

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

MICHAEL NEWAGO, JR.,

Petitioner,

ORDER

v.

07-C-0091-C

GREG GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

Michael Newago, Jr., an inmate the Columbia Correctional Institution in Portage, Wisconsin, 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.

Petitioner challenges his March 19, 2004 conviction in the Circuit Court for Bayfield County for several controlled substance offenses, intimidating a witness and bail jumping. Petitioner contends that his detention for these offenses is in violation of the United States Constitution. Petitioner raises the following claims:

- 1) the trial court's admission of a statement by a deceased witness violated petitioner's right to confrontation guaranteed by the Sixth Amendment;
- 2) the trial court abused its discretion in allowing the state to present evidence of petitioner's prior convictions;

- 3) the combination of these two errors deprived petitioner of his right to a fair trial;
- 4) the evidence presented at trial was insufficient to support a conviction for possession of cocaine with intent to deliver;
- 5) petitioner's trial lawyer was ineffective for failing to request a cautionary instruction concerning the prior convictions; and
- 6) the prosecutor made inflammatory comments during rebuttal that prejudiced petitioner's ability to receive a fair trial.

It appears that petitioner has exhausted his state court remedies and filed his petition within the one year statute of limitations. Petitioner's claims are sufficient to require a response from the state.

ORDER

1. The clerk shall serve copies of the petition, the memorandum in support of the petition and the appendix to the memorandum to respondent Grams 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. *See* 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 22nd day of February, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge