

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

JAMES GOMEZ,

Petitioner,

ORDER

v.

03-C-290-C

GERALD BERGE, Warden, Wisconsin
Secure Program Facility,

Respondent.

On June 18, 2003, this court entered an order dismissing petitioner James Gomez's petition for a writ of habeas corpus under 28 U.S.C. § 2254 on the ground that it presented a mix of exhausted and unexhausted claims. Specifically, this court found that petitioner had not exhausted his claim of ineffective assistance of counsel.

Petitioner has now filed a letter with numerous supporting documents that I construe as a motion for reconsideration. In his letter, petitioner asserts that it would be futile for him to present his unexhausted claim of ineffective assistance of appellate counsel to the Wisconsin courts. Although he concedes that he has not filed either a habeas petition in the state court of appeals under State v. Knight, 168 Wis.2d 509, 512-13, 484 N.W.2d 540, 541(1992) (setting forth procedure for bringing claims of ineffective assistance of appellate counsel) or a postconviction motion in the trial court under State ex rel. Rothering v. McCaughtry, 205 Wis.2d 675, 680-82, 556 N.W.2d 136, 138-39 (Ct. App. 1996) (setting

forth procedure for bringing claims of ineffective postconviction counsel), he asserts that he raised the issue in both the state court of appeals and supreme court but both courts ignored it. As proof, petitioner has attached copies of letters he wrote to the court of appeals complaining about his appellate lawyer's refusal to raise certain issues. He also asserts that he raised the issue in his statement in support of his petition for review by the Wisconsin Supreme Court.

I agree with petitioner that the Wisconsin state courts are not likely to decide any claim of ineffective assistance of postconviction or appellate counsel in petitioner's favor. However, the concept of "futility" in the habeas context means more than that. As the Court of Appeals for the Seventh Circuit explained in White v. Peters, 990 F.2d 338 (7th Cir. 1993):

Although futility is a recognized exception to the exhaustion of state remedies requirement . . . the pertinent question is not whether the state court would be inclined to rule in the petitioner's favor, but whether there is any available state procedure for determining the merits of petitioner's claim. Federal-state comity demands that a habeas petitioner first give the state courts an opportunity to pass on his federal claims, even if those courts would be expected to view such claims unfavorably.

Id., at 341-342 (citations omitted). I note that one of the documents included with petitioner's latest submission includes an order from the state court of appeals dated August 9, 2002, in which the court noted that petitioner's "counsel correctly analyzed the issues he refuses to raise and exercised reasonable professional judgment in those decisions." The court's statement was made in the context of an order rejecting petitioner's request to file

a brief supplemental to the one filed by his lawyer. On October 29, 2002, the court of appeals issued a final decision on the merits of the appeal in which it addressed only the issues raised by petitioner's appellate lawyer and did not mention petitioner's complaints about his appellate lawyer or the other issues he sought to raise. Viewed in context, the court's passing reference in its October 9 order to petitioner's claim that his appellate lawyer was ineffective was not a decision on the merits that would bar petitioner from presenting that claim to the state courts in a postconviction motion or habeas petition. In short, because petitioner has state procedures available to him by which he can bring a claim of ineffective assistance of appellate or postconviction counsel, the futility exception has not been met.

Accordingly, there is no basis for this court to amend or alter its previous order dismissing the petition under Rose v. Lundy, 455 U.S. 509 (1982). As noted in that order, petitioner has a choice: he can return to state court to exhaust his unexhausted claims, or he can amend his petition and proceed only on his exhausted claims. In the previous order, I advised petitioner of certain things to consider when making this choice. To that advice, I add the following: whichever course petitioner chooses, he should proceed quickly. Pursuant to 28 U.S.C. § 2244(d), a state prisoner has one year from the time his direct conviction becomes final by the "conclusion of direct review or the expiration of the time for seeking such review" within which to file a petition for a writ of habeas corpus in federal court. Although any time during which petitioner has a properly filed application for

postconviction or collateral review pending in the state courts does not count towards the one year, see § 2244(d)(2), petitioner should nonetheless be aware that he does not have an unlimited amount of time within which to exhaust his claims.

Finally, petitioner asks what he needs to do to amend the case caption to properly reflect that Warden Berge is the respondent in the action. Petitioner does not need to do anything. The court has already amended the caption.

ORDER

IT IS ORDERED that the motion of petitioner for reconsideration of this court's order entered June 18, 2003, is DENIED.

Dated this 3rd day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge