

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

IVAN MITCHELL,

ORDER

Petitioner,

10-cv-446-bbc

v.

MICHAEL THURMER, Warden,
Waupun Correctional Institution,

Respondent.

Ivan Mitchell, an inmate at the Waupun Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He is represented by counsel. In the petition, he challenges his August 14, 2002 judgment of conviction in the Circuit Court for Dane County for being a party to the crime of first degree intentional homicide. Petitioner contends that his counsel was ineffective by (1) failing to challenge his unlawful stop and arrest and seek suppression of the evidence obtained therein and (2) failing to discuss with petitioner a lesser-included jury instruction for felony murder and failing to request such instruction from the court. Petitioner has paid the \$5 filing fee.

Petitioner's allegations in his petition are sufficient to state valid constitutional claims. In addition, it appears that petitioner has exhausted his state court remedies and filed his

petition within the one-year limitations period. Accordingly,

ORDER

IT IS ORDERED that

1. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on Warden Thurmer.

2. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Ivan Mitchell's claims that (1) his counsel was ineffective by failing to challenge the unlawful stop and arrest and seek suppression of the evidence obtained from it and (2) for failing to discuss with petitioner a lesser-included jury instruction for felony murder and for failing to request such instruction from the court. The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue. **I note that petitioner has submitted copies of several transcripts with his petition, dkt. #2, including a copy of the August 7, 2002 and August 8, 2002 transcript from petitioner's jury trial, and a copy of transcripts from hearings held on April 24, 2008, April 25, 2008 and January 30, 2004.** Respondent need not submit transcripts that are duplicative of those already submitted by petitioner.

3. **Dispositive motions.** If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of

exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. If the state contends that the petition presents a mix of exhausted and unexhausted claims, then it must address in its supporting brief whether petitioner meets the criteria for a stay announced in Rhines v. Weber, 544 U.S. 269 (2005), in the event he opts to pursue his unexhausted claims in state court. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If the court denies the motion to dismiss in whole or in part, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

4. When no dispositive motion is filed. If respondent does not file a dispositive motion, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of respondent's answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:
 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,

2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

NOTE WELL: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims dismissed for his failure to meet his burden of proof.

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.
- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

Entered this 7th day of September, 2010.

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