IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ERIC JAMES HENDRICKSON,

Petitioner, OPINION AND ORDER

v. 12-cv-354-bbc

DEBORAH McCULLOCH, Director,
Sand Ridge Secure Treatment Center,

Respondent.

- -

Petitioner Eric James Hendrickson is currently confined at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin, as a "sexually violent person" under Wis. Stat. ch 980. He seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge the ruling by the Circuit Court for Marathon County, denying his petition for discharge from confinement under Wis. Stat. § 980.09. Petitioner contends that his continued confinement is unlawful and in violation of his constitutional right to due process because the evidence presented during his discharge proceeding was insufficient to prove that he was still a sexually violent person as defined by Wis. Stat. § 980.01(7).

Documents in the record show that petitioner raised a similar argument on direct appeal in the state courts. In affirming the circuit court's decision that petitioner's continued confinement was justified, the Wisconsin Court of Appeals concluded that the evidence was sufficient to satisfy the statutory criteria found in Wis. Stat. ch. 980 and that

petitioner's challenge to the sufficiency of the evidence was foreclosed by state precedent. In re Commitment of Hendrickson, 2011 WI App 58, 332 Wis. 2d 806, 798 N.W.2d 320 (Wis. App. March 10, 2011) (unpublished). Petitioner filed this federal habeas corpus petition after the Wisconsin Supreme Court denied his request for further review.

From my review of the record, I conclude that the state court's decision was neither contrary to nor an unreasonable application of clearly established federal law. Therefore, I must deny the petition for a writ of habeas corpus.

The following facts are drawn from the pleadings and the state court record.

RECORD FACTS

A. Background

Petitioner was convicted of second-degree sexual assault, among other things, in Marathon County in case no. 1993CF203. Shortly before petitioner's release from prison, the state petitioned for civil commitment, alleging that petitioner was a "sexually violent person" as defined in Wis. Stat. ch. 980. Under the current version of Chapter 980, the state may subject to indefinite commitment "a person who has been convicted of a sexually violent offense . . . and who is dangerous because he or she suffers a mental disorder that makes it likely that the person will engage in acts of sexual violence." Wis. Stat. § 980.01(7).

A jury in Marathon County found that petitioner met the definition of a sexually violent person set out in Wis. Stat. § 980.01(7). The circuit court entered judgment on

February 11, 2002, committing petitioner to the Wisconsin Department of Health and Family Services "for control, care and treatment until such time as [he] is no longer a sexually violent person." Since that time, petitioner has been confined at either the Sand Ridge Secure Treatment Center or the Wisconsin Resource Center for treatment and evaluation on an annual basis to determine whether his continued confinement is warranted.

B. Petitioner's Motion for Discharge

In 2008, petitioner filed a motion in the state circuit court for discharge from confinement under Wis. Stat. § 980.09, arguing that he no longer met the criteria for commitment as a sexually violent person. A person seeking discharge from civil commitment under Chapter 980 must allege facts that would allow a court or jury to conclude that his condition has changed since the date of initial confinement so that he does not meet the criteria for commitment as a sexually violent person. Martin v. Bartow, 628 F.3d 871, 875 (7th Cir. 2010) (citing Wis. Stat. § 980.09(1); In re Commitment of Kruse, 2006 WI App 179, 296 Wis. 2d 130, 150, 722 N.W.2d 742, 752 (2006)). If the petitioner meets his pleading burden, the trial court will hold a hearing to determine whether a jury could conclude that the petitioner is no longer a sexually violent person. Martin, 628 F.3d at 875 (citing Wis. Stat. § 980.09(2)). The burden then shifts to the state to demonstrate by clear and convincing evidence that the petitioner's continued confinement remains justified. Id. (citing Wis. Stat. § 980.09(3)).

The Circuit Court for Marathon County conducted a bench trial on the petition in

July 2009. To meet its burden, the state had to prove by clear and convincing evidence the following elements: (1) petitioner had been convicted of a sexually violent offense; (2) petitioner has a mental disorder; and (3) petitioner is dangerous to others because he has a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence. Wis. J.I.–Criminal 2506, at 1-2. Because petitioner conceded that he had been convicted of a sexually violent offense, the hearing focused on elements two and three.

For purposes of Chapter 980, a "mental disorder" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. 980.01(2). The pattern jury instructions relevant to the discharge of sexually violent persons under Chapter 980, define mental disorder as follows:

> "Mental disorder" as used here, means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior.

Wis. J.I.–Criminal 2506, at 1 (footnotes omitted). According to the instructions, in determining whether a particular person suffers from the requisite mental disorder, the finder of fact "[is] not bound by medical opinions given by witnesses, or labels or definitions used by witnesses, relating to what is or is not a mental disorder." Id. at 2.

At petitioner's bench trial, the state presented testimony from Lloyd Sinclair, the associate treatment director at the Sand Ridge Secure Treatment Center. Sinclair testified that petitioner's test results demonstrated "elevated levels of psychopathic traits." He noted that petitioner's treatment had yielded "mixed" results. Petitioner performed "relatively well

at some times and in some tasks, and quite poorly at other times with some tasks." Of particular concern to Sinclair was the discovery that petitioner had managed to obtain and use marijuana while at Sand Ridge on at least three occasions, the latest of which was in December 2008. Sinclair considered this "extraordinarily serious because of [petitioner's] drug abuse history, and the association of drug use with his criminal behavior, including his violent sexual behavior."

Sinclair testified that, in addition to behavioral issues, petitioner was resistant to treatment efforts because he believed that his commitment was "unfair." Petitioner's lack of motivation resulted in his placement in a remedial program at the Wisconsin Resource Center in December 2008 (where he was housed at the time of the discharge hearing in July 2009). After summarizing petitioner's evaluations and record of behavioral shortcomings at the Sand Ridge facility, Sinclair concluded that petitioner had not made "significant progress in treatment" as defined in Wis. Stat. 980.01(8), and was not amenable to discharge or supervised release.

In addition to the information provided by Sinclair, the state presented expert testimony from Richard Elwood, who is employed as a clinical psychologist by the Wisconsin Department of Health Services in the evaluation unit of the Sand Ridge Secure Treatment Center. Dr. Elwood had evaluated petitioner several times at Sand Ridge. He testified that, in addition to a diagnosis of substance abuse, petitioner suffered from two qualifying mental disorders that fit within the "narrow criteria of Chapter 980." The first mental disorder he diagnosed was exhibitionism, meaning that petitioner "exhibits or exposes himself to

unsuspecting strangers." The second was antisocial personality disorder, which entails "a persistent pattern of behavior from an early age of violating rules and the rights of others."

Dr. Elwood testified that, considered separately or in combination, petitioner's exhibitionism and antisocial personality order affected his "emotional or volitional capacity" and predisposed him to commit sexually violent acts. Dr. Elwood "presum[ed]" that these mental disorders caused petitioner serious difficulty in controlling his behavior. Trial trans., July 7, 2009, at 61-62. Elwood explained that he was "presuming" rather than determining whether the mental disorders caused "serious difficulty" because Chapter 980 did not contain an explicit definition of a the term serious difficulty. Id. at 61. When pressed on cross-examination, Elwood explained that he was unable to state with scientific certainty that petitioner had "serious" difficulty controlling his behavior because there were no clear scientific standards about what that meant:

> A. I am saying that I do not have a scientific standard by way to measure serious difficulty controlling behavior, and neither the courts nor the [Diagnostic and Statistical Manual of Mental Disorders] have given me what that criteria will be. In the absence of criteria, I don't know how to say whether any individual meets it.
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> Q. So in the absence of a standardized criteria provided by someone in a position that you wold recognize as being authoritative, you are unable to say to a reasonable degree of psychological certainty that [petitioner's] mental disorder causes him serious difficulty in controlling his behavior?
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> A. I would say I could not answer that question in any case.

Id. at 95. Nevertheless, he concluded that petitioner's mental disorders made it "more likely than not [that he would commit another sexually violent act] if he were to be released and

given the opportunity." Id. at 82.

Petitioner presented expert testimony from psychologist Luis Rosell, who also diagnosed exhibitionism and antisocial personality disorder. However, Dr. Rosell testified that he did not believe petitioner's mental disorders "cause[d] him serious difficulty in controlling his behavior." Rosell did not believe that petitioner's mental disorders predisposed him to commit sexually violent acts and he concluded that petitioner was not suffering from a mental disorder as defined in Chapter 980 and that it was "less likely than not" that he would commit an act of sexual violence if released. Petitioner presented similar expert testimony from psychologist Diane Lytton, who testified to her opinion that petitioner's mental disorders did not meet the definition found in Chapter 980 because she was aware of no evidence that he had serious difficulty in controlling his sexual behavior.

C. The Circuit Court Decision

After considering all of the testimony and post-trial briefing from the parties, the circuit court denied the petition for discharge on October 30, 2009. Before doing so, the court announced a series of findings in open court on October 22, 2009. It found that petitioner had a conviction for second-degree sexual assault, which is a sexually violent offense and that petitioner had committed that offense while on work release from jail. It noted that, in addition to another conviction for false imprisonment, petitioner had a record of committing lewd and lascivious acts by exposing himself to women in a stairwell at a mall, although these charges had been dismissed when petitioner pleaded guilty in his sexual

assault case.

The court found that petitioner suffered from mental disorders of exhibitionism and antisocial personality disorder. It credited the testimony of Dr. Elwood that petitioner had a mental disorder "that affects his volitional and emotional capacity, and which also predisposes him to engage in acts of sexual violence." In addition, the circuit court found that petitioner was at a high risk to reoffend because his conduct for exhibitionism was accompanied by a "hands-on" offense, which made petitioner atypical in relation to other offenders. The court found that petitioner had failed to make significant progress in treatment and it was troubled by petitioner's repeated use of marijuana at Sand Ridge, which is a controlled setting. This repeated violation of the rules in the face of the certain consequences signaled an inability to control his behavior. The court concluded that it was "much too dangerous at this point to allow him out" and that petitioner continued to meet the criteria for civil commitment as a sexually violent person under Chapter 980. It denied the petition for discharge.

D. Petitioner's Direct Appeal

On direct appeal, petitioner argued that the evidence was insufficient to support his continued confinement because the state had not met its burden of providing that he is still a sexually violent person. In particular, petitioner argued that the evidence was insufficient because none of the testimony showed that he had serious difficulty controlling his behavior or that he was different from the typical criminal recidivist. In the absence of such proof,

he argued, the evidence was insufficient to justify his continued confinement under Kansas v. Hendricks, 521 U.S. 346 (1997), and Kansas v. Crane, 534 U.S. 407 (2002).

In Hendricks, the United States Supreme Court held that the criteria for confinement found in the Kansas Sexually Violent Predator Act satisfied substantive due process requirements because the statute required a finding of dangerousness to one's self or others and "link[ed] that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." 521 U.S. at 358. Five years later in Crane, the Supreme Court vacated a decision by the Kansas Supreme Court, which had held that the Kansas statute on sexually violent predators was unconstitutional because it did not require a finding that the individual could not control his dangerous behavior. The Court found that the Kansas statute is satisfied if there is proof that the sexual offender has "serious difficulty in controlling behavior," explaining that such a showing was necessary to "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Crane, 534 U.S. at 413 (citing Hendricks, 521 U.S. at 357-58).

The sexually violent predator statute in Kansas is similar, but not identical, to Wis. Stat. ch. 980. Petitioner argued, nevertheless, that the holdings in Crane and Hendricks required the state to produce direct evidence specifically proving the element of serious difficulty in controlling behavior in order to satisfy this distinguishing factor.

The Wisconsin Court of Appeals rejected petitioner's argument and affirmed the

circuit court's decision. In re Commitment of Hendrickson, 2011 WI App 58, 332 Wis. 2d 806, 798 N.W.2d 320 (unpublished). In doing so, the court of appeals observed that the Wisconsin Supreme Court had held that additional proof of the sort proposed by petitioner (that a person has a serious difficulty in controlling his behavior) was not required to satisfy Chapter 980. Id. at ¶ 9. In State v. Laxton, 2002 WI 82, 254 Wis. 2d 185, ¶ 2, 647 N.W.2d 784, the Wisconsin Supreme Court held that Chapter 980 was constitutional and that civil commitment does not require direct evidence or a separate finding that the individual's mental disorder involves serious difficulty in controlling behavior as outlined in Crane:

> . . . [W]e conclude that such a civil commitment does not require a separate finding that the individual's mental disorder involves serious difficulty for such person to control his or her behavior. The requisite proof of lack of control is established when the nexus between such person's mental disorder and dangerousness is established. Specifically, we conclude that evidence showing that a person's mental disorder predisposes such individual to engage in acts of sexual violence, and evidence establishing a substantial probability that such person will again commit such acts, necessarily and implicitly includes proof that such person's mental disorder involves serious difficulty in controlling his or her behavior.

Laxton, 2002 WI 82, 254 Wis. 2d 185, ¶ 2, 647 N.W.2d 784. In that respect, the Wisconsin Supreme Court concluded that evidence of a predisposition to engage in sexual violence, coupled with a substantial probability to commit such acts in the future, was adequate to distinguish a person from "the dangerous but typical recidivist," in compliance with the United States Supreme Court's decision in Crane. Id. Finding that petitioner's arguments were foreclosed by Laxton, the Wisconsin Court of Appeals concluded that the evidence was sufficient to support his continued confinement because the state statutory

scheme adequately addressed the concerns outlined in Crane and Hendricks. Hendrickson, 2011 WI App 58, ¶¶ 14-16, 332 Wis. 2d 806, 798 N.W.2d 320.

Petitioner filed a petition for review in the Wisconsin Supreme Court, which denied his petition on May 24, 2011. Petitioner filed this petition for a writ of habeas corpus on May 15, 2012, raising arguments similar to those he presented on direct appeal regarding the sufficiency of the evidence.

OPINION

Review of petitioner's federal habeas corpus petition is governed by the terms of the Antiterrorism and Effective Death Penalty Act, codified at 28 U.S.C. § 2254(d), which "tightly constrains the availability of the writ." Winston v. Boatwright, 649 F.3d 618, 625 (7th Cir. 2011) (citing Stock v. Rednour, 621 F.3d 644, 649 (7th Cir. 2010)). If a petitioner's claims have been adjudicated on the merits in state court, a federal habeas corpus court may grant relief only if the state court's adjudication of the claims "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." 28 U.S.C. § 2254(d)(1). Alternatively, relief is available if the state court's adjudication 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)(2).

A state court decision is contrary to clearly established precedent if the state court

applies a rule that contradicts the governing law set forth by the Supreme Court. Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court decision also will be contrary to clearly established precedent if the state court is addressing a set of facts materially indistinguishable from those in a decision of the Supreme Court and arrives at a different result. Id. at 406. In this context, "clearly established" law refers to "the holdings, as opposed to the dicta," of the Supreme Court's decisions as of the time of the relevant state court decision. Carey v. Musladin, 549 U.S. 70, 74 (2006) (citing Williams, 529 U.S. at 412); see also Howes v. Fields, — U.S. —, 132 S. Ct. 1181 (2012).

A federal court may grant relief under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case." Bell v. Cone, 535 U.S. 685, 694 (2002). The focus of the reasonableness inquiry is on whether the state court's application of clearly established federal law is "objectively unreasonable," not whether the court applied clearly established federal law correctly. Id.

The Supreme Court has cautioned that, in conducting federal habeas review, state court decisions must be treated with "deference and latitude." Harrington v. Richter, — U.S. —, 131 S. Ct. 770, 787 (2011); Renico v. Lett, 559 U.S. —, 130 S. Ct. 1855, 1862 (2010) (The AEDPA "imposes a 'highly deferential standard for evaluating state-court rulings, . . . and 'demands that state-court decisions be given the benefit of the doubt.") (citations omitted). The AEDPA standard is "difficult to meet" because it was meant to limit relitigation of claims already rejected in state proceedings and to preserve the extraordinary

nature of federal habeas review as "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Richter, 131 S. Ct. at 786 (quoting Jackson v. Virginia, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring)).

A. Petitioner's Claims

Petitioner argues that the evidence was insufficient to show that he suffered from a mental disorder and that his continued confinement violates due process, because the state did not prove that he had serious difficulty controlling his behavior. In deciding whether a habeas corpus petition merits relief, a reviewing court looks to the "last reasoned state-court opinion" to address the petitioner's claims. Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991); Jefferson v. Welborn, 222 F.3d 286, 288 (7th Cir. 2000). The last state court to consider the petitioner's insufficient evidence claim was the Wisconsin Court of Appeals, which affirmed the circuit court's decision to deny his petition for discharge from confinement.

Petitioner maintains that the state court's decision to deny his petition for discharge is contrary to and an unreasonable application of federal law governing the meaning of "mental disorder" as determined by the United States Supreme Court in Crane and Hendricks. Petitioner raises the separate argument that the evidence was insufficient under Jackson v. Virginia.

1. Sufficiency of the Evidence (Part One)

Petitioner contends that the state court's decision is contrary to and an unreasonable application of the holdings in Crane and Hendricks because the state failed to present direct proof that he had a serious difficulty controlling his behavior, which it was required to do in order to establish that he had a "mental disorder" as defined by Chapter 980. Petitioner points to the testimony from the state's only expert witness, Dr. Elwood, and argues that it was insufficient to meet the burden of proof regarding this element.

Dr. Elwood testified that diagnosing a mental disorder and finding a risk of reoffense "essentially presumes a serious difficulty controlling behavior," but he declined to be more specific. He did not deny that serious difficulty in controlling behavior was something that the trial court should consider. In the absence of definitive testimony from Dr. Elwood, petitioner maintains that he was entitled to prevail as a matter of law because the evidence was insufficient to establish a mental disorder or support his continued confinement under Chapter 980. The circuit court rejected petitioner's argument and found that the state had met its burden.

The Wisconsin Court of Appeals also rejected petitioner's argument that the evidence was insufficient to establish a mental disorder under Chapter 980. As the Wisconsin Court of Appeals noted, petitioner's argument (that the state was required to present direct evidence of a serious difficulty controlling behavior as a separate element) was foreclosed by state precedent in Laxton. Hendrickson, 2011 WI App 58, ¶¶ 14-15, 332 Wis. 2d 806, 798 N.W.2d 320. As outlined above, the Wisconsin Supreme Court held in Laxton that Chapter 980 was constitutional and satisfied Crane and Hendricks because it required the state to

prove a nexus between the individual's mental disorder and his dangerousness. Laxton, 2002 WI 82, ¶ 22, 254 Wis. 2d 185, 647 N.W.2d 784. In other words, a finding of serious difficulty in controlling behavior is implicit in the conclusion that the individual meets the definition of a sexually violent offender under Chapter 980. Id.

Petitioner argues that the Wisconsin Court of Appeals' decision to follow the precedent found in Laxton is contrary to Crane and Hendricks because those decisions required the state to present evidence of serious difficulty in controlling behavior. I note that the Wisconsin Court of Appeals identified both Crane and Hendricks and acknowledged that the Supreme Court required proof of serious difficulty in controlling behavior. Hendrickson, 2011 WI App 58, ¶¶ 10-15, 332 Wis. 2d 806, 798 N.W.2d 320. Petitioner does not demonstrate, however, that the Wisconsin Court of Appeals reached a conclusion inconsistent with the holdings in Crane and Hendricks when it affirmed the circuit court's decision that continued confinement was warranted under Chapter 980. Because the Court of Appeals summarized the legal rule announced in Crane and Hendricks correctly, the state court's adjudication was not "contrary to" Supreme Court precedent. Williams, 529 U.S. at 405-06.

Petitioner makes the additional argument that the Wisconsin Court of Appeals unreasonably applied the rules in Crane and Hendricks in deciding that he had a mental disorder as defined under Chapter 980. However, as explained above, the Wisconsin Court of Appeals rejected petitioner's argument that Crane and Hendricks demanded additional proof of serious difficulty in controlling behavior and found that such an argument was

precluded by the Wisconsin Supreme Court's decision in Laxton. The Court of Appeals for the Seventh Circuit has held that Laxton was not an objectively unreasonable application of Crane or Hendricks. Laxton v. Bartow, 421 F.3d 565, 571-72 (7th Cir. 2005). In reaching that conclusion, the Seventh Circuit observed that neither Hendricks nor Crane set out a bright line definition for a "lack-of-control element." Id. at 572. Because neither Hendricks nor Crane clearly establishes that there must be a specific finding made on whether a petitioner has serious difficulty in controlling behavior, it was not objectively unreasonable for the Wisconsin Court of Appeals to conclude that a finding of serious difficulty in controlling behavior was implicit in the determination that he met the statutory definition of a sexually violent person under Chapter 980. Id.

Petitioner argues at length that his case is different from Laxton and that his claim for relief is not governed by that case. The Wisconsin Court Appeals disagreed, finding that petitioner's argument "amounted to a challenge to the underpinning of Laxton's central holding: that evidence supplying sufficient evidence under the pattern jury instruction 'necessarily and implicitly includes proof that such person's mental disorder involves serious difficulty in controlling his or her behavior.'" Hendrickson, 2011 WI App 58, ¶ 9, 332 Wis. 2d 806, 798 N.W.2d 320 (quoting Laxton, 254 Wis. 2d 185, ¶ 2, 647 N.W.2d 784). This is fatal to petitioner's argument.

To the extent that the Wisconsin Court of Appeals' adjudication rests on an interpretation of state law, its decision is not subject to review in a federal habeas corpus proceeding. McCloud v. Deppisch, 409 F.3d 869, 874-75 (7th Cir. 2005) (citing Estelle v.

McGuire, 502 U.S. 62, 67-68 (1991)). It is well established that "[s]tate courts are the ultimate expositors of their own states' laws and federal courts entertaining petitions for writs of habeas corpus are bound by the construction placed on a state's criminal statutes by the courts of that state except in extreme circumstances . . . ." McCloud, 409 F.3d at 875 (quoting Lechner v. Frank, 341 F.3d 635, 641 (7th Cir. 2003) (citation omitted)). As respondent points out, Laxton remains the law in Wisconsin. In re Commitment of Phillips, 2012 WI App 62, 341 Wis. 2d 489, 815 N.W.2d 406 (unpublished). Petitioner does not show otherwise or demonstrate that his case fits within an exception to the limits on federal habeas corpus review. Lechner, 341 F.3d at 642 ("Violations of state laws are cognizable only if they resulted in fundamental unfairness and consequently violate a petitioner's constitutional rights."). For these reasons, he has not established that the Wisconsin Court of Appeals unreasonably applied clearly established federal law and he is not entitled to relief on his claim under Crane and Hendricks.

2. Sufficiency of the Evidence (Part Two)

Petitioner argues that the evidence was legally insufficient under Jackson v. Virginia, 443 U.S. 307 (1979), and could not support his continued confinement, because the state failed to affirmatively prove that he suffered from a mental disorder as that term is defined in of Chapter 980. Noting that petitioner did not challenge the sufficiency of the evidence under Jackson in state court, the respondent maintains that this claim is barred by the doctrine of procedural default. Petitioner does not deny that he failed to invoke Jackson v.

Virginia or a state court decision based on Jackson in his appellate brief, but argues that it was enough to argue that the evidence failed to satisfy due process in his case. Assuming that this argument was sufficient to exhaust a claim under Jackson, respondent contends, in the alternative, that petitioner cannot prevail because the evidence was more than sufficient to support the state court's decision and the Wisconsin Court of Appeals did not unreasonably conclude otherwise. I agree for reasons explained briefly below.

Jackson addressed the amount of evidentiary support necessary to sustain a criminal conviction. In the context of a criminal prosecution, the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The evidence is sufficient to support a criminal conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. Because the commitment proceeding in petitioner's case was a civil matter, the burden of proof differs. In a civil commitment proceeding, the standard of proof must be higher than a preponderance of the evidence, but may be lower than beyond a reasonable doubt. Addington v. Texas, 441 U.S. 418, 430-33 (1979). In this instance, the state had the burden to satisfy all of the elements necessary to justify civil commitment by clear and convincing evidence. Wis. Stat. § 980.09(3).

In determining whether a commitment was based on constitutionally sufficient evidence, it is necessary to look at the substantive elements as defined by state law. Jackson,

443 U.S. at 324 & n.16. As previously stated, Chapter 980 authorizes indefinite civil commitment of "a person who has been convicted of a sexually violent offense . . . and who is dangerous because he or she suffers a mental disorder that makes it likely that the person will engage in acts of sexual violence." Wis. Stat. § 980.01(7). A "mental disorder" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Wis. Stat. 980.01(2).

It is undisputed that petitioner was convicted of second-degree sexual assault, which is a sexually violent offense, and that he was accused of other instances of lewd and lascivious conduct by exposing himself to strangers. The experts agreed that petitioner suffered from two mental disorders: exhibitionism and antisocial personality disorder. Dr. Elwood testified that both mental disorders affected his "emotional or volitional capacity" and presumed that those disorders caused petitioner "serious difficulty in controlling his behavior." Trial trans., July 7, 2009, at 61-62. Dr. Elwood said that both disorders predisposed petitioner to commit sexually violent acts, along with test scores placing him in the "high risk range of psychopathy," making it more likely than not that he would reoffend in the future. Id. at 82, 85.

The circuit court found Dr. Elwood's testimony credible and "more convincing" than that of the defense experts. The court also found it compelling that petitioner had a "hands on" offense, which made him "atypical for [an] exhibitionist." It observed that petitioner had not made significant progress in treatment, resulting in his placement in a remedial program. In addition, the circuit court found troubling the evidence of petitioner's use of

marijuana while in a controlled setting in view of his history of polysubstance abuse. The court concluded that petitioner was "too dangerous" to discharge from confinement or place on supervised release. Accordingly, it found that confinement was warranted under Chapter 980.

Fact findings and credibility determinations made by a state court are presumed correct under 28 U.S.C. § 2254(e)(1). That presumption may be set aside on federal habeas review only if the petitioner demonstrates with "clear and convincing evidence" that the state court's determinations were erroneous. Hinton v. Uchtman, 395 F.3d 810, 819 (7th Cir. 2005) (citations omitted). Petitioner has not challenged any of the state court's fact findings here. He simply disagrees with the legal determination that the evidence presented was sufficient to show that he suffered from a mental disorder. A federal habeas corpus court "may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." Cavazos v. Smith, — U.S. —, 132 S. Ct. 2, 4 (2011). Rather, "[it] may do so only if the state court decision was 'objectively unreasonable.'" Id. (quoting Renico, 559 U.S. at —, 130 S. Ct. at 1862 (internal quotation marks omitted)). Petitioner has not demonstrated that the state court's conclusion was objectively unreasonable.

Petitioner has not shown that the evidence was insufficient to meet the legal definition of a mental disorder found in Wis. Stat. 980.01(7). Viewing the evidence in the light most favorable to the state, I conclude that a rational trier of fact could have found the essential elements for civil commitment under Chapter 980. Accordingly, I conclude that

the state court's decision was not contrary to or an unreasonable application of Jackson and that petitioner is not entitled to relief on his second claim.

In summary, petitioner has not established that the state court issued a decision that was contrary to or an unreasonable application of clearly established federal law when it denied petitioner's request for discharge from confinement. Because petitioner has not shown that his claims merit relief under the deferential standard of review found in 28 U.S.C. § 2254(d), his habeas corpus petition must be denied.

B. Certificate of Appealability

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 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 above, reasonable jurists would not debate whether the decision of the Wisconsin Court of Appeals was objectively reasonable or contrary to clearly

established Supreme Court precedent. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

1. Petitioner Eric James Hendrickson's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

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

Entered this 3d day of December, 2012.

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