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

JEFFERY DALE JONES,

Petitioner,

v.

JUDY SMITH, Warden, Oshkosh Correctional Institution,

Respondent.

REPORT AND RECOMMENDATION

02-C-526-C

REPORT

Petitioner Jeffery Dale Jones, a state prisoner currently incarcerated at the Oshkosh Correctional Institution, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In an order to show cause entered October 3, 2002, this court ordered the state to respond to petitioner's claim that his parole revocation proceeding suffered from various constitutional defects. Presently before the court is the state's motion to dismiss the petition for procedural default.

Although I agree with the state that petitioner has procedurally defaulted his claims by failing to file a petition for review with the Wisconsin Supreme Court, I am not recommending dismissal on that basis. Instead, I am recommending that this court transfer petitioner's application to the United States District Court for the Eastern District of

Wisconsin because jurisdiction over the application lies properly with that court.

From the parties' submissions, I find the following facts.

FACTS

On August 26, 1988, petitioner was convicted in Waukesha County circuit court of armed robbery and theft. He was sentenced to 15 years in prison on each count, with the terms to run concurrently. Petitioner's maximum discharge date on these convictions is September 21, 2003. Under Wisconsin law, petitioner's mandatory release date was May 7, 1997, which was the date on which petitioner would have served two-thirds of his 15-year sentence. *See* Wis. Stat. § 302.11(1).

Petitioner was released on parole from this sentence on three separate occasions; each time, the Department of Corrections revoked his parole and sent him back to prison for parole violations. In his federal habeas petition, petitioner challenges the last of these revocations. On that occasion, petitioner was granted discretionary parole on September 17, 1996. In September 1999, an unidentified individual alleged that petitioner had sexually assaulted her. The Department of Corrections instituted parole revocation proceedings on the basis of the sexual assault allegations. A parole hearing was held in December 1999, after which the administrative law judge revoked petitioner's parole and ordered him reincarcerated for a term of six years. On January 6, 2000, the Administrator of the Division of Hearings and Appeals rejected plaintiff's appeal and affirmed the revocation decision.

Later, petitioner learned that the Waukesha County District Attorney's office had decided not to file charges against him for the alleged sexual assault.

On September 17, 2001, petitioner filed a petition for a writ of habeas corpus in the circuit court for Waukesha County. In his petition, petitioner complained that his parole revocation had been based solely on allegations that were subsequently dismissed by the Waukesha County District Attorney's office. He also contended that the state was depriving him unconstitutionally of his liberty by confining him after he had reached his mandatory release date of May 7, 1997.

On October 26, 2001, the Waukesha County Circuit Court issued a decision dismissing the habeas petition as improperly filed, noting that under Wisconsin law, parole revocation decisions can only be challenged by means of a petition for a writ of certiorari. Petitioner appealed. In an opinion and order issued June 19, 2002, the Wisconsin Court of Appeals affirmed summarily the circuit court's dismissal. The court agreed with the circuit court's conclusion that a petition for a writ of certiorari, not a petition for a writ of habeas corpus, was the proper vehicle for bringing a challenge to a parole revocation. Further, held the court, even if petitioner's habeas petition could have been construed as a certiorari petition, it would have been untimely because petitioner filed it well outside the 45-day limit for commencing a certiorari action under Wisconsin law. *See* Wis. Stat. § 893.735(2).

Petitioner did not seek review of the court of appeals' decision in the Wisconsin Supreme Court. On September 3, 2002, petitioner filed the instant petition for federal habeas relief. At that time, he was incarcerated at the Oshkosh Correctional Institution in Winnebago County, where he remains.

DISCUSSION

I. Jurisdiction

Pursuant to 28 U.S.C. § 2241(d), a petitioner under § 2254 may file his claim in the federal court sitting in the district in which he is incarcerated or in the federal court sitting in the district in which petitioner was convicted and sentenced. Petitioner was convicted and sentenced by the Circuit Court for Waukesha County and he is currently incarcerated at the Oshkosh Correctional Institution, both of which are located in the Eastern District of Wisconsin. Therefore, petitioner must seek relief in the United States District Court for the Eastern District of Wisconsin.

Petitioner might argue that because he is challenging a decision made by the Department of Corrections, which is headquartered in the Western District of Wisconsin, he may file his petition in this court. This argument would not prevail. In order for this court to entertain petitioner's habeas corpus action, it must have personal jurisdiction over petitioner's custodian. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973). The custodian is the person having day-to-day control over the prisoner, for he is the only one

who can directly produce "the body" of the petitioner. *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986).

The fact that petitioner is not challenging his underlying criminal conviction or sentence but is challenging actions of the Department of Corrections as an institution would not vest this court with jurisdiction. If petitioner were correct, then every decision made in every prison in this state could be brought in this district, since the department runs all of the prisons. The case of *Guerra v. Meese*, while not on all fours with this case, is instructive on this point.

In *Guerra*, a group of prisoners challenged the duration of their confinement arising from the U.S. Parole Commission's calculation of parole eligibility. The court held that because the U.S. Parole Commission was not the prisoners' custodian, the court lacked jurisdiction to hear the claim. The court observed:

> It is clear that the Parole Commission is responsible for the appellees' continued detention. Were the Commission to decide to change the prisoners' parole eligibility dates today, they might be freed. But this power does not make the Commission the prisoners' custodian in the sense of the habeas corpus statute. Appellees argue that because the Commission has the power to release them, the Commission is their custodian. But their argument extends to any person or entity possessing some sort of power to release them. Under appellees' theory, the Attorney General of the United States could be considered the custodian of every prisoner in federal custody because he supervises the Federal Bureau of Prisons . . . We have specifically rejected this interpretation.

Id. (citations omitted). *See also Wadsworth v. Johnson*, 235 F.3d 959, 961-62 (5th Cir. 2000) (state department that conducted disciplinary proceeding and imposed punishment was not

"state court;" therefore, court in which department was located did not have jurisdiction under § 2241(d)).

In sum, the Department of Corrections cannot be characterized as petitioner's custodian even though he is challenging a decision made by the department's agents. Pursuant to 28 U.S.C. § 2241(d), petitioner may not proceed with his petition in this court.

II. Procedural Default

Even if this court finds that it has jurisdiction over petitioner's application, the petition should be dismissed for procedural default. Before a federal court may grant habeas relief to a state prisoner, the prisoner must first exhaust any remedies that are "available" in state court. *See Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1999). In *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the United States Supreme Court held that in order to comply with this requirement, a state prisoner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Id*. at 845. This means that state prisoners must seek discretionary review of their claims in the state's highest court "when that review is part of the ordinary appellate review procedure in the State . . . ." *Id*. at 847. If a prisoner fails to fairly present claims in a petition for discretionary review to a state court of last resort, those claims are procedurally defaulted. *Rodriguez*, 193 F.3d at 917 (citing *Boerckel*, 526 U.S. at 848).

Because discretionary review by the supreme court is "part of the ordinary appellate review procedure" in Wisconsin, petitioner's failure to file a petition for review in that court constitutes a procedural default under *Boerckel*. Petitioner argues that state supreme court review was not really "available" to him because the lower state courts had "refused to notice" and "deliberately overlooked" his constitutional issues. Petitioner appears to contend that because his state court habeas petition raised constitutional issues and the remedy of certiorari was no longer available to him, the state courts should have considered the merits of his habeas petition.

Even if petitioner is right and the state courts got it all wrong, that does not excuse him from his failure to file a petition for review in the Wisconsin Supreme Court. When determining whether a petitioner has exhausted his state court remedies, "the pertinent question is not whether the state court would be inclined to rule in the petitioner's favor, but whether there is any *available state procedure* for determining the merits of petitioner's claim." *White v. Peters*, 990 F.2d 338, 342 (7 th Cir. 1993) (emphasis added). In *Boerckel*, the Supreme Court held that discretionary review by the state supreme court is "available" when it is part of the ordinary appellate review procedure in the state, as it is in Wisconsin. Whether or not that review is likely to actually provide relief to the petitioner is irrelevant for exhaustion purposes. The purpose of the exhaustion requirement is to allow the state courts the *opportunity* to review constitutional claims before those claims are presented to a

federal habeas court. *Boerckel*, 526 U.S. at 845. By depriving the state supreme court of that opportunity, petitioner has procedurally defaulted his claims.

A procedural default may be excused if the petitioner can show cause for and actual prejudice resulting from his default, or demonstrates that the failure to consider the claims will result in a fundamental miscarriage of justice. *Dellinger v. Bowen*, 301 F.3d 758, 765 (7th Cir. 2002). Petitioner cannot make either showing. First, petitioner's belief that he was unlikely to get relief from the state supreme court does not establish "cause" because it was not an external factor that impeded him from filing a petition for review. *See McCleskey v. Zant*, 499 U.S. 467, 493-94, 497 (1991). Absent a showing of cause, this court need not reach the issue of whether petitioner can establish prejudice. Second, to show a fundamental miscarriage of justice, petitioner must present clear and convincing evidence that shows that "the constitutional violation has probably resulted in a conviction of one who is actually innocent." *Dellinger*, 301 F.3d at 767 (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Petitioner has not attempted to make any showing of actual innocence, much less one that is clear and convincing. Accordingly, there has been no fundamental miscarriage of justice that would allow this court to consider the merits of his claims.[1]

Finally, even if petitioner had not procedurally defaulted his claims, they would fail on their merits. It appears that petitioner's primary objection to his parole revocation is that

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[1]It is questionable whether the miscarriage of justice exception applies to a habeas petition like Jones's that does not challenge the underlying conviction.

it was based on sexual assault allegations for which the state declined to prosecute him. However, the state's decision not to prosecute does not amount to a finding that petitioner was "innocent" of the charges. The state may have had various reasons for its decision, including the fact that the department had returned petitioner to prison already. As the department explained to petitioner in a letter dated March 7, 2001, the department's revocation proceedings and the Waukesha County District Attorney's investigation were two separate matters involving different burdens of proof, so the fact that the district attorney's office did not file charges against petitioner was irrelevant to the parole revocation proceedings. In short, the failure of the district attorney's office to prosecute petitioner for sexual assault did not amount to a "new factor" warranting a new parole revocation hearing.

Finally, insofar as petitioner claimed in his state court habeas petition that the state was depriving him of his liberty unconstitutionally by confining him after his mandatory release date of May 7, 1997, he did not state a cognizable constitutional claim. As the court noted in the order to show cause, "[n]othing in the United States Constitution or federal law entitles petitioner to be released from state custody even one day before serving his entire 15 year sentence of imprisonment."

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that Jeffery Dale Jones's petition for a writ of habeas corpus be transferred to the United States District Court

for the Eastern District of Wisconsin, pursuant to 28 U.S.C. § 2241(d). In the alternative, I recommend that this court dismiss the petition with prejudice on grounds of procedural default.

Dated this 18th day of December, 2002.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge