IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN JACQUES,

ORDER

Petitioner,

11-cv-789-bbc

v.

MR. PUGH, Warden,

Respondent.

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Petitioner John Jacques has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in which he is challenging his conviction for using a computer to facilitate a child sex crime, in violation of Wis. Stat. § 948.075. He includes four grounds in his petition, but all of them seem to be related to his entrapment defense.

Petitioner says that he was unable to present his entrapment defense persuasively because of the way the government proved its case. That is, it showed the jury the text of the online conversations petitioner had with an undercover officer, but it did not "completely and accurately depict the digital record for the jury." Petitioner does not explain what that means in his petition, but context is provided by the decision of the Wisconsin Court of Appeals. State v. Jacques, 2010AP82-CR (Wis. Ct. App. Mar. 10, 2011). On

appeal, he argued that he was unfairly prejudiced because the government did not show the jury how various "smiley face" emoticons used by the officer in the conversations would have appeared to him on the screen. Although the emoticons were included, the government did not show how the emoticons were animated. If the animation had been included, petitioner argued, it would have shown how the government had "induced" him to commit the crime.

Petitioner says that the government violated his constitutional rights by failing to show the jury the complete context of the conversation, by failing to disclose "the computer application software" that would have permitted him to show the context and by providing printouts of the conversation that were of such poor quality that "graphical representations from embedded codes for the actual color animations were indistinguishable." In addition, petitioner says that his trial lawyer provided ineffective assistance of counsel by failing to retain a computer expert to "completely and accurately depict the digital record."

A federal court may grant a writ of habeas corpus only if the petitioner shows that he is in custody in violation of the laws or treaties or Constitution of the United States. 28 U.S.C. § 2254. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief, the district court must dismiss the petition. Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, the district court may dismiss a petition summarily if it determines that the petition "raises a legal theory that is indisputably without merit" or contains factual allegations that are "palpably incredible." Small v.

Endicott, 998 F.2d 411, 414 (7th Cir. 1993). Having reviewed petitioner's petition, I conclude that it must be dismissed because it has no merit.

All of petitioner's claims rely on the premise that he was prevented from presenting an effective entrapment defense because the jury did not see the animated versions of the emoticons. The Wisconsin Court of Appeals rejected this argument: "We fail to see how viewing the emoticons as animations would have led the jury to conclude that he was the victim of 'excessive incitement, urging, persuasion, or temptation' by" the undercover officer. Jacques, slip op. at 5 (citing State v. Hilleshiem, 172 Wis. 2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992)). I agree. Petitioner fails to explain how the animated versions of the emoticons could have made any difference to his defense. In fact, petitioner does not even explain what additional information the jury would receive by viewing the animated versions. Even if I assume that the animation would have shown a wink or similar expression, the difference is simply too slight to help petitioner show that he "would not have committed an offense of that character except for the urging of the agent." State v. Schuman, 226 Wis. 2d 398, 403, 595 N.W.2d 86, 89 (Ct. App. 1999). Wisconsin courts have found as a matter of law that much more suggestive conduct is not entrapment. Hilleshiem, 172 Wis. 2d at 9, 492 N.W.2d at 384 ("seeking or offering to buy drugs is not the kind of inducement which establishes entrapment"); State v. Abramoff, 114 Wis. 2d 206, 212, 338 N.W.2d 502, 506 (Ct. App. 1983) (telling suspect to deliver drugs to particular location not entrapment).

Whether petitioner's claim is for failing to disclose evidence or providing ineffective representation, he must show that the failure harmed his defense in some way. Harrington v. Richter, 131 S. Ct. 770, 791-92 (2011) (counsel's error violates Constitution only when it is "reasonably likely" the result would have been different); United States v. Bagley, 473 U.S. 667 (1985) (failure to disclose evidence violates due process only if evidence is "material," which means that there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different"). Thus, petitioner cannot show that the Wisconsin Court of Appeals erred in rejecting these claims, much less that its decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," which is what he must show to prevail on his petition. 28 U.S.C. § 2254(d).

Petitioner's claim regarding the poor quality of the copies is slightly different from his other claims. His theory for this claim seems to be that he was prejudiced because it was difficult to see what the emoticons looked like. Petitioner did not raise this claim with the Wisconsin Court of Appeals and he does not try to show cause for failing to do so or argue that failing to consider the issue will lead to a miscarriage of justice, so the claim is forfeited. Smith v. McKee, 598 F.3d 374, 382 (7th Cir. 2010). In any event, petitioner fails to explain what the jury was deprived of seeing and how that could have made any difference to the outcome of the case.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated, reasonable jurists would not debate the decision that the petition should be denied because petitioner has failed show that his constitutional rights were violated during the state proceedings. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

1. John Jacques's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED for his failure to show that he is in custody in violation of federal law.

2. Petitioner is DENIED a certificate of appealability. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 28th day of February, 2012.

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