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

GEORGE E. TAYLOR,

Petitioner, ORDER

v. 00-C-466-C

GARY McCAUGHTRY, Warden, Waupun Correctional Institution,

Respondent.

Petitioner George E. Taylor is serving a 65 year sentence of incarceration imposed by the Circuit Court for La Crosse County, Wisconsin, after being convicted by a jury of kidnaping, second degree sexual assault and substantial battery. Petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, in which he contends 1) that the evidence adduced at trial was insufficient to support the jury's verdict on the kidnaping count and 2) that his trial lawyer was ineffective. Both claims state cognizable constitutional claims. Petitioner alleges that he appealed his claims up to the Wisconsin Supreme Court and that his direct appeal concluded within the past year. Petitioner has paid the filing fee.

This case presents a question of statutory interpretation that is unresolved in the Seventh Circuit: Under the relevant statute of limitations provision, 28 U.S.C. § 2244(d)(1)(A), does a prisoner's conviction become final when the highest court in the state

denies his petition for review, or 90 days later, the last day on which the prisoner could have filed a petition asking the Supreme Court of the United States to issue a writ of certiorari?[1] *See Gendron v. United States*, 154 F.3d 672, 674 & n. 2 (holding that period to apply for certiorari is not included for federal prisoners under § 2255, but expressly stating, "we do not address the question of whether a prisoner . . . would have the time for filing certiorari with the United States Supreme Court included in his 'direct review' for the purposes of § 2244"), *cert. denied sub nom.*, 526 U.S. 1113 (1999); *Freeman v. Page*, 208 F. 3d 572, 573 (7th Cir. 2000) (same). If the answer is the former, then Taylor is barred from challenging his conviction in federal court because he filed the instant petition more than one year after the Wisconsin Supreme Court denied his petition for review. (Taylor proffers that the Wisconsin Supreme Court denied his petition for review on April 27, 1999; Taylor's habeas petition was received in this court on July 27, 2000.) If the answer is the latter, then Taylor's petition is timely because it was filed within one year of the date on which his right to petition the United States Supreme Court for a writ of certiorari expired.

I conclude that a prisoner's "direct review" for the purposes of § 2244 includes the right to file a petition for a writ of certiorari with the United States Supreme Court. 28 U.S.C. § 2244(d)(1) provides:

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[1] *See* Sup. Ct. R. 13.1(petition for writ of certiorari is timely when filed within 90 days after entry of judgment).

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . .

Thus, Congress offered two dates from which its one-year limitation period can begin running: 1) at the conclusion of direct review or (2) at the expiration of time in which further direct review could have been sought, but was not. While the term "direct review" is not defined in § 2244(d)(1)(A), the Supreme Court has indicated in various contexts that direct review of a state court criminal judgment includes the right to seek certiorari review in the United States Supreme Court. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.") (citing *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982)); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("[T]he process of direct review . . ., if a federal question is involved, includes the right to petition this Court for a writ of certiorari."); *Bell v. Maryland*, 378 U.S. 226, 232 (1964) ("In the present case, the [state court judgment] is not yet final, for it is on direct review in this Court."). Although the Court of Appeals for the Seventh Circuit has indicated that the Supreme Court's definition of when a conviction is final should be used merely as a guide to Congress's intent when it enacted the statutory language, *see Gendron*, 154 F. 3d at 674, every other circuit to address this question has concluded that "direct review" as used in § 2244

tracks the language of *Griffith* and includes the right to petition the Supreme Court for a writ of certiorari. *See United States v. Torres*, 211 F.3d 836, 838 (4th Cir. 2000) (following *Gendron's* holding relating to federal prisoner's deadline under § 2255, but distinguishing § 2244(d)(1)(A); *United States v. Arrevalo Garcia*, 210 F.3d 1058, 1060 (9th Cir. 2000); *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999), *cert. denied*, --- U.S. ----, 120 S. Ct. 808 (2000); *Kapral v. United States*, 166 F.3d 565, 575 (3d Cir. 1999); *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998), *cert. denied*, 525 U.S. 1187 (1999); *see also United States v. Thomas*, 203 F.3d 350, 354 (5th Cir. 2000) (addressing § 2255); *Ross v. Artuz*, 150 F.3d 97, 98 (2d Cir. 1998) (adopting interpretation without analysis). Several district courts in this circuit share this view. *See Jones v. Berge*, 101 F. Supp. 2d 1145, 1149 (E.D. Wis. 2000); *Williams v. DeTella*, 37 F. Supp. 2d 1048, 1049 (N.D. Ill. 1999); *Gonzalez v. DeTella*, 9 F. Supp. 2d 780, 781 (N.D. Ill. 1998), *rev'd on other grounds*, 202 F.3d 273 (7th Cir. 1999) (table); *Flowers v. Hanks*, 941 F. Supp. 765, 770 (N.D. Ind. 1996).

Further support for the conclusion that the term "direct review" as used in § 2244(d)(1)(A) was meant to include the right to petition the Supreme Court for a writ of certiorari can be found by comparing the language of § 2244(d)(1)(A) to the procedures that govern § 2254 petitions filed by state prisoners serving capital sentences in states that meet certain conditions set forth in the statute ("opt-in jurisdictions"), which Congress enacted as part of the AEDPA. *See* 28 U.S.C. § 2261 *et seq.*

Section 2263 provides in relevant part:

> (a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

Significantly, the limitations period in § 2263 runs from "final State court affirmance of the conviction and sentence on direct review." Congress's use of "State court" to modify the term "direct review" under § 2263 but its omission of the same modifier in § 2244 provides strong support for the conclusion that the limitations period under § 2244 runs from the conclusion of Supreme Court review or the expiration of time for seeking such review. *See Gendron*, 154 F.3d at 674 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and the language will not be implied where it has been excluded.")(citing *Hohn v. United States*, 524 U.S. 236 (1998) and *McNutt v. Board of Trustees of Univ. of Ill.*, 141 F.3d 706, 709 (7th Cir. 1998)).

For these reasons, I conclude that Taylor's statute of limitations did not begin to run until 90 days after the Wisconsin Supreme Court denied his petition for review—or until July 27, 1999. Thus, he had until July 27, 2000, in which to file his petition for habeas corpus. *See United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (establishing anniversary date as last day to file habeas petition). Because petitioner is *pro se*, his petition is deemed filed on the date he gave it to the proper prison authorities for mailing, *see Jones v. Bertrand*, 171 F. 3d

499, 502 (7th Cir. 1999) (adopting "mailbox rule" for pro se habeas petitioners); in the absence of evidence to the contrary, I presume that occurred on the date of his cover letter, or July 20, 2000. Thus, Taylor got his petition filed on time, with seven days to spare. (Although Taylor's petition was received by the district clerk on July 27, 2000 and was therefore timely even without the benefit of the mailbox rule, the seven days remaining on petitioner's one-year clock could be useful to him later in the event he has not exhausted his state court remedies.)

Having concluded that Taylor's petition is not barred by the statute of limitations, and it appearing from the petition that he exhausted his state court remedies by filing a petition for review with the Wisconsin Supreme Court, *see O'Sullivan v. Boerckel*, ___ U.S. ___, 119 S. Ct. 1728, 1732-33 (1999), I am ordering the state to respond to the claims raised in the petition. If the state disagrees with my conclusion regarding the statute of limitations and wishes to be heard on the matter, it may request reconsideration and present its arguments in a motion to dismiss.[2]

Because petitioner has paid the filing fee, it is his responsibility to serve his petition upon the respondent. This may be accomplished by mailing a copy of the petition, via certified mail, to Wisconsin's Attorney General and to Wisconsin's Secretary of the Department of Corrections. Such service triggers the state's obligation to respond.

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[2] Given the procedural posture of this particular case, if this is the only motion to dismiss that the state plans to file, then the state should submit it simultaneously with a substantive response to the petition.

ORDER

It is ordered that not later than twenty days from the date of service of the petition, the state shall file and serve either a substantive response or a motion to dismiss on procedural grounds.

If the state claims that petitioner has not exhausted his state court remedies and is not willing to waive the exhaustion requirement, or if the state claims that petitioner has defaulted all of his claims, then we will litigate those issues first by way of a motion to dismiss. Respondent should submit his legal memorandum and any portion of the state court record relevant to the motion along with any such motion. Petitioner will have twenty days after service of the motion within which to file and serve a response. The state shall file and serve any reply within ten calendar days of receiving petitioner's response.

If the state concedes or waives exhaustion and wishes to argue the merits of one or more of petitioner's claims, then and only then must it file and serve any and 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 claim. The state must also file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on the claim were unreasonable in light of the facts presented. *See* 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within the twenty day period allowed for the filing of the response, respondent must advise the court when

such papers will be filed. Finally, within the twenty day deadline the state should submit all of its legal support for its arguments seeking dismissal on the merits.

Petitioner shall have twenty days from the service of the response to file and serve a substantive reply to the state's response, which should include all documents, affidavits, and legal arguments in support of petitioner's claims for relief.

Entered this 24th day of August, 2000.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge