

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

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ANDREW MATTHEW OBRIECHT,

Petitioner,

ORDER

v.

05-C-0725-C

BYRAN BARTOW, Director,  
Wisconsin Resource Center,

Respondent.

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Andrew Matthew Obrieht, a Wisconsin inmate confined at the Wisconsin Resource Center in Winnebago, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

The subject of the petition is an August 17, 2001 sentence imposed by the Circuit Court for Dane County in Case No. 98-CF-271 after it revoked petitioner's probation for second degree attempted sexual assault of a child. Petitioner contends that he is custody in violation of the laws or Constitution of the United States because the state has deprived him of his right to appeal that sentence by declining to appoint counsel to represent him.

As an initial matter, I note that although petitioner has filed numerous habeas petitions in this court, the instant petition does not appear to be successive insofar as this

court has never issued a substantive ruling with respect to Dane County Case No. 98-CF-271. See Obrieht v. Bartow, 05-C-0489-C (attacking judgment imposed by Dane County Circuit Court in Case No. 00-CF-2286); Obrieht v. Bartow, 05-C-230-C (attacking judgment imposed by Dane County Circuit Court in 96-CF-2331); Obrieht v. Swenson, 03-C-004-C, Order, Jan. 23, 2003 (dismissing petition attacking conviction in 98-CF-271 for failure to exhaust state court remedies). A challenge to a judgment different from a judgment at issue in a prior case is not treated as a successive claim. Beyer v. Litscher, 306 F.3d 504, 508 (7th Cir. 2002).

Nonetheless, the petition must be dismissed because documents attached to it indicate that petitioner has not exhausted his state court remedies. According to the petition and its attachments, petitioner filed a petition for a writ of habeas corpus in the Wisconsin Supreme Court seeking reinstatement of his direct appeal. On November 4, 2005, that court dismissed the writ on the ground that petitioner could raise the issue in one of his appeals that were currently pending in the state court of appeals pertaining to the conviction in Dane County case 98-CF-271. Petitioner asserts that the court of appeals issued a decision on those appeals on November 23, 2005. However, it appears that petitioner has not yet filed a petition for review of that decision in the Wisconsin Supreme Court.

As petitioner is aware from prior orders of this court, to properly exhaust state court remedies a Wisconsin prisoner must present all of his claims to the state court of appeals and then the Wisconsin Supreme Court. O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999);

Moore v. Casperson, 345 F.3d 474, 486 (7th Cir. 2003). Petitioner appears to be taking the position that he need not file a petition for review in the Wisconsin Supreme Court because he already presented his claim to that court in the petition for a writ of habeas corpus that he filed before the court of appeals decided his appeal. He insists that his claim was properly presented to the supreme court in accordance with State ex rel. Fuentes v. Wisconsin Court of Appeals, Dist. IV, 225 Wis. 2d 446, 593 N.W. 2d 48 (1999), and that the state supreme court erred when it declined to consider his petition.

Petitioner's disagreement with the manner in which the state supreme court resolved his habeas corpus petition does not excuse him from filing a petition for review in that court of the court of appeals' November 23 order. Even assuming petitioner is correct that the supreme court should have considered his claim in the context of his habeas petition, that would at most constitute an error of state law that this court lacks the authority to correct. It is up to the state courts to prescribe how petitioner must proceed through Wisconsin's court system; petitioner cannot jump into federal court merely because he disagrees with the state court's procedural rulings.

Because it is clear from petitioner's assertions that he has not yet presented his claim to the state supreme court in a petition for review, the petition will be dismissed. Although it might be difficult now for petitioner to file a petition for review on time, see Wis. Stat. § 809.62 (1) (allowing 30 days from court of appeals' decision to file petition for review), petitioner has provided no basis for a finding that good cause exists for the issuance of a

stay. See Rhines v. Weber, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1528, 1535 (2005) (district court has discretion to issue stay of federal habeas action to allow petitioner to exhaust state court remedies if petitioner has good cause for failure to exhaust). Petitioner's frustration with the state court system is not good cause for his failure to exhaust his state court remedies.

#### ORDER

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, IT IS ORDERED that the petition of Andrew Matthew Obrieht for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE for his failure to exhaust his state court remedies.

Entered this 15th day of December, 2005.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge