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

JOHN A. LULLOFF,

Petitioner,

v.

JANE DIER-ZIMMELL, Warden, Oregon Correctional Center,

Respondent.

REPORT AND RECOMMENDATION

05-C-483-C

REPORT

Before me for report and recommendation is petitioner John A. Lulloff's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] Lulloff attacks the validity of a December 12, 2001 administrative decision revoking his parole. He contends that his custody resulting from that decision is unlawful because his parole was revoked in violation of his rights to due process. More specifically, Lulloff contends that he was denied a revocation hearing and that his purported waiver of that hearing was not made knowingly or intelligently. The state has filed a motion to dismiss the petition, contending that the state court of appeals' conclusion that Lulloff had missed the deadline for raising his

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[1] At the time he filed his petition, Lulloff was in custody at the Chippewa Valley Correctional Treatment Facility. He has now been transferred to the Oregon Correctional Center. Accordingly, I have substituted its warden, Jane Dier-Zimmell, as the proper respondent in this action. The clerk of court's office should do the same.

challenges in state court is an independent and adequate state rule that bars this court from considering the merits of Lulloff's claims. I agree.

FACTS

Lulloff was convicted of operating a vehicle while under the influence of an intoxicant as a fifth or subsequent offense. After serving part of his sentence and being released on parole, Lulloff was taken into custody for a new charge of operating a motor vehicle while under the influence of alcohol. On November 20, 2001, while in custody at the Ozaukee County jail, he signed a form indicating that he was waiving his right to a final revocation hearing. On December 12, 2001, the Department of Corrections revoked his parole without a hearing, and ordered him re-incarcerated for the entire 11 months and 25 days remaining on his sentence. Lulloff was subsequently convicted of the new drunk driving charge on September 10, 2002.

On October 30, 2002, Lulloff filed a petition for a writ of habeas corpus in the Milwaukee County Circuit Court seeking release from his imprisonment as a result of the revocation of his parole. Lulloff contended that he was denied his right to a revocation hearing and that any purported waiver of that hearing was not made knowingly or voluntarily. More specifically, Lulloff contended that he did not have his glasses on at the time the agent presented him with the waiver form and that the agent took advantage of this and misrepresented the content of the documents. The circuit court denied the petition as

moot; the court of appeals reversed. On remand, the circuit court dismissed the petition on the merits on April 1, 2004.

Lulloff appealed. In a per curiam decision issued March 1, 2005, the state court of appeals affirmed the circuit court's denial of Lulloff's habeas petition. The court denied the petition on procedural grounds, noting that the proper remedy for challenging a parole revocation decision was a petition for a writ of certiorari, not habeas corpus. Because Lulloff had missed his 45-day deadline for filing a certiorari action, his petition was untimely. *State ex rel. Lulloff v. Schwarz*, Appeal No. 04-1156, ¶ 4, (Ct. App. March 1, 2005) (unpublished). The state supreme court denied Lulloff's petition for review on July 28, 2005.

ANALYSIS

The state contends that Lulloff's claim is barred by the independent and adequate state ground doctrine. Under this doctrine, a federal court will not review a question of federal law if the state court declined to address the question because the prisoner failed to meet a state procedural requirement. *Moore v. Bryant*, 295 F.3d 771, 774 (7th Cir. 2002) (citations omitted). A state ground is "independent" of the federal claim if the state court "actually relied on a state rule sufficient to justify its decision." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1382 (7th Cir. 1990). A state ground is "adequate" if the state courts apply the rule in question consistently enough such that the petitioner could be deemed to have been apprised of the rule's existence at the time he omitted the procedural step in question. *Id*.

at 1383; *Moore v. Parke*, 148 F.3d 705, 709 (7th Cir. 1998) (citation omitted). In assessing whether a state court ruling is based on an "independent and adequate" determination of state law, the federal court must refer to the decision of the last state court to have written an opinion. *Prihoda*, 910 F.2d at 1383.

The last state court that issued an opinion in Lulloff's case was the Wisconsin Court of Appeals. Its decision makes clear that it rested solely on the ground that Lulloff had forfeited his right to review of the revocation decision by failing to file a petition for a writ of certiorari within 45 days of the decision, as required by Wis. Stat. § 893.735(2). The court did not address the merits of Lulloff's due process claim. Thus, the state court's decision rested on a state law ground that was "independent" of Lulloff's federal claim.

The rule cited by the court of appeals was also "adequate." The requirement that challenges to parole revocation are to be raised by certiorari petition has been the rule in Wisconsin since 1971, when the state supreme court decided *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W. 2d 306 (1971). The 45-day time limit for filing a certiorari petition has been established since September 1, 1998, when Wis. Stat. § 893.735(2) went into effect. 1997 Wis. Act 133, Sec. 38. Lulloff has not argued or attempted to show that Wisconsin courts do not apply these rules regularly or consistently.

Lulloff's failure to comply with an independent and adequate state procedural rule bars this court from reaching the merits of his claims unless he demonstrates (1) cause for the default and actual prejudice from failing to raise the claim as required, or (2) that

enforcing the default would lead to a "fundamental miscarriage of justice." *Steward v. Gilmore*, 80 F .3d 1205, 1211-12 (7th Cir. 1996) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). To show "cause," petitioner must show that "some objective factor external to the defense impeded counsel's [or petitioner's] efforts to comply the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show that a fundamental miscarriage of justice occurred, petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id*. at 496. To satisfy this latter exception, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of newly discovered evidence of innocence. *Schlup v. Delo*, 513 U.S. 298, 325-327 (1995).

Lulloff asserts in his petition that he did not realize his parole had been revoked without a hearing until January 26, 2002, when he was able to read a copy of his revocation warrant at the prison. Lulloff asserts that although he signed a waiver form while incarcerated at the Ozaukee County Jail, he thought he was agreeing to waive only his right to a preliminary hearing. He asserts that he did not have his glasses at the county jail and that the agent who presented the form to him misled him into thinking that he was waiving his preliminary hearing only. Lulloff suggests that he was not able to read the papers until he was transferred to prison and was provided with reading glasses. According to Lulloff, as soon as he was able to read the papers and discovered that he had waived his right to a final hearing, he wrote to William Groshans, the administrator of the Department of Probation

and Parole, and asked that his waiver be rescinded. Lulloff has included a copy of a February 27, 2002 letter from Groshans denying Lulloff's request for rescission.

Even assuming Lulloff's unsworn statements are true, they are insufficient to establish cause for his default. Even if one accepts Lulloff's claim that he did not know until January 26, 2002 that his parole had been revoked and that his lack of knowledge could somehow be blamed on the state, he still waited another nine months before filing his habeas petition in the state circuit court. Lulloff has not identified any external factor during those nine months that prevented him from filing a certiorari petition. Thus, even if he could show that the agent's alleged misconduct prevented him from filing a certiorari petition within 45 days of the revocation decision, his lack of diligence in pursuing his rights after he *did* learn of the revocation decision means that he cannot show cause for his default. *Cf. Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1815 (2005) (petitioner not entitled to equitable tolling where he waited too long to raise claims in state court and then waited another five months before seeking relief in federal court).

Lulloff makes no claim that his default should be excused under the miscarriage-of-justice exception and it is clear that he has no basis for such a claim. The conduct that provided the basis for the revocation of his parole was drunk driving, an offense for which he was subsequently convicted. His conviction on the OWI charge establishes his guilt for the conduct for which he was revoked.

Having failed to show that he satisfies either of the exceptions to the procedural default doctrine, Lulloff is not entitled to have his claims reviewed by this court. Accordingly, this court should grant the state's motion and dismiss the petition.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of John Lulloff for a writ of habeas corpus be DISMISSED.

Entered this 29th day of November, 2005.

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

November 29, 2005

John A. Lulloff
#49884
Oregon Correctional Center
P.O. Box 25
Oregon, WI 53575-0025

William L. Gansner
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Re: Lulloff v. Dier-Zimmell
Case No. 05-C-483-C

Dear Mr. Lulloff and Attorney Gansner:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before December 16, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by December 16, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge