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

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LEONARD T. COLLINS,

Petitioner,

v.

JOHN BETT, Warden,
Dodge Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

03-C-0555-C

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Leonard Collins, an inmate at the Dodge Correctional Institution, is serving a life sentence without the possibility of parole after having been convicted in the Circuit Court of Dane County for attempted first-degree intentional homicide and sentenced as a "persistent repeater" under Wisconsin's "three strikes" law, Wis. Stat. § 939.62(2m)(c). He contends that Wisconsin's persistent repeater statute is unconstitutional on its face and as applied to him insofar as it allows a judge, sitting alone, to decide the question whether a defendant's prior out-of-state felonies are comparable to a serious felony in Wisconsin so as to trigger a mandatory sentence of life without the possibility of parole.[1]

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[1] This court dismissed Collins's other claims in an order entered October 20, 2003. *See* dkt. 3.

The state concedes that the petition is timely and that Collins exhausted his state court remedies. It contends that Collins procedurally defaulted his constitutional claim by failing to raise it on direct appeal to the Wisconsin Court of Appeals. In the alternative, the state argues that the claim has no merit in light of controlling Supreme Court precedent. For the reasons explained below, I am recommending that this court deny Collins's claim on the merits and dismiss the petition.

## FACTS

The facts are undisputed. On February 8, 2000, petitioner stabbed a woman multiple times with a knife in a parking lot on Madison's west side. The victim survived, and the state charged petitioner with both attempted first-degree intentional homicide while using a dangerous weapon and first-degree reckless injury. In addition, the state alleged that petitioner was a "persistent repeater" under Wisconsin's "three strikes" law, Wis. Stat. § 939.62(2m)(b)1, because he had been previously convicted of two murders in other states.

Under Wisconsin's three strikes law, the state can charge a defendant as a "persistent repeater" if he has been previously convicted of two or more "serious felonies." Upon conviction for the third serious felony, the statute mandates "life imprisonment without the possibility of parole or extended supervision." Wis. Stat. § 939.62(2m)(c). Whether a felony committed in Wisconsin is a "serious felony" is determined by reviewing the felonies listed in paragraph (a)2m.a., b. and c of the statute. Per subdivision 2m.d., a conviction under the law of another state constitutes a "serious felony" if that out-of-state conviction

is "comparable" to one of the Wisconsin crimes specified in subdivision 2m.b. Before a conviction under the law of another state can be counted as a serious felony conviction under § 939.62(2m)(b)1., the circuit court must determine, beyond a reasonable doubt, that the violation relating to that out-of-state conviction would constitute a felony specified under paragraph (a)2m.b. if committed by an adult in Wisconsin.[2]

Petitioner entered a plea of no contest to attempted first-degree intentional homicide and the state dismissed the reckless injury charge. Before accepting petitioner's plea, the circuit court informed petitioner that he would be convicted of attempted first-degree intentional homicide with a dangerous weapon and as a persistent repeater, which would mean that he would be sentenced to life in prison without the possibility of extended supervision. The state presented judgments of conviction for "murder second degree" from Missouri and "second degree murder" from Illinois. Petitioner conceded that those were his convictions and that the state could prove that he was a persistent repeater. The court accepted his plea and convicted him. After petitioner failed to prove at trial that he was "not responsible because of mental disease or defect," the court sentenced him to life in prison without parole, in accordance with the mandate of § 939.62(2m)(c).

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[2] Specifically, § 939.62(2m)(d) provides the following:

> If a prior conviction is being considered as being covered under par.(a) . . . 2m.d. as comparable to a felony specified under par. (a) . . . 2m. . . (b) . . ., the conviction may be counted as a prior conviction under par. (b) only if the court determines, beyond a reasonable doubt, that the violation relating to that conviction would constitute a felony specified under par.(a) . . . 2m. . . . b. . . . if committed by an adult in this state.

After an unsuccessful postconviction motion, petitioner appealed. Citing the statutory language and Wisconsin case law, petitioner contended that the court had no factual basis for finding that petitioner's Illinois conviction for "second degree murder" was a "serious felony" under the persistent repeater statute.[3] The court of appeals agreed with petitioner that it was not enough for the trial court to have relied on petitioner's admission at the plea hearing regarding his past convictions; rather, the court should have determined independently whether petitioner's out-of-state convictions were comparable to one of Wisconsin's "serious felonies." *State v. Collins*, 256 Wis. 2d 697, 705-706, 649 N.W. 2d 325, 330 (Ct. App. 2002). The court held that whether an out-of-state crime is comparable to a "serious felony" under Wis. Stat. § 939.62(2m) was a legal question that the court had to resolve notwithstanding the defendant's concession. *Id*. The court of appeals then proceeded to compare Illinois's second degree murder statute with serious felonies in Wisconsin, and concluded that petitioner had been properly sentenced as a persistent repeater. *Id*. at 706-712, 649 N.W. 2d at 330-333. Therefore, the court affirmed Collins's conviction and the denial of his postconviction motion.

Collins's appointed attorney then filed a no-merit petition for review with the Wisconsin Supreme Court pursuant to Wis. Stat. § 809.32(4). Collins filed a *pro se* supplemental response to the petition. He argued that whether his Illinois conviction was

[3] Collins did not challenge the use of his Missouri conviction to establish that he was a persistent repeater.

comparable to a serious felony under Wisconsin law was an issue of fact and not one of law, and that therefore Collins's Sixth Amendment rights were violated when that issue was decided by the court rather than by a jury. Collins relied on the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which the court had decided eleven days after the Wisconsin Court of Appeals had issued its decision affirming his sentence. On September 26, 2002, the Wisconsin Supreme Court denied Collins's petition for review. This habeas petition followed.

ANALYSIS

The state contends that Collins procedurally defaulted his constitutional claim by failing to present it to the Wisconsin Court of Appeals on direct appeal. Before resorting to federal court, a state prisoner must first give the state courts a fair opportunity to address his claims and to correct any error of constitutional magnitude. *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001). To satisfy this requirement, a petitioner must "give the state courts a meaningful opportunity to pass upon the substance of the claims later presented in federal court" by placing "both the operative facts and the controlling legal principles before the state courts." *Chambers v. McCaughtry*, 264 F.3d 732, 737-38 (7th Cir. 2001). Failure to do so "constitutes a procedural default," *id*. at 737, which bars federal review unless the petitioner demonstrates cause for the default and actual prejudice as a result of the violation, or demonstrates that the failure to consider the claims will result in a fundamental miscarriage of justice. *See Rodriguez v. Scillia*, 193 F.3d 913, 917 (7th Cir. 1999). To

determine whether a petitioner has fairly presented the claim in state court, the court considers four factors: (1) whether the petitioner relied on federal cases that engage in constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation. *Wilson*, 243 F.3d at 327.

There is no dispute that Collins did not fairly present his Sixth Amendment challenge to his sentence to the Wisconsin Court of Appeals. In his briefs, Collins had argued that the application of the persistent repeater statute presented a question of law that the court had to decide notwithstanding the defendant's admission at the plea hearing that he was a persistent repeater under the statute. Furthermore, he argued that the record in his case did not provide a factual basis upon which to conclude that his conviction of second-degree murder in Illinois constituted a "serious felony" that would qualify him for persistent repeater status under Wis. Stat. § 939.62(2m)(a)2m.b. In making these arguments, Collins relied exclusively on state law. Nowhere did he argue that his Sixth Amendment rights were violated because the statute allowed the court rather than a jury to decide the issue whether his prior out-of-state convictions qualified him as a persistent repeater under Wisconsin law.

Collins presented his constitutional claim for the first time in his petition for review to the Wisconsin Supreme Court. However, "[p]resenting a federal claim for the first time

in a petition for discretionary review by a state's highest court will not satisfy the fair presentment requirement." *Wilson*, 243 F.3d at 328. Thus, Collins has procedurally defaulted his claim unless he can show cause and prejudice or that a fundamental miscarriage of justice will result if this court fails to consider the claims.

Collins argues that his failure to present his constitutional claim to the state court of appeals should be excused because Wisconsin's appellate courts "have already ruled that the Wisconsin persistent repeater statute is constitutional." Pet.'s Response, dkt. #8, at1-2. However, none of the cases he cites considered the Sixth Amendment challenge that he now raises. *See State v. Radke*, 259 Wis. 2d 13, 657 N.W. 2d 66 (2003) (due process); *State v. Wield*, 2003 WI App 179, 668 N.W. 2d 823 (Ct. App. 2003) (due process); *State v. Block*, 222 Wis. 2d 586, 587 N.W. 2d 914 (Ct. App. 1998) (equal protection); *State v. Lindsey*, 203 Wis. 2d 423, 554 N.W. 2d 215 (Ct. App. 1996) (cruel and unusual punishment, separation of powers and equal protection). Thus, none of these cases stood in the way of Collins raising his Sixth Amendment challenge in the court of appeals.

Collins also asserts that he could not have presented his constitutional challenge to the court of appeals because it was based on *Ring v. Arizona*, 536 U.S. 584 (2000), which was not decided by the Supreme Court until 11 days after the court of appeals issued its decision denying his appeal. However, Collins's reliance on *Ring* is a red herring. In *Ring*, the Supreme Court resolved the conflict between the principle it had announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that a criminal defendant is entitled to a jury

determination of facts that may lead to any increase in his maximum punishment, and its decision in *Walton v. Arizona*, 497 U.S. 639 (1990), in which the court had upheld the constitutionality of Arizona's capital sentencing scheme that authorized the judge, sitting alone, to determine the presence or absence of aggravating factors required for the imposition of the death penalty in a capital case. In *Apprendi*, the majority reasoned that its holding could be reconciled with *Walton* because the jury under Arizona's capital sentencing scheme made all of the findings necessary to expose the defendant to a death sentence. 530 U.S. at 497. However, the Arizona Supreme Court later disagreed with that interpretation of Arizona law, finding that a defendant in Arizona could not receive a death sentence unless a judge made a factual determination that a statutory aggravating factor existed. *Ring*, 536 U.S. at 595-596. In light of Arizona's authoritative construction of its law, the Court overruled its holding in *Walton* as irreconcilable with *Apprendi* "to the extent that [*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609.

Important to this case, the Court in *Ring* said nothing to suggest that it was renouncing its holding in *Almendarez-Torres v.United States*, 523 U.S. 224 (1998), a case in which it had held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. In *Almendarez-Torres*, the Court noted that recidivism has long been considered a distinct issue because it "does not relate to the commission of the offense, but goes to the punishment only." 523 U.S. at 244 (*quoting*

*Graham v. West Virginia*, 224 U.S. 616, 629 (1912)). Although the Court in *Apprendi* questioned whether *Almendarez-Torres* had been correctly decided, *see* 530 U.S. at 489, it left *Almendarez-Torres* intact and carved out an exception for recidivism, expressing its holding as follows: "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added). In *Ring*, the Court noted that the petitioner was not challenging this exception to the rule announced in *Apprendi*. *Ring*, 536 U.S. at n.4. *See also United States v. Morris*, 293 F.3d 1010, 1012 (7th Cir. 2002) (*Almendarez-Torres*' holding that recidivism used to enhance defendant's maximum penalty is not element of crime that must be proved beyond a reasonable doubt remains good law after *Apprendi*).

The upshot of all this is that *Ring* did not alter the legal landscape with respect to the issue with which Collins is concerned–the state's use of his prior convictions to enhance his maximum penalty. At the time Collins filed his briefs on direct appeal, he had sufficient legal authority to support a claim that Wisconsin's persistent repeater statute was unconstitutional in that it allowed the trial judge and not the jury to determine whether his prior convictions were the equivalent of a "serious felony" in Wisconsin. Notably, the Supreme Court had decided *Apprendi* by that time and even had questioned whether its holding in *Almendarez-Torres* could survive *Apprendi*'s logic. *Ring* did not provide Collins with any new legal ammunition that he did not already have when he prosecuted his direct

appeal. Accordingly, his reliance on that opinion as a basis for his failure to raise his constitutional claim earlier fails to establish cause for his default.[4]

Indeed, Collins concedes as much in his next argument. Seeking a different route around his default, Collins asserts that his default was caused by the ineffectiveness of his appellate lawyer, who should have challenged his sentence on the basis of *Apprendi*. It is true that ineffective assistance of counsel can establish cause for a procedural default. However, in *Edwards v. Carpenter*, 529 U.S. 446 (2000), the Supreme Court held that because the assertion of ineffective assistance as a cause to excuse a procedural default in a § 2254 petition is, itself, a constitutional claim, the petitioner must have raised this claim first to the state court or he has procedurally defaulted it. *Id*. at 453. Collins never presented a claim of ineffective assistance of appellate counsel to the state courts.

This failure raises the question whether Collins can still pursue such a claim and if so, whether the petition should be dismissed in order to allow him to exhaust his state court remedies. The state has not responded to Collins's ineffective assistance of appellate counsel claim.

Wisconsin's statute governing postconviction motions, Wis. Stat. § 974.06, allows defendants collaterally to attack their convictions on constitutional grounds after the time

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[4] Furthermore, even if petitioner had not procedurally defaulted, and even if *Ring* announced a new rule concerning the use of prior convictions as penalty enhancers in Wisconsin, petitioner could not benefit from it. Petitioner's conviction became final before the Supreme Court decided *Ring*. The Court of Appeals for the Seventh Circuit has held that *Ring* does not apply retroactively on collateral attack. *Szabo v. Walls*, 313 F.3d 392, 398-99 (7th Cir. 2002).

for seeking a direct appeal or other post-conviction remedy has expired. However, a petitioner is procedurally barred from raising a claim in a post-conviction motion that he could have raised on direct appeal unless he has a "sufficient reason" for not raising the issue on direct appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994); Wis. Stat. § 974.06(4). Ineffective assistance of post-conviction or appellate counsel may provide a sufficient reason. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W. 2d 136, 139 (Ct. App. 1996) (describing procedure for challenging effectiveness of postconviction counsel); *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992) (appellate counsel). Thus, there are still avenues of relief available to Collins in the state courts through which he could present his claim that his postconviction and/or appellate lawyers were ineffective for failing to challenge his sentence on *Apprendi* grounds.

Generally, when a petition contains a mix of exhausted and unexhausted claims, the court must dismiss the petition under the rule of *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (district court must dismiss habeas petitions containing both exhausted and unexhausted claims). However, a dismissal in this case would prejudice Collins's ability later to pursue federal habeas relief on his claims because of 28 U.S.C. § 2244(d), which allows a petitioner only one year after his judgment of conviction became final in which to file a federal habeas petition. Collins's conviction became final on December 25, 2002, 90 days after the Wisconsin Supreme Court denied his petition for review. *See Anderson v. Litscher*, 281 F.3d 672, 675 (7th Cir. 2002) (limitations period under § 2244(d) includes time 90-day time

period during which petitioner could seek writ of certiorari from United States Supreme Court). Thus, his one-year limitation period expired on December 25, 2003. Although Collins filed his federal habeas petition on or about September 25, 2003, the time during which his petition has been pending before this court would not get excluded from the one-year limitations period if this court were to dismiss his petition. *Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002) (habeas petition dismissed without prejudice does not stop running of statute of limitations). Furthermore, once expired, the clock cannot be revived by the filing of a state postconviction motion or a new federal habeas petition. *See Fernandez v. Sternes*, 227 F.3d 977, 980-981 (7th Cir. 2000). Therefore, dismissing the petition without prejudice to allow Collins to exhaust his ineffective assistance of counsel claim would be the equivalent of dismissing the petition *with* prejudice because any subsequent habeas petition that Collins might file would be untimely.

The Court of Appeals for the Seventh Circuit has stated that if dismissal would essentially bar a future habeas case because the statute of limitations would run before it could be re-filed, the district court may, in its discretion, stay the petition to provide the petitioner with the opportunity to exhaust. *See Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000); *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999). However, I am *not* recommending this option, because Collins stands no chance of succeeding in the state courts on his *Apprendi* claim. It is better for this court to decide the claim on the merits now to avoid putting plaintiff and the state through unnecessary procedural hoops that would not

change the outcome. Although the state has not addressed Collins's ineffective assistance of appellate counsel claim, I predict that it would waive exhaustion in light of its position that the *Ring/Apprendi* claim has no merit. Accordingly, I recommend that this court deny the petition on the merits notwithstanding Collins's failure to exhaust his state court remedies. *See* 28 U.S.C. § 2254 (b)(2).

As noted above, the Court in *Apprendi* stated expressly that its holding did not apply to sentence enhancements for recidivism, leaving intact its prior holding in *Almendarez-Torres*. Collins attempts to avoid the holdings in these cases by arguing that he challenges not the *fact* of his prior convictions, but the determination whether those out-of-state convictions are "comparable" to a "serious felony" under Wisconsin law. That determination, he argues, should have been submitted to the jury.

Courts considering analogous challenges to federal statutes routinely have rejected the argument that the recidivism exception carved out by *Apprendi* does not apply to the determination whether a prior conviction is one of the enumerated types qualifying for sentence enhancement. For example, in *United States v. Morris*, 293 F.3d 1010, the defendant challenged his sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), which provides for an enhanced sentence for a person who has three previous convictions for a violent felony or drug offense "committed on occasions different from one another." The defendant argued that although it may have been proper under *Apprendi* for the court to have determined the fact of his prior convictions, the determination

that his prior convictions were committed on occasions different from one another should have been submitted to the jury under the reasonable doubt standard.

The court found no authority for the defendant's attempt to "parse out the recidivism inquiry in this manner." *Morris*, 293 F.3d at 1012. Characterizing the issue whether the prior convictions arose from offenses committed on different occasions as "merely involv[ing] a determination of which prior convictions will be considered," the court reasoned that the logic of *Almendarez-Torres* applied as well to that aspect of the recidivism inquiry and not simply to the existence of the prior convictions. *Id*. Also, the court observed that the recidivism enhancement at issue in *Almendarez-Torres* was similar to the armed career criminal enhancement in that it limited the felonies that the court could consider to only aggravated felonies. *Id*. In fact, noted the court, the *Almendarez-Torres* court had cited § 924(e) of the ACCA as one of many examples to support the proposition that "'prior commission of a serious crime–is as typical a sentencing factor as one might imagine.'" *Id*. (quoting *Almendarez-Torres*, 523 U.S. at 230).

The court also agreed with the reasoning of the Second Circuit in *United States v. Santiago*, 268 F.3d 151 (2d Cir. 2001), a case involving the same *Apprendi* challenge to § 924(e)(1). In rejecting the defendant's challenge in *Santiago*, the court reasoned that 1) the separateness of the convictions was not a fact different in kind from the types of facts already left to the judge by *Almedarez-Torres* and *Apprendi*; 2) treating recidivism as a substantive criminal offense was problematic, including the risk that the defendant would

be prejudiced if evidence regarding his prior crimes was submitted to the jury; and 3) the § 924(e)(1) inquiry related to the punishment alone, not to the commission of the offense. *Santiago*, 268 F.3d at 156. Other federal courts considering similar challenges to other statutes have reached the same conclusion for the same reasons. *See*, *e.g.*, *United States v. Kempis-Bonola*, 287 F.3d 699, 702-03 (8th Cir. 2002) (rejecting defendant's claim that *Apprendi* required jury determination whether prior felonies were "aggravated" for purpose of 18 U.S.C. § 1326(b)(2)); *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001) (reaching same conclusion with respect to enhancement under 18 U.S.C. § 3559(c), which requires a mandatory life sentence on the third conviction for a "serious violent felony").

In light of these authorities, Collins's challenge to Wis. Stat. § 939.62 must fail. As the state correctly notes, Collins's argument is "analytically indistinguishable" from those rejected by the Seventh Circuit in *Morris* and the other cases just noted. Like comparable federal statutes providing for an enhanced sentence if the defendant has certain qualifying prior convictions, the serious felony comparison under Wisconsin's persistent repeater statute merely involves a determination of which prior convictions will be considered and relates to the punishment, not the commission of the underlying offense. Therefore, it falls within the *Almendarez-Torres* exception recognized in *Apprendi*.

Because Collins is not in custody in violation of the laws or Constitution of the United States, his petition for a writ of habeas corpus must be denied.

## RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of Leonard T. Collins for a writ of habeas corpus be dismissed with prejudice..

Entered this 26th day of January, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge