

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

ROBERT LEE JORDAN,

Petitioner,

ORDER

v.

05-C-550-C

DANIEL J. BENIK, Warden, Stanley
Correctional Institution,

Respondent.

This application for a writ of habeas corpus under 28 U.S.C. § 2254 is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases. Robert Lee Jordan, an inmate at the Stanley Correctional Institution, contests a 1987 judgment of conviction and sentence in the Circuit Court for Racine County for attempted robbery, carrying a concealed weapon, possession of a firearm by a felon, resisting arrest, obstructing an officer, two counts of endangering safety and battery to a police officer, all as a habitual offender. Jordan claims the enhancement for habitual criminality--which added 30 years to his sentence-- is void because he was never convicted of the crimes on which the enhancement was based.

According to the petition, Jordan has presented this claim to the state courts on direct appeal and on several occasions thereafter with no success. In his most recent attempt, Jordan claimed to have discovered new information to support his claim that the prior

convictions listed on the information that formed the basis for his repeater enhancement are “false.” The state circuit court denied Jordan’s latest motion on the record on June 6, 2005, finding the motion procedurally barred. Apparently, the court signed a written order to that effect on June 9, 2005; Jordan alleges that he did not receive a copy of it until September 3, 2005.

Jordan admits that he has not yet appealed the circuit court’s order. In his petition, Jordan asks if he can bypass the state appellate system, arguing that the state courts have refused to grant him relief. The answer is no. Despite petitioner’s claim of futility, this court will not consider his § 2254 petition until the state courts have completed their review of his claims. “A state prisoner . . . may obtain federal habeas review of his claim only if he has exhausted his state remedies and avoided procedurally defaulting his claim.” Thomas v. McCaughtry, 201 F.3d 995, 999 (7th Cir. 2000); see also 28 U.S.C. §2254(d). When a petitioner claims that he cannot obtain relief from the state courts, 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). A petitioner “cannot simply opt out of the state review process because he is tired of it or frustrated by the results he is getting.” Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995).

Petitioner may not short-circuit the review process by coming straight to federal court simply because he believes the state courts will not grant him relief. The state courts

are better equipped than this court to decide whether the allegedly “new” information that petitioner is discovered is truly new, whether it undermines the validity of petitioner’s repeater status and whether petitioner has been diligent in pursuing relief. Petitioner may return to this court to seek relief under § 2254 after he has exhausted his state court remedies in this case; including filing a petition for review to the Wisconsin Supreme Court. O’Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

As a final matter, I note that Jordan asserts that because his conviction was final before the Antiterrorism and Effective Death Penalty Act went into effect on April 24, 1996, he is not subject to the Act’s provisions. He is incorrect. The Act applies to petitions for writs of habeas corpus filed after the Act’s effective date, even if the petitioner was convicted before the Act went into effect. Lindh v. Murphy, 521 U.S. 320, 327 (1997).

ORDER

IT IS ORDERED that petitioner Robert Lee Jordan's petition for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE for failure to exhaust state court remedies. The clerk of court is directed to enter judgment closing this case.

Entered this 19th day of October, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge