IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT D. McGRATH,

Petitioner,

OPINION AND ORDER

v.

05-C-393-C

DEIRDRE MORGAN, Warden,
Oakhill Correctional Institution,

Respondent.

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This case presents a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Robert D. McGrath is serving a fifteen-year prison sentence imposed on him on April 4, 1995 by the Circuit Court for Sauk County, Wisconsin, following his no contest plea to two counts of sexual assault of a child under the age of 13. Petitioner contends that Wisconsin law entitled him to mandatory release on April 4, 2005 after he had served two-thirds of his sentence, but that the parole commission has declined to release him. Petitioner has paid the five dollar filing fee and has filed his petition within the one-year statute of limitations imposed by § 2244(d). The petition is before the court for preliminary consideration pursuant to Rule 4 of the Rules Governing Section 2254 Cases. I am dismissing this petition with prejudice because petitioner is not entitled to federal habeas relief on his claim.

As a preliminary matter, petitioner has not attempted to exhaust his state court remedies as required by § 2254(b). In petitioner's situation, Wis. Stat. §302.11(1g)(3)(d) provides that he may appeal the parole commission's adverse decision "only by the common law writ of certiorari." Petitioner has not done this, contending that it would be futile. The pertinent question regarding futility is not whether the state court would be inclined to rule in petitioner's favor, but whether there is any available state procedure for determining the merits of petitioner's claim. Spreitzer v. Schomig, 219 F.3d 639, 647 (7th Cir. 2000). Before petitioner would be entitled to consideration of his petition, he would have to exhaust his state certiorari remedies.

But pursuant to Rule 4, "if it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition." State prisoners have no constitutionally protected interest in parole unless the state has established a statutory or regulatory entitlement that stands or falls on the application of rules to facts. Greenholtz v. Inmates of the Nebraska Penal and Correctional Center, 442 U.S. 1, 11-12 (1979); Huggins v. Isenbarger, 798 F.2d 203, 205 (7th Cir. 1986). Wisconsin has conferred such an interest upon some of its inmates by mandating that, with certain exceptions, prisoners must be released from prison when they have served two-thirds of their sentences.

However, a prisoner who is subject to one of the statutory exceptions cannot claim any federal constitutional right to mandatory release. The due process clause protects only

liberty interests to which a person has a legitimate claim of entitlement as opposed to some unilateral expectation or abstract need. Greenholtz, 442 U.S. at 7. See also Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463 (1981):

> A state-created right can, in some circumstances beget yet other rights to procedures essential to the realization of the parent right. Plainly, however, the underlying right must have come into existence before it can trigger due process protection.

In other words, a prisoner has no constitutional entitlement to release from a valid prison sentence absent a right explicitly conferred by the state. Id. at 463-64.

The judgment of conviction entered against petitioner on April 4, 1995 states that the crime charged in count 1 to which petitioner had pleaded no contest was committed "On or about 4/24/94." See Petition, dkt. #1, Exh. 1. Often there is ambiguity as to the actual date of a sexual assault reported by a child and apparently that was so in this case. However, according to a May 18, 2005 letter from Warden Morgan to petitioner, the Department of Corrections considers the official date of an offense to be the date listed in the court's Judgment of Conviction. See Petition, unnumbered exhibit.

On April 21, 1994, Wisconsin's Presumptive Mandatory Release Law went into effect. Pursuant to Wis. Stat. 302.11(1g)(3)(am), the mandatory release date for inmates convicted of "serious felonies" (including sexual assault of a child) is not actually mandatory, but merely presumptive. The statute provides that it is up to the parole commission to determine whether to deny presumptive mandatory release to the inmate based on specified grounds.

Citing Greenholtz, a Wisconsin appellate court has held that §302.11(1g) does not create a protected liberty interest in parole because the statute uses permissive rather than mandatory language and vests "virtually unlimited" discretion in the parole commission to grant or deny presumptive mandatory release to an inmate. State ex rel. Gendrich v. Litscher, 246 Wis. 2d 814, 825 632 N.W.2d 878, 883 (Ct. App. 2001). This makes for "an easy analysis under Greenholtz" in federal court: whenever an inmate's request for parole appeals to discretion rather than rules, there is no property interest at stake. Huggins, 798 F.2d at 205.

Petitioner cannot obtain relief from this court on his claim because he has no liberty interest in parole that a federal court would recognize. His recourse is in state court.

ORDER

IT IS ORDERED that this petition for a writ of habeas corpus is DISMISSED WITH PREJUDICE. The clerk of court is directed to enter judgment closing this case.

Entered this 18th day of August, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge