

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

HOWARD FRANK WILLIAMS,

Petitioner,

v.

RICHARD SCHNEITER, Warden,
Wisconsin Secure Program Facility,

Respondent.

ORDER

08-cv-221-slc

Howard Frank Williams, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. I have granted his petition for leave to proceed *in forma pauperis* in a separate order. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

The subject of the petition is petitioner's 1992 conviction in the Circuit Court for Milwaukee County of felony murder and two counts of armed robbery, for which he is serving a 50-year aggregate sentence. Petitioner alleges that he was denied his constitutional right to have a lawyer represent him on appeal, including during postconviction proceedings before the trial court. Petitioner contends that the lawyer who was appointed to represent him for this purpose closed her file without filing a no-merit report and without obtaining a valid waiver from him of his right to postconviction/appellate counsel. He also contends that appellate counsel

interfered with his direct appeal by failing to inform the trial court that she was no longer representing petitioner. Finally, he contends that the state courts failed to inform him of the dangers of proceeding *pro se*, have refused to give adequate consideration to his claims and have given him the run-around in the 17 years that have elapsed since he was convicted. (Petitioner also argues that the effective denial of his right to appeal for 17 years amounts to a greater punishment for his crime than that allowed by law, in violation of the constitutional prohibition on ex post facto laws. This claim has no legal merit.)

Documents attached to the petition show that petitioner has pursued his claims in the state courts: first, on direct appeal; then, in a series of motions in the appellate and trial courts in 1996 and 1997, and again in 2005 with the filing of a petition for a writ of habeas corpus. It appears that petitioner took no steps to pursue his rights from July 9, 1997, when the circuit court denied an application by petitioner for a writ of habeas corpus, until 2005, when petitioner filed his second petition for a writ of habeas corpus.

The allegations of the petition are sufficient to state a claim of the denial of the constitutional right to the assistance of counsel on direct appeal and to warrant a response from the state. I anticipate that the state will move to dismiss the petition on the ground that it is untimely, given petitioner's inactivity for eight years. Such a motion should address whether any grounds exist for applying the doctrine of equitable tolling, such as petitioner's claim that he has been "ensnared" by the state courts and their procedural rulings. Alternatively, the state may wish to forgo dismissal on procedural grounds and seek a determination on the merits. It appears that the state appellate court concluded from correspondence between petitioner and

his appointed lawyer that there was no merit to his claim that she abandoned him.

ORDER

IT IS ORDERED that:

1. Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on Warden Schneider.
2. The state shall file a response to the petition 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 any of petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address in its supporting brief the issue of cause, prejudice and staying this action while petitioner exhausts his state court remedies. 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. 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.

Entered this 13th day of May, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge