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

RICHARD A FORD,

Petitioner, ORDER

v. 06-C-757-C

TIMOTHY LUNDQUIST, Warden,
New Lisbon Correctional Institution,

Respondent.

Richard Ford, an inmate at the New Lisbon Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has also filed companion motions to vacate his sentence and to grant him relief under the All Writs Act. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.

According to the petition, documents attached to the petition and a review of documents available electronically, petitioner was convicted in the Circuit Court for Richland County on August 6, 1998 for one count of second-degree sexual assault of a child. Petitioner entered a plea of no contest to the charge pursuant to a plea agreement under which the state agreed to dismiss a second count of the same offense and recommend a sentence of no more than 10 years in prison. The court rejected the state's recommendation and instead sentenced petitioner to 20 years in prison.

A new lawyer was appointed to represent petitioner on appeal. Petitioner's deadline for filing an appeal was April 1, 1999. He did not file an appeal.

Petitioner contends that he is in custody in violation of the laws and Constitution of the United States because he was denied his right to a direct appeal as a result of his appellate lawyer's closing his file without filing an appeal. Petitioner presented this claim to the state court of appeals in July 2002 by filing a petition for a writ of habeas corpus pursuant to State v. Knight, 168 Wis. 2d 509, 522, 484 N.W. 2d 540 (1992) (authorizing mechanism of writ of habeas corpus for raising claims of ineffective assistance of appellate counsel). After a series of opinions, several rounds of briefing and an evidentiary hearing in the trial court, the state court of appeals ultimately determined that petitioner had knowingly and intelligently waived his right to appeal the one issue that his attorney thought had merit and that the attorney had no obligation to file a "partial" no-merit report with respect to the sentencing issue petitioner wanted to raise but which counsel determined had no merit. See State ex rel. Ford v. Holm, 2004 WI App 22, 269 Wis. 2d 810, 676 N.W. 2d 500 (Ford I); State ex rel. Ford v. Holm, 2006 WI App 176, 722 N.W. 2d 609 (Ford II). Accordingly, the court denied the writ. The state supreme court denied petitioner's petition for review on November 7, 2006.

Petitioner's federal habeas petition presents a cognizable claim that petitioner was denied his constitutionally-guaranteed right to a direct appeal. However, petitioner must overcome a significant procedural problem before this court may consider the merits of that

claim. In general, a state prisoner has only one year from the date on which his state court conviction becomes final in which to file a federal habeas petition challenging that conviction. 28 U.S.C. § 2244(d)(1)(A). However, petitioner did not take *any* action with respect to his appellate lawyer's alleged ineffectiveness until July 15, 2002, more than three years after petitioner's conviction became final. Although § 2244(d)(2) provides that time during which a properly filed application for state collateral review, such as petitioner's Knight petition, is pending does not count against the statutory time period, that is so only if petitioner filed his state court petition *before* the federal time clock expired. Fernandez v. Sternes, 227 F.3d 977, 979 (7th Cir. 2000). Petitioner's federal deadline expired before he filed his Knight petition, so tolling under § 2244(d)(2) is not available to him.

It's possible that petitioner can establish that he satisfies one of the statutory criteria for tolling set out in § 2244(d)(1)(B)-(D) that provide relief from the statute of limitations in certain situations. These situations include those in which the petitioner was impeded from filing a federal habeas petition by some unconstitutional state action or in which he could not have discovered the facts underlying his claims any sooner than he did. Alternatively, petitioner might be able to show that the statute of limitations should be tolled for some equitable reason not specifically enumerated in the statute. Owens v. Boyd, 235 F.3d 356, 360 (7th Cir. 2000) (noting that equitable tolling "may be available when some impediment of a variety not covered in § 2244(d)(1) prevents the filing of a federal collateral attack"). Equitable tolling "excuses a timely filing when the plaintiff could not,

despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time." Taliani v. Chrans, 189 F.3d 597, 597 (7th Cir. 1999). To qualify for either statutory or equitable tolling, petitioner will have to show that some extraordinary circumstance beyond his control prevented him from acting on his rights sooner than he did.

Because the statute of limitations is an affirmative defense that can be waived, I will order the state to respond to the petition. If the state raises the statute of limitations defense, then it will be petitioner's burden to show that the statute should be tolled under one of the provisions set forth in § 2244(d)(1)(B)-(D) or for other, equitable reasons. I note that the fact that the state court of appeals considered the merits of petitioner's tardy Knight petition does not automatically entitle petitioner to *federal* review of his petition. Federal rules are different from state rules.

Petitioner's motions to vacate his state court sentence under 28 U.S.C. §§ 2241 and 2255 and for the issuance of a writ under the All Writs Act will be denied. 28 U.S.C. § 2254 provides the exclusive mechanism for state court prisoners seeking federal court review of their state court convictions. Under that statute, this court has the authority to direct the state to reinstate petitioner's direct appeal, vacate his sentence or order other relief the court deems appropriate. Because petitioner's additional motions do not appear to seek relief beyond that which is authorized by § 2254, they are unnecessary.

Finally, petitioner has filed a "Motion for Transcripts" in which he asks the court to forward all the records, briefs, motions, exhibits and documents related to his state court case. As set forth below, unless the state takes the position that the petition must be dismissed on procedural grounds, the state is required to submit these documents in response to the petition. Accordingly, that motion is also denied as unnecessary.

ORDER

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

2. 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.

3. 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.

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

5. Petitioner's Motion to Vacate Sentence and the Judgment Entered by the Lower Courts, Motion to Issue All Writs Act and Motion for Transcripts are DENIED as unnecessary.

Entered this 3rd day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge