

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

DUANE CARPENTER,

Petitioner,

ORDER

v.

07-C-259-C

GREG GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

Duane Carpenter, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He has paid the \$5 filing fee. The petition was filed and signed by attorney Bridget Boyle, whom the court presumes is representing petitioner in this case. The petition is before the court for preliminary review pursuant to Pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner challenges his custody resulting from his March 26, 2004 conviction in the Circuit Court for Shawano County for kidnapping, false imprisonment and felon in possession of a firearm. The victim of the crimes was Jodi Carpenter, petitioner's estranged wife. Jodi Carpenter died before trial. At trial, the state was permitted to read her preliminary hearing testimony to the jury.

Petitioner contends that he is entitled to federal habeas relief because: 1) the trial court erred in allowing the state to introduce evidence of petitioner's prior convictions for impeachment purposes because the convictions were too old; and 2) petitioner's right to confrontation was violated by the state's introduction of Jodi Carpenter's preliminary hearing testimony. It appears that petitioner has exhausted his state court remedies and filed his petition within the one year limitations period.

Federal habeas relief is available only if a state prisoner is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In general, state court evidentiary questions do not give rise to federal habeas relief unless the ruling is so prejudicial that it violates fundamental due process or a specific constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Burrus v. Young*, 808 F.2d 578, 581 (7th Cir. 1986). With respect to his first claim, petitioner does not allege that the state court's decision to admit evidence of petitioner's prior convictions violated any constitutional right. However, I will give him the benefit of the doubt and presume that he is contending that the alleged error violated his right to fundamental due process.

With that clarification, both of petitioner's claims are sufficient to warrant a response from the state.

ORDER

1. The clerk shall serve copies of the petition 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.

Entered this 14th day of May, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge