

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

LEE A. KNOWLIN, JR.,

Petitioner,

ORDER

v.

03-C-0577-C

DANIEL BENIK, Warden, Stanley
Correctional Institution,

Respondent.

This is an application for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Before the court are two motions: 1) respondent's motion to dismiss the petition on the ground that it contains a mix of exhausted and unexhausted claims and 2) petitioner's motion for discovery. I am denying respondent's motion and staying decision on petitioner's motion.

Respondent contends that the petition contains a mix of exhausted and unexhausted claims and that therefore it must be dismissed under the rule of Rose v. Lundy, 455 U.S. 509, 522 (1982) (district court must dismiss habeas petitions containing both exhausted and unexhausted claims). Respondent argues that petitioner failed to include the following claims in his brief on appeal to the state appellate court: the prosecutor's discovery violations and failure to produce witnesses at trial violated petitioner's right to effective assistance of counsel (Ground Five of the petition); the trial court admitted a chair and a rag

into evidence at trial in violation of petitioner's right to due process (Ground Six); and the prosecutor relied on false testimony to prove that photographs of shoe prints on a chair seat were taken at the crime scene (Ground Eight). Respondent contends that petitioner may still present these claims to the state courts by filing a postconviction motion under Wis. Stat. § 974.06 if he has a sufficient reason for not raising the claims on direct appeal.

I am not persuaded that respondent's argument is correct. A review of petitioner's brief to the court of appeals shows that he raised all three of the claims in the context of arguing that the court should reverse his conviction in the interests of justice. Petitioner may not have framed his arguments clearly in constitutional terms before the state courts, but this bears on whether he may have procedurally defaulted his claims by failing to "fully and fairly" present them to the state courts, not whether he still has state court remedies available to him. See Chambers v. McCaughtry, 264 F.3d 732, 738 (7th Cir. 2001) (discussing fair presentment requirement of exhaustion doctrine). It is the latter with which the rule of Rose v. Lundy is concerned. It is clear in this case that no state procedure exists through which petitioner could present his recast claims to the state courts without running into the procedural bar of State v. Escalona-Naranjo, 185 Wis. 2d 168, 184-85, 517 N.W. 2d 157 (1994) (petitioner may not raise issues in postconviction motion under Wis. Stat. § 974.06 that were raised on direct appeal). Because petitioner has already given the state courts "an opportunity to pass" on all the claims raised in his federal petition, see Lundy, 455 U.S. at 518, his claims have been exhausted and respondent's motion must be denied.

Petitioner's motion for discovery relates to his unwavering contention that his conviction was unlawfully obtained by police deception and tampering of evidence. A § 2254 petitioner is allowed to invoke discovery, but 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." Habeas Corpus Rule 6(a); see also Bracy v. Gramley, 520 U.S. 899, 904 (1997). In order to meet the Rule 6(a) requirements, petitioner must "(1) make a colorable claim showing that the underlying facts, if proven, constitute a constitutional violation; and (2) show 'good cause' for the discovery." Henderson v. Walls, 296 F.3d 541, 553 (7th Cir. 2002) (citing Harris v. Nelson, 394 U.S. 286, 298-300 (1969)). It will be easier to decide whether petitioner has satisfied these requirements once this court has had the opportunity to review the transcripts from petitioner's trial and postconviction hearings. Accordingly, I am staying decision on petitioner's discovery motion until the record is complete and briefing has been completed on the merits of petitioner's claims.

ORDER

IT IS ORDERED that the motion of respondent to dismiss the petition as a mixed petition under Rose v. Lundy, 455 U.S. 509 (1982) is DENIED. Respondent should submit copies of transcripts from the relevant trial court proceedings and a substantive response to petitioner's claims within 30 days from the date of this order. Petitioner shall have 20 days following receipt of respondent's response within which to file and serve a reply.

Petitioner's motion for discovery is STAYED pending briefing on the merits of petitioner's claims.

Dated this 22nd day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge