

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

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KENNETH A, ROBERTS,

Petitioner,

v.

DEB McCULLOCH,

Respondent.

ORDER

13-cv-446-wmc

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Petitioner Kenneth A. Roberts is in custody of the Wisconsin Department of Health Services at the Sand Ridge Secure Treatment Center in Mauston. Invoking 28 U.S.C. § 2254, Roberts seeks a writ of habeas corpus to challenge his continued civil commitment as a “sexually violent person” pursuant to Wis. Stat. ch. 980. Roberts has paid the five dollar filing fee and he has provided a supplement to his petition. (*See* Dkt. 3). This case is now pending before the court on preliminary review under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

Preliminary review of the pleadings shows that Roberts is confined at Sand Ridge pursuant to a 2005 civil commitment order entered in the Circuit Court for Oneida County. In January 2010, Roberts filed a “petition for discharge” from custody pursuant to Wis. Stat. § 980.09, arguing that he no longer met the criteria for continued confinement because his risk of recidivism was low. After considering argument from both sides, the circuit court denied Roberts’s petition without a full discharge hearing because: (1) an annual evaluation from December 2009 disclosed that Roberts’s risk of recidivism was “high”; and (2) Roberts did not offer any expert opinion to the contrary.

On direct appeal, Roberts argued that the circuit court erred by denying the petition without a full hearing pursuant to Wis. Stat. § 980.09(1). The Wisconsin Court of Appeals

affirmed the circuit court's decision on October 11, 2012, *see In re Commitment of Roberts*, 2012 WI App 132, 345 Wis. 2d 62, 823 N.W.2d 840, and the Wisconsin Supreme Court denied his petition for review on February 11, 2013, *see State v. Roberts*, 2013 WI 22, 346 Wis. 2d 285, 827 N.W.2d 375.

Roberts now seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254. In a petition that is dated June 21, 2013, Roberts argues that the circuit court violated his constitutional right to “substantive and procedural due process” by denying his petition without a full discharge hearing. Because the Wisconsin Court of Appeals interpreted this issue as one arising under state law, namely, Wis. Stat. § 980.09, the court asked Roberts to supplement his pleadings to determine whether he exhausted his state court remedies as required by 28 U.S.C. § 2254(b), by fairly presenting a federal claim. In response to that order, Roberts maintains that the grounds for relief that he raised in state court were based on both state and federal precedent. In support of this contention, Roberts also has provided a portion of his attorney's appellate brief. After considering Roberts' response, the court concludes that an answer from the respondent is necessary to resolve the issue of exhaustion and any other procedural deficiency in this case before the merits can be considered.

## ORDER

IT IS ORDERED THAT:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on the respondent, Deborah McCullough, in her official capacity as Director of the Sand Ridge Secure Treatment Facility.

2. **Answer deadline.** Within 30 days of the date of service of this order, respondent must file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.

3. **Motions to dismiss.** If the respondent contends that the petition is subject to dismissal on its face - - on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default - - then the respondent is authorized to file within 30 days of this order, a motion to dismiss, a supporting brief and any documents relevant to the motion. 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 respondent shall have 10 days following service of the response within which to file a reply.

4. **Denial of motion to dismiss.** If the court denies such a motion to dismiss in whole or in part, then it will set deadlines for the respondent to file its answer and for the parties to brief the merits.

5. **Briefing on the merits.** If respondent does not file a motion to dismiss, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- (a) Petitioner shall file a brief in support of his petition within 30 days after respondent files his answer. With respect to claim adjudicated on the merits in state court, petitioner must show either that (1) the state court contravened a controlling opinion of the United States Supreme Court; (2) the state court applied a controlling opinion of the United States Supreme Court in an unreasonable manner; or (3) the state court's decision rested upon an unreasonable determination of the facts. 28 U.S.C. § 2254(d).
- (b) Respondent shall file a brief in opposition within 30 days after petitioner files his initial brief.
- (c) Petitioner shall have 20 days after respondent files his brief in which to file a reply brief.

Entered this 5th day of November, 2013.

BY THE COURT:

STEPHEN L. CROCKER  
Magistrate Judge