

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

ANTONIO P. BROWN,

Petitioner,

ORDER

v.

04-C-459-C

GARY R. MCCAUGHTRY, Warden,
Waupun Correctional Institution,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Antonio P. Brown, an inmate at the Waupun Correctional Institution, is serving two consecutive 12-year sentences after having been convicted in the Circuit Court for Milwaukee County for two counts of armed robbery as party to a crime. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases. Petitioner has paid the five dollar filing fee. Because petitioner is in custody in this district, this court has jurisdiction over the petition. 28 U.S.C. § 2241(d).

The petition presents one constitutional claim: that the evidence adduced at trial was insufficient to support the jury's guilty verdict.¹ It appears that petitioner exhausted his

¹ Petitioner previously filed a habeas petition in which he raised this claim as well as two other claims that he had not exhausted. In an order entered June 30, 2004, this court dismissed that petition without prejudice as a "mixed" petition under *Rose v. Lundy*, 455 U.S. 509 (1982). It appears that petitioner has abandoned his unexhausted claims.

state court remedies with respect to this claim and filed his petition within the one-year limitations period. Petitioner's claim is sufficient to require a response from the state.

Because petitioner paid the five dollar filing fee, it is his obligation to serve his petition by mailing a copy of it, along with a copy of this order, to Warden McCaughtry and to the Wisconsin Attorney General, c/o Assistant Attorney General Gregory M. Weber. Petitioner also must send a letter to this court certifying the date on which he accomplished this service. Once the state has filed a motion to dismiss or other response, petitioner must serve 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. It is petitioner's obligation to certify that he has served the state with each submission to the court.

ORDER

IT IS ORDERED that the state shall file a response to petitioner's claim 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 petitioner's claim is 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 claim on its 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 claim, 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 claim. 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 this claim was 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.

Entered this 19th day of July, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge