

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

DONALD NEWELL,

ORDER

Petitioner,

10-cv-707-bbc

v.

JUDY SMITH, Warden,
Oshkosh Correctional Institution,

Respondent.

Donald Newell, Jr., an inmate at the Oshkosh Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he contends that his conviction and sentence for ten counts of sexual assault are in violation of the laws and Constitution of the United States in 25 different ways. However, petitioner has exhausted his state court remedies only with respect to his claim that the state failed to corroborate his confession. On December 16, 2010, I explained to petitioner that I could not consider the merits of the 24 additional claims until he had exhausted his claim for ineffective assistance of counsel in the state courts. I asked petitioner to inform the court whether he would like to proceed only with his exhausted claim or dismiss the petition in its entirety and re-file it after he exhausts all of his claims.

Petitioner has responded with three letters to the court, dkt. ##5, 6 & 7, in which he says that he wishes to proceed with his corroboration claim in federal court and pursue his additional 24 claims in state court. Petitioner says that he has not pursued the 24 claims in state court yet because his previous attorneys refused to raise them. In addition, petitioner has no legal assistance at this time.

Petitioner's response indicates that he wishes to pursue his corroboration claim in this court while pursuing his additional claims in state court simultaneously. After the 24 claims are exhausted, he would bring those claims in a separate habeas petition. This is not a viable option. Once petitioner had prosecuted his petition alleging the lack of corroboration of his confession, he would be barred from bringing a subsequent habeas petition raising new claims about the same conviction and sentence. Rose v. Lundy, 455 U.S. 509, 521 (1982) (“[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions [regarding those unexhausted claims].”) (citing 28 U.S.C. § 2254 Rule 9(b), authorizing dismissal for abuse of the writ). Thus, petitioner's only options are to (1) dismiss his 24 unexhausted claims and proceed solely on the exhausted claim, understanding that he will not be allowed to raise the 24 claims in a subsequent habeas petition; or (2) dismiss his entire petition without prejudice, exhaust his state remedies with respect to the 24 claims and refile the petition with all 25 claims. Id. at 510. Petitioner may have until January 14, 2011, to advise the court

which of these options he wishes to choose.

In deciding which court of action to pursue, petitioner should be aware that under the Antiterrorism and Effective Death Penalty Act of 1996, a state prisoner generally has one year from the date his state court conviction becomes final in which to seek federal habeas relief. 28 U.S.C. § 2244(d)(1)(A). Petitioner's conviction became final on December 20, 2010, 90 days after the Wisconsin Supreme Court denied his petition for review. Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (one-year statute of limitations does not begin to run under §2244(d)(1)(A) until expiration of 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court). His one-year limitations period began to run the next day, December 21, 2010.

Under 28 U.S.C. § 2244(d)(2), “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” does not count against the one-year statute of limitations for filing a federal habeas action. This means that if petitioner chooses to dismiss this petition and exhaust the 24 claims, the limitations period would be tolled once his post conviction motion is filed properly and would remain tolled until he receives a final decision from the Wisconsin Supreme Court on his post conviction motion, so long as petitioner does not miss any deadlines for filing a petition for review. Fernandez v. Sternes, 227 F.3d 917, 979-80 (7th Cir. 2000).

One final matter requires attention. Petitioner has filed a motion for appointment of counsel, dkt. #2. Under 18 U.S.C. § 3006A(2)(B), a district court may appoint counsel to represent an indigent petitioner seeking relief under § 2254 if the court determines that “the interests of justice so require.” It is too early to determine whether to appoint counsel in this case because it is not certain whether petitioner will be proceeding with his petition. Thus, I will defer consideration of petitioner’s motion for appointment of counsel until after I receive petitioner’s response to this order. In addition, petitioner says that he needs legal assistance in presenting his unexhausted claims in state court. However, this court cannot appoint counsel to assist litigants in state court cases. That is a matter he will have to raise in state court.

ORDER

IT IS ORDERED that petitioner Donald Newell has until January 14, 2011, within which to advise the court whether he wishes to (1) amend his petition to delete the unexhausted claims and proceed solely on the exhausted claim; or (2) pursue his unexhausted claims in state court. If petitioner chooses the second option and pursues his unexhausted claims in state court, or if he does not report his choice by the deadline, then his petition will be dismissed without prejudice for his failure to exhaust his state court remedies, pursuant to Rose v. Lundy. If petitioner chooses to proceed, then the state will be ordered to respond

to petitioner's corroboration claim.

Entered this 6th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge