

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

GORDON E. SUSSMAN,

Petitioner,

v.

LARRY JENKINS,

Respondent.

ORDER

09-cv-35-bbc

On April 1, 2011, the Court of Appeals for the Seventh Circuit reversed this court's decision denying petitioner Gordon E. Sussman's petition for a writ of habeas corpus and remanded the case to this court with instructions to grant the writ unless the state elected to retry petitioner. On April 28, 2011, the court of appeals denied respondent's motion to stay the mandate so that he would have an opportunity to petition for a writ of certiorari in the Supreme Court.

The state then filed a motion in this court to stay the issuance of the writ for 180 days after the Supreme Court acted on the petition for a writ of certiorari that the state intended to file, so that if the Supreme Court denied the petition or granted it and affirmed the court of appeals, the state would have six months in which to prepare for petitioner's

retrial. I denied that motion in a June 1, 2011 order, stating that “the court of appeals has made it clear that no grounds exist for a stay that is any longer than necessary to allow the parties to prepare for retrial.” Dkt. #38. Because the state confirmed that it would retry petitioner, I stayed issuance of the writ for 120 days to allow for retrial. Id. The State of Wisconsin has until September 29, 2011 to try petitioner pursuant to this ruling. Respondent informs the court that one of the prosecutors assigned to the case has directed the Dane County Clerk to set a “jury call” for the week of September 26, 2011. Petitioner informs the court that the trial is tentatively scheduled to begin on September 27, 2011.

Now respondent has filed a document titled “Motion to Clarify or Reconsider this Court’s Order Staying Issuance of the Writ,” dkt. #39, asking whether the trial judge has any discretion to set the trial date to a date later than September 29, 2011. Respondent states that “a Wisconsin trial judge would normally have discretion, absent a speedy trial demand, to set a trial date at any point once trial proceedings have commenced.” They argue further that retrial proceedings have commenced with petitioner’s motion for release on bail. I understand respondent to be asking whether the state would be in compliance with the June 1, 2011 order by leaving the date for commencement of the trial itself to the trial judge.

To clarify the June 1 order, the September 29, 2011 deadline is for commencement of the trial itself. If petitioner’s trial has not commenced by this date, petitioner may ask this court to issue the writ of habeas corpus. However, to the extent that respondent is

concerned that pretrial matters or unforeseen events might push the trial date past the deadline, he is free to file a motion in this court to further stay issuance of the writ.

Respondent argues in the alternative that I should reconsider the 120-day deadline because the United States Supreme Court is likely to act on his petition for writ of certiorari sometime in October 2011, petitioner will not suffer irreparable harm because he has been released from custody on bail and respondent has a strong likelihood of success on the merits in the Supreme Court, particularly because a recent Supreme Court decision, Harrington v. Richter, 131 S. Ct. 770 (2011), supports respondent's case.

I will deny this request for reconsideration. As I stated in the June 1, 2011 order, the court of appeals has already denied respondent's motion to stay the mandate in order to seek review in the Supreme Court, and this court's only task is to set a reasonable deadline for the state to retry petitioner.

Finally, respondent seems to argue that petitioner may need extra time to prepare for trial because he has new counsel. This speculation is no reason to grant respondent's request for more time. Should petitioner need more time to prepare for trial but believe that the trial judge will not grant him more time because of the September 29 deadline set by this court, he remains free to file a motion in this court requesting an extension of the stay.

ORDER

Respondent Larry Jenkins's "Motion to Clarify or Reconsider this Court's Order Staying Issuance of the Writ," dkt. #39, is DENIED.

Entered this 16th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge