

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

THOMAS L. MCCANTS,

Petitioner,

v.

JAMES SCHWOCHERT,

Respondent.

ORDER

11-cv-16-wmc

Thomas McCants, an inmate at the Waupun Correctional Institution, by his lawyer, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee.

Petitioner is challenging his Dane County conviction for first-degree intentional homicide, enhanced for use of a dangerous weapon, in case no. 03-CF-1395. He filed a motion for post conviction relief in the trial court, which was denied. The Wisconsin Court of Appeals affirmed the judgment and order of the trial court on June 11, 2009. His petition for review was denied by the Wisconsin Supreme Court on October 20, 2009.

Petitioner argues that his conviction violated his Sixth Amendment right to his counsel of choice, based on the fact that the court granted the state's motion to disqualify attorney Joe Sommers as petitioner's counsel over a potential conflict of interest and later denied Sommers' motion to be reinstated as counsel, even though petitioner waived the conflict. The conflict of interest was that Sommers had represented another criminal defendant, who initially told police that someone other than petitioner committed the crime he was charged with, but later changed his story, admitting that he had lied and that petitioner admitted to him that petitioner had committed the crime.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense,” and the Supreme Court has held that “an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). There is a presumption in favor of a defendant's right to counsel of his choice. *Wheat v. United States*, 486 U.S. 153, 164 (1988). Accordingly, the Sixth Amendment bars a court from denying a defendant the right to retain counsel of his choice arbitrarily or unreasonably. *Ford v. Israel*, 701 F.2d 689, 692 (7th Cir. 1983). Only a serious potential conflict will justify overriding the defendant's choice of counsel. *Wheat*, 486 U.S. at 164.

I conclude that petitioner’s allegations are sufficient to raise valid constitutional claims. In addition, it appears that petitioner has exhausted his state court remedies and filed his petition within the one-year limitations period. Accordingly, the state must respond to the petition.

ORDER

It is ORDERED that:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on respondent James Schwochert.

2. **Answer deadline.** Within 30 days of the date of service of this order, respondent must file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.

3. **Motions to dismiss.** If the state contends that the petition is subject to dismissal on its face—on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default—then it is authorized to file within 30 days of this order, a motion to dismiss, a supporting brief and any documents relevant to the motion. Petitioner shall have 20 days following service of any dismissal 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.

4. **Denial of motion to dismiss.** If the court denies such a motion to dismiss in whole or in part, then it will set deadlines for the state to file its answer and for the parties to brief the merits.

5. **Briefing on the substantive merits.** If respondent does not file a motion to dismiss, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of his petition within 30 days after respondent files its answer. With respect to claim adjudicated on the merits by the Wisconsin Court of Appeals, petitioner must show either that (1) the state appellate court contravened a controlling opinion of the United States Supreme Court; (2) the state appellate court applied a controlling opinion of the United States Supreme Court in an unreasonable manner; or (3) the state appellate court's decision rested upon an unreasonable determination of the facts. 28 U.S.C. § 2254(d).
- Respondent shall file a brief in opposition within 30 days after petitioner files his initial brief.

- Petitioner shall have 20 days after respondent files its brief in which to file a reply brief.

Entered this 18th day of May, 2011.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge