

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

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GORDON E. SUSSMAN,

Petitioner,

ORDER

v.

09-cv-0035-bbc

JODINE DEPPISCH, Warden,  
Fox Lake Correctional Center,

Respondent.

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Gordon E. Sussman, an inmate at the Fox Lake Correctional Center in Fox Lake, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He 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.

Petitioner challenges his December 29, 2005 conviction in the Circuit Court for Dane County of two counts of repeated sexual assault of a child and 16 counts of possession of child pornography. He contends that he is in custody in violation of his constitutional rights. Specifically, he alleges that: 1) his trial lawyer was ineffective for failing to file a motion under Wis. Stat. § 971.31(11)(requiring the filing of a pretrial motion to determine admissibility of evidence relating to sexual conduct of complaining witness), thereby resulting in petitioner's inability to present evidence that the victim had a history of making false sexual abuse accusations; 2) trial counsel was ineffective for failing to make proper use

of available evidence to alert the jury that the victim had told his therapist that he had not had sexual contact with petitioner; and 3) petitioner's right to confrontation and due process were violated as a result of the trial court's overruling petitioner's hearsay objection to a certain statement by the accuser. From the petition, it appears that petitioner filed his petition within the statutory limitations period and exhausted his state court remedies, although it appears that he may have procedurally defaulted his third claim by failing to fairly present it to the state appellate court. Petitioner's allegations are sufficient to warrant a response from the state.

#### ORDER

1. Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on Warden Deppisch.

2. The state shall file a response to the petition not later than 45 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, as an unauthorized successive petition, lack of exhaustion or procedural default, then it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion within 45 days of this order. If the state contends that the petition presents a mix of exhausted and unexhausted claims, then it must address in its supporting brief whether petitioner meets the criteria announced in *Rhines v. Weber*, 544 U.S. 269 (2005), for

a stay in the event he opts to pursue his unexhausted claims in state court. Petitioner shall have 30 days following service of any dismissal 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 the court denies the motion to dismiss in whole or in part, then it will set a deadline within which the state must file an answer and supporting brief addressing any claims that have not been dismissed. Petitioner will be given the opportunity to reply to the state's submissions.

If the state does not file a motion to dismiss, then within its 45-day deadline it shall file an answer addressing the allegations in the petition in accordance with Rule 5 of the Rules Governing Section 2254. The answer must be accompanied by a brief containing a substantive legal response to petitioner's claims. In addition, the state must file the documents required by Rule 5(c) and (d). If the necessary records and transcripts cannot be furnished within 45 days, the state must advise the court when such papers will be filed. Petitioner shall have 30 days from the service of the state's response within which to file a substantive reply.

3. 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 4<sup>th</sup> day of February, 2009.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge