

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

NATHANIEL LINDELL,

Petitioner,

ORDER

v.

04-C-249-C

GERALD BERGE, Warden,
Wisconsin Secure Program Facility,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Nathaniel Lindell, an inmate at the Wisconsin Secure Program Facility, challenges his March 3, 1998, judgment of conviction in the Circuit Court for LaCrosse County for first degree murder, arson and burglary. I have granted petitioner's application for leave to proceed *in forma pauperis* in a separate order. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

The petition is a duplicate of a petition that Lindell filed in the United States District Court for the Eastern District of Wisconsin on October 30, 2003. On May 7, 2004, after this court had assigned a case number to the petition, the district court in the eastern district entered an order transferring the case to this district. (Petitioner is in custody in this district and the judgment of conviction that he is challenging was entered by a state court located in this district; therefore, this district is the appropriate venue for the petition. 28 U.S.C.

§ 2241.) The record from the transferred case will be consolidated with the instant case, with the petition in the transferred case superseding the duplicate petition that Lindell filed in this court.

Petitioner has submitted a shotgun petition in which he challenges numerous aspects of his trial and subsequent sentence. Having carefully reviewed each of petitioner's claims, I distill them down to the following:

1) the trial court deprived him of his rights to equal protection and procedural due process by refusing to strike a biased juror for cause, resulting in petitioner having to use one of his peremptory strikes to remove that juror from the venire panel;

2) the trial court deprived him of his Sixth Amendment right to confront witnesses when it refused to allow petitioner's lawyer to impeach witness Robert Hansen;

3) the prosecutor committed several acts of misconduct that deprived petitioner of his right to a fair trial, including: a) introducing improperly into evidence a recorded statement made by petitioner; b) making numerous prejudicial remarks during his closing statement; c) coercing witnesses to testify falsely and introducing that testimony at trial; d) failing to prevent state's witnesses from testifying about matters the trial court had ruled were inadmissible; and e) failing to preserve casts made of shoe prints from the crime scene that might have been exculpatory;

4) the trial court allowed these errors to occur, indicating that the court was biased against petitioner;

5) the trial judge relied on incredible and unproven evidence at sentencing, in violation of petitioner's due process right to be sentenced on the basis of accurate information;

6) petitioner's trial attorneys were ineffective for allowing the foregoing errors to occur and because the attorneys had a conflict of interest; and

7) petitioner's right to a fair and impartial jury was denied as a result of the trial court's failure to transfer venue to another county or to allow petitioner's counsel to submit a jury questionnaire, trial counsel's failure to strike a biased juror (Paul Thicke) for cause and misconduct by a juror (Connie Pratt) who lied during *voir dire*.

Petitioner asserts that he presented each of these claims to the state courts by raising it on direct appeal from his conviction or in a postconviction motion brought pursuant to Wis. Stat. § 974.06.

Petitioner's claims are sufficient to require a response from the state. However, it is doubtful that this court will reach the merits of all of the claims because all of petitioner's claims except the first two are likely to be barred on grounds of procedural default.

Petitioner presented (in slightly different constitutional terms) his first two claims to the state courts on direct appeal. The state courts considered the merits of these claims, culminating in a published decision by the Wisconsin Supreme Court on July 11, 2001. *State v. Lindell*, 2001WI 108, 245 Wis. 2d 689, 629 N.W. 2d 223. When petitioner attempted later to present his other claims in a postconviction motion under Wis. Stat. § 974.06, the state trial and appellate courts declined to consider the merits, finding that petitioner had not alleged facts sufficient to warrant a hearing on the claims. *See State v. Lindell*, 2003 WI App 89, 263 Wis. 2d 431, 669 N.W. 2d 678 (unpublished opinion). The state appellate court's conclusion that petitioner had not complied with state law requiring him to allege sufficient facts in support of his motion is likely to constitute an independent and adequate state rule that bars this court from considering the merits of these claims

unless petitioner can show cause and prejudice. *See Coleman v. Thompson*, 502 U.S. 722, 729 (1991).

ORDER

IT IS ORDERED that the record from the United States District Court for the Eastern District of Wisconsin in Case No. 2:03-cv-01060-RTR, shall be consolidated with this case. The petition from that record shall supersede the petition that was filed in this district.

The state shall file a response to the petition not later than thirty days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that all of petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations, it should file a motion to dismiss and all supporting documents within its thirty-day deadline. The state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have twenty days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have ten days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its thirty-day deadline the state must file and serve not only its substantive legal response to

petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims were unreasonable in light of the facts presented. *See* 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within thirty days, the state must advise the court when such papers will be filed. Petitioner shall have twenty days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

The federal mailbox rule applies to all submissions in this case.

The court will not docket or consider any submission that has not been served upon the state. It is petitioner's obligation to certify that he has served the state with each submission to the court.

Entered this 13th day of May, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge