

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

JOHN A. LULLOFF,

Petitioner,

ORDER

v.

PAMELA WALLACE, Warden,
Chippewa Valley Correctional Treatment
Facility,

05-C-483-C

Respondent.

John A. Lulloff, an inmate at the Chippewa Valley Correctional Treatment Facility, 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.¹ Having reviewed the petition, I conclude that it is lacking information sufficient to determine whether the state must be ordered to respond to it.

Federal habeas relief is available only to prisoners who are “in custody . . . in violation of the Constitution or laws or treaties of the United States.” § 2254. Although it is clear from the petition that petitioner is challenging an administrative decision by the Department of Corrections to revoke his parole, petitioner has not specified the date of the decision he is challenging or provided any basis for concluding that he is in “custody”

¹ Petitioner has another petition in Case No. 05-C-288-C, under advisal to the court. That petition challenges an August 2002 judgment of conviction entered by the Circuit Court for Ozaukee County. Because the instant petition does not appear to challenge that conviction, it is not “successive.”

pursuant to that decision. In addition, although he alleges that the department's decision violated his right to due process, the facts underlying that claim are unclear. Petitioner avers that he did not knowingly and voluntarily waive his right to a final revocation hearing, but he does not provide any specific facts to support this allegation.

Accordingly, before ordering the state to respond to the petition, I am ordering petitioner to provide more complete information about his claim. Not later than October 14, 2005, petitioner must submit an addendum to his petition that answers the following questions:

1. When did the Department of Corrections issue its decision revoking petitioner's parole?
2. Is petitioner still serving time pursuant to that revocation? If not, what is the basis for petitioner's present confinement? How does the parole revocation relate, if at all, to that confinement?
3. What are the specific facts underlying petitioner's claim that the Department violated his rights to due process?

If petitioner provides additional facts sufficient to show that he is in custody in violation of the United States Constitution, then I will order the state to respond to the petition.

However, this court is not likely to reach the merits of petitioner's claim: According to the petition, the state appellate court never reviewed the merits of petitioner's claim because it found that petitioner had lost his right to such review by failing to file a petition for a writ of certiorari within 45 days of the revocation decision. The state court's finding that petitioner was not entitled to relief because he missed his deadline for filing a certiorari

action appears to be an “independent and adequate” state procedural default that bars this court from hearing petitioner’s claim unless petitioner can demonstrate either “(a) cause for the default and prejudice (i.e., the errors worked to the petitioner's "*actual* and substantial disadvantage"); or (b) that failure to consider his claim would result in a fundamental miscarriage of justice (i.e., a claim of actual innocence).” *Conner v. McBride*, 375 F.3d 643, 648 (7th Cir. 2004) (internal citations omitted).

In the event the state is ordered to respond to the petition, I expect it will contend that petitioner’s claim is procedurally defaulted and that petitioner cannot satisfy either of these two exceptions. Right now, however, the burden is on petitioner to supplement his petition by answering the questions set forth above.

ORDER

IT IS ORDERED that petitioner has until October 14, 2005, in which to submit an addendum to his petition that answers the questions set forth in the body of this order. If petitioner fails to do so, this court likely will dismiss his petition for failure to prosecute it.

Dated this 27th day of September, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge