

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

JAMES G. FREER,

Petitioner,

ORDER

v.

08-cv-0135-bbc

MICHAEL THURMER, Warden,
Waupun Correctional Institution,

Respondent.

James Freer, an inmate at the Waupun Correctional Institution, 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 confinement resulting from his January 18, 2002 conviction in the Dane County Circuit Court for first and second degree sexual assault of a child and repeated sexual assault of the same child. Although the description of the ground for his claim is not entirely clear, petitioner appears to be contending that he is in custody in violation of the laws and Constitution of the United States because he was denied his Sixth Amendment right to counsel. Although petitioner incorrectly refers to the state statutory duties of the public defender set forth in Wis. Stat. § 977.05(4), he also cites *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendant who faced felony charges in state court without assistance of counsel guaranteed by the Sixth Amendment denied due process). Dkt. 1 at 5. From court records

available electronically, petitioner apparently requested appointment of new trial counsel because his trial attorney had not been communicating with him. *See* Consolidated Court Automation Programs (CCAP) WI Supreme Court and Court of Appeals Cases Access for no. 2003 AP 000853 at <http://wcca.wicourts.gov> (visited Mar. 31, 2008). On appeal, petitioner alleged that the circuit court failed to address his request for appointment of new trial counsel before his sentencing hearing and ultimately denied his request after sentencing. *Id.* Although petitioner did not provide any details in his petition about the circumstances relating to his denial of counsel, his allegations are sufficient to warrant a response from the state at this stage of the proceedings. *See Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (Sixth Amendment right to counsel prevents states from conducting trials at which defendant faces incarceration without adequate legal assistance).

It appears that petitioner has exhausted his state court remedies. However, it is unclear from the petition or court records available electronically whether he filed his petition within the one-year limitations period. I will leave it to the state to address in its 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 Thurmer.
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 31st day of March, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge