALTH
 PROGRAM, AND A SEX OFFENDER
 PROGRAM FOR DEFENDANT WHILE
 INCARCERATED. THE SENTENCES
 ON COUNTS ONE AND TWO ARE
 CONCURRENT TO EACH OTHER. THE
 SENTENCE ON COUNT THREE IS A
 JAIL TERM AND HAS BEEN
 SATISFIED. DEFENDANT TO
 REGISTER AS A TIER TWO
 OFFENDER UNDER THE SEX
 OFFENDER REGISTRATION ACT.
 (PROCEEDING WAS DIGITALLY
 RECORDED)
 SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
 YYY- 17-DDD YYY- 60-DDD YYY-MMM- 69
 BEGIN 11/25/13
 \$130.00 CRIME VICTIM FEE 184.00 STATE MINIMUM COSTS
 12 00002 SENTENCING
 SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
 YYY- 17-DDD YYY- 48-DDD YYY-MMM- 69
 BEGIN 11/25/13
 13 00003 SENTENCING
 SENTENCE JAIL: MINIMUM MAXIMUM CREDIT
 YYY-MMM- 69 YYY-MMM- 69 YYY-MMM- 69
 BEGIN 11/25/13
 14 11/26/13 FINAL ORDER OR JUDGMENT FILED
 JUDGMENT OF SENTENCE FILED.
 15 ORDER TO REMIT PRISONER FUNDS
 (FAXED TO MDOC)
 16 NOTICE OF RIGHT TO APPELLATE
 REVIEW AND RECEIPT OF NOTICE
 OF APPEAL RIGHTS FORM FILED.
 17 12/02/13 SENTENCING INFORMATION REPORT FILED
 18 SENTENCING INFORMATION REPORT FILED
 19 12/03/13 BEHM COLLECT Status - PRISON
 20 01/24/14 NEITHERCUT MONEY ORDERED
 AUTOMATIC LATE FEE ASSESSMENT
 \$62.80 LATE FEE
 21 03/22/18 CERTIFIED COPIES OF COMPLAINT,
 INFORMATION, PLEA AGREEMENT
 AND JUDGMENT OF SENTENCE SENT
 TO SANTA CLARA DISTRICT
 ATTORNEY, SAN JOSE CA.
 22 04/11/18 CERTIFIED COPIES OF COMPLAINT,
 INFORMATION, PLEA AGREEMENT,
 AND JUDGMENT OF SENTENCE SENT
 TO PUBLIC DEFENDER, SAN JOSE,
 CA.

Register of Action

23	07/27/18	BEHM	Removed COLLECT status - PRIS
24	09/17/18		Mailer Sent - Overdue Payment Stmt Nbr - 1 Text - 101 Tot Due on Stmt - \$376.80
25	10/02/18		PREV. 15197 CHARLUENE DRIVE ADDR. FENTON MI 48430 SOURCE: PER CLEAR
26	10/23/18		PREV. 729 DAMON ST ADDR. FLINT MI 48505 SOURCE: CLEAR
27	11/01/18		Address Stop-Bad Addr on File
28	12/11/18	NEITHERCUT	TRUE COPIES OF INFORMATION, PLEA AGREEMENT AND JUDGMENT OF SENTENCE SENT TO MILES MCKAMEY OF THE CALIFORNIA DEPT. OF JUSTICE, SACRAMENTO, CA.
29	12/30/18	BEHM	CASE REASSIGNMENT FROM: NEITHERCUT,GEOFFREY L., TO: BEHM,F. KAY,
30	08/07/20		REQUEST DATED 8-7-20 FROM STATE OF CALIFORNIA DEPARTMENT OF JUSTICE ATTN: NATALIE MCVEY-ASSESSMENT UNIT REQUESTING DOCUMENTS THAT WERE PREVIOUSLY SENT ON 12-11-18 FILED
31	09/08/20		SENT E-MAIL RE: REQUEST OF 8-7-20 PREVIOUSLY SENT TO THEM ON 12-11-18 TO: Natalie.Mcvey@dog.ca.gov
32	10/28/20		FAX RECEIVED AND DATED 8-7-20 REQUESTING DUPLICATE COPIES PREVIOUSLY SENT 12-11-18 FILED
33	11/12/20		SENT E-MAIL RE: REQUEST OF 10-28-20 RE: PREVIOUS ITEMS SENT REQUESTING PAYMENT TO: Natalie.Mcvey@dog.ca.gov
		 END OF SUMMARY

Enter New Search


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EXHIBIT 3

Your Search Criteria: Last Name: rose
 (Data as of: Sep 29 2021 3:36AM)
First Name: donald

2 matches found.

<u>Offender Number</u>	<u>Last Name</u>	<u>First Name</u>	<u>Date of Birth</u>	<u>Sex</u>	<u>Race</u>	<u>MCL Number</u>	<u>Location</u>	<u>Status</u>	<u>Parole Board Jurisdiction Date</u>	<u>Maximum Date</u>	<u>Date Par</u>
405868	ROSE	DONALD	08/15/1970	M	White	333.7401C2F	Baraga Max CF	Prison	06/09/2022	02/16/2062	
981818	ROSE	DONALD	11/27/1997	M	White	333.74032B1	Allegan	Parole			12/0


 Click on the offender number to access the detail page.