

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

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CHRISTOPHER MCSWAIN,

Petitioner,

ORDER

v.

05-C-650-C

PHILLIP KINGSTON, Warden,  
Waupun Correctional Institution,

Respondent.

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Christopher McSwain, a Wisconsin inmate confined at the Waupun Correctional Institution in Waupun, Wisconsin, has filed a document that purports to be an application for a writ of habeas corpus. I have granted petitioner's application for leave to proceed in forma pauperis in a separate order. The petition is before the court for preliminary review pursuant to 28 U.S.C. § 2254.

Petitioner's submission consists of nine handwritten pages plus one three-page attachment, which is also handwritten. In the first three pages of the document, petitioner alleges that various errors were committed during the criminal court proceedings that led to his current confinement. Although petitioner does not provide specific information about the conviction, it appears that he is referring to a judgment of conviction entered by the Circuit Court for Milwaukee County for sexual assault and abduction of a child. In most of the remaining six pages and the three-page attachment, petitioner complains that he is

hearing voices and seeing little green men, unnamed individuals at the prison are “out to get” him and he is having suicidal impulses. Petitioner asks this court to order prison officials to transfer him to the Wisconsin Resource Center for sex offender and mental health treatment.

A petition for a writ of habeas corpus may be used only to challenge the fact or duration of a prisoner’s confinement, not the nature of that confinement. Pischke v. Litscher, 178 F.3d 497, 499 (7th Cir. 1999). Insofar as the focus of petitioner’s submission appears to be what he contends are intolerable conditions at his present place of confinement, habeas corpus is not the proper vehicle for his claims. As the court made clear in Pischke, a challenge to the location in which one is in custody is not the proper subject of a habeas corpus petition. Id. at 499-500. Accordingly, to the extent that the goal of petitioner’s lawsuit is to be transferred to a different institution with different treatment programs, it is really a challenge to the conditions of his confinement. As such, it must be brought under 42 U.S.C. § 1983.

As noted previously, however, the petition does contain some allegations that appear to be directed at the underlying conviction that resulted in petitioner’s imprisonment. If in fact petitioner is attacking his conviction, then he may proceed under 28 U.S.C. § 2254. However, he may not proceed in this court. Under 28 U.S.C. § 2241(d), a prisoner in a state having two or more federal judicial districts can file an application for a writ of habeas corpus either in the district in which he is in custody or in the district in which he was convicted. According to the petition, petitioner was convicted in Milwaukee County.

Because both Milwaukee County and Waupun are in the eastern district of Wisconsin, petitioner must file his habeas petition in that district.

In sum, whether petitioner seeks to challenge the conditions of his confinement or the underlying conviction that led to that confinement, his habeas petition is not properly before this court. If he is complaining about the conditions to which he is subject at the Waupun Correctional Institution, then he must proceed under 42 U.S.C. § 1983. If he is complaining about the validity of his Milwaukee County conviction, then he must file a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin, which is located in Milwaukee. For those reasons, the petition will be dismissed without prejudice. Petitioner is free to refile his lawsuit under the proper label in the proper court. Petitioner should be aware that if he does refile his lawsuit as a civil rights action under 42 U.S.C. § 1983, he will be subject to the requirements of the Prison Litigation Reform Act, 28 U.S.C. §§ 1915 and 1915A.

ORDER

IT IS ORDERED that the petition of Christopher McSwain for the issuance of a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE.

Entered this 2nd day of December, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge