

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

DARRYL WAYNE PRUETT,

Petitioner,

ORDER

v.

15-cv-708-wmc

JUDY P. SMITH, Warden,

Respondent.

Petitioner Darryl Wayne Pruett seeks a writ of habeas corpus under 28 U.S.C. § 2241 and § 2254. On April 7, 2016, the court issued an order directing Pruett to explain why two of his claims should not be dismissed as barred by the doctrine of procedural default. (Dkt. #8.) Pruett has since responded. For the reasons that follow, claims 1 and 4 of his petition will be dismissed, but the court will require a response on claims 2 and 3.

As the court explained previously, Pruett is raising four claims for relief in his petition: (1) the circuit court judge was biased; (2) a false rape allegation caused the judge to double the sentence requested by the prosecutor; (3) the State brought two felonies against him with respect to the same event, making it appear that he was a habitual offender; and (4) the punishment constituted cruel and unusual punishment because the judge sentenced him for “imaginary” crimes against his son, resulting in a prohibition on Pruet having contact with him.

The court explained that claims 2 and 3 appear to be exhausted and that a response from the state will be necessary as to those claims, but that claims 1 and 4 are barred by the doctrine of procedural default and thus are subject to dismissal. The court directed petitioner

to explain how he could avoid default by establishing cause and prejudice, or that the failure to consider these claims will result in a fundamental miscarriage of justice because he is actually innocent. In his response, Pruett states that he would like to pursue his claims that his judge was biased (claim 1), but he does not mention his claim that the judge sentenced him for imaginary crimes (claim 4). He fails to explain why he did not raise either claim in the Wisconsin courts, nor that these claims could show that he is actually innocent of his crimes of conviction. Accordingly, petitioner has failed to establish that he can overcome procedural default and claims 1 and 4 will be dismissed from his petition. The court will order a response as to claims 2 and 3, however, as set forth below.

ORDER

IT IS ORDERED THAT:

1. Pursuant to the doctrine of procedural default, claims 1 and 4 of Darryl Pruett's petition are DISMISSED.
2. **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 the respondent, Judy Smith, in her official capacity as warden of the Oshkosh Correctional Institution.
3. **Answer deadline.** Within 60 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.
4. **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 a 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 merits. In the event that the respondent does not file a motion to dismiss as outlined above, the court will proceed to consider the merits. The court notes that petitioner has not filed a separate memorandum or brief in support of his petition. Therefore, the parties shall adhere to the following briefing schedule with respect to the merits of petitioner's claims:

- a. If petitioner wishes to file a brief in support of his petition he must do so within 30 days after the respondent files an answer.
- b. Once petitioner submits his brief or his time to submit a brief expires, respondent shall file a brief in response to the petition within 30 days.
- c. Once respondent files a brief in opposition, petitioner shall have 20 days to file a reply if he wishes to do so.

Entered this 25th day of July, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge