

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

EARL D. PHIFFER,

Petitioner,

ORDER

v.

08-cv-0384-slc

GREGORY GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

Earl D. Phiffer, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the \$5 filing fee, making it unnecessary for me to consider his request for leave to proceed *in forma pauperis*. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

The subject of the petition is petitioner's August 19, 2003 conviction in the Circuit Court for Rock County for one count of second degree sexual assault of a child. Petitioner contends that his custody resulting from that conviction is in violation of the laws or Constitution of the United States because the state coerced the victim into testifying falsely against petitioner, trial counsel was ineffective for failing to challenge certain jurors for cause and appellate counsel was ineffective for failing to raise on appeal the issue of trial counsel's ineffectiveness. Petitioner has included with his petition documents that show that he

presented these claims, or at least variations of them, to the state circuit court in a postconviction motion brought pursuant to Wis. Stat. § 974.06, and that he exhausted his appellate remedies.

Construing petitioner's first claim as a claim that he was denied his right to a fundamentally fair trial, I find that petitioner's claims are sufficient to require a response from the state. Although the petition contains few facts supporting petitioner's claim that certain jurors were biased, I assume that petitioner's claim depends upon the same allegations he made in support of his state court post-conviction motion. With this assumption, the petition contains facts sufficient to allow the state to craft a response.

ORDER

IT IS ORDERED that:

1. Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on Warden Grams.
2. The state shall file a response to the petition 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 any of petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address in its supporting brief

the issue of cause, prejudice and staying this action while petitioner exhausts his state court remedies. 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. 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 9th day of July, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge