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

ROBERTO I. LOPEZ,
a/k/a MIGUEL A. DOTEL SIERRA,

Petitioner,

v.

MICHAEL DITTMANN,
Warden, Columbia Correctional Institution,

Respondent.

OPINION and ORDER

Case No. 16-cv-753-wmc

ROBERTO I. LOPEZ,
a/k/a MIGUEL A. DOTEL SIERRA

Petitioner,

v.

MICHAEL DITTMANN,
Warden, Columbia Correctional Institution,

Respondent.

OPINION and ORDER

Case No. 16-cv-754-wmc

ROBERTO I. LOPEZ,
a/k/a MIGUEL A. DOTEL SIERRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION and ORDER

Case No. 16-cv-756-wmc

Petitioner Roberto I. Lopez has filed three separate petitions seeking a writ of habeas corpus challenging his confinement stemming from his conviction for two counts of felony murder entered on January 8, 2007, in Milwaukee County Case No. 2002CF3278. In case no. 16-cv-753, Lopez filed a petition under 28 U.S.C. § 2241, seeking to challenge his extradition

from the Dominican Republic to Wisconsin in 2006 on grounds that the criminal complaint and warrant were defective and thus did not provide sufficient basis for his extradition. In case no. 16-cv-754, Lopez filed a petition under 28 U.S.C. § 2254, again challenging the sufficiency of the criminal complaint and his extradition, as well as asserting that the prosecutor manipulated witnesses, fabricated evidence, failed to disclose exculpatory evidence and violated his Miranda rights. Finally, in case no. 16-cv-756, Lopez filed a petition under 28 U.S.C. § 2255, again arguing that the criminal complaint was defective and that his extradition was unlawful. Lopez has also filed a request for assistance in recruiting counsel in all of his cases.

For the reasons set forth below, the court is dismissing the petitions brought in case nos. 16-cv-753 and 16-cv-756. The court will direct the state to respond to three of the four claims Lopez raises in case no. 16-cv-754. Lopez's request for assistance in recruiting counsel will be denied without prejudice at this time.

OPINION

I. Petitions under § 2255 and § 2241

As an initial matter, Lopez cannot file a petition under 28 U.S.C. § 2255 or 28 U.S.C. § 2241 to challenge his state court conviction. Section 2255 is the vehicle for collateral attacks on convictions and sentences for *federal* prisoners. *See* 28 U.S.C. § 2255(a). Section 2241 is the vehicle for bringing "challenges by *federal* prisoners that implicate the fact or duration of confinement but do not stem from the original conviction or sentence." *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000) (emphasis added). Because Lopez is a state prisoner attempting to challenge a state court conviction, neither § 2255 nor § 2241 apply. Instead, Lopez's challenges must be brought under 28 U.S.C. § 2254. *Id.* at 633 ("§ 2254 [is] the exclusive

vehicle for prisoners in custody pursuant to a state court judgment who wish to challenge anything affecting that custody.")

In some cases, a court may choose to recharacterize a petition improperly filed under § 2255 or § 2241 as a petition under § 2254, after giving the petitioner the opportunity to withdraw or amend the petition. *See Castro v. United States*, 540 U.S. 375, 383 (2003). Here, however, Lopez already has a petition pending under § 2254 that encompasses all of the claims he seeks to assert in the petitions filed under § 2241 and § 2255. Accordingly, the court will dismiss the petitions filed in case nos. 16-cv-753 and 16-cv-756.

Under Rule 11 of the Rules Governing Section 2255 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated, reasonable jurists would not debate the decision that petitioner cannot pursue relief under § 2241 or § 2255. Therefore, no certificate of appealability will issue as to those cases.

II. Petition under § 2254

This leaves Lopez's petition filed under 28 U.S.C. § 2254. Under Rule 4 Governing Section 2254 Cases, the court must examine the petition and supporting exhibits and dismiss a petition if it "plainly appears" that petitioner is not entitled to relief. If the petition is not dismissed, then the court orders respondent to answer or otherwise respond to the petition.

Lopez did not file this petition until approximately 9 years after he was convicted, so the initial question is whether the petition is timely under the Antiterrorism and Effective Death Penalty Act of 1996, which established a one year statute of limitations for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one year limitation period begins to run from the latest of: 1) the date on which judgment in the state case became final by the conclusion of direct review or the expiration of the time for seeking such review; 2) the date on which any state impediment to filing the petition was removed; 3) the date on which the constitutional right asserted was first recognized by the Supreme Court, if that right was also made retroactively applicable to cases on collateral review; or 4) the date on which the factual predicate of the claims could have been discovered through the exercise of due diligence. § 2244(d)(1)(A)-(D). The statute also provides that the time during which a properly filed application for state post-conviction or other collateral review is pending is not counted toward any period of limitation. § 2244(d)(2).

Although Lopez was convicted in 2007, a review of Wisconsin's publicly accessible court records reveals that he has been challenging his conviction in state court nearly continuously since that time. The court cannot determine from the online court records whether Lopez's challenges would qualify as "properly filed" challenges for the purpose of tolling under

§ 2244(d)(2), but the court will give Lopez the benefit of the doubt at this stage.[1] Lopez should be aware, however, that the state may well file a motion to dismiss his petition as untimely.

Turning next to Lopez's grounds for relief, he asserts the following: (1) the government unnecessarily delayed in extraditing him and bringing him to trial in violation of Fed. R. Crim. P. 48(b); (2) his extradition was unlawful because the criminal complaint supporting it was defective; (3) the prosecutor withheld evidence, manipulated witnesses and fabricated evidence; and (4) violations of his *Miranda* rights and other instances of prosecutorial misconduct. Claim 1 will be dismissed because the Federal Rules of Criminal Procedure do not apply to state criminal proceedings and cannot provide a basis for habeas relief. *See* Fed. R. Crim. P. 1 ("These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States."). In contrast, Claims 2, 3, and 4 raise potential constitutional issues. Additionally, Lopez claims that he has raised these claims in state court. Accordingly, the court will order the state to respond to those claims.

III. Motion for Assistance in Recruiting Counsel

Finally, Lopez filed a motion for assistance in recruiting counsel to represent him in presenting his habeas petition. He also submitted evidence showing that he has unsuccessfully attempted to find counsel on his own.

Lopez's motion will be denied without prejudice at this time at this time because it is too early to determine whether counsel is necessary. In the context of a § 2254 petition, a

[1] The statute of limitations in § 2244(d)(2) is an affirmative defense and not a jurisdictional bar. *See Day v. McDonough*, 547 U.S. 198, 205 (2006). Thus, although courts can resolve the issue of timeliness *sua sponte*, courts are not required to do so. *See Simms v. Acevedo*, 595 F.3d 774, 779 (7th Cir. 2010).

federal court may appoint counsel for a financially eligible petitioner when "the interests of justice so require." 18 U.S.C. § 3006A(g); *Johnson v. Chandler*, 487 F.3d 1037, 1038 (7th Cir. 2007). Although petitioner's claims are numerous and somewhat complex, it is too early to determine whether litigating them is beyond Lopez's capabilities. *Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007) (en banc) (the central question in deciding whether to request counsel for an indigent civil litigant is "whether the difficulty of the case – factually and legally – exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself"). Unlike a civil action under 42 U.S.C. § 1983, a habeas corpus action is generally resolved on paper and will not require any discovery or a trial – two activities that often are the most difficult tasks for *pro se* litigants. Additionally, this court will have the benefit of petitioner's state court briefs and state court decisions describing his claims. Thus, even if the petitioner lacks knowledge of the law and has difficulty expressing himself, this court will likely not have any problem understanding and evaluating his claims.

For these reasons, this court rarely finds it necessary to appoint counsel in a habeas action. That being said, petitioner's motion for assistance recruiting counsel will be denied without prejudice. Petitioner may renew his motion if this case becomes more complex than it currently appears. Additionally, the court will consider, on its own, whether to recruit a lawyer for petitioner if at any point the court believes it is necessary.

ORDER

IT IS ORDERED that:

1) The petitions for a writ of habeas corpus filed by Roberto I. Lopez in case nos. 16-cv-753-wmc and 16-cv-756-wmc are DISMISSED with prejudice. Petitioner is DENIED a certificate of appealability in both cases. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

2) Petitioner's motions for assistance in recruiting counsel in case no. 16-cv-754-wmc (dkt. ##4, 13) are DENIED without prejudice.

3) Claim 1 of the petition filed in case no. 16-cv-754-wmc is DISMISSED.

4) **Service of petition in Case No. 16-cv-754-wmc**. 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, Michael Dittman, in his official capacity as warden of the Columbia Correctional Institution.

5) **Answer deadline**. Within 60 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.

6) **Motions to dismiss**. If the state 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 it 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 a responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

7) **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 state to file its answer and for the parties to brief the merits.

8) **Briefing on the merits**. In the event that the respondent does not file a motion to dismiss as outlined above, the court will proceed to consider the merits. The court notes that petitioner has not filed a separate memorandum or brief in support of his petition. Therefore, the parties shall adhere to the following briefing schedule with respect to the merits of petitioner's claims:

a. If petitioner wishes to file a brief in support of his petition he must do so within 30 days after the respondent files an answer.

b. Once petitioner submits his brief or his time to submit a brief expires, respondent shall file a brief in response to the petition within 30 days.

c. Once respondent files a brief in opposition, petitioner shall have 20 days to file a reply if he wishes to do so.

Entered this 31st day of May, 2017.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge