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

VAUGHNELL D. FRENCH,

Petitioner, ORDER

v. 03-C-550-C

JUDY SMITH, Warden, Oshkosh Correctional Institution,

Respondent.

Vaughnell French, an inmate at the Oshkosh Correctional Institution serving a 12-year sentence for first degree sexual assault as a repeater, has filed an application for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner has paid the five dollar filing fee. The application is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

According to the petition, petitioner was convicted in September 13, 1995 in the Circuit Court for Dane County. However, none of the allegations in the petition are directed at the 1995 judgment of conviction. Rather, petitioner appears to be challenging various administrative decisions made by the Department of Corrections during his confinement. It is difficult to tell exactly what petitioner is complaining about because he has used various acronyms throughout his petition. For example, in his first claim, petitioner asserts that he was "placed with P.M.R. due to a case I had as a juvenile." In claim two,

petitioner states that he was "cleared for a ECRB on August 14, 2002" which showed he was not a threat to the public. In claim three, petitioner complains that he was taken out of a "S.O.T. Group" because of an inappropriate evaluation. (I presume that "S.O.T." is short for sex offender treatment.) Finally, in claim four, petitioner asserts that "sufficient time has been served" in that he has served two-thirds of his sentence.

As best I can tell, petitioner appears to be raising two different types of claims. First, he appears to be challenging the department's refusal to allow him to participate in certain programming at the institution. Second, he appears to be contending that the department relied on improper factors in refusing to release him on parole after service of two-thirds of his sentence, otherwise known as his "mandatory release" date. Both of these claims suffer from defects that prevent this court from considering the claims in the context of a habeas petition.

In order to bring an action under § 2254, a prisoner must be "in custody" pursuant to the conviction or sentence being challenged. See 28 U.S.C. § 2254; Maleng v. Cook, 490 U.S. 488, 490-91 (1989) (per curiam). The Court of Appeals for the Seventh Circuit has taken a broad view of the term "sentence," finding that § 2254 is the appropriate vehicle when prison officials have revoked good-time credits once earned, e.g., Walker v. O'Brien, 216 F.3d 626, 633 (7th Cir. 2000), or lowered a previously established credit-earning classification, see Montgomery v. Anderson, 262 F.3d 641, 643 (7th Cir. 2001). However, when the prisoner brings a claim that if decided favorably only *might* accelerate the accrual

of good time and thereby lead to an earlier release, the court of appeals has found that § 1983 is the proper vehicle. See Zimmerman v. Tribble, 226 F.3d 568, 571-72 (7th Cir. 2000) (addressing, under § 1983, prisoner's constitutional claim that his transfer from a prison that had vocational training and substance-abuse programs prevented him from earning additional good time); Higgason v. Farley, 83 F.3d 807, 809-10 (7th Cir. 1995) (addressing, under § 1983, inmate's claim that not allowing him to participate in educational programs deprived him of opportunity to earn good time; court observed that "denying the opportunity to earn credits did not 'inevitably affect the duration of the sentence'").

Petitioner's claim that he was improperly removed from the sex offender treatment group appears to fall into this category of claims. Petitioner has not alleged that his removal from the group has resulted in the loss of good-time credits or his ability to earn good time credits at a certain rate. Rather, I infer that petitioner is contending that his removal from group has the potential to delay his release from prison. However, in order to bring a claim under § 2254, petitioner must show that it is inevitable, not merely possible, that his removal from group will affect the duration of his sentence. Petitioner has not made this showing.

Insofar as petitioner appears to be challenging the department's refusal to parole him after serving two-thirds of his sentence, this claim is cognizable in a § 2254 action. See Clark v. Thompson, 960 F.2d 663, 664-65 (7th Cir. 1992); Walker v. Prisoner Review Bd., 694 F.2d 499, 501 (7th Cir. 1982). However, this claim suffers from a different defect:

petitioner has not exhausted his state court remedies. Under § 2254(b), a court shall not grant an application for habeas relief unless the petitioner has first exhausted the remedies available to him in the state courts. In Wisconsin, the refusal by prison officials to grant discretionary parole is reviewable by common law certiorari. State ex rel. Britt v. Gamble, 257 Wis. 2d 689, 698, 653 N.W. 2d 143 (Ct. App. 2002). According to the petition, petitioner has not attempted to seek any relief from the state courts before filing his federal habeas petition.

ORDER

Accordingly, because it plainly appears from the face of the petition that the petitioner is not entitled to relief in this court, IT IS ORDERED that the petition of Vaughnell D. French for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Dated this 16th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge