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

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STANLEY E. MARTIN,

ORDER

Petitioner,

08-cv-518-bbc

v.

BYRAN BARTOW, Director,
Wisconsin Resource Center[1],

Respondent.

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Petitioner Stanley Martin, who is presently confined at the Wisconsin Resource Center in Winnebago, Wisconsin, has applied for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Dkt. 1. He is serving an indefinite term of confinement under Wisconsin's sexually violent person civil commitment provision, Chapter 980, pursuant to a final order entered by the Circuit Court for Milwaukee County on December 3, 1996. Because the petition appeared to be brought outside the one-year limitation period for habeas actions, this court gave petitioner the opportunity to present any additional facts that might show that the petition is timely. Dkt. 4 at 3-4 (finding petitioner's limitations period began running in November 2001 when 1996

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[1] In October 2008, after filing his petition, petitioner was transferred from the Sand Ridge Secure Treatment Center to the Wisconsin Resource Center. Dkt. 7. I have changed the caption to reflect petitioner's new custodian and will direct the clerk to do the same. *See* Rule 2 of the Rules Governing Section 2254 Cases (proper respondent is state officer having custody of prisoner).

confinement decision became final and statutory tolling no longer applied). Petitioner responded with a motion to amend the petition on October 7, 2008. Dkt. 5.

In his response to the court, petitioner asserts that the recent case of *Revels v. Sanders*, 519 F.3d 734 (8th Cir. 2008) acted as a trigger for a new one-year limitations period for habeas relief. He alleges that he did not file his federal habeas petition earlier because he did not have a constitutional right to challenge his continued (as opposed to initial) confinement until *Revels* was decided. Dkt. 5 at 3-4; *see also id.* at 737-40 (holding that petition timely because it challenged continued commitment decision and not conviction or initial commitment). Petitioner appears to be trying to avail himself of an alternative start date for his federal habeas limitations period under either subsection (C) (newly-recognized constitutional right) or (D) (newly-discovered facts) of § 2244(d)(1). Although it is unlikely that petitioner will prevail under either of these provisions, I will ask the state to respond to petitioner's argument that *Revels* triggered a later start date for his federal statute of limitations period. *See Lo v. Endicott*, 506 F.3d 572, 575 (7th Cir. 2007) (court decision establishing abstract proposition of law arguably helpful to petitioner's claim does not constitute factual predicate for that claim); *id.* at 575-76 (only court decision involving constitutional right recognized by Supreme Court and applied retroactively can restart limitations period).

Petitioner also seems to be alleging that his petition is timely because it challenges the state court's decision on his continued confinement, which became final on August 18, 2008, *see* dkt. 4 at 1. Although the claims in the petition relate to the initial confinement decision,

petitioner asserts that the constitutional errors made at the time of his initial commitment are still being used against him in his annual reevaluations. He also contends that under Wisconsin law, he may challenge the constitutionality of his initial confinement in periodic probable cause hearings. Dkt. 5 at 2 (citing Wis. Stat. § 980.09(2); *In re Commitment of Combs*, 295 Wis. 2d 457, 476, 720 N.W.2d 684, 693 (Ct. App. 2006)).

Although petitioner may petition the state for release at any time under § 980.09(2), the statute directs the state court to deny the petition unless it "alleges facts from which the court or jury may conclude the person's condition *has changed* since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person." *Id.* The Wisconsin Court of Appeals has interpreted § 980.09 to require "something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent." *In re Commitment of Kruse*, 296 Wis. 2d 130, 150, 722 N.W.2d 742, 752 (Ct. App. 2006); *see also Brown v. Watters*, No. 06-C-753, 2007 WL 3026845, *1 (E.D. Wis. Oct. 16, 2007) (citing same and finding that § 980.09 cannot be used to raise constitutional challenge that could have been raised at time of initial confinement). It does not appear from the petition that petitioner alleged any "new" facts in his § 980.09 challenge to his continued confinement. His claims appear to re-argue the basis of his initial confinement, which he had the opportunity to challenge on direct appeal. Instead of alleging that he should be released because he is no longer sexually violent, petitioner seems to be asserting that he should never have been found sexually violent

in the first place. If that is the case, I am surprised that the state courts allowed petitioner to raise his claims in his later § 980.09 petition, given he could have raised any such challenges in his direct appeal. *See Brown*, 2007 WL 3026845, *1 (noting same and that petitioner's claims may be procedurally defaulted).

Given the unusual and complex procedural issues involved in this case, the court would benefit from a response from the state. In addition to any other arguments that it may wish to raise, the state should address the following issues related to the timeliness of the petition:

1. The starting date of petitioner's federal habeas statute of limitations period;

2. Whether the claims raised in the petition challenge the initial 1996 confinement decision or the 2008 decision on continued confinement;

3. Whether in a § 980.09 petition, petitioner may challenge constitutional errors made at the time of his initial commitment that are still being used against him in his annual reevaluations; and

4. Whether petitioner's claims are barred by the doctrine of procedural default.

ORDER

IT IS ORDERED that:

1. The clerk of court is directed to change the caption to reflect that Byran Bartow, Director, Wisconsin Resource Center, is the respondent.

2. Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on Director Bartow.

3. The state shall file a response to the petition not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue and addressing the issues identified by the court.

If the state contends that petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such 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 at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed.

Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

4. Once the state has filed its answer or other response, 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 docket or consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

5. The federal mailbox rule applies to all submissions in this case.

Entered this 1st day of December, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge