

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 orders dated July 27 and August 23, 2011, I told petitioner that I could not consider the merits of three out of his four claims because he had not exhausted them. I asked petitioner whether he wished to proceed on only his exhausted claim that his trial counsel was ineffective for failing to supplement an expert witness's report that would have allowed her to testify at trial, or whether petitioner wished to dismiss the petition in its entirety and refile it after he had exhausted all of his claims. I told petitioner that if he wished to proceed with his exhausted claim only, I would order the state to respond. However, I warned petitioner that

if he proceeded only with his exhausted claim, he would not be able to raise his unexhausted claims in a separate petition at a later date.

Petitioner has responded, dkt. #7, stating that he wishes to continue with his petition solely on his claim that his counsel was ineffective for failing to supplement the expert's report to include additional opinions and evidence. Petitioner's allegations regarding this claim are sufficient to state a plausible claim that his counsel was ineffective in violation of the constitution. In addition, petitioner has exhausted his state court remedies with respect to this claim. Thus, I will order respondent to show cause why this petition should not be granted.

ORDER

IT IS ORDERED that

1. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Amancio Reyes-Cruz's claims that the his counsel was ineffective because he failed to supplement the expert's report, resulting in the exclusion of important expert medical testimony. The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue.

2. Dispositive motions. If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of

exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. Petitioner shall have 20 days following service of any dismissal 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 the court denies the motion to dismiss in whole or in part, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

3. When no dispositive motion is filed. If respondent does not file a dispositive motion, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of respondent's answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:
 1. 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; or,
 2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

NOTE WELL: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims dismissed for his failure to meet his burden of proof.

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.
- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

Entered this 7th day of September, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge