

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

AMANCIO REYES-CRUZ,

ORDER

Petitioner,

11-cv-465-bbc

v.

RANDALL HEPP, Warden
Jackson Correctional Institution,

Respondent.

Amancio Reyes-Cruz, an inmate at the Jackson Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in which he contends that his conviction for second-degree sexual assault violates the United States Constitution in four separate ways. However, petitioner has exhausted his state court remedies on only one claim: that his trial counsel was ineffective for failing to supplement an expert witness's report. On July 27, 2011, I explained to petitioner that I could not consider the merits of the three additional claims until he had exhausted them. 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 refile it after he had exhausted all of his claims.

Petitioner has responded with a letter to the court, dkt. #5, in which he says that he

does not understand the difference between his exhausted and unexhausted claims, that he thought that all of his claims had been raised in state court, that he wishes to proceed with his federal habeas petition and that he needs assistance in deciding what to do about his unexhausted claims. He asks the court to appoint him counsel to help him decide how to proceed with his petition.

It is not clear from petitioner's response whether he wishes to proceed with his petition solely on his claim regarding his trial counsel's failure to supplement the expert report or whether he wishes to raise all of his claims in a federal habeas petition after exhausting them in state court. To the extent petitioner believes he may pursue his claim regarding the expert report in this court while simultaneously pursuing his additional claims in state court and then bringing them to federal court, he is wrong. Once petitioner had prosecuted his petition in this court alleging trial counsel's failure to supplement the expert report, 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:

(1) dismiss his three unexhausted claims and proceed solely on the exhausted claim

regarding the expert witness report, understanding that he will not be allowed to raise the three claims in a later habeas petition in federal court. (If he chooses this option, he could not raise in a habeas petition his claims that (i) trial counsel was ineffective for failing to obtain the victim's medical records; (ii) trial counsel was ineffective for prohibiting petitioner from testifying on his own behalf; and (iii) trial counsel discriminated against petitioner on the basis of his national origin.) or

(2) dismiss his entire petition without prejudice, exhaust his state remedies with respect to the three claims and refile the petition in federal court raising all four claims.

Petitioner may have until September 6, 2011, to advise the court which of these options he wishes to pursue. I will deny petitioner's request for the assistance of counsel in making this decision. There are a limited number of attorneys with the background or desire to represent habeas petitioners in a pro bono capacity. As a general practice, this court does not appoint counsel before a petitioner has decided whether to proceed with his case.

I will advise petitioner that in deciding which course of action to pursue, he should consider 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 will become final on August 22, 2011, 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, August 23, 2011.

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 three claims, the limitations period would not run once his postconviction motion is filed properly and would remain “tolled” (not running) until he receives a final decision from the Wisconsin Supreme Court on his postconviction 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).

ORDER

IT IS ORDERED that

1. Petitioner Amancio Reyes-Cruz has until September 6, 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 claim that his trial counsel was ineffective for failing to supplement an expert's report.

2. Petitioner's motion for appointment of counsel, dkt. #5, is DENIED without prejudice.

Entered this 23d day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge