

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
**CENTRAL DIVISION at LEXINGTON**

MITCHELL WILLOUGHBY,

Petitioner,

V.

THOMAS L. SIMPSON, WARDEN,

Respondent.

Civil Action No. 5: 08-179-JMH

**ORDER**

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This matter is before the Court on several motions filed by the parties.

Respondent Thomas L. Simpson has filed a motion seeking an extension of time within which to file the state court record in this matter. [R. 14] Petitioner has not filed a response in opposition. The Court finds the motion to be filed in good faith and meritorious, and the Court will grant the extension requested.

Petitioner Mitchell Willoughby has filed a motion [R. 18] seeking an extension of time within which to file his response to Respondent's Answer/Motion to Dismiss. [R. 14] The Court finds the motion to be filed in good faith and meritorious, and the Court will grant the extension requested.

Petitioner has filed a second motion to proceed *in forma pauperis*. [R. 15] Petitioner previously filed a motion to proceed *in forma pauperis* [R. 1] which was denied by the Court on April 17, 2008. [R. 4] Petitioner offers no new argument in support of his motion. The motion is also now moot: Petitioner paid the \$5 filing

fee on May 27, 2008. [R. 6] The motion will be denied.

Petitioner has filed a Renewed Motion for Appointment of Counsel. [R. 16] Petitioner previously filed a motion for the appointment of counsel [R. 3] which was denied by the Court without prejudice on May 14, 2008. [R. 5] The Court denied Petitioner's prior motion on two grounds. First, at the time he filed the motion, Petitioner had yet to file a petition, and *McFarland's* exception to the filing requirement did not apply where Petitioner was represented - apparently at no cost - by attorneys from the Department of Public Advocacy ("DPA"). Petitioner correctly notes that this concern is no longer implicated, as his counsel filed a 90-page petition on his behalf within 10 days of the entry of that Order. [R. 7] Second, the Court determined at that time that it could not conclude that Petitioner "is or [will] become[] financially unable to obtain adequate representation" where DPA was providing federal habeas representation at no expense. In Petitioner's renewed motion, DPA counsel advise the Court that in light of budgetary constraints upon the agency, their representation of Petitioner must cease absent an appointment by this Court. Petitioner therefore appears to be financially eligible for the appointment of counsel under the Criminal Justice Act, 28 U.S.C. §3006A, as directed by 18 U.S.C. § 3599(a)(2). Finally, proposed counsel David H. Harshaw III and Dennis J. Burke appear to satisfy or substantially satisfy the requirements of 18 U.S.C. § 3599(b)-(d), and counsel for the Respondent has voiced no

objection to their appointment. The Court finds good cause for the appointment of Messrs. Harshaw and Burke as counsel for the Petitioner, and his motion for the appointment of counsel will be granted.

Finally, Petitioner has filed a motion for a Pre-Trial Conference [R. 17] to address his motion for appointment of counsel and perhaps issues relating discovery, including the preparation of the record from the state courts. The Court will deny the motion as premature at this juncture. The Court has ruled on the motion for appointment of counsel, and Respondents have yet to file the state court record in this Court. The parties may yet resolve any disagreements regarding its contents without the intervention of the Court. Either party may renew a motion for a pre-trial conference should the need arise, whether before or after the filing of Petitioner's response to Respondent's motion to dismiss.

Accordingly, **IT IS ORDERED** that:

1. Respondent's Motion for Extension of Time to File the State Court Record [R. 14] is **GRANTED**. Respondent shall have to and until February 28, 2009 to file the state court record in this matter.

2. Petitioner's Motion for Time to File a Reply [R. 18] is **GRANTED**. Petitioner shall have to and until April 29, 2009 to file his response to the Respondent's Answer/Motion to Dismiss.

3. Petitioner's Second Motion to Proceed *in forma pauperis* [R. 15] is **DENIED**.

4. Petitioner's Renewed Motion for Appointment of Counsel [R. 16] is **GRANTED**. David H. Harshaw III and Dennis J. Burke are appointed as counsel for the Petitioner in this proceeding under the terms set forth in the Criminal Justice Act, 28 U.S.C. §3006A, subject to the *Guidelines for the Administration of the Criminal Justice Act and Related Statutes* promulgated by the Administrative Office of the Courts and further orders of the Court.

5. Petitioner's motion for a Pre-Trial Conference [R. 17] is **DENIED** without prejudice.

This the 18th day of February, 2009.



**Signed By:**

**Joseph M. Hood** *JMH*

**Senior U.S. District Judge**