

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

DUSTIN J. JOHNSON,

Petitioner,

ORDER

v.

3:07-cv-00674-bbc

PETER HUIBREGTSE,
Wisconsin Secure Program Facility,

Respondent.

Dustin J. Johnson, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

The subject of the petition is petitioner's August 28, 2003 conviction in the Circuit Court for Eau Claire County for substantial battery as party to a crime, burglary, felony bail jumping and aggravated battery as party to a crime with a weapons enhancer. Petitioner plead guilty to substantial battery as party to a crime and entered a no contest plea to the other charges. He contends that his custody resulting from that conviction is in violation of the laws or Constitution of the United States because: 1) his plea of no contest to aggravated battery was neither knowing or voluntary because he intended to enter an Alfred plea; 2) his trial counsel was ineffective for failing to ensure that he entered the correct plea;

and 3) the entry of a no contest plea violated his Fifth Amendment right against self incrimination. It appears that petitioner has exhausted his state court remedies and filed his petition within the one year limitations period.

Petitioner's claims are sufficient to warrant a response from the state.

ORDER

1. The clerk shall serve copies of the petition and this order by mail to Warden Huibregtse and to the Wisconsin Attorney General.
2. The state shall file a response to the petition not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such 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 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 30-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 was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 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.

3. Once the state has filed its answer or other response, 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 include on each of his submissions a notation indicating that he served a copy of that document upon the state.

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

Entered this 20th day of December, 2007.

BY THE COURT:

/s/

Stephen Crocker
Magistrate Judge