

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

EUGENE JENSEN,

Petitioner,

ORDER

v.

03-C-0079-C

PHIL KINGSTON, Warden, Columbia
Correctional Institution,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Eugene Jensen, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, is serving a sentence imposed on December 5, 1994, by the Circuit Court for Marinette County for four counts of sexually assaulting a minor. Petitioner contends that he is in custody in violation of the laws and Constitution of the United States. Petitioner has not paid the \$5.00 fee for filing his petition. Instead, he requests leave to proceed in forma pauperis. That request will be denied, because it is clear from petitioner's trust fund account statement that he does not qualify for pauper status.

In determining whether a petitioner is indigent for the purpose of filing a § 2254 petition, this court calculates the average monthly deposits and the average monthly balances in the petitioner's prison account for the six-month period preceding the filing of his habeas petition. If 20% of the greater of these two figures is \$5 or more, then the petitioner is not

eligible for indigent status and must prepay all of the \$5 filing fee. If 20% of the greater of these two figures is less than \$5, the petitioner must prepay whatever portion of \$5 the 20% calculation works out to be.

Petitioner's trust fund account statement covers the most recent six-month period. During that time, petitioner received deposits totaling \$197.57 to his prison account, which averages out monthly to \$32.92. It is unnecessary to calculate petitioner's monthly balance for the same period, because regardless which amount is greater, he does not qualify for indigent status. Twenty percent of \$32.92 is \$6.58, which is more than the \$5 filing fee. Therefore, petitioner does not qualify for indigent status.

Even if petitioner did qualify for indigent status, this court would dismiss his petition because it is clear that petitioner has missed the one-year statute of limitations for filing a habeas petition. Pursuant to 28 U.S.C. § 2244(d)(1), a person in custody pursuant to the judgment of a state court has one year from the "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" within which to file a federal habeas petition. A review of electronic records shows that the Wisconsin Court of Appeals rejected petitioner's direct appeal and affirmed the judgment of conviction on December 10, 1996, and the Wisconsin Supreme Court denied his petition for review on February 18, 1997. Because petitioner did not file a petition for a writ of certiorari with the United States Supreme Court, his judgment became final 90 days later, or approximately May 19, 1997. See Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir.

2002) (§ 2244(d)(1) includes the 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court). It expired one year later, on May 19, 1998.

Although § 2244(d)(2) provides that “time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” is not counted towards the statute of limitations, that provision does not help petitioner. According to the petition, petitioner filed a postconviction motion in the state circuit court on September 14, 2000, after his federal statute of limitations had expired. The filing of a postconviction motion cannot toll a limitations period that has expired already.

ORDER

Accordingly, IT IS ORDERED that petitioner’s request for leave to proceed in forma pauperis in the habeas corpus action is DENIED.

Dated this 26th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge