

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

DUANE DARNELL CLINTON,

Petitioner,

ORDER

v.

04-C-0174-C

JUDY SMITH, Warden, Oshkosh
Correctional Institution,

Respondent.

Duane Darnell Clinton, an inmate at the Oshkosh Correctional Institution, has filed a petition for a writ of habeas corpus. Petitioner seeks to challenge a February 11, 2004 decision of the Program Review Commission recommending that petitioner be transferred to a new state prison in New Lisbon. He has paid the five dollar filing fee.

The petition must be dismissed. Habeas corpus cannot be used to challenge a transfer between prisons unless the custody in which the transferred prisoner will find himself when transferred is so much more restrictive than his former custody that the transfer can fairly be said to have brought about "a quantum change in the level of custody." Pischke v. Litscher, 178 F.3d 497, 499 (7th Cir. 1999). Petitioner is not complaining that his custody will be more restrictive at New Lisbon. Rather, he opposes transfer because he will be farther away from his family and might lose his chance to see the parole board. Thus, petitioner is

not seeking to “get out” of custody, but is simply challenging the location of his custody. Habeas corpus is not the proper vehicle for such a challenge. See id.

Petitioner asserts that his transfer is forbidden by a rule of the United States Supreme Court, which forbids a person having custody over a prisoner from transferring the prisoner without court authorization while a habeas corpus proceeding is pending in the Supreme Court. (Petitioner cites the rule as Rule 49, but it is now set forth at Rule 36.) However, not only is this court not the United States Supreme Court, but because this court is dismissing the petition, there is no habeas corpus “proceeding.” Petitioner is not entitled to the protection of the rule simply because he filed a document in the federal district court that he labeled as a petition for a writ of habeas corpus.

Petitioner could refile his claim as a civil rights suit under 42 U.S.C. § 1983 but he would be foolish to do so. In order to state a claim under § 1983, petitioner must allege facts showing that one or more of his constitutional rights were violated. The constitution does not guarantee a prisoner the right to be confined in the prison of his choice, which is the essence of petitioner’s claim. Because a civil rights action would be wholly frivolous, petitioner is likely to incur a strike under the Prison Litigation Reform Act if he refiles his complaint as a § 1983 action.

ORDER

Accordingly, IT IS ORDERED that the petition of Duane Darnell Clinton for a writ of habeas corpus is DISMISSED.

Dated this 29th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge