

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

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THOMAS C. SMITH,

Petitioner,

v.

ORDER

13-cv-337-wmc

MICHAEL MEISNER, Warden,  
Columbia Correctional Institution,

Respondent.

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Petitioner Thomas C. Smith is presently incarcerated by the Wisconsin Department of Corrections at the Columbia Correctional Institution in Portage. Smith seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge one of his state court convictions. After conducting a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the court issued an order directing Smith to show cause why this case should not be dismissed as barred by the governing one-year statute of limitations. Smith has filed a response along with a memorandum in support of his petition. Based on the facts outlined briefly below, the court now concludes that an answer is needed from the respondent.

FACTS

According to the petition, Smith pleaded *nolo contendere* to charges of first-degree sexual assault of a child in Waupaca County Case No. 03CF136, which alleged alternative theories of liability, including conspiracy pursuant to Wis. Stat. § 939.31. On May 23, 2005, the circuit court sentenced Smith to serve a total of 20 years in prison, followed by a 20-year term of extended supervision.

Smith challenged his plea on direct appeal, arguing that it was not voluntarily and knowingly made with an adequate understanding of the state's conspiracy theory of liability. The Wisconsin Court of Appeals rejected that argument and affirmed the conviction in an unpublished decision. *See State v. Smith*, 2010 WI App 19, 323 Wis.2d 276, 779 N.W.2d 723 (Dec. 23, 2009). The Wisconsin Supreme Court denied Smith's petition for review on March 9, 2010. Smith did not appeal further by pursuing a writ of certiorari with the United States Supreme Court, meaning that his conviction became final 90 days later on or about June 7, 2010. *See Sup. Ct. R. 13.1* (West 2013).

Subsequently, Smith filed a petition for state post-conviction relief or other collateral review on September 15, 2010. The circuit court denied that application, following an evidentiary hearing, and Smith filed an appeal. The Wisconsin Court of Appeals affirmed the circuit court's decision on October 3, 2012. *See State v. Smith*, No. 2011AP1614. Smith also filed an unsuccessful petition pursuant to *State v. Knight*, 168 Wis. 2d 609, 484 N.W.2d 540 (1992), alleging ineffective assistance on the part of his appellate counsel. The Wisconsin Court of Appeals rejected that petition on February 5, 2013. *See State v. Smith*, No. 2012AP2507. He did not appeal further.

On April 21, 2013, Smith executed the pending petition for a writ of habeas corpus under 28 U.S.C. § 2254, and filed it with this court. Here, Smith contends that he is entitled to relief because his plea was not voluntarily and knowingly entered with a full understanding of the conspiracy theory asserted in the criminal complaint. It appears that he has exhausted all available state court remedies and that the petition is timely. Therefore, the court will authorize service of the petition on the respondent.

## ORDER

IT IS ORDERED THAT:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on the respondent, Michael Meisner, in his official capacity as warden of the Columbia Correctional Institution.
2. **Answer deadline.** Within 60 days of the date of service of this order, respondent must file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.
3. **Motions to dismiss.** If the state contends that the petition is subject to dismissal on its face - - on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default - - then it is authorized to file within 30 days of this order, a motion to dismiss, a supporting brief and any documents relevant to the motion. Petitioner shall have 20 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.
4. **Denial of motion to dismiss.** If the court denies such a motion to dismiss in whole or in part, then it will set deadlines for the state to file its answer and for the parties to brief the merits.
5. **Briefing on the merits.** In the event that the respondent does not file a motion to dismiss as outlined above, the court will proceed to consider the

merits. Petitioner has already filed a statement or initial brief in support of his grounds for relief. Therefore, the parties shall adhere to the following briefing schedule with respect to the merits of petitioner's claims:

- a. Petitioner has already filed a memorandum in support of his request for relief. (Dkt. # 5). Petitioner shall file any additional brief in support of his petition or give written notice that he intends to rest on his initial brief within 30 days after respondent files its answer.
- b. Once petitioner submits additional briefing or gives written notice that he does not intend to file further briefing, respondent shall file a brief in opposition within 30 days.
- c. Once respondent files a brief in opposition, petitioner shall have 20 days to file a reply if he wishes to do so.

Entered this 24th day of January, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge