

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60600
Summary Calendar

MOSES CHARLES EVERETT,

Petitioner-Appellant,

versus

EDWARD HARGETT, Superintendent,
MISSISSIPPI STATE PENITENTIARY,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:93-CV-657-BN)

(April 25, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Moses Charles Everett appeals the district court's dismissal of his petition for a writ of habeas corpus. We affirm.

Everett was convicted of sexual battery in a Mississippi state court on July 16, 1986. The Mississippi court sentenced him to a term of twenty years. Pursuant to that sentence Everett was incarcerated from June 26, 1986, to August 11, 1986, when he was

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

released on bond pending his direct appeal to the Mississippi Supreme Court. While he was free on bond, he was arrested by Louisiana on September 9, 1987 and was incarcerated there until he was again released on appeal bond on December 1, 1987. On February 27, 1989, Everett was returned to Louisiana's custody until January 8, 1992, when he was released into the custody of the Mississippi Department of Corrections.

On Everett's motion, the Mississippi court issued an order clarifying his sentence on January 28, 1992. The order provided that Everett "be given credit for any time served in the Louisiana Department of Corrections or the Mississippi Department of Corrections since July 16, 1986, as if he had been incarcerated in the Mississippi Department of Corrections since that date." The director of records for the Mississippi State Penitentiary interpreted that order to grant Everett credit for the time he was incarcerated, but not to grant him credit for the time Everett was free on appeal bonds.

Seeking credit for the time he was free on appeal bonds, Everett filed this habeas petition after fully exhausting his state court remedies. The gist of Everett's argument is that the clarification order is ambiguous and that that ambiguity should be construed in his favor. He finds a conflict between the order's phrase crediting him "for any time served in the Louisiana Department of Corrections and the Mississippi Department of Corrections" and the phrase that he has truncated to read as follows: ". . . since July 16, 1986, as if he had been

incarcerated in the Mississippi Department of Corrections since that date." The sentence he quotes in part reads in full as follows: "It is therefore ordered and adjudged that defendant, Moses Charles Everett, be given credit for any time served in the Louisiana Department of Corrections or the Mississippi Department of Corrections since July 16, 1986, as if he had been incarcerated in the Mississippi Department of Corrections since that date." (emphasis added).

The magistrate judge properly recommended denial of Everett's petition because it did not allege the violation of any federal rights. In his objections to the magistrate judge's recommendation, Everett tried to remedy his mistake by alleging the violation of his federal due process rights. The district court rejected his objections in a summary order.

We agree with the district court that Everett has not stated a violation of his due process rights. It is not a violation of due process to refuse to count time spent free on bond toward serving a federal sentence. See United States v. Dovalina, 711 F.2d 737, 740 (5th Cir. 1983). We do not see how Mississippi's refusal to count Everett's time spent free on bond as time served on his state court sentence violates due process.

Finally, Everett argues that Mississippi's interpretation of the clarification order violates his Eighth Amendment rights. Because the argument is raised for the first time on appeal, we need not review it. See United States v. Armstrong, 951 F.2d 626, 630 (5th Cir. 1992). Even if we were to review his claim, it would

fail on the merits. Everett could have been sentenced to thirty years for sexual battery, the crime for which he was convicted. Miss. Code Ann. § 97-3-101 (1994). Everett does not challenge the propriety of his original twenty-year sentence, and the clarifying order reduces that sentence by crediting Everett for time served in Louisiana. It is impossible that his sentence as revised by the clarifying order is so "greatly disproportionate" to his offense as to violate the Eighth Amendment. See McGruder v. Puckett, 954 F.2d 313, 315 (5th Cir.), cert. denied, 113 S. Ct. 146 (1992).

The district court's opinion denying Everett's petition for a writ of habeas corpus is AFFIRMED.