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

ROBERT A. MOORE,

Petitioner, ORDER

v. 07-C-008-C

PAMELA WALLACE, Warden,
Stanley Correctional Institution,

Respondent.

Robert A. Moore is confined at the Stanley Correctional Institution serving a 42-year sentence for various crimes committed in Grant County in the mid-1980s. He has filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in which he contends that after he was sentenced, the Wisconsin Department of Corrections adopted a new parole policy that has effectively abolished his right to be released on discretionary parole. Petitioner contends that this change in policy violates the constitution's ban on *ex post facto* laws. In addition, he contends that the refusal of the circuit court to reduce his sentence on the basis of the change in parole policy violates his right to equal protection because some courts have reduced the sentences of other inmates in light of the new policy.

Petitioner's equal protection claim will be dismissed because it has no merit. In Wisconsin, trial courts retain discretion to deny a motion for sentence modification even where the defendant comes forth a "new factor" not known at sentencing. State v.

Macemon, 113 Wis. 2d 662, 667-68 335 N.W. 2d 402 (1983); State v. Hegwood, 113 Wis. 2d 544, 546, 335 N.W. 2d 399 (1983). This discretion is not lessened simply because a different judge in a different case involving a different defendant might have granted a similar motion. Indeed, it is not constitutionally impermissible for a judge to sentence identically situated co-defendants to materially different terms of imprisonment. Dellinger v. Bowen, 301 F.3d 758, 767-68 (7th Cir. 2002). Sentencing judges have wide discretion, and this discretion "naturally leads to discrepancies in sentencing." Holman v. Page, 95 F.3d 481, 486 (7th Cir. 1996). Plaintiff's equal protection claim is based solely on his assertion that third parties have received better results on their motions for sentence modification than he has. However, as long as a defendant receives a sentence that is not grossly disproportionate to his crime, he is not "entitled to assert third parties' rights to better sentencing practices and thereby improve his own lot." Id. Accordingly, this claim will be dismissed with prejudice.

Petitioner's *ex post facto* claim must be dismissed because it is not properly raised in a petition for a writ of habeas corpus. Although petitioner has not identified the facts underlying his claim that the parole board has implemented a change in parole policy, his *ex post facto* claim appears to be identical to that raised by petitioner in Williams v. Benik, 04-C-966-C, a case decided by this court. In that case, I concluded that because success on petitioner Williams's *ex post facto* claim meant at most a new parole hearing at which he might or might not be granted parole, the claim had to be brought under § 1983 because it

did not necessarily imply the invalidity of petitioner's confinement or its duration. See Williams v. Benik, 04-C-966-C, Op. and Order entered April 18, 2005. For the reasons stated in that opinion, a copy of which is attached to this order, I conclude that petitioner's *ex post facto* claim must be dismissed without prejudice to his refiling it as a civil action under § 1983.

Petitioner should keep in mind that if he refiles his claim under § 1983 he will be subject to the requirements of the Prison Litigation Reform Act, including payment of the $250 filing fee. In addition, dismissal of a § 1983 suit will often count as a "strike" under 28 U.S.C. § 1915(g). Most important, petitioner should be mindful that in Williams, I determined that the *Ex Post Facto* Clause does not extend to changes in parole board policy with respect to the granting of discretionary parole.

ORDER

IT IS ORDERED that the petition of Robert Moore for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed. Petitioner's claim that he has been denied the equal protection of the laws by virtue of the circuit court's refusal to modify his sentence on the basis of a change in parole policy is DISMISSED WITH PREJUDICE. His claim that

the change in parole policy is an unconstitutional *ex post facto* law is DISMISSED WITHOUT PREJUDICE to his refiling it as a civil action under § 1983.

Entered this 22nd day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge