

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Chad Evans, Petitioner

v.

Warden, New Hampshire State
Prison, Respondent

No. 1:08-cv-105-JD

**RESPONDENT’S MOTION FOR CLARIFICATION
WITH RESPECT TO FEBRUARY 25, 2010
DOCKET ENTRY REGARDING ANSWER AND DEADLINE**

By notice of electronic filing, served on February 25, 2010, the respondent has learned that this Court has terminated the deadline for filing an answer. It is unclear what effect this docket entry has on the case. A telephone discussion with the Clerk of Court, although helpful, has not made it clear to the respondent what the appropriate course of action is. As a result, the respondent asks this Court to clarify the docket entry.

On January 20, 2010, this Court directed the respondent to “answer or otherwise plead” within 30 days of service of the order. D. 15: 6.¹ The Order further directed that the pleading comply with Rule 5 of the Rules Governing § 2254 Cases. On February 19, 2010, the respondent filed a motion for summary judgment. D. 16. In the memorandum of law, the respondent noted that the

¹ “D. :_” refers to this Court’s document and page number.

motion and memorandum of law were filed in accordance with this Court's order to answer or otherwise plead. D. 16-2: 1. The pleading also cited Federal Rule of Civil Procedure 56(b), which states that a defending party, in response to a "claim, counterclaim, or cross-claim . . . may move *at any time*, with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. 56(b) (emphasis added). The respondent has taken advantage of this rule in the interest of expediting this petition.

The respondent notes that Rule 5 of the Rules Governing § 2254 Cases does not require the respondent to answer the petition "unless a judge so orders." The rule does set out specific requirements, to include: (1) addressing the allegations in the petition; and (2) stating a claim in which the petition is barred. Rule 5(b). Further, the respondent must inform the court of the existence of transcripts and when they will be furnished, attaching relevant parts of the transcripts to the response. Rule 5(c). It directs the respondent to submit post-conviction pleadings and orders. Rule 5(d)(1), (2). *See also* Rule 4 of Rules Governing § 2254 ("If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.").²

² According to the Advisory Committee Notes, Rule 4 "afford[s] the judge flexibility in a case where either dismissal or an order to answer may be appropriate." The Order issued by this Court appears to adopt this flexibility, which may "avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition."

The respondent's pleading complies with this Court's order to answer or otherwise plead in accordance with Rule 5. The motion for summary judgment and memorandum of law, together with the addenda, provided this Court a response to the allegations in the petition, including the respondent's view of the *ex post facto* claim raised in it. The respondent further provided the relevant post-conviction pleadings, as well as an analysis of the three published opinions associated with this case.

Further, the respondent has filed a motion for summary judgment in place of an answer in several other habeas corpus proceedings in this Court. *See, e.g., Clough v. Warden*, 1:08-cv-114-JL; *Silva v. Warden*, 1:09-cv-388-JD; *Haniffy v. Warden*, 1:08-cv-268-SM; *Larose v. New Hampshire Adult Parole Board*, 1:09-cv-268-JL; *Roberts v. Warden*, 1:09-cv-159-PB; and *Vedrani v. New Hampshire Department of Corrections*, 1:09-cv-320. *See also Looney v. Warden*, 1:09-cv-302 (Opposition to Petitioner's Motion to File a Habeas Petition). None of these cases has generated a similar docket entry. And in *Pemberton v. Ashcroft*, the United States District Court for the Western District of New York rejected as meritless a petitioner's claim that filing a motion to dismiss in place of an answer was improper. *Pemberton v. Ashcroft*, 2002 WL 31011879 n.3 (W.D.N.Y. 2002) (unpublished opinion).

As a result, the respondent is unsure of the effect of the docket entry. By filing a motion for summary judgment in place of an answer, the respondent

believes that the pleading has complied with this Court's Order, Federal Rule of Civil Procedure 56(b), and Rule 5 of Section 2254. If this Court directs the respondent to seek leave to file a motion for summary judgment in place of an answer, then the respondent will certainly do so.³ On the other hand, if the notice of electronic filing was simply to inform the respondent that the deadline for filing an answer has passed, and no further action is required, then the respondent will simply rely on the pleading filed on February 19, 2010, in satisfaction of the directive to "otherwise plead." If this Court intends the entry to have a negative effect on the respondent's case, then the respondent seeks leave of this Court to address the concerns that this Court may have.

³ This procedure was used in *Smith v. Palmquist*, 2008 WL 4163097 (W.D. Wash.) (unpublished decision). In that case, the respondent filed a motion to be relieved from the obligation to file an answer and move for summary judgment. However, the respondent believed that this Court's Order had already given the respondent permission to "otherwise plead" within 30 days.

CONCLUSION

WHEREFORE, the respondent respectfully requests this Court to clarify the meaning of the docket entry dated February 26, 2010.

Respectfully Submitted,

Warden, New Hampshire State Prison,
Respondent.

By his attorneys,

Michael A. Delaney
Attorney General

/s/ Elizabeth C. Woodcock

Elizabeth C. Woodcock

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February 25, 2010

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served the petitioner, who is represented, by e-filing. Defense counsel is: David M. Rothstein, Deputy Chief Appellate Defender, Appellate Defender Program, 2 White Street, Concord, NH 03301.

/s/ Elizabeth C. Woodcock

Elizabeth C. Woodcock