

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

STEVEN J. BURGESS,

Petitioner,

v.

STEVE WATTERS, Director,
Sand Ridge Secure Treatment Facility,

Respondent.

OPINION AND ORDER

04-C-0544-C

In a report and recommendation entered on January 19, 2005, the United States Magistrate Judge recommended denial of the petition for a writ of habeas corpus filed by petitioner Steven J. Burgess pursuant to 28 U.S.C. § 2254. Petitioner has filed objections to the report and recommendation.

The magistrate judge's report and recommendation is a model of thoroughness and legal analysis that needs no additional gloss. Nevertheless, I will add just a few comments on the interesting legal questions that petitioner has raised.

Petitioner is serving an indefinite term of confinement at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin, after having been found a sexually violent person

under Wisconsin's sexually violent persons law, Wis. Stat. Ch. 980. Petitioner argues that because he is a member of a federally recognized Indian tribe and a legal resident of the tribe's federally recognized reservation land, it is a violation of Public Law 280 for the state to enforce a civil regulatory law such as the sexually violent persons law against him. He argues also that in enforcing the law against him, the state violated his right to due process by committing him without establishing that his risk of re-offending was the direct result of a mental disorder.

Petitioner has mounted a strong argument in support of his position that the state supreme court erred in its conclusion that the state could apply Chapter 980 to petitioner without violating the United States Supreme Court's decisions in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1986), and Bryan v. Itasca County, 426 U.S. 373 (1976). Unfortunately for him, he is raising his argument in the wrong vehicle and the wrong court. In deciding a petition for a writ of habeas corpus, this court can overturn a decision of a state court only if it can find that the state court's adjudication "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). As the magistrate judge explained, the question that petitioner raises is complex enough that reasonable judges could not say that the state supreme court's decision in his case is contrary to the holdings in Cabazon and Itasca County. In Cabazon, the Court

attempted to distinguish between the criminal/prohibitory laws that Public Law 280 states may enforce against Indians in Indian country and the civil/regulatory jurisdiction that the states may not enforce. The Court affirmed the court of appeals' decision that gambling was regulated rather than prohibited in California and thus fit within the civil/regulatory side of the divide, with the consequence that the state could not regulate it on Indian land. The Court noted that the dividing line is not clearly defined, id. at 210, and that the lower courts would have to examine any challenged regulation carefully to determine its actual character. Id. at 211.

In deciding petitioner's case, the state supreme court conceded that it had held that the involuntary commitment of an individual under Chapter 980 was a "civil" commitment rather than a criminal one. However, it noted that in Cabazon, the Supreme Court had said that the labels applied to particular regulations were not determinative. In re Commitment of Burgess, 2003 WI 71, ¶16, 262 Wis. 2d 354, 370, 665 N.W.2d 124, 132. For Public Law 280 purposes, the state supreme court classified Chapter 980's civil commitment procedure as criminal/prohibitory in light of the law's purpose of protecting the public from future acts of sexual violence. This classification was not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States."

Under § 2254, as amended by the Antiterrorism and Effective Death Penalty Act, the only way that someone in petitioner's position can challenge an adverse state court ruling

that he believes is contrary to Supreme Court precedent, but not obviously so, is to file a petition for a writ of certiorari. When reasonable jurists can debate whether a particular state court ruling is contrary to federal law as established by the Supreme Court, only the Supreme Court can make the final call.

As to petitioner's claim that he was denied due process protections by the state court's reliance on inappropriate kinds of evidence to determine that he was a risk for re-offending, it was not unreasonable for the state supreme court to conclude that the jury had sufficient evidence from which to find that petitioner was dangerous because he suffers from a mental disorder that makes it substantially probable that he will engage in acts of sexual violence.

ORDER

IT IS ORDERED that the magistrate judge's recommendation is ADOPTED and petitioner Steven J. Burgess's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.

Entered this 14th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge