

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

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BILL P. MARQUARDT,

Petitioner,

MEMORANDUM and ORDER

v.

06-C-684-S

STATE OF WISCONSIN,

Respondent.

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Petitioner filed a petition for a writ of habeas corpus alleging that his state conviction is unconstitutional. Respondent filed a response on December 22, 2006. Petitioner filed his reply on January 5, 2007.

FACTS

On February 5, 2003 the Honorable Eric Wahl, Eau Claire County Circuit Court Judge, found petitioner not guilty by reason of mental disease or defect of six counts of mistreatment of animals, two counts of possession of a firearm by a felon and one count of aggravated burglary. The Court ordered petitioner committed for 75 years.

Petitioner appealed the commitment order and the trial court's denial of his post conviction motion to the Wisconsin Supreme Court. On appeal petitioner argued that the search of his cabin was illegal, that his trial counsel was ineffective and the circuit court violated his right to represent himself.

On September 9, 2005 the Wisconsin Supreme Court affirmed petitioner's commitment and the trial court's order denying his postconviction motion. Petitioner filed a petition for a writ of certiorari in the United States Supreme Court which was denied on October 30, 2006.

Petitioner filed this petition for a writ of habeas corpus on November 20, 2006.

#### MEMORANDUM

Petitioner claims in this petition that the search of his cabin was illegal, that his trial counsel was ineffective and the circuit court violated his right to represent himself. He also claims that his appellate counsel was ineffective and that he has newly discovered evidence of his innocence. Petitioner has not exhausted his state court remedies on these last two grounds.

Federal district courts are required by 28 U.S.C. § 2254 for reasons of comity to defer to state courts in proceedings for writs of habeas corpus. Petitioner did not exhaust his state court remedies on his grounds that his appellate counsel was ineffective or that he has newly discovered evidence of his innocence.

Although petitioner has exhausted his state court remedies on three of his five grounds, this Court may not consider a petition that contains both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509, 513-19 (1982). Accordingly, petitioner's petition for a writ of habeas corpus will be dismissed without

prejudice to petitioner's refiling his petition after he has exhausted his state court remedies within the meaning of 28 U.S.C. § 2254.

Petitioner is advised that he has one year from October 30, 2006 to file his petition for a writ of habeas corpus in this Court. This time period will be tolled for the time he has filed a proper post conviction motion in state court.

Petitioner may exhaust his claim of ineffective assistance of counsel by filing a petition for a writ of habeas corpus in the Wisconsin Supreme Court. He may raise his claim of actual innocence in the state trial court. To toll the statute of limitations, petitioner must file these state court remedies before the one year period from October 30, 2006 expires.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed without prejudice for his failure to exhaust his state court remedies. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED without prejudice for his failure to exhaust his state court remedies.

Entered this 8<sup>th</sup> day of January, 2007.

BY THE COURT:

S/  
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JOHN C. SHABAZ  
District Judge