IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARY CARNELL TUCKER SR.,

ORDER

Petitioner,

00-C-332-C

v.

J.T. O'BRIEN, Warden,
FCI - Oxford Wisconsin,

Respondent.

- -

This is a petition for a writ of habeas corpus. Petitioner, an inmate at the Federal Correctional Institution at Oxford, Wisconsin, claims that he is in custody in violation of the laws or Constitution of the United States. See 28 U.S.C. § 2241. Petitioner has paid the $5 filing fee.

This action was originally filed in the United States District Court for the District of Columbia. That court dismissed the complaint for lack of jurisdiction after determining that petitioner was challenging his convictions and sentences and that such a challenge must be made in the court that sentenced him. Petitioner responded to the dismissal by arguing that he was challenging only post-sentencing actions taken by various parties to enhance his

sentence. The case was transferred to this court because this is the district in which petitioner is incarcerated.

In his "Statement of Prosecution and Motion to Supplement the Record," which I construe to be a part of his petition, petitioner appears to argue that at least one of his original sentences was illegal. See Statement at 4 ("Simply because the addictional [sic] five year term was so by their definition an illegal sentence. Dur [sic] to Title 18: 2113 having already so covered the offense."); Statement at 7 ("My plea is for the court to vacate the disposition upon the gathering of the multiple errors so committed by both the respondent. And or so by those of the courts of sentencing."). In his Statement, petitioner contends that the respondents who were removed from the caption by both this court and the District Court for the District of Columbia should be allowed to remain parties to the case and insists that his claim arose in the District of Columbia. Because this court has no authority to review petitioner's conviction and sentence and because petitioner explicitly told the District Court of the District of Columbia that he is challenging only post-sentencing actions, I will address only those claims that relate to post-sentencing actions.

I understand petitioner to be alleging that he is being held unlawfully past the expiration of his sentence. Ordinarily, in addressing any pro se litigant's pleading, the court must construe it liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). Much of petitioner's petition is

incomprehensible. However, it is possible to make out the gist of petitioner's claims from the petition and its exhibits.

Petitioner has attached his sentencing orders to his petition. From these orders, it appears that on November 18, 1977, petitioner pleaded guilty in the United States District Court for the Northern District of Indiana to bank robbery with jeopardy of lives in violation of 18 U.S.C. § 2113(d) and was sentenced to fifteen years in prison. On August 23, 1978, petitioner pleaded guilty in the United States Northern District of Illinois to knowingly, willfully and unlawfully stealing the deposits of a federally insured bank by force, violence and intimidation and assaulting and putting the lives of others in jeopardy, and of conspiring to commit that offense, in violation of 18 U.S.C. §§ 371, 2113(a) and (d). He was sentenced to serve five years on count 1 (it is not clear from the judgment form which violation was count 1) and twenty years on count 2. The sentence on count 2 was to run concurrently with the sentence on count 1, and the sentence was to run consecutively to the sentence imposed on petitioner in the Northern District of Indiana. On September 27, 1978, petitioner pleaded guilty in the United States District Court for the Northern District of Indiana to bank robbery and bank robbery with jeopardy of life in violation of 18 U.S.C. §§ 2113(a) and (d) and was sentenced to serve twelve years, to run consecutively to the sentences in the two earlier cases. Therefore, the time petitioner was committed to serve consecutively is 15 years + 20 years

(which includes the 5-year concurrent sentence) + 12 years = 47 years. As stated in the sentence monitoring computation data form that is Plt.'s Ex. # 6, his full term will not expire until 2024, forty-seven years after 1977. That same sentence monitoring computation data form indicates that petitioner was eligible for parole in 1987, has a statutory release date in 2009 and a projected satisfaction date of 2006.

Petitioner contends that the release date of 2006 is double that of the time ordered by the sentencing court, but his exhibits do not support his position. Petitioner appears to believe that he was sentenced multiple times for the same crime and alleges that the sentencing court described in triplicate the sentence that was to be served. See Statement at 4 ("Now they did so aggregate the term's my honor, But in a consecutive and un-lawful manner. And with doing so, That of the so ordered single term of (20) year's of which was the greatest sentence so imposed. Was enhanced by (27) year's. [sic]"). As noted, such an argument is properly made in a petition brought under 28 U.S.C. § 2255; this court does not have jurisdiction to evaluate the claim. By assuming that the three sentences ran concurrently, petitioner calculates his second sentence as expiring in December 1998 and his third sentence as expiring in December 1989, without taking into account good time credits. The sentencing orders petitioner has attached as exhibits 1-3 indicate that his sentences were to be served consecutively. Therefore, petitioner has not alleged facts from which it appears that he is in illegal custody.

Petitioner contends also that his custody is illegal because the judge who sentenced him failed to instruct the clerk properly about preparation of the sentencing orders and that Judge McNagny of the Northern District of Indiana had petitioner's FBI and pre-sentence report at the time of sentencing and failed to comply with the sentencing guidelines. Petitioner argues that the sentencing orders show two methods for determining the length of sentence that contradict the commission's instructions for identical offenses. He appears to believe that because he was convicted multiple times of violation of the same statutory code sections his sentences should run concurrently. The sentencing orders are clear that the sentences are to be served consecutively. In any event, this claim is a challenge to his sentence that may be raised only in the sentencing court.

I also understand petitioner to allege that the United States Bureau of Prisons followed repealed federal statute §§ 18 U.S.C. 4201 - 4218 on Dec 11, 1977, without notifying petitioner or the court of sentencing. Petitioner contends that the bureau used § 4205(a) of the void statute to redescribe the type of sentence petitioner originally received when placed in the agency's secondary custody on August 27. This resulted in a parole eligibility date for a series of possible convictions that did not exist when the date was altered. I note that the repeal of §§ 4201 to 4218 was effective November 1, 1987, and applicable only to offenses committed after that date. Therefore the statutes were not "void" or repealed at the time of

petitioner's sentencing. Section 4205(a) states that a prisoner shall generally be eligible for parole after serving ten years of a sentence of over thirty years. The fact that petitioner saw the parole commission in 1987 indicates that the prison understood him to be eligible for parole after he had served ten years.

Finally, petitioner alleges that the United States Parole Commission delayed his release on parole even though he was qualified for parole in February 1987, 1989 and 1992. He alleges that his original score of nine in February 1987 indicated that he would be an excellent risk and that the commission later lowered his risk factor score to seven because he had no criminal history. Petitioner believes he established that his release would not place the public in any risk of danger. Petitioner's allegations are belied by the United States Parole Commission's Notice of Action and Notice of Action on Appeal, attached as exhibits 7 and 8 to his petition.

The United States Parole Commission explained its May 4, 1999, decision denying petitioner parole by noting that neither his offense severity rating nor his salient factor risk was more favorable than at his last parole hearing. The commission also noted

> You have committed behavior that constitutes new criminal conduct in a prison facility or in a community treatment center which is rated as Category Four severity because it involved communicating a threat, indicating a guideline range of 20-26 months to be added to your original guideline range. In addition, you have committed rescission behavior classified as administrative. Guidelines established by the Commission indicate a range of 0-2 months for non-drug

> related infractions. You have committed 1 non-drug related infraction. Your aggregate guideline range is 20-28 months to be added to your original guideline range. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted.

Plt.'s Ex. 8. The National Appeals Board affirmed the commission's decision on July 27, 1999, after individually addressing each of petitioner's arguments and finding that none had merit. See Plt.'s Ex. 7.

The standard of review of parole determinations is whether the decision constitutes an abuse of discretion. See Slader v. Pitzer, 107 F.3d 1243, 1246 (7th Cir. 1997) (citing Solomon v. Elsea, 676 F.2d 282, 290 (7th Cir.1982)). In reviewing the information on which the parole commission relied, courts need determine only whether the information is "sufficient to provide a factual basis for its reasons. The inquiry is not whether the Commission's decision is supported by the preponderance of the evidence, or even by substantial evidence; the inquiry is only whether there is a rational basis in the record for the Commission's conclusions embodied in its statement of reasons." Id. Petitioner has not shown that the commission did not have a rational basis for denying him parole.

ORDER

IT IS ORDERED that this petition for a writ of habeas corpus is DISMISSED for petitioner's failure to show that he is in custody in violation of the Constitution or laws of

the United States.

Entered this 31st day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge