

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

ERIC LIVELY, # 223091,

Petitioner,

v.

Case Number: 10-cv-12110
Honorable Lawrence P. Zatkoff

TOM BIRKETT,

Respondent.

**ORDER DENYING WITHOUT PREJUDICE MOTION FOR
APPOINTMENT OF COUNSEL AND MOTION FOR EXPANSION OF RECORD**

On May 25, 2010, Petitioner Eric Lively, a state inmate currently incarcerated at the Pine River Correctional Facility in St. Louis, Michigan, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging that he is incarcerated in violation of his constitutional rights. Petitioner was convicted by a Wayne County, Michigan, circuit court jury of (1) possession with intent to deliver methamphetamine or ecstasy, and (2) possession of marijuana. He was sentenced to eight to twenty years in prison for the delivery-of-ecstasy conviction and time served for the marijuana conviction. Pending before the Court are Petitioner's "Motion to Appoint Counsel" and "Motion for Expansion of Record," filed on September 21, 2010. (Dkt. ## 4 & 5.) For the reasons set forth below, the Court will deny the motions without prejudice.

I. Motion to Appoint Counsel

The constitutional right to counsel in criminal proceedings provided by the Sixth Amendment does not apply to an application for writ of habeas corpus, which is a civil proceeding. *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002), *cert. denied*, 538 U.S. 984 (2003), *reh. denied*, 539 U.S. 970 (2003). The Court has broad discretion in determining whether counsel should be appointed. *Childs v. Pellegrin*, 822 F.2d 1382, 1384 (6th Cir. 1987). A habeas petitioner may obtain representation at any stage of the case “[w]henver the United States magistrate or the court determines that the interests of justice so require.” 18 U.S.C. § 3006A(a)(2)(B).

In this case, Respondent’s answer and the state-court record are not due until December 10, 2010. Once the answer and the state-court record are filed, and, after the Court has carefully reviewed those documents, if it determines that appointment of counsel is necessary, then it will do so at that time. Petitioner need not file any further motions regarding this issue.

II. Motion for Expansion of Record

Rule 7 (a) of the rules governing § 2254 cases, 28 U.S.C. foll. § 2254, indicates that if a habeas petition is not summarily dismissed, the district court judge “may direct the parties to expand the record by submitting additional materials relating to the petition.” A federal district court judge may employ a variety of measures to avoid the necessity of an evidentiary hearing in a habeas case, including the direction to expand the record to include evidentiary materials that may resolve the factual dispute without the need for an evidentiary

hearing. *Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977).

In the present case, Petitioner requests that the Court expand the record to include materials, namely “affidavits, exhibits and additional material[s],” which may support his claims. However, because the necessary Rule 5 materials have not yet been filed—due to be filed December 10, 2010—the Court cannot determine whether the record needs to be expanded to include the materials Petitioner requests. If, after the Rule 5 materials are filed and the Court has carefully reviewed them, it determines that the documents Petitioner requests are necessary to resolve the claims in this case, the Court will order an expansion of the record at that time. Petitioner need not file any further motions regarding this issue.

Accordingly, **IT IS ORDERED** that Petitioner’s “Motion to Appoint Counsel” [Dkt. # 4] and “Motion for Expansion of Record” [Dkt. # 5] are **DENIED WITHOUT PREJUDICE**. The Court will reconsider Petitioner’s motions if it determines at a later date that appointment of counsel or an expansion of the record are necessary.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: October 6, 2010

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on October 6, 2010.

s/Marie E. Verlinde

Case Manager

(810) 984-3290