IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MARIO L. BALLARD,	)	
Plaintiff,	)	**Civil Action No. 7:03cv00354**
	)	
v.	)	**Memorandum Opinion**
	)	
CHIEF OF FEDERAL BUREAU	)	**By: Samuel G. Wilson**
OF INVESTIGATION, et al.,	)	**Chief United States District Judge**
Defendants.	)	

Plaintiff Mario L. Ballard, proceeding pro se and in forma pauperis, seeks damages, declaratory relief, and injunctive relief in this civil rights action brought pursuant to Bivens v. Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), and 42 U.S.C. § 1983. Ballard challenges the constitutionality of the Sex Offender and Crimes Against Minors Registry Act, Virginia Code § 9.1-900 et seq. ("Sex Offender Act"). The court finds Ballard's arguments meritless and dismisses the action without prejudice.

I.

The Circuit Court for the City of Newport News found Ballard guilty of rape and on August 22, 1994, imposed a twenty year sentence with eight years suspended.[1] Ballard's anticipated mandatory release date is May 6, 2005. Pursuant to Virginia Code § 19.2-298.1, the precursor to the Sex Offender Act, Virginia entered Ballard's sex offender conviction record, physical characteristics, and address into the Virginia sex offender registry.

[1]Ballard was also convicted of a drug violation and two counts of assault and battery.

In 2003, Virginia passed the Sex Offender Act, Virginia's version of a Megan's Law.[2] The statute requires the Department of State Police to maintain a registry of sex offenders and to transmit information regarding sex offenders to the Federal Bureau of Investigation. § 9.1-911. The statute also requires non-incarcerated sex offenders to periodically register by providing their complete name, address, gender, and date of birth to the Department of State Police. § 9.1-903. The Department of State Police is required to publicly disseminate information on violent sex offenders by means of the internet. § 9.1-913. Finally, the statute defines violent sex offender to include anyone convicted of rape. § 9.1-902.

Ballard's present action[3] includes the following three claims:

> Claim #1. Peonage violation: In 2001 I found out that the chief of the FBI and the Chief VA Dept. State Police have put me in their custodies. They allege I owe debt "after the fact" to a conviction which I have served physical imprisonment for.
>
> Claim #2. Seizure violation: Information has been put on the Internet about me by the individuals above. Furthermore, even upon release of incarceration they claim that I would have to allow signs to be put upon my street involving me "after the fact" due to an accused offense.
>
> Claim #3. Fair Trial Violation: I was not given a hearing for these issues mentioned herein by no court but these officers of the law have placed me in their restraints still.

Ballard is currently incarcerated in Red Onion State Prison. Ballard has a number of pending motions

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[2]Named after Megan Kanka, "a seven-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children." Smith v. Doe, 123 S. Ct. 1140, 1145 (2003).

[3]Ballard has filed four prior civil actions in federal court while incarcerated. Ballard v. Red Onion State Prison, 2003 U.S. App. LEXIS 24637 (4th Cir. 2003); Ballard v. Williams, 56 Fed. Appx. 193 (4th Cir. 2003); Ballard v. Page, 15 Fed. Appx. 57 (4th Cir. 2001); Ballard v. True, 13 Fed. Appx. 98 (4th Cir. 2001). Ballard also has another federal action currently pending before the Eastern District of Virginia. Ballard v. Chief of FBI, Civ. No. 3:03cv926 (filed Nov. 5, 2003).

before the court.[4]

II.

Ballard proceeds in forma pauperis; therefore, he "must meet certain standards of rationality and specificity" because courts considering in forma pauperis complaints possess the "'unusual power . . . to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual allegations are clearly baseless.'" Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994) (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989) (applying former version of § 1915(e)(2)(B)). Under 28 U.S.C. § 1915(e)(2), "the court shall dismiss the case at any time if the court determines that - (A) the allegation of poverty is untrue; or (B) the action or appeal - (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."

III.

Although his claims lack clarity, Ballard appears to be challenging the constitutionality of the Sex Offender Act. Ballard complains that he is illegally in the FBI's and Department of State Police's "custodies" and "restraints," yet he also states that he is incarcerated in Red Onion State Prison and would therefore be in the custody of the Virginia Department of Corrections. Presumably, Ballard is

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[4]This court previously denied Ballard's motion for a hearing to expedite the resolution of his claims, and Ballard has filed an interlocutory appeal in the United States Court of Appeals for the Fourth Circuit. This court has jurisdiction to rule on the merits of his claims because an interlocutory appeal only contemplates review of the interlocutory order and does not intend to transfer the cause as a whole to the appellate court. Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 203 F.3d 291, 301(4th Cir. 2000) ("The case, except for the hearing on appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered.").

complaining about his inclusion in the FBI's and Department of State Police's registries for sex offenders. Furthermore, to the extent that Ballard is arguing that his probation officers will require him to place signs announcing his sex offender status on his yard, this is not required by the Sex Offender Act and is complete speculation, so the court will not address it. The court will consider Ballard's complaints against the Sex Offender Act, however. Because this court must liberally construe pro se complaints, Weller v. Department of Social Services, 901 F.2d 387, 390-91 (4th Cir. 1990), this court interprets Ballard's claims as raising four constitutional challenges to the Sex Offender Act: an ex post facto challenge, a double jeopardy challenge, a procedural due process challenge, and a substantive due process challenge. However, each one of these challenges is meritless, and the court therefore dismisses Ballard's action for failure to state a claim on which relief may be granted.

A. Ex Post Facto Challenge

To the extent Ballard is attacking the Sex Offender Act as a violation of the Ex Post Facto Clause, this court find's Ballards arguments meritless because the Sex Offender Act establishes civil proceedings rather than criminal punishments.

The Supreme Court very recently considered an ex post facto challenge to Alaska's Megan's law in Smith v. Doe, 123 S. Ct. 1140 (2003). The Supreme Court stated the framework for resolving ex post facto challenges:

> We must ascertain whether the legislature meant the statute to establish civil proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into

a criminal penalty.

Id. at 1146-47 (internal quotations and citations omitted). The Supreme Court then concluded that Alaska intended to establish civil proceedings because the stated government interest in the statute was "protecting the public from sex offenders," which the Supreme Court described as a "legitimate nonpunitive governmental objective and has been historically so regarded." Id. at 1147. Having decided that the legislature did not intend to impose punishment, the Court next analyzed the effects of the Act by "refer[ring] to the seven factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)." Smith, 123 S. Ct. at 1149. The Court reasoned that the Mendoza-Martinez factors supported a finding that the statute was nonpunitive and therefore concluded that the statute did not violate the Ex Post Facto Clause. Id. at 1149-54.

As did the Alaskan legislature in Smith, the Virginia legislature clearly intended for the Sex Offender Act to be civil. The legislature made clear this intent by placing the statute in Title 9.1 of the Virginia Code, which deals with Commonwealth public safety, rather than Title 18.2, which deals with crimes and offenses,[5] and by stating that "[t]he purpose of the Sex Offender and Crimes Against Minors Registry shall be to assist the efforts of law-enforcement agencies and others to protect children from becoming victims of criminal offenders by helping to prevent such individuals from being allowed to work directly with children." § 9.1-900. Furthermore, the Virginia Court of Appeals in Ktize v. Commonwealth, 475 S.E.2d 830 (Va. Ct. App. 1996), held that Va. Code § 19.2-298.1, the

[5]Although "[t]he location and labels of a statutory provision" do not always control the classification of a statute as civil or criminal, Smith, 123 S. Ct. at 1148, statutory placement does provide evidence of legislative intent. Kansas v. Hendricks, 521 U.S. 341, 361 (1997).

precursor to the Sex Offender Act, was civil rather than punitive, a well reasoned opinion to which this court defers. Consequently, the Virginia legislature intended for the Sex Offender Act to be civil rather than criminal.

Having concluded that Virginia intended for the Act to be civil, this court concludes that Smith requires dismissal. The Sex Offender Act is indistinguishable from the Alaskan statute at issue in Smith; consequently, the Supreme Court analysis of the Mendoza-Martinez factors in Smith compels this court to find that the effect of the statute is not so punitive as to negate Virginia's intention. Thus, to the extent Ballard is arguing the Act violates the Ex Post Facto Clause, Smith forecloses the possibility of relief.

B. Double Jeopardy Challenge

Furthermore, if Ballard is arguing that the Act violates the Double Jeopardy Clause, his claims are still meritless. The Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense . . ." Hudson v. United States, 522 U.S. 93, 99 (1997) (emphasis in original). When determining whether a punishment is criminal, courts use the exact same Mendoza-Martinez factors as used in Smith's ex post facto analysis. Shavitz v. City of High Point, 270 F. Supp. 2d 702, 713 (M.D.N.C. 2003); see Smith, 123 S. Ct. at 1149 ("[T]he Mendoza-Martinez] factors, which migrated into our ex post facto case law from double jeopardy jurisprudence . . ."). Because Smith found a nearly identical Megan's Law to be civil when applying the Mendoza-Martinez factors, Ballard is unable to show that the defendants' actions resulted in multiple criminal punishments, and the court dismisses the claim.

C. Procedural Due Process Challenge

To the extent Ballard is arguing Virginia must grant him a hearing before requiring registration or publicizing his name and convictions on the internet, his claim is meritless because there are no relevant facts in dispute.

The Supreme Court in Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003), considered a procedural due process claim in which a convicted sex offender argued he was entitled to a predeprivation hearing to determine whether he was likely to be currently dangerous. The Supreme Court reasoned that "the fact that respondent seeks to prove–that he is not currently dangerous–is of no consequence under Connecticut's Megan's Law . . . Unless respondent can show that the substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise." Id. at 10-11 (emphasis in original). The Supreme Court therefore held that "[p]laintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme. Id. at 12.

Under the Sex Offender Act, the only relevant issue is whether Ballard has been convicted of a sexually violent offense. Ballard does not challenge the fact of his conviction; consequently a hearing would have no purpose. Ballard's procedural due process claim is therefore meritless.

D. Substantive Due Process

Finally, Ballard challenges the Sex Offender Act as a violation of substantive due process. The court finds this argument meritless. An inmate simply does not have a liberty interest in preventing the truthful publication over the internet of his criminal record. Paul v. Davis 424 U.S. 693, 713 (1976) ("[Respondent's] claim is based, not upon any challenge to the State's ability to restrict his freedom of

action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decision hold this or anything like this, and we decline to enlarge them in this manner."); Paul P. v. Verniero, 170 F.3d 396, 400 (3rd Cir. 1999); Lanni v. Engler, 994 F. Supp. 849, 856 (E.D. Mi. 1998). Furthermore, even if a liberty interest was at stake, the criminal proceedings and the "categorical abrogation of that liberty interest by a validly enacted statute suffices to provide all the process that is 'due'" Conn. Dep't of Public Safety, 538 U.S. at 12 (Scalia concurring); see Montalvo v. Snyder, 207 F. Supp. 2d 581, 588 (E.D. Ky. 2002) ("any detrimental effects that may flow from [Megan's law] would flow most directly from the plaintiff's own misconduct and private citizen's reaction thereto, and only tangentially from government action."). Because Ballard cannot show that he has been deprived of a liberty interest without adequate procedural protection, Ballard's substantive due process challenge is meritless.

IV.

For the above reasons, the court dismisses Ballard's action without prejudice and denies all of Ballard's pending motions as moot.

ENTER: This _____ day of January, 2004

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Chief United States District Judge

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MARIO L. BALLARD,	)	
Plaintiff,	)	**Civil Action No. 7:03cv00354**
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v.	)	**Order**
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CHIEF OF FEDERAL BUREAU	)	**By: Samuel G. Wilson**
OF INVESTIGATION, et al.,	)	**Chief United States District Judge**
Defendants.	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that: (1) all of Ballard's claims are **DISMISSED** without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B); (2) all of Ballard's pending motions are denied as moot.

Ballard is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within thirty (30) days of the date of entry of this order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

ENTER: This _____ day of January, 2004.

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Chief United States District Judge