

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

ANDREW TORSTENSON,

Petitioner,

ORDER

v.

06-C-0720-C

STATE OF WISCONSIN DEPARTMENT
OF CORRECTIONS, DIVISION OF
COMMUNITY CORRECTIONS,

Respondent.

Andrew Torstenson, an inmate at the Waushara County Jail, 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. It appears that petitioner is challenging a decision by the Wisconsin Department of Corrections to revoke his parole. Although the facts leading up to the revocation of petitioner's parole are not clear from the petition, it appears that petitioner is alleging that he was revoked for having admitted during a sex offender treatment program that he had been seeking out potential sexual assault victims. Petitioner asserts that the department's revocation decision violates his protections against double jeopardy and cruel and unusual punishment and his First Amendment right to freedom of speech.

It is unnecessary to decide whether petitioner has alleged a cognizable constitutional claim. Before seeking habeas relief from a federal court, a state prisoner must allow the state

courts the opportunity to remedy the alleged constitutional violations. To do this, the prisoner must pursue any state court remedies that are available to him. In Wisconsin, a prisoner may challenge a parole revocation decision by filing a certiorari action in the circuit court. *State ex rel. Darby v. Litscher*, 2002 WI App 258, n.5, 258 Wis. 2d 270, 653 N.W. 2d 160; Wis. Stat. § 893.735. This petition must be filed within 45 days of the adverse revocation decision. Wis. Stat. § 893.735.

Petitioner has not specified the date on which his parole was revoked. A search of state court records maintained electronically at <http://wcca.wicourts.gov> reveals that petitioner's parole was revoked on July 13, 2006. Thus, to properly exhaust his state court remedies, petitioner had to have filed a certiorari action by August 28, 2006. It does not appear that petitioner ever filed such an action.

When a petitioner fails to fairly present a claim to the state courts and has no further state court avenues by which to raise that claim in the state courts, he has procedurally defaulted his claim. This means that the federal court may not review the claim unless petitioner can show one of two things. First, he could show that his failure to file a certiorari petition in state court within the 45-day deadline (1) was caused by a circumstance beyond his control and (2) that he was harmed by the alleged violation of federal law. Second, he could show that a "fundamental miscarriage of justice" will result if this court does not consider his claims. *Chambers v. McCaughtry*, 264 F.3d 732, 737 (7th Cir. 2001). To meet the fundamental-miscarriage-of-justice exception, petitioner must establish that, "in light of

new evidence, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” *House v. Bell*, 126 S. Ct. 2054, 2076-77 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 319-322 (1995)).

Because it appears that petitioner has procedurally defaulted his claims, I will not order the state to respond to the petition until petitioner provides more information. More specifically, I am asking petitioner to answer the following questions:

1. On what date did the Department of Corrections issue its decision to revoke your parole?
2. Did you seek review of that decision by filing a petition for certiorari in the state circuit court?
3. If so, what was the outcome of the certiorari action? In other words, did you win or lose?
4. If you lost, did you appeal that decision to the state court of appeals?
5. If you did not file a certiorari petition or if you filed a certiorari petition but did not appeal that decision to the state court of appeals, why not?
6. Do you have any new evidence that the department did not consider when it revoked your parole?

Petitioner should submit answers to these questions to the court in writing no later than January 8, 2007.

ORDER

IT IS ORDERED that petitioner Andrew Torstenson should provide written answers to the six questions listed on page 3 of this order no later than January 8, 2007. If he fails to do so, the court is likely to dismiss his petition for failure to prosecute it.

Entered this 18th day of December, 2006.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge