

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

DANIEL LANDIS,

Petitioner,

v.

REED RICHARDSON,

Respondent.

OPINION AND ORDER

14-cv-720-bbc

Petitioner Daniel L. Landis has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in which he challenges his July 14, 2006 convictions in the Circuit Court for Vernon County for possession of burglarious tools, carrying a concealed weapon, intentionally contributing to the delinquency of a minor, intentionally concealing stolen property, robbery with threat of force and attempted burglary while armed. He has paid the \$5 fee, so his petition is ready for screening in accordance with Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner did not file this petition until more than eight years after he had been convicted, so the initial question is whether the petition is timely under § 2244, which governs the timeliness of actions filed under § 2254. Section § 2244(1)(d)(A) requires applicants for writs of habeas corpus to file their petitions within one year from the date on which the judgment in their case “became final by the conclusion of direct review or the

expiration of the time for seeking such review.” The statute provides three exceptions to this finality rule, none of which are applicable to this petition. The statute also provides that a properly filed application for state post conviction or other collateral review is not counted toward any period of limitation. § 2244(d)(2).

Petitioner alleges that after he was sentenced in state court, he filed a timely appeal to the state court of appeals on August 2, 2006; the appeals court issued its final order in his case on October 20, 2011; and he filed a timely appeal to the state supreme court, which was denied on February 23, 2012. He then had 90 days, or until May 25, 2012, in which to petition the United States Supreme Court to hear his case. He did not file such an petition, but the time is still excluded as “time for seeking such review” under § 2244(d)(1)(A).

Once the time for direct appeal had expired, defendant had one year in which to file a post conviction motion in this court under § 2254, as he acknowledges in his petition, dkt. #1 at 22. Instead of doing so, however, on March 5, 2013, he began new proceedings in the Wisconsin state courts to overturn his conviction, asserting that he had newly discovered evidence. These proceedings came to an end when the state supreme court denied his petition for review on August 4, 2014. Under § 2244(d)(2), the time that elapsed between March 5, 2013 and August 4, 2014 does not count against the year in which petitioner could file for federal habeas relief because he was pursuing post conviction remedies in state court. However, the 282 days from May 25, 2012, when his time for petitioning in the supreme court expired, until March 5, 2013, when he filed his post conviction motion in state court, and the 77 days from August 4, 2014, the end of those proceedings, until October 20, 2014,

when he filed his petition in this court, do count because there were no state proceedings during these two periods that would have tolled the limitations period. Lawrence v. Florida, 549 U.S. 327, 332 (2007) (under § 2244(d)(2) limitations period is tolled from filing of petition for state post conviction relief until state supreme court issues mandate affirming denial of petition).

At this stage of the proceedings, it appears that the petition for habeas corpus relief is timely. If the state thinks otherwise, it is free to raise the issue in its response to the petition. It bears the burden of proving that the statutory limitations period has expired. Ray v. Clements, 700 F.3d 993, 1007 (7th Cir. 2012).

Petitioner contends that his state court conviction was unconstitutional in a number of respects: (1) he was denied his right to due process by the state's failure to meet its burden of proof on every element of each of the charged crimes; (2) the state courts acted unconstitutionally when they denied his post conviction motion for an evidentiary hearing and new trial on newly discovered evidence, having to do with the issue of his identity; (3) the circuit court failed unconstitutionally to inform him of the nature of the action against him, that is, whether the prosecution was being brought under common law or admiralty. (He concedes in his petition that the court told him he was not proceeding in a court of admiralty. Dkt. #1 at 13.) Petitioner admits that he did not raise the second contention involving newly discovered evidence on his direct appeal in state court but says that he raised it in his motion for post conviction relief, so the state courts have had an opportunity to consider it.

After filing his initial petition, petitioner filed a motion to amend his petition, dkt. #2, seeking leave to pursue a fourth contention. Citing Milanovich v. United States, 365 U.S. 551, 554-55 (1961), he argues that the state court violated his right not to be put twice in jeopardy when it charged him with both robbery and concealing or receiving stolen property. He admits that he did not raise the issue in the state supreme court after pursuing his post conviction motion in the state trial court and the state court of appeals and thus did not fully exhaust his state court remedies, but he argues that he should be allowed to proceed on the claim in this court, saying that a miscarriage of justice would result if he is not allowed to go forward with this claim.

At this stage, petitioner's claims are weak at best and the jurisdictional claim is clearly without merit, but I cannot make the same determination about the remaining three. Therefore, I will direct the state to respond to the claims that (1) petitioner was denied his right to due process by the state's failure to meet its burden of proof on every element of each of the charged crimes; (2) the state courts acted unconstitutionally when they denied his post conviction motion for an evidentiary hearing and new trial on newly discovered evidence having to do with the issue of his identity; and (3) the state court violated his right not to be put twice in jeopardy when it charged him with both robbery and concealing or receiving stolen property. If the state believes that petitioner has not exhausted his state court remedies on any or all of these claims, it is free to argue those issues.

ORDER

IT IS ORDERED that

1. Petitioner Daniel L. Landis's motion to amend his petition, dkt. #2, to add a claim that the state court violated his right not to be put twice in jeopardy when it charged him with both robbery and concealing or receiving stolen property is GRANTED.

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 respondent Reed Richardson.

2. Within 30 days of the date of service of this order, respondent must file an answer to the petition. 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.

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. 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.

5. For the time being, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

Entered this 18th day of November, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge