

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

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JONATHAN B. McCORD,

Petitioner,

v.

ROBERT HUMPHREYS, Warden,  
Kettle Moraine Correctional Institution,  
RANDY GASSER, Extended Supervision Officer  
Division of Community Corrections,  
Department of Corrections,

Respondents.  
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OPINION and ORDER

11-cv-180-bbc

Jonathan B. McCord has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging the rules of his state probation and extended supervision. (He has also filed a motion for preliminary injunctive relief, titled motion for stay and abeyance, in which he seeks an immediate order enjoining the probation office from imposing certain conditions on him. Because his request for injunctive relief essentially duplicates his request for habeas relief, I have considered it as part of his habeas application.) He is proceeding under the in forma pauperis statute and has made an initial partial payment. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

After reviewing the petition, I conclude that it must be dismissed because petitioner has not exhausted his state court remedies. Because I am dismissing the petition, I will also deny petitioner's motion for stay and abeyance, dkt. #3, and motion for a hearing, dkt. #7.

From the petition and attached documents, I find the following facts.

### FACTS

Petitioner is serving a prison sentence for escape at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. He is scheduled to be released on May 6, 2011. A social worker informed plaintiff that he would be subject to sex offender rules upon his release to extended supervision because of petitioner's 1994 conviction for fourth-degree sexual assault and his 1999 conviction for lewd and lascivious behavior. Petitioner was convicted of both of these offenses when he was a minor and has never before been subjected to sex offender rules while on probation or extended supervision.

On January 11, 2011, petitioner filed a petition for writ of habeas corpus in the Circuit Court for Dane County, challenging the application of the sex offender rules to his extended supervision. On February 21, 2011, the court denied the petition because petitioner did not pay the filing fee. Petitioner appealed the dismissal to the Wisconsin Court of Appeals; that appeal is pending.

## OPINION

Petitioner asserts two grounds for habeas relief. First, he contends that by subjecting him to the sex offender rules of supervision, the Department of Corrections is punishing him twice for his previous convictions. Second, petitioner contends that the department violated his right to procedural due process by relying on expired convictions that do not qualify as sex offenses under Wisconsin law to impose sex offender restrictions.

I cannot consider the substance of petitioner's claims because it is clear from his petition that he has not exhausted his state court remedies. It is well established that before a federal court may consider the merits of a state habeas petitioner's claims, the petitioner must exhaust the remedies available to him in the state courts. 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). Petitioner filed objections to application of the sex offender rules in the Circuit Court for Dane County. The circuit court dismissed the case and petitioner only recently filed an appeal of the dismissal. According to the public records available electronically through the Wisconsin Supreme Court and Court of Appeals Access website, <http://wscca.wicourts.gov>, the court of appeals has yet to schedule briefing in the case. Petitioner may not obtain relief from this court under § 2254 unless he gives the Wisconsin Court of Appeals and Wisconsin Supreme Court an opportunity to consider the merits of his claims. Because petitioner's petition is premature, I will dismiss it without prejudice.

ORDER

IT IS ORDERED that

1. Petitioner Jonathan McCord's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED without prejudice for his failure to exhaust his state court remedies.
2. Petitioner's motion for stay and abeyance, dkt. #3, and motion for hearing, dkt. #7, are DENIED.

Entered this 15th day of April, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge