

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

DONALD NEWELL,

ORDER

Petitioner,

12-cv-432-bbc

v.

JUDY P. SMITH, Warden,
Oshkosh Correctional Institution,

Respondent.

Petitioner Donald Newell seeks habeas corpus relief under 28 U.S.C. § 2254 from his state court conviction for second-degree sexual assault in Chippewa County case number 06CF122. On July 11, 2012, the court issued an order directing petitioner to show cause before August 24, 2012 why several of his claims for relief (grounds 1-2 and 4-24) should not be dismissed as procedurally defaulted. On July 30, 2012, petitioner filed a motion for discovery of evidence that will support his claims. Dkt. #7. The motion will be denied for a number of reasons.

First, the request is premature because the court has not made a final decision on the claims that petitioner can pursue in his petition. After it makes that decision, the respondent will be given an opportunity to file her response to the petition.

Second, petitioner has not shown that he is entitled to any discovery. A habeas corpus petitioner “is not entitled to discovery as a matter of ordinary course.” Bracy v. Gramley, 520

U.S. 899, 904 (1997). Rather, discovery can be pursued only “if and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.” Id. (quoting Rule 6(a), Rules Governing Section 2254 Cases). Petitioner has made no showing that the evidence he is asking for relates to a claim on which he will be allowed to proceed, that is, a claim that is not barred by petitioner’s procedural default.

Third, petitioner has not shown that the requested evidence is evidence that was introduced at his state court proceedings. “[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” Cullen v. Pinholster, — U.S. —, 131 S. Ct. 1388, 1398 (2011). Petitioner is not entitled to discovery related to evidence that was not used in the state court litigation of his claims.

ORDER

IT IS ORDERED that the motion for discovery filed by petitioner Donald A. Newell, dkt. #7, is DENIED. Petitioner may file a new request after respondent has filed her response to the claims on which petitioner is allowed to proceed. He should limit any request for discovery to matters relating to the claims on which he is allowed to proceed.

Entered this 1st day of August, 2012.

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