

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

-----  
ROBERT LEE HAMILTON,

Petitioner,

v.

TIM DOUMA, Warden  
New Lisbon Correctional Institution,

Respondent.  
-----

ORDER

15-cv-510-bbc

Robert Lee Hamilton, an inmate at the New Lisbon 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 screening pursuant to Rule 4 of the Rules Governing Section 2254 cases.

According to the petition, petitioner is serving a sentence of 155 years after being convicted in the Circuit Court for Milwaukee County on July 23, 1997 of armed robbery, first degree sexual assault, attempted first degree intentional homicide while armed, first degree recklessly endangering safety while armed and resisting an officer. He asserts the following grounds for relief: 1) his plea was not entered knowingly and voluntarily because he was not advised that two of the counts had presumptive minimum sentences of three years; 2) his plea to reckless endangerment was not entered knowingly and voluntarily because the court failed to advise him what the term “utter disregard” meant; 3) his plea was

not knowing and voluntary because he did not understand the maximum penalty that he was facing on each offense; 4) his plea was not knowing and voluntary because his lawyer led him to believe that the habitual criminality enhancers would be dismissed on double jeopardy grounds and failed to litigate a challenge to the enhancers until after petitioner entered his plea; and 5) the circuit court misled petitioner about the maximum total sentence he might receive when it said the maximum “could be less later on.” (Petitioner has filed a brief in support of his petition in which he raises only claims 1, 2 and 4, although he includes arguments about claims 3 and 5 in the course of arguing claim 4. Accordingly, I will assume that he wishes to pursue all five claims.)

Petitioner’s conviction is approximately 18 years old, raising the initial question whether the petition is timely under 28 U.S.C. § 2244(d). According to the petition, petitioner failed to file a direct appeal from his conviction within the state’s deadlines for doing so. However, for reasons that are not entirely clear, the Wisconsin Court of Appeals recently reinstated petitioner’s appellate rights and allowed him to file a post conviction motion to withdraw his plea. Petitioner asserts that he filed such a motion in the trial court and proceeded to exhaust his state court remedies by appealing the denial of the motion to the Wisconsin Court of Appeals and the state supreme court. Assuming the truth of these assertions (which are corroborated by the Wisconsin Court of Appeals’ July 22, 2014 decision, attached to the petition), then petitioner’s conviction became final only recently and his petition may be timely. Further, it appears that petitioner exhausted his state court remedies.

Petitioner's claims that his plea was not entered knowingly and voluntarily for various reasons and that his lawyer rendered ineffective assistance in connection with the plea are sufficient to state a colorable claim that petitioner was deprived of his constitutional rights. Accordingly, I will order the state to respond to the five claims set forth above.

## 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 Warden Douma.

2. Within 30 days of the date of service of this order, respondent must file an answer to the 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 the date of this order, either with or in lieu of an answer. If the state contends that the petition presents a mix of exhausted and unexhausted claims, then it must address in its supporting brief whether petitioner meets the criteria for a stay announced in Rhines v. Weber, 544 U.S. 269 (2005), in the event he chooses to pursue his unexhausted claims in state court. 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 the 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 docket or 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 29th day of September, 2015.

BY THE COURT:

/s/

---

BARBARA B. CRABB  
District Judge