

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

STEVEN ALAN MAGRITZ,

Petitioner,

ORDER

v.

06-C-0590-C

DEIRDRE MORGAN, Warden,
Oakhill Correctional Institution,

Respondent.

Steven Alan Magritz, an inmate at the Oakhill Correctional Institution located in Oregon, Wisconsin, has filed a document titled “Verified Petition for the Great Writ, Habeas Corpus Ad Subjiciendum, Secured by Article I, Section 9, Clause 2, and Recognized by Title 28, Section 2241.” Petitioner has paid the five dollar filing fee. In the habeas petition, petitioner complains that his January 17, 2003 conviction in the Circuit Court for Dane County for slander of title in violation of Wis. Stat. § 943.60 is null and void and in violation of the laws and Constitution of the United States. Petitioner contends that his conviction is null and void because the circuit court lacked subject matter jurisdiction. In addition, he raises a number of other claims, including that the circuit court erred in finding that petitioner had constructively waived his right to representation during the trial court proceedings and sentencing, in violation of petitioner’s Sixth Amendment right to counsel

(Grounds two and three of the petition), and that he was denied his right to be tried by an impartial jury (Ground eight).

Petitioner asserts that his “foundational” claim is that the trial court lacked subject matter jurisdiction, and that he included the additional claims in his petition only “for completeness of the record, and **specifically NOT** to be used as attempted justification to reclassify this petition as one under 28 U.S.C. § 2254.” Pet., dkt. #1, at 2, ¶ 5. However, it is not the nature of the claims raised but the form of the petitioner’s custody that drives the determination whether a petition filed by a state prisoner falls under § 2241 or § 2254. Walker v. O'Brien, 216 F.3d 626, 633 (7th Cir. 2000). Section 2254 refers to an application “in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). As the court explained in Walker, § 2254 “in effect implements the general grant of habeas corpus authority found in § 2241, as long as the person is in custody pursuant to the judgment of a state court, and not in state custody for some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms of custody that are possible without a conviction.” Id. Examining the Supreme Court’s opinion in Felker v. Turpin, 518 U.S. 651 (1996), the court of appeals explained:

[W]hen a prisoner begins in the district court, § 2254 and all associated statutory requirements apply no matter what statutory label the prisoner has given the case. (Roughly speaking, this makes § 2254 the exclusive vehicle for prisoners

in custody pursuant to a state court judgment who wish to challenge anything affecting that custody, because it makes clear that bringing an action under § 2241 will not permit the prisoner to evade the requirements of § 2254.)

Id.

Petitioner in this case is in custody pursuant to the judgment of conviction of a state court. Accordingly, his petition falls under § 2254, not § 2241.

The petition sets forth at least one viable constitutional claim, so respondent will be ordered to respond to it. However, it is unlikely that this court will reach the merits of the claims because it appears that petitioner has procedurally defaulted his claims by failing to properly exhaust his state court remedies. § 2254(b)(1)(state prisoner applying for federal habeas relief must exhaust state court remedies unless there is absence of available state corrective process or circumstances exist that render such process ineffective to protect applicant's rights); Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001) (petitioner commits procedural default if he fails to exhaust available state court remedies). Although petitioner asserts that he presented his claims to the state courts by filing several writs of habeas corpus in the state circuit court and supreme court, petitioner acknowledges that he did not file a direct appeal of his conviction. Petitioner's own belief that an appeal was not possible from what he says was a "sham" conviction and a void judgment is not the sort of circumstance that shows that state corrective processes do not exist or are ineffective to protect petitioner's rights. White v. Peters, 990 F.2d 338, 342 (7th Cir. 1993) (when petitioner claims that he cannot obtain relief from state courts, pertinent question is not

whether state court would be inclined to rule in petitioner's favor, but whether there is any available state procedure for determining merits of petitioner's claim). A petitioner "cannot simply opt out of the state review process because he is tired of it or frustrated by the results he is getting." Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995).

In any case, because procedural default is a defense to the petition that can be waived, I leave it to respondent to address that issue in her response to the petition.

ORDER

1. The clerk shall serve copies of the petition and this order by mail to Warden Morgan and to the Wisconsin Attorney General.
2. The state shall file a response to petitioner's claims not later than 30 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 claims are 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 30-day deadline. The state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such 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 at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, 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 claims. 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 these claims was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 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.

3. Once the state has filed its answer or other response, 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 25th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge