

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

ROGER O'NEAL,

Petitioner,

ORDER

v.

06-C-0149-C

BYRAN BARTOW, Director,
Wisconsin Resource Center,

Respondent.

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Roger O'Neal, an inmate at the Wisconsin Resource Center in Winnebago, Wisconsin, challenges his May 11, 2004 conviction in the Circuit Court for Dane County of two counts of first degree intentional homicide and one count of first degree reckless endangerment. He has paid the \$5 filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Under the Antiterrorism and Effective Death Penalty Act, a petitioner has one year from the date on which his state court conviction becomes final in which to file a federal petition for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1)(A). According to the petition, petitioner's judgment of conviction was entered on May 11, 2004. Petitioner did not file a notice of intent to pursue postconviction relief within the 20-day period prescribed by state law. See Wis. Stat. § 809.30(2)(b) (notice of intent to seek postconviction relief must be

filed within 20 days after date of sentencing or final adjudication). Thus, his conviction became final on May 21, 2004. His deadline for filing a federal habeas petition expired one year later, on May 21, 2005.

Petitioner did not file any motion for state court relief until December 2005, when he asked the court of appeals for permission to file a belated appeal from his conviction. Even assuming petitioner's motion for an extension of time to file an appeal could be construed as a properly filed application for state postconviction review under the AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), that motion could not have tolled the federal statute of limitations because it was not filed until several months after the federal limitations period had expired. Fernandez v. Sternes, 227 F.3d 977, 979 (7th Cir. 2000).

Thus, the petition is untimely and must be dismissed unless petitioner can show that there are equitable reasons to excuse his failure to file his petition on time. See United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000). Equitable tolling is granted sparingly and only when "[e]xtraordinary circumstances far beyond the litigant's control . . . prevented timely filing." Id. See, e.g., U.S. ex rel. Ford v. Page, 132 F. Supp. 2d 1112, 1115 (N.D. Ill. 2001) (run-of-the-mill claim of ignorance of law not sufficient to warrant equitable tolling); Posada v. Schomig, 64 F. Supp. 2d 790, 796 (C.D. Ill. 1999) (fact that prison was sometimes on lock-down, preventing access to prison law library, did not establish "extraordinary circumstances" justifying equitable tolling). Because the petition does not address whether there might be circumstances from which this court can conclude that

petitioner's failure to file his petition on time should be excused for equitable reasons, I will allow petitioner the opportunity to supplement his petition with a response that includes any facts that might allow this court to apply the doctrine of equitable tolling. If petitioner fails to file a response or if his response fails to establish to show that equitable tolling is warranted, his petition will be dismissed.

ORDER

IT IS ORDERED that petitioner has until May 5, 2006, within which to file a response setting forth facts from which this court could conclude that his failure to file his federal habeas petition on time was due to extraordinary circumstances beyond his control.

Entered this 19th day of April, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge