

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

MICHAEL WESTON,

Petitioner,

v.

GARY HAMBLIN,

Respondent.

ORDER

11-cv-481-bbc

Petitioner Michael Weston, a prisoner at the Racine Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the \$5 filing fee. In his petition, petitioner states that his parole revocation was based on perjury and he was hampered by ineffective assistance of counsel. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner's previous petition for a writ of habeas corpus in this court was dismissed without prejudice for his failure to exhaust his state court remedies. Weston v. Raemisch, case no. 09-cv-339-bbc (W.D. Wis. June 2, 2009). In that order, I noted that petitioner had filed a petition for writ of certiorari in the Circuit Court for Dane County (case no. 2008CV3972), but had not yet appealed the dismissal of that petition or the denial of any

of his motions for reconsideration. Court records available through the online Wisconsin Circuit Court Access and Wisconsin Supreme Court and Court of Appeals Case Access databases show that since that time, petitioner has not filed an appeal of the dismissal of that case.

In addition, the online court records show that petitioner has filed two collateral attacks since this court's order in case no. 09-cv-339-bbc. Petitioner filed a petition for a writ of habeas corpus in the Circuit Court for Dane County on December 23, 2009 (case no. 2010CV262). That petition was dismissed on October 12, 2010, and petitioner appealed. However, the court of appeals has not yet issued a ruling on the appeal. Also, on January 3, 2011, petitioner filed a petition for writ of habeas corpus directly in the court of appeals, which dismissed the petition on January 14, 2011. Petitioner has not sought review by the Wisconsin Supreme Court of that dismissal.

Thus, the records show that petitioner has still not presented any of his claims to the Wisconsin Supreme Court and he has failed to exhaust his administrative remedies. In his petition, petitioner does not attempt to argue that he has exhausted his remedies. Rather, he argues that I should excuse the exhaustion requirement under § 2254(b)(1)(b)(ii), which allows the court to excuse exhaustion if "circumstances exist that render such process ineffective to protect the rights of the applicant."

Petitioner has not shown why this exception should apply. Petitioner seems to be

arguing that his state court remedies are unavailable because of the financial burden of initiating proceedings at each level of the state court system, but this argument is undermined by the court records showing that petitioner *has* filed numerous collateral attacks on his revocation and has repeatedly been granted leave to proceed in forma pauperis in the state courts. He argues also that “there is no Wisconsin judge who would DARE rule in [his] favor; the political climate bars such a ruling,” but he provides no evidence to support this dubious claim. As I told petitioner in his previous case, he “cannot simply opt out of the state review process because he is tired of it or frustrated by the results he is getting.” Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995). Accordingly, I must dismiss the petition for petitioner’s failure to exhaust his administrative remedies.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether

a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated, reasonable jurists would not debate whether petitioner fairly presented his claim to the Wisconsin courts.

ORDER

IT IS ORDERED that

1. The petition of Michael Weston for a writ of habeas corpus, dkt. #1 is DISMISSED WITHOUT PREJUDICE for his failure to exhaust his state court remedies.

2. Petitioner is DENIED a certificate of appealability. He may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 1st day of September, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge