

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ZACHARY O. SMITH,

Petitioner,

v.

Case No.: 2:23-cv-1032-SPC-KCD

SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

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OPINION AND ORDER

Before the Court are Petitioner Zachary O. Smith's motions for appointment of counsel (Docs. 3 and 10) and motion to expand the record (Doc. 22).

Federal law (28 U.S.C. § 2254(h)) allows this Court to appoint counsel for habeas petitioners who become financially unable to find counsel. Section 2254(h) is governed by 18 U.S.C. § 3006A, which clarifies that counsel should be appointed when "the interests of justice so require[.]" The interests of justice do not require appointment of counsel here. Prisoners commonly litigate habeas actions *pro se*, and Smith's petition and subsequent filings show he can adequately research and present his claims to the Court. The Court thus denies Smith's motions for appointment of counsel. If the Court finds an evidentiary

hearing warranted, it will appoint counsel as required by Section 2254, Rule 8(c).

In his Motion to Expand the Record, Smith asks the Court to order Respondent to add six items to the record. Smith did not certify that he conferred with Respondent before filing the motion as required by Local Rule 3.01(g). The Court will enforce Local Rule 3.01(g) here because Smith asks the Court to compel Respondent to act, and because it appears likely that a good-faith conferral can resolve all (or part) of the motion. Smith must confer with Respondent's counsel before asking the Court to compel them to supplement the record. To aid the parties in their conferral, the Court notes that federal habeas review "must be conducted on the basis of the record that was before the state habeas court when it adjudicated" Smith's claims. *French v. Warden, Wilcox State Prison*, 790 F.3d 1259, 1266 (11th Cir. 2015). So the Court will not order Respondent to supplement the record with documents not considered by the state postconviction courts. If the parties cannot agree on supplementation of the record after conferring in good faith, Smith may renew his request.

Accordingly, Petitioner Zachary O. Smith's motions for appointment of counsel (Docs. 3 and 10) and Motion to Expand the Record (Doc. 22) are **denied**.

DONE and **ORDERED** in Fort Myers, Florida on April 17, 2024.



Kyle C. Dudek
United States Magistrate Judge

SA: FTMP-1

Copies: All Parties of Record