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

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LAMONT WILLIAMS,

Petitioner, ORDER

v. 04-C-966-C

DANIEL BENIK, Warden, Stanley Correctional Institution,

Respondent.

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Lamont Williams filed this petition for a writ of habeas corpus on December 22, 2004. After petitioner paid the five dollar filing fee, this court conducted a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases. In an order entered January 26, 2005, I dismissed the petition. I dismissed two of the petitioner's three claims with prejudice on the ground that they were without merit. I dismissed the third, petitioner's claim that a post-sentencing change in the Department of Corrections' parole policy constituted an unconstitutional *ex post facto* law, without prejudice on the ground that it was improperly filed under § 2254. In doing so, I noted that petitioner had not yet attained his mandatory release date and had not alleged that he had been denied discretionary parole as a result of the alleged change in parole policy. Therefore, I inferred that petitioner was not contending that the alleged change in policy had affected the fact or

duration of his custody, but rather was challenging the procedures used for making parole decisions, in which case § 1983, not § 2254, was the proper vehicle for bringing such a claim.

Petitioner has now filed a motion in which he asks this court to reconsider the dismissal of his *ex post facto* claim. In his motion, he alleges what was missing from his petition: that he has twice been before the parole board (in March 2002 and August 2004) and twice been denied release on discretionary parole pursuant to the alleged change in policy. This is sufficient to bring his *ex post facto* claim within the ambit of § 2254 and to require a response from the state. Petitioner's motion for reconsideration shall be treated as an addendum to the petition.

I note that petitioner's *ex post facto* claim might falter on procedural grounds. Namely, it is debatable whether petitioner has satisfied the requirement that he properly exhaust his state court remedies before seeking habeas relief in federal court. § 2254(b)(1)(A). In order to properly exhaust state court remedies, a petitioner must present "fully and fairly his federal claims to the state courts . . . ". Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001). This means that a petitioner must "give the state courts a meaningful opportunity to pass upon the substance of the claims later presented in federal court" by placing "both the operative facts and the controlling legal principles before the state courts." Id. at 737-38 (internal citations omitted). Failure to do so "constitutes a procedural default," id. at 737, which bars federal review unless the petitioner demonstrates cause for the default and actual prejudice as a result of the violation, or demonstrates that the failure to consider

the claims will result in a fundamental miscarriage of justice. See Rodriguez v. Scillia, 193 F.3d 913, 917 (7th Cir. 1999).

It appears that petitioner never brought a state court action to challenge either of the parole commission's decisions to deny his parole, even though he could have done so by filing a common law writ of certiorari. State ex rel. Britt v. Gamble, 257 Wis. 3d 689, 698, 653 N.W. 2d 143, 148 (Ct. App. 2002) (refusal to grant discretionary parole reviewable by common law certiorari). Moreover, it is too late for petitioner to file such a petition in state court now because a prisoner seeking review of a governmental decision by writ of certiorari must file an action within 45 days of the date of the challenged decision. State ex rel. Walker v. McCaughtry, 244 Wis. 2d 177, 183, 629 N.W. 2d 17, 20 (Ct. App. 2001). By failing to seek certiorari review of the denial of his release on parole, petitioner may have committed a procedural default that bars this court from considering the merits of his claim.

That said, petitioner did present his *ex post facto* claim to the state courts in the context of his challenge to the trial court's refusal to modify his sentence on the basis of the alleged change in parole policy, and the state courts considered the claim on the merits. This might be enough to allow this court to consider petitioner's claim on its merits. I will leave it to the state to address this issue more fully in its response to the petition.

ORDER

IT IS ORDERED that:

1. Petitioner's motion for reconsideration of the dismissal of Claim 2 of the petition is GRANTED. That portion of the judgment of January 27, 2005 order is VACATED and the claim is reinstated.

2. The clerk shall make a copy of petitioner's motion for reconsideration (dkt. #6) and attach it to a copy of the petition. The documents together shall be docketed as the amended petition.

3. The clerk shall serve copies of the amended petition and this order by mail to Warden Benik and to the Wisconsin Attorney General.

4. The state shall file a response to petitioner's *ex post facto* claim 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 claim is 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 claim on its 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 claim, 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 claim. 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 this claim 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.

5. 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.

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

Entered this 8th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge