

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

-----  
JERRY MEANS,

Petitioner,

v.

PETER HUIBREGTSE, Warden  
Wisconsin Secure Program Facility,

Respondent.  
-----

OPINION and ORDER

11-cv-321-bbc

Petitioner Jerry Means, a prisoner at the Wisconsin Secure Program Facility, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging the duration of his 1994 sentences for bail jumping and escape. He is proceeding in forma pauperis and has paid an initial partial payment of the filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases, along with petitioner's motion for appointment of counsel.

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 appointment of counsel.

I draw the following facts from the petition and attached documents.

## FACTS

Petitioner is serving prison sentences at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin. On March 14, 1994, he was sentenced in three separate cases in the Circuit Court for Monroe County, Wisconsin. Petitioner received a three-year sentence in case no. 93CF103 for resisting/obstructing an officer and a concurrent three-year sentence in case no. 93CF264 for resisting/obstructing an officer. Also, in case no. 93CF110, petitioner received a nine-year sentence for bail jumping, to run consecutively to his sentences in the previous two cases, two three-year sentences for additional bail jumping charges, to run concurrently with his other sentences and a stayed sentence of 11 years with 10 years of probation on an escape charge. Petitioner's sentence should have been credited with 219 days of time served but was not.

Petitioner's total sentence of 12 years and his previous time served should have made him eligible for release no later than August 8, 2005. Instead, he was not released from prison until November 9, 2008. He was placed in jail on a probation hold on December 3, 2009 and his probation was revoked on April 27, 2010.

On December 1, 2010, the district attorney filed a motion to commute a portion of petitioner's sentence. He noted that the judgment of conviction gave petitioner a stayed sentence of 11 years on one of his bail jumping charges, enhanced by his status as a habitual offender, rather than the proper charge of escape as decided at petitioner's sentencing. The district attorney argued that under Wisconsin law, the habitual offender enhancer cannot be applied to an escape charge, so the appropriate sentence should have been five years of

incarceration with five years of probation. The judge granted this motion, reducing petitioner's sentence on this charge to five years of incarceration. Petitioner remains incarcerated under this sentence.

## OPINION

I understand petitioner to be asserting two grounds for habeas relief. First, he argues that he should be released from prison because he has served his amended five-year sentence for escape. Second, he argues that his nine-year sentence for one of his bail jumping charges was excessive.

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). From my review of the online Wisconsin Circuit Court Access and Wisconsin Supreme Court and Court of Appeals Case Access databases, I can find no evidence that petitioner has raised his claims in the state court system and given the state courts an opportunity to review the claims. Although these records lack detail, it appears that plaintiff is in the midst of litigating a postconviction motion in circuit court concerning these issues. In any case, it is clear that plaintiff has failed to give 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 so that he may refile it after he exhausts his state court remedies if he does not obtain the relief he is seeking. Because I am dismissing the petition, I will deny petitioner's motion for appointment of counsel as moot.

#### ORDER

IT IS ORDERED that

1. Petitioner Jerry Means's petition for a writ of habeas corpus under 28 U.S.C. § 2254, dkt. #1, is DISMISSED without prejudice for his failure to exhaust his state court remedies.

2. Petitioner's motion for appointment of counsel, dkt. #1, is DENIED as moot.

Entered this 15th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge