

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

CHAS SIMONSON,

Petitioner,

ORDER

v.

07-C-397-C

RANDALL HEPP, Warden,
Jackson Correctional Institution,

Respondent.

Chas Simonson, an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He has paid the \$5 filing fee. Petitioner is represented by attorney Robert Henak. 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 12, 2002 conviction in the Circuit Court for Dunn County for first degree sexual assault of a child. The victim of the crimes was petitioner's daughter. At trial, the state presented evidence through a sexual assault nurse examiner that there was damage to the victim's hymen which would have been caused by pressure put directly on that tissue or near that tissue. Petitioner contends that he is entitled to federal habeas relief because the trial court violated his right to fundamental due process when it: 1) denied him the right to present a defense when it excluded testimony

regarding an alternative explanation for the victim's damaged hymen; and 2) relied on inaccurate information during sentencing. It appears that petitioner has exhausted his state court remedies and filed his petition within the one year limitations period.

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 Hepp 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 27th day of July, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge