

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

LARRY A. PETERSON,

Petitioner,

v.

ORDER

CATHERINE FARREY,

05-C-326-S

Respondent.

Petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. On July 27, 2005 respondent filed a motion to dismiss the petition. On August 3, 2005 petitioner filed his reply.

FACTS

Petitioner was convicted in Chippewa County Circuit Court of second degree sexual assault on November 12, 2002. The Wisconsin Court of Appeals reversed his conviction and remanded his case for a new trial. Petitioner was again convicted on February 26, 2003. The Wisconsin Court of Appeals affirmed his second conviction. The Wisconsin Supreme Court denied petitioner's petition for review on August 2, 2004.

Petitioner filed a Knight petition in the Wisconsin Court of Appeals alleging that his appellate counsel was ineffective. This petition was denied on April 7, 2005.

On January 25, 2005 petitioner filed a petition for a writ of habeas corpus in Chippewa County Circuit Court alleging that the Department of Corrections was holding him past his mandatory release (MR) date. The Court denied his petition on February 15, 2005. Petitioner did not appeal this decision.

MEMORANDUM

Petitioner claims that the Department of Corrections is holding him past his mandatory release date. This is the same issue he raised in his state court petition for a writ of habeas corpus.

Petitioner did not appeal the February 15, 2005 denial of his petition for a writ of habeas corpus. The time for appealing this decision to the Wisconsin Court of Appeals expired on May 15, 2005. §808.04(a), Wis. Stats.

State courts must have had a fair opportunity to consider a constitutional issue before federal collateral review is appropriate. Kurzawa v. Jordan, 146 F.3d 435, 441 (7th Cir. 1998). It is the petitioner's duty to fairly present his federal claims to the state court. O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999).

Federal courts will not address the merits of petitioner's habeas corpus claim unless he has asserted it through one complete round of the state court's appellate review process. Lewis v.

Sternes, 390 F. 3d 1019, 1025 (7th Cir. 2004). Where a petitioner has deprived the state court of a fair opportunity to address his federal claim and the state remedy is no longer available the petitioner has defaulted on his claim. O'Sullivan, 526 U.S. at 848, 854.

Petitioner failed to appeal the denial of his petition for a writ of habeas corpus to the Wisconsin Court of Appeals which deprived the state court of a fair opportunity to address his claim. Since this state remedy is no longer available petitioner has defaulted on his claim and cannot obtain federal review. Accordingly, petitioner's petition for a writ of habeas corpus will be dismissed with prejudice.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed with prejudice. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED with prejudice.

IT IS FURTHER ORDERED that judgment be entered DISMISSING petitioner's petition for a writ of habeas corpus with prejudice.

Entered this 9th day of August, 2005.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge