

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

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JOHN BROWN,

Petitioner,

v.

MARC CLEMENTS,

Respondent.

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OPINION and ORDER

12-cv-861-bbc

John Brown has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his conviction for second-degree sexual assault of a child. 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. (Plaintiff has filed a motion for leave to proceed in forma pauperis, but he has paid the \$5 filing fee so I will deny that motion as moot.)

Petitioner challenges his June 2009 conviction in the Circuit Court for Dane County on one count of second-degree sexual assault of a child. Petitioner appealed the conviction, contending that his counsel had been ineffective for a number of reasons. The court of appeals rejected petitioner's arguments and affirmed the conviction on September 1, 2011. The Wisconsin Supreme Court denied petitioner's request for review on December 14, 2011. Petitioner filed the present habeas petition on November 29, 2012, arguing that his trial counsel provided him ineffective assistance by failing to impeach the victim with prior

inconsistent statements and by failing to introduce evidence that a witness for the prosecution had received favorable treatment in his own case in exchange for implicating petitioner.

To make out a claim of ineffective assistance of counsel, a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that he was prejudiced by counsel's errors. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

At this stage, the allegations in petitioner'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. Plaintiff John Brown's motion for leave to proceed in forma pauperis, dkt #3, is DENIED as moot.

2. 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 Warden Marc Clements.

3. Within 30 days of the date of service of this order, respondent must file an answer to petitioner John Brown's claims that he received ineffective assistance of counsel at trial. 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.

4. **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.

5. **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.

6. 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 17th day of December, 2012.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge