

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

MICHAEL M. REVELES,

ORDER

Petitioner,

11-cv-378-bbc

v.

LIZZY TEGELS, Warden,
New Lisbon Correctional Institution,

Respondent.

Michael M. Reveles, an inmate at the New Lisbon Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He is challenging his December 2005 conviction in the Circuit Court for Dane County on six counts of second degree sexual assault. He has paid the \$5 filing fee.

Petitioner raises three claims in his petition: (1) his constitutional right to due process was violated because the government failed to submit any evidence regarding an essential element of the second degree sexual assault defense; (2) his right to be free from double jeopardy was violated because he was prosecuted for multiplicitous offenses; and (3) his right to effective assistance of counsel was violated because his trial counsel failed to object to the duplicative charges. At this stage, the allegations in petitioner's petition are

sufficient to state valid constitutional claims. In addition, because these claims are the same claims petitioner raised in his direct appeal, State v. Reveles, 2009 WI App 27, 2009 WL 198017 (Ct. App. Jan, 29, 2009) (unpublished), it appears that petitioner has exhausted his state court remedies. Additionally, although the decision on his direct appeal became final more than one year ago, it appears that petitioner was seeking additional post conviction relief on these charges in state court until February 2011 that may have tolled his federal habeas deadline. Therefore, I will direct the state to respond to the petition.

Petitioner attached two motions to his petition, namely, a motion requesting an evidentiary hearing, dkt. #2, and a motion for appointment of counsel, dkt. #3. I will deny the motion for an evidentiary hearing because a hearing is unnecessary at this stage. The issues in this case will likely be resolved through analysis of the record and the parties' written briefs only. In the unlikely event that I believe a hearing is necessary at a later stage, I will schedule one at that time.

Finally, I will deny plaintiff's motion for appointment of counsel. Under 18 U.S.C. § 3006A(2)(B), a district court may appoint counsel to represent an indigent petitioner seeking relief under § 2254 if the court determines that "the interests of justice so require." Although petitioner is asserting somewhat complex legal arguments in support of his petition, his petition is clear and he has demonstrated an understanding of the law and standards implicated by his petition. At this stage, I cannot conclude that petitioner requires legal

assistance. If it turns out later that petitioner is unable to understand and respond to the state's arguments in opposition to his petition, he may renew his motion for appointment of counsel at that time.

ORDER

IT IS ORDERED that

1. Petitioner Michael Reveles's motion for an evidentiary hearing, dkt. #2, and motion for appointment of counsel, dkt. #3, are DENIED.

2. 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 Tegels.

3. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Michael Reveles's claims that (1) his constitutional right to due process was violated because the government failed to submit any evidence regarding an essential element of the second degree sexual assault defense; (2) his right to be free from double jeopardy was violated because he was prosecuted for multiplicitous offenses; and (3) his right to effective assistance of counsel was violated because his trial counsel failed to object to the duplicative charges. 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. Respondent need only submit

transcripts and records from the state court proceedings that are relevant to petitioner's sentencing claim.

4. 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, untimeliness, 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 his answer or in lieu of one. 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.

5. 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. Because petitioner's claim was adjudicated on the merits in a state court proceeding, State v. Reveles, 2009 WI App 27, 2009 WL 198017 (Ct. App. Jan, 29, 2009)

(unpublished), 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: Although petitioner already has submitted a brief in support of his petition, it does not address the standard of review set out in § 2254(d) explicitly. Thus, he should submit a supplemental brief. If he fails to do so, then he risks having his claim 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 30th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge