

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

DUSTIN JOHNSON,

Petitioner,

MEMORANDUM

v.

07-cv-674-bbc

PETER HUIBREGTSE, Warden,
Wisconsin Secure Program Facility,

Respondent.

Petitioner Dustin Johnson has filed a motion for clarification of this court's opinion and order of March 14, 2008, in which I denied his request for a stay of proceedings so that he could exhaust certain claims in state court. In denying the motion, I found that petitioner had shown neither good cause for his failure to exhaust his claims before filing his federal petition nor that the claims had any potential merit. See Rhines v. Weber, 544 U.S. 269, 275 (2005) (setting forth criteria for issuance of stay). In his motion for clarification, petitioner asks whether this court's determination that his claims have no potential merit is binding on the state courts in the event petitioner attempts to exhaust the claims, and if so, then whether the claims should therefore be deemed exhausted and included in the instant habeas petition.

My determination that petitioner had failed to make the showing necessary to warrant a stay in the proceedings was not a final adjudication of the merits of petitioner's unexhausted claims. Rather, it was a tentative finding, made without a fully developed record that was necessary to make in order to decide whether petitioner was entitled to the procedural relief of a stay. Accordingly, the claims are still "unexhausted," at least for federal habeas purposes. I cannot say whether the state courts will give any effect to my preliminary assessment of the potential merit of petitioner's claims. That is a question of state law that must be decided by the state courts.

Entered this 15th day of May, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge