

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

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DAVID C. MYERS,

Petitioner,

ORDER

v.

06-C-0158-C

JUDY SMITH, Warden,  
Oshkosh Correctional Institution,

Respondent.

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David Myers, an inmate at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, has filed an application for a writ of habeas corpus under 28 U.S.C. § 2254. Myers challenges his 1997 conviction in the Circuit Court for Dane County of three counts of sexual contact with a child. He contends that the court's sentence violated the principles announced in Blakely v. Washington, 542 U.S. 296 (2004), because it was based in part on facts relating to pending counts for which Myers had not yet been convicted.

This is petitioner's third habeas petition in this court in which he challenges his 1997 conviction and sentence. As Myers is aware, 28 U.S.C. § 2244(b)(3)(A) states:

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

The petition is successive even though the claims in it are based upon new Supreme Court law that was not available to petitioner at the time he filed his two previous petitions. It is

up to the Court of Appeals for the Seventh Circuit to determine whether the claim falls within an exception to the rules barring successive petitions. Accordingly, petitioner must first obtain authorization from that court before he can proceed in this court on his petition. I note, however, that the court of appeals is unlikely to allow the petition because the Supreme Court has not announced that the Blakely rule is retroactive. See 28 U.S.C. § 2244(b)(2)(A) (claim presented in successive petition may be allowed if claim relies on new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court).

ORDER

It is ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED for lack of jurisdiction.

Entered this 19<sup>th</sup> day of April, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge