

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

MARK J. MEY,

Petitioner,

v.

REED RICHARDSON,

Respondent.

ORDER

15-cv-740-jdp

Petitioner Mark Mey is a Wisconsin prisoner currently housed at the Stanley Correctional Institution. Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge a 2006 conviction in the Wisconsin Circuit Court for Dane County. Petitioner has paid the \$5 filing fee. The next step is for the court to conduct a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, I must dismiss the petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” In screening a pro se litigant’s petition, I must read the allegations of the petition generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam). After reviewing the petition with this principle in mind, I conclude that the state should be served with the petition.

In 2005, the state charged petitioner with six counts of criminal conduct: three counts of being party to the crime of attempted first-degree intentional homicide and three counts of being party to the crime of endangering safety by use of a firearm. These charges arose out of petitioner’s involvement in a shooting. Petitioner and three other co-defendants were accused of jumping from vehicles in the street, firing several shots up a driveway toward a group of people near the garage of a house, and then fleeing the scene.

The case proceeded to a jury trial. During the trial, prosecutors solicited testimony about gang membership, including testimony that petitioner and his co-defendants were members of a gang. These remarks were in apparent tension with a pretrial evidentiary ruling that the state not introduce gang evidence except to provide context for the alleged crime. Attorneys for petitioner's co-defendants also solicited testimony about gang affiliations from different witnesses, as did petitioner's counsel himself.

At the close of the trial, the court instructed the jury on the elements of attempted first-degree intentional homicide. The court gave this instruction three times: once for each count. But during the second and third instructions, the court told the jury that “[t]o this charge, each of the defendants before you has entered a plea of *guilty*, which means that the State must prove every element of the offense charged beyond a reasonable doubt.” Dkt. 1-10, at 2 (emphasis added by the Wisconsin Court of Appeals). This was a mistake: the defendants had actually pleaded *not guilty*.

The jury found petitioner and his co-defendants guilty on all six counts. The Dane County court sentenced petitioner to a total of 24 years of initial confinement and 9 years of extended supervision. Petitioner appealed his conviction and sentence to the Wisconsin Court of Appeals, which affirmed. The Wisconsin Supreme Court denied petitioner's petition for review.

Petitioner returned to the state trial court and filed a motion for postconviction relief. The Dane County court denied petitioner's motion in an oral ruling, without conducting an evidentiary hearing. The Wisconsin Court of Appeals eventually affirmed that denial after requiring the state to submit supplemental briefing on two issues. On November 15, 2015,

the Wisconsin Supreme Court denied petitioner's petition for review. Petitioner then applied to this court for a writ of habeas corpus.

Petitioner asserts the following grounds for habeas relief:

1. Ineffective assistance of trial counsel for failing to object to the state's use of gang evidence as contrary to the court's pretrial rulings;
2. Ineffective assistance of trial counsel for failing to object to petitioner's co-defendants' attorneys' use of gang evidence;
3. Ineffective assistance of trial counsel for presenting the jury with highly prejudicial gang evidence; and
4. Ineffective assistance of trial counsel for failing to object to the trial court's errors in delivering the jury instructions.

Petitioner alleges that he raised each of these grounds for habeas relief in his postconviction motion and in appealing the denial of that motion. Thus, it appears that petitioner has exhausted his state court remedies and that his petition is timely and not plainly without merit. I will direct service of the petition on respondent.

ORDER

IT IS ORDERED that:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, copies of the petition and this order are being sent today to the Attorney General for service on respondent.
2. **Answer deadline.** Within 60 days of the date of service of this order, respondent must file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.
3. **Motion to dismiss.** 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, then it may 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 may have 20 days following service of any dismissal motion within which to file and serve his

responsive brief and any supporting documents. The state may 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, then 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. **Briefing on the merits.** If respondent does not file a dispositive motion, then the parties must adhere to the following briefing schedule regarding the merits of petitioner's claims:
 - a. Petitioner must file a brief in support of his petition within 30 days after the respondent's answer is filed.
 - b. Respondent must file a brief in opposition within 30 days.
 - c. Once respondent files a brief in opposition, petitioner may have 20 days to file a reply if he wishes to do so.

Entered April 5, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge