

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

OUATI K. ALI,

Petitioner,

v.

MICHAEL BAENEN,

Respondent.

ORDER

12-cv-841-bbc

Petitioner Ouati Ali, a prisoner at the Green Bay Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the \$5 filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.

In 2007 petitioner was convicted in the Circuit Court for Dane County, Wisconsin of second degree sexual assault of a child and was sentenced to 14 years in prison. The Wisconsin Court of Appeals affirmed the conviction summarily on October 20, 2009; the Wisconsin Supreme Court denied review on March 9, 2010.

Petitioner raises five claims in his petition: (1) the 14-year delay between the alleged crime and the filing of the criminal complaint violated his right to due process; (2) insufficient evidence existed to convict him beyond a reasonable doubt; (3) the requirement to register as a sex offender violates the ex post facto clause; (4) trial counsel was

constitutionally ineffective; and (5) post conviction and appellate counsel were constitutionally ineffective.

This is the third time Ali has filed a petition in this court challenging the same conviction. Ali v. Pollard, No. 10-cv-706-bbc (W.D. Wis.); Ali v. Pollard, No. 11-cv-269-bbc. The first two times I dismissed the petition without prejudice because his sufficiency of the evidence claim was the only one he had presented to the trial court, the court of appeals and the supreme court. Baldwin v. Reese, 541 U.S. 27, 29 (2004) (under § 2254, "the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review)"). He said he had not presented the other claims because of his counsel's ineffective assistance. Although ineffective assistance may provide cause for failing to raise a claim in state court, ineffective assistance claims must be exhausted in state court as well. Edwards v. Carpenter, 529 U.S. 446 (2000). Because petitioner had not finished presenting his ineffective assistance claims to the state court, I gave him the choice of proceeding with his sufficiency of the evidence claim or returning to state court to obtain rulings on the other claims. Rhines v. Weber, 544 U.S. 269, 277 (2005); Rose v. Lundy, 455 U.S. 509 (1982). Petitioner chose the latter option, so I dismissed the petition without prejudice to his refiling it after he was finished in state court.

It is not clear from the face of the new petition whether Ali has finished the exhaustion process, but a review of the Wisconsin courts' electronic docket shows that the supreme court denied a petition for review in this case just before Ali filed his petition in this court. State v. Ali, Case No. 2011AP00183, available at <http://wscca.wicourts.gov>.

At this stage, the allegations in Ali's petition are sufficient to state valid constitutional claims. In addition, it appears that petitioner has exhausted his state court remedies and filed his petition within the one-year limitations period. Therefore, I will direct the state to respond to the petition.

ORDER

IT IS ORDERED that

1. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on respondent Michael Baenen.

2. Within 30 days of the date of service of this order, respondent must file an answer to Ouati Ali's petition. 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.

3. **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.

4. 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.

5. For the time being, 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 consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

Entered this 7th day of January, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge