

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

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GARY WATERS,

Petitioner,

ORDER

v.

04-C-0297-C

DANIEL BENIK, Warden, Stanley  
Correctional Institution,

Respondent.

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Gary Waters, an inmate at the Stanley Correctional Institution, has filed an application for a writ of habeas corpus under 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner challenges his March 2001 conviction in the Circuit Court for Marathon County for sexual assault and bail jumping. Petitioner was convicted by a jury after a trial. The state courts affirmed his conviction on appeal. See State v. Waters, 2003 WI App 201, 267 Wis. 2d 278, 670 N.W. 2d 557 (unpublished opinion), pet. for rev. denied, 2003 WI 140, 266 Wis. 2d 64, 671 N.W. 2d 850 (Table).

As an initial matter, I note that petitioner has named as respondent Matthew Frank, Secretary of the Wisconsin Department of Corrections. The proper respondent is the person who has custody over petitioner, who is Daniel Benik, Warden of the Stanley Correctional

Institution. I have amended the caption to reflect this, and will direct petitioner and the clerk of court to do the same.

Petitioner contends that he is in custody in violation of the Constitution or laws of the United States. He contends that the trial court made erroneous evidentiary rulings that deprived him of his Sixth Amendment right to confront witnesses and of due process and that the state violated his right to due process by filing bail jumping charges against him in the county that imposed bail instead of the county in which the bond violation occurred. I assume that the evidentiary rulings that petitioner seeks to challenge are the same as those he challenged on direct appeal, namely, 1) the trial court improperly allowed a physician to testify that the condition of the hymen of one of the victims was consistent with her allegations; 2) the trial court improperly allowed a social worker to testify about the behavior of the victims and their mother; 3) the trial court improperly allowed into evidence photographs of the victims taken near the times of the assaults and a poem written by one of the victims; and 4) the trial court improperly limited cross-examination about a complainant's criminal record.

The petition also includes claims that petitioner concedes he has not exhausted. In particular, petitioner alleges that trial counsel was ineffective for failing to investigate the case and for committing various errors at trial and that postconviction/appellate counsel was ineffective for failing to challenge trial counsel's effectiveness.

As petitioner appears to recognize, a prisoner seeking a writ of habeas corpus must exhaust his state remedies before seeking federal relief. Moleterno v. Nelson, 114 F.3d 629, 633 (7th Cir. 1997) (citing cases). Principles of comity require that the habeas petitioner present his federal constitutional claims initially to the state courts in order to give the state the “opportunity to pass upon and correct alleged violations of its prisoners' federal rights.” Duncan v. Henry, 513 U.S. 364, 365 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971) (internal quotation marks omitted)). Claims are exhausted when they have been presented to the highest state court for a ruling on the merits of the claims or when state remedies no longer remain available to the petitioner. Engle v. Isaac, 456 U.S. 107, 125 n. 28, 1570 n. 28 (1982).

Where, as here, the petition presents a mix of unexhausted and exhausted claims, the district court must dismiss the petition. Rose v. Lundy, 455 U.S. 509, 510 (1982). Alternatively, the petitioner may choose to amend his petition by deleting the unexhausted claims and then proceed solely on the exhausted claims. Id., at 520. Before dismissing the petition, I will give petitioner the opportunity to decide whether he prefers to abandon his unexhausted claims of ineffective assistance of trial and appellate counsel and proceed solely on the claims that he has exhausted.

In deciding which course of action to pursue, petitioner should consider the following: If he decides to give up his unexhausted claims and present only the ones that he has already exhausted, it is unlikely that this court would allow him to raise the unexhausted claims in

a subsequent federal habeas petition. See Lundy, 455 U.S. at 521 ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions") (citing 28 U.S.C. § 2254 Rule 9(b), authorizing dismissal for abuse of the writ).

Another factor to consider is the statute of limitations for filing a federal habeas petition. Under the federal statutes governing habeas petitions, a state prisoner has only one year from the date his judgment became "final" in which to file a federal habeas petition. 28 U.S.C. § 2244(d)(1)(A). In this case, petitioner's judgment became final 90 days following the Wisconsin Supreme Court's denial of his petition for review, or January 21, 2004. See Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (where petitioner does not file petition for writ of certiorari, one-year statute of limitations begins to run at expiration of the 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court).

Petitioner's federal statute of limitations began to run on January 22, 2004, and it has continued to run during the time that the petition has been pending in this court. Newell v. Hanks, 283 F.3d 827, 834 (7th Cir. 2002); Jones v. Berge, 101 F. Supp. 2d 1145, 1150 (E.D. Wis. 2000). As of the date of this order, petitioner has 243 days remaining on his federal habeas clock. If petitioner chooses to have this court dismiss his petition so that he may pursue his unexhausted claims in state court, he will not get a new one-year clock. Rather, he will have 243 days in which to: 1) file a postconviction motion in the proper

state court; 2) exhaust his appeals in the state courts by appealing any denial of the motion to the state's court of appeals and then to the state supreme court; and then 3) file a new federal habeas application in this court. O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999) (discussing exhaustion requirement). Assuming petitioner would not miss any of Wisconsin's deadlines for filing an appeal or petition for review, all time that petitioner spends exhausting his claims in state court would not count against the 243 days remaining on petitioner's federal habeas clock. 28 U.S.C. § 2244(d)(2); Fernandez v. Starnes, 227 F.3d 977, 979-980 (7th Cir. 2000) (properly filed application for state postconviction relief is "pending" within meaning of § 2244(d)(2) and continues to be "pending" during period between one court's decision and timely request for further review by higher court). See also Artuz v. Bennett, 531 U.S. 4, 8 (2000) (discussing what it means for application to be "properly filed"). Thus, should petitioner choose to exhaust in state court his as-yet unexhausted claims, the only time that will count against petitioner's federal habeas clock is that which elapses between now and the date on which petitioner properly files a postconviction motion in state court, plus that which elapses between the date on which the Wisconsin Supreme Court denies his petition for review and the date on which petitioner files a new federal habeas petition.

Because a total of 243 days affords petitioner enough time, at the front end, within which to file a postconviction motion in state court, and, at the back end, to file a new habeas petition in this court after he exhausts his appeals in the state court, I would not stay

the instant habeas application while petitioner exhausts his state court remedies on his ineffective assistance of counsel claims. See Freeman v. Page, 208 F.3d 572, 577 (7th Cir. 2000) (noting that district courts have discretion to stay habeas corpus action while prisoner exhausts state court remedies if dismissal could jeopardize timeliness of collateral attack); Tinker v. Hanks, 172 F.3d 990, 991 (7th Cir. 1999) (same). Petitioner should keep this in mind when deciding between pursuing his unexhausted claims in state court or amending his petition to include solely the exhausted claims.

#### ORDER

IT IS ORDERED that petitioner Gary Waters has until June 21, 2004, within which to advise the court whether he wishes to pursue his unexhausted claims in state court or whether he prefers to amend his petition to delete the unexhausted claims and proceed solely on the exhausted claims. If petitioner chooses the former, or if he does not report his choice by the deadline, then his petition will be dismissed without prejudice for his failure to exhaust his state court remedies, pursuant to Rose v. Lundy.

The clerk of court shall amend the case caption to reflect that Daniel Benik, Warden, Stanley Correctional Institution, is the proper respondent in this case.

Dated this 23<sup>rd</sup> day of May, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge