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

JAMES KARLS,

Petitioner,

v.

CATHERINE FERRY, Warden,
New Lisbon Correctional Institution,

Respondent.

ORDER

05-C-0431-C
05-C-0570-C

James Karls, an inmate at the New Lisbon Correctional Institution, has filed a single-claim habeas corpus petition pursuant to 28 U.S.C. § 2241 (docketed as 05-C-570-C) and a 15-claim habeas corpus petition pursuant to 28 U.S.C. § 2254 (docketed as 05-C-431-C). He has paid the five dollar filing fee for each petition. For reasons discussed below, I am consolidating the two cases into a single § 2254 action and ordering a response from the state. The following allegations of facts are drawn from petitioner's submissions:

ALLEGATIONS OF FACT

In 1990 or 1991, Karls was charged in the Circuit Court for Dane County with first-degree intentional homicide while armed, as party to a crime. While free on bond, Karls fled to Costa Rica but was arrested. The Costa Rican government granted the United States' request for extradition on the condition that if Karls was convicted and received a sentence of life imprisonment, Wisconsin's governor would commute his sentence to no more than 25 years.

Karls was extradited to Wisconsin, tried by a jury and convicted of murder. On April 22, 1994, the court sentenced him to a term of life imprisonment and announced that it would hold a hearing in a few weeks to establish Karls's parole eligibility date. Three months later, the court amended Karls's sentence to set 35 years as his first parole eligibility date.

On October 4, 1994, Wisconsin's Governor, Tommy Thompson, sent Karls a form so he could apply for a gubernatorial pardon. Karls did not return the application and he did not otherwise request clemency from the governor. On January 20, 1995, Governor Thompson issued an executive order commuting Karls's sentence to 25 years with no parole. Karls did not learn of this commutation until about a year later.

Karls initiated a direct appeal of his conviction. In 1997, after Karls had "fired" a series of attorneys appointed to represent him on appeal, the Wisconsin Court of Appeals lost patience and denied Karls's request for yet another appointed counsel. Karls continued *pro se*. Two years later, the court of appeals reversed its position and held that Karls had been denied his constitutional right to counsel on direct appeal. The court restored Karls's right to a direct appeal with assistance of counsel; in light of this decision, the court did not reach the merits of any of Karls's other claims.

But on remand, the trial court determined that Karls was not indigent, so it declined to appoint an attorney to represent him on appeal. Karls did not hire an attorney or file a new *pro se* appeal and his time for pursuing his restored direct appeal eventually expired. Thereafter, Karls filed a series of unsuccessful *pro se* post-conviction motions, including two

petitions for habeas corpus and a motion for sentence modification, each of which he exhausted on appeal.

KARLS'S § 2241 CLAIM

In his § 2241 petition, Karls contends that his prosecution was void *ab initio* for lack of personal jurisdiction. His argument has two parts. First, he contends that then-Governor Thompson's order commuting his sentence was void under state and federal law because the governor commuted Karls's sentence without Karls's request or consent and without adhering to the state's procedures for sentence commutation. *See* Wis. Stat. §§ 304.08-304.11. Karls maintains that such unsolicited, *ultra vires* action by the governor does not fall into the no-harm, no-foul category: a sentence commutation implies an admission of guilt, which may bar future attacks on the underlying conviction. *See United States v. Burdick*, 236 U.S. 79, 90-91 (1915) (for pardon to have effect, it must be accepted by person to whom it is issued). Karls then argues that because the commutation order is void, the United States is in material breach of its promise to Costa Rica that Karls's sentence would not exceed 25 years. According to Karls, this violation of the extradition agreement deprives Wisconsin of all personal jurisdiction over him, rendering his judgment of conviction and sentence void *ab initio*.

Insofar as Karls is still in custody pursuant to the judgment of conviction entered by the state circuit court, § 2254 and not § 2241 is the proper vehicle for his claim. Section 2254 refers to an application "in behalf of a person in custody pursuant to the judgment of

a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In *Walker v. O'Brien*, 216 F.3d 626, 633 (7th Cir. 2000), the court explained that § 2254 "in effect implements the general grant of habeas corpus authority found in § 2241, as long as the person is in custody pursuant to the *judgment* of a state court, and not in state custody for some other reason, such as pre-conviction custody, custody awaiting extradition, or other forms of custody that are possible without a conviction."

Contrary to Karls's position, the governor's commutation order did not "undo" or replace his conviction or state court judgment. As the Supreme Court explained in *United States v. Benz*, 282 U.S. 304 (1931),

> The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment.

Id. at 311. Accordingly, because the *judgment* of the state court is still in effect, Karls's must proceed under § 2254. Moreover, because the rules direct that all grounds for relief should be set forth in a single petition (or risk being barred as second or successive), I am directing the clerk of this court to consolidate Case No. 05-C-570-C with Case No. 05-C-431-C and to treat the applications as a single petition. All future filings should be filed under 05-C-431-C. Karls's claim that the governor's sentence commutation order is void and his related jurisdictional claim will be considered as Claim 16 of the consolidated petition.

THE § 2254 CLAIMS

In his § 2254 petition, as just construed, Karls raises the following16 challenges to his conviction and the sentence imposed by the circuit court:

1) The trial court lacked subject matter jurisdiction over Karls because the state prosecutor never filed the written extradition documents that placed limitations on Karls's prosecution.

2) The evidence at trial was insufficient to support the conviction.

3) Karls's trial lawyer was ineffective for failing to object to jury instructions directing guilt for a completed crime where the evidence showed at most solicitation.

4) The trial court's imposition of a parole-eligibility date of 35 years after Karls had already begun serving a "regular" life sentence violated the prohibition against double jeopardy;

5) In the alternative to claim 4, if the court finds the court's imposition of a parole eligibility date was authorized by Wis. Stat. § 973.014, then the statute violates the Double Jeopardy Clause and counsel was ineffective for failing to object on that ground;

6) Karls was denied due process at the second sentencing hearing because the trial court received *ex parte* communications from the governor's office that potentially influenced the court regarding how Karls should be sentenced;

7) The state violated Karls's right to due process and access to the courts by failing to provide him with competent appellate counsel which inordinately delayed his the appeal, and by refusing to allow Karls to represent himself on appeal;

8) Karls was denied effective assistance of counsel on appeal;

9) After Karls's direct appeal rights were restored, the state public defender and the state courts wrongly denied Karls's application for pauper status, thereby violating his right to counsel;

10) Karls's trial lawyer was ineffective for failing timely to convey a plea offer;

11) The trial court's requirement that Karls serve 35 years before becoming eligible for parole violates the Equal Protection Clause because other lifers serving a "regular" sentence were eligible for parole after 13.6 years;

12) The state and federal officials who entered into an agreement with Costa Rica for Karls's extradition lacked the authority to do so;

13) Then-Governor Thompson violated the extradition agreement and the Costa Rican Constitution by providing that Karls's sentence be commuted to 25 years without parole;

14) The governor's commutation order did not account for 533 days of sentencing credit to which Karls is entitled;

15) The state violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose the extradition documents to Karls before trial, preventing him from attacking the court's jurisdiction; and

16 The governor lacked authority to commute Karls's sentence without Karls requesting commutation; therefore, the government has breached its extradition agreement with Costa Rica, which in turns renders Karls's conviction void *ab initio*.

Several of these claims plainly are meritless. For example, there is no merit to Karls's contention that the trial court "increased" his punishment or violated equal protection principles when it set a parole eligibility date instead of ordering Karls to be eligible for discretionary parole. Equally meritless is Karls's claim that he was denied the effective assistance of counsel on appeal: Karls was never actually represented by a lawyer on appeal. However, it would not be appropriate to dismiss these claims now because, as discussed

below, there is a potential "mixed petition" issue (*see Rose v. Lundy*, 455 U.S. 509 (1982)) lurking, and some of Karls's unexhausted claims may deserve further consideration upon exhaustion. Accordingly, I am ordering the state to respond to the entire petition.

EXHAUSTION

Section 2254 petitioners must exhaust their state court remedies before seeking federal relief. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). A petitioner has exhausted his state court remedies where he has "no further available means for pursuing a review of one's conviction in state court." *Wallace v. Duckworth*, 778 F.2d 1215, 1219 (7th Cir. 1985). However, where state remedies remain available to a habeas petitioner who has not fairly presented his constitutional claim to the state courts, the claim is unexhausted. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) (citations omitted). Where a petition contains a mix of exhausted and unexhausted claims, the court should dismiss the petition without prejudice without considering the merits of any claim so the petitioner may return to state court to litigate the unexhausted claims. *Rose v. Lundy*, 455 at 522.

In certain circumstances a federal court has discretion to overlook a failure to exhaust. The most common example is when the court dismisses with prejudice an unexhausted petition because the claims on their face are meritless. 28 U.S.C. § 2254(b)(2) (1994 &; *Duncan v. Walker*, 533 U.S. 167, 183 (2001) (Stevens, J., concurring) (noting that § 2254(b)(2) "gives the district court the alternative of simply denying a petition containing

unexhausted but nonmeritorious claims"); *Granberry v. Greer*, 481 U.S. 129, 135 (1987) (federal court may deny unexhausted claim on merits where "it is perfectly clear that the applicant does not raise even a colorable federal claim").

According to Karls, he presented only claims 1, 2, 4, and 16 to the state courts. *See* Pet. Mem. in Supp., dkt. #2, at 10. Karls seems to take the position that his other claims may be considered here because there exist no state procedures by which he now may present them. Karls may be correct: his failure to present his other claims in any of his post-conviction motions could be deemed a procedural default by the state courts should he attempt to present them at this late date. On the other hand, because Karls abandoned his reinstated direct appeal and apparently never filed a postconviction motion under Wis. Stat. § 974.06 (Wisconsin's collateral relief statute), it is at least possible that the state courts might allow him to raise his constitutional claims in a motion brought under that statute.

Karls contends that returning to state court would be futile because the governor's commutation order effectively bars him from contesting his guilt or challenging his sentence. This argument misconstrues the futility doctrine, which only applies when "the corrective *process* is so clearly deficient as to render futile any claim to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (emphasis added). The focus is on procedure, not result: "the pertinent question is not whether the state court would be inclined to rule in the petitioner's favor, but whether there is any available state procedure for determining the merits of petitioner's claim." *White v. Peters*, 990 F.2d 338, 342 (7th Cir. 1993). Assuming there

exists a procedural vehicle by which Karls could present his claims, the fact that the state court might deem his claims barred by the commutation order would not excuse him from litigating his claims in the state court. Indeed, Wisconsin's courts are better equipped than this court to decide in the first instance whether the governor's order is valid and if so, whether it bars Karls from contesting his conviction.

I leave it to the state to address the exhaustion issue as it sees fit in its response. In light of the fact that Karls was convicted over 10 years ago and the fact that many of his claims appear to have no merit, it would not surprise me if the state chose to waive the exhaustion requirement and to oppose Karls's claims substantively.

TIMELINESS

Karls has submitted a detailed time line of his case's procedural history in state court. He maintains that by virtue of his having filed various postconviction motions and appealing them–in some instances all the way up to the United States Supreme Court–his one-year limitations period for filing a federal habeas petition either did not start running or was tolled during most of the half-dozen years since his conviction became final. (As a result of the haggling over Karls's entitlement to appointed counsel on direct appeal, his conviction did not become final until 1999 at the earliest). Karls contends that there were 16 days remaining on his federal habeas clock when he submitted the instant petition to the prison authorities for mailing on July 15, 2005.

For the purposes of the instant order, I accept Karls's contention that his petition is timely. However, the state may contest that assertion in its response to the petition.

MOTION TO STAY AND ABEY

Finally, Karls has filed a "Motion to Stay Habeas Corpus Petitions and Allow Time to Amend for Good Cause" in which he asserts that he learned recently from a lawyer that he has an "unexhausted excessive sentence issue" that he would like to pursue in the state court. In addition, he asserts that he has learned that a Costa Rican court is in the process of adjudicating the legality of "petitioner's extradition in its entirety." Karls asserts that if Costa Rica concludes that his extradition was illegal, then he will need time to present that finding to the state courts as a basis for vacating his conviction. He asks this court to stay his petition until he has exhausted these issues in the state courts.

In *Rhines v. Weber*, ___ U.S. ___, 125 S. Ct. 1528, 1534 (2005), the Supreme Court held that district courts are not precluded by the Antiterrorism and Effective Death Penalty Act from issuing stays in habeas cases. The Court recognized that the interplay between AEDPA's one-year statute of limitations and the total exhaustion requirement of *Lundy* creates a risk that a petitioner who comes to federal court with a "mixed" petition might "forever los[e] [the] opportunity for any federal review of [the] unexhausted claims." *Id*. at 1533. Although the Court recognized that the issuance of a stay is a way to reduce this risk, it held that the procedure should be employed "only in limited circumstances" so as not to undermine AEDPA's twin goals of encouraging finality of state court judgments and

encouraging petitioners to seek relief from the state courts in the first instance. *Id*. at 1535. Granting a stay is inappropriate unless the district court determines there was "good cause" for the petitioner's failure to exhaust his claims first in state court, and is inappropriate when the unexhausted claims are "plainly meritless." *Id*.

I am denying Karls's motion for a stay. Karls has failed to provide any facts or law that would allow this court to determine whether his excessive sentence claim has any arguable merit. He has not asserted any reason why he could not have discovered the claim sooner. The fact that Karls has been without legal assistance does not constitute "good cause." *See Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999) ("neither a plaintiff's unfamiliarity with the legal process nor his lack of representation during the applicable filing period merits equitable tolling"). As for the alleged proceedings in Costa Rica, the likelihood that even a favorable finding by that court will undermine the validity of Karls's conviction is so unlikely that it does not warrant delaying this already-stale case for an indefinite amount of time. *See United States v. Burke*, ___ F. 3d ___ , 2005 WL 2373934 (7th Cir. Sep. 28, 2005) (whether extradited defendant "came to this nation in a regular manner does not affect the court's authority to resolve the criminal charges against him,"citing *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)). Karls's motion does not provide a basis to conclude that this is one of the rare cases in which a stay is warranted. However, if Karls has new documentation from Costa Rica that he thinks is relevant to the merits of the issues already raised in his habeas petition, he may submit it to the court.

ORDER

It is ORDERED that:

1. The clerk shall consolidate Case No. 05-C-570-C with Case No. 05-C-431-C and treat the applications as a single petition. All future filings must be filed under Case No. 05-C-431-C. Karls's claim in Case No. 05-C-570-C, that the governor's sentence commutation order is void and his related jurisdictional claim, shall be deemed Claim 16 of the consolidated petition.

2. The clerk shall apply the extra $5 filing fee paid by petitioner to his obligations on his civil actions under 28 U.S.C. § 1915(b)(2).

3. The clerk shall serve copies of the petition and this order by mail to Warden Ferry and to the Wisconsin Attorney General.

4. The state shall file a response to petitioner's claims not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations, it should file a motion to dismiss and all supporting documents within its 30-day deadline. The state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also 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 claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was 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 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

5. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

6. The federal mailbox rule applies to all submissions in this case.

7. Petitioner's motion to stay the petition and hold it in abeyance (dkt. #4) is DENIED.

Entered this 5th day of October, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge