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

JAMES KAUFMAN,

Petitioner,

OPINION AND ORDER

v.

05-C-0313-C

RANDALL HEPP, Warden, Jackson Correctional Institution,

Respondent.

James Kaufman, an inmate at the Jackson Correctional Institution, brings this petition for a writ of habeas corpus to challenge a 1998 state court conviction for possession of child pornography, as a habitual criminal. (Petitioner was convicted at the same time of one count of sexual exploitation of a child and first degree sexual assault of a child, but he does not attack the validity of those convictions.) Petitioner contends that he is in custody in violation of the laws or Constitution of the United States because 1) his guilty plea to the child pornography charge was not entered knowingly and voluntarily because the court failed adequately to explain the charge and did not explain that mere possession of "computer generated photographs" of what "appeared to be" minors would not constitute an offense under the statute; 2) his lawyer rendered ineffective assistance by failing to explain the foregoing to petitioner and by persuading him to plead guilty; 3) petitioner's conviction is constitutionally invalid because he never admitted to possessing pictures of "actual" children;

and 4) the trial court lacked subject matter jurisdiction because the possession of virtual images of what "appear to be children" is not an offense.

In an order to show cause entered June 9, 2005, the magistrate judge found that although petitioner's claims were sufficient to require a response from the state, the petition appeared to be untimely. Now before the court is the state's motion to dismiss the petition for petitioner's failure to file it within the one-year limitations period set forth at § 2244(d). Because I agree that the petition is untimely under § 2244(d) and petitioner has not shown any equitable reason to excuse his untimely filing, the petition will be dismissed.

FACTS

On or about January 7, 1998, the state filed a criminal complaint in the Circuit Court for Eau Claire County charging petitioner with one count of possessing child pornography, in violation of Wis. Stat. § 948.12.[1] The complaint also alleged that petitioner was eligible

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[1] The statute reads as follows:

948.12. Possession of child pornography

(1m) Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances is guilty of a Class I felony:

(a) The person knows that he or she possesses the material.

(b) The person knows the character and content of the sexually explicit conduct in the material.

for an enhanced sentence for criminal habituality. The complaint stated that police had been informed by someone who knew petitioner that petitioner had three CD-rom disks that had a large number of nude teens on them. Acting on this information, police executed a search of petitioner's residence, where they discovered a large amount of child pornography stored on various computer discs. According to the complaint, a sergeant reviewing some of these discs discovered on them "a large amount of what appeared to be very young children" in sexually explicit poses. One of the discs contained at least 6,000 pornographic images of children.

Petitioner entered a guilty plea and was convicted on June 15, 1998. Although petitioner pursued a direct appeal, he did not raise at that time any of the issues that he presents in the instant habeas petition. The Wisconsin Court of Appeals issued a decision affirming the conviction summarily on July 13, 1999. Petitioner did not seek Wisconsin Supreme Court review. Petitioner's conviction became final when the court of appeals issued its remittitur on August 17, 1999.

Nearly four years later, on May 21, 2003, petitioner filed a post-conviction motion under Wis. Stat. § 974.06, Wisconsin's collateral attack statute. The trial court denied that motion; apparently, petitioner did not pursue an appeal. Then, on September 23, 2003, petitioner filed a state court petition for a writ of habeas corpus in which he raised the same

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(c) The person knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years.

issues he raises in his federal habeas petition. The trial court denied the motion; the court of appeals affirmed the trial court; and the state supreme court denied review. The state supreme court issued its decision denying review on May 11, 2005.

OPINION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one year limitations period for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one year limitation begins to run from the latest of: 1) the date on which judgment in the state case became final by the conclusion of direct review or the expiration of the time for seeking such review; 2) the date on which any state impediment to filing the petition was removed; 3) the date on which the constitutional right asserted was first recognized by the Supreme Court, if that right was also made retroactively applicable to cases on collateral review; or 4) the date on which the factual predicate of the claims could have been discovered through the exercise of due diligence. See § 2244(d)(1)(A)-(D). Pursuant to 28 U.S.C. § 2244(d)(2), time is tolled during the pendency of any properly filed application to the state for post-conviction relief.

Petitioner concedes that because he did not file his habeas petition or any state court petition within one year after his conviction became final, his petition is untimely under § 2244(d)(1)(A). He relies instead on subsection (C). Petitioner asserts that all of his claims are predicated on the United States Supreme Court's decision in Ashcroft v. Free Speech

Coalition, 535 U.S. 234 (2002), in which the Court struck down a federal statute criminalizing "virtual" child pornography and images that "convey the impression" of child pornography, even if the images were not made using actual minors. According to petitioner, he filed his first state court post-conviction motion within one year from the time a copy of Free Speech Coalition became available in his prison law library.

I agree with the magistrate judge that petitioner's reliance on Free Speech Coalition as a basis for tolling the statute of limitations and as a substantive weapon to attack his conviction is misplaced. In that case, the Court reviewed provisions of the Child Pornography Prevention Act of 1996 that expanded the federal prohibition on child pornography to include not only pornographic images made using actual children but also images that "appeared to be" of minors engaging in sexually explicit conduct and those distributed in such a manner as to "convey the impression" that they depicted such minors. The Court held that the two provisions were overbroad insofar as they were not limited to images that were "obscene," as the Court defined that term in Miller v. California, 413 U.S. 15, 24 (1973), or images produced using actual children, as the Court found to be outside the scope of the First Amendment in New York v. Ferber, 458 U.S. 747, 758 (1982). Free Speech Coalition, 535 U.S. at 247-52.

Contrary to petitioner's contention, the Supreme Court did not recognize any "new" constitutional right to possess "virtual child pornography" but merely held that the statutory provisions in question abridged the freedom to engage in a substantial amount of lawful

speech. Indeed, the Court itself noted that it had recognized the distinction between virtual and actual pornography in Ferber. Id. at 251 (quoting Ferber, 458 U.S. at 763). Thus, even if one could argue that the possession of virtual child pornography is a constitutional right, that right was recognized 20 years before the Court decided Free Speech Coalition. Because the Court's decision in Free Speech Coalition did not announce any "new" constitutional right, petitioner is not eligible for tolling under § 2244(d)(1)(C). It is worth noting that petitioner also cannot satisfy the second clause of that provision, which requires a showing that the Court made an alleged "new" constitutional right "retroactively applicable to cases on collateral review." I am aware of no Supreme Court case holding that Free Speech Coalition applies retroactively to criminal cases on collateral review.

Even so, petitioner argues, this court must hear his petition because he is actually innocent. In Gildon v. Bowen, 384 F.3d 883 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit held that "actual innocence" will operate to overcome the failure to timely file a petition under § 2244 only if the petitioner shows "some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations." Id. at 887 (quoting Flanders v. Graves, 299 F.3d 974, 978 (8th Cir. 2002)). See also Escamilla v. Jungwirth, No. 04-3666, slip op. at 5 (7th Cir. 2005) ("'Actual innocence' permits a second petition under § 2244(b)(2)(B) . . . but does not extend the time to seek collateral relief.")

Petitioner contends that, as a result of Free Speech Coalition, he discovered that the state could not lawfully prosecute him for possessing pornographic images of "what appeared to be" children as opposed to images of actual children. However, petitioner was not convicted of possessing "virtual" child pornography, but of possessing pornography that was produced using an actual child. See State v. Holze, 2004 WI App 125, ¶ 6, 275 Wis. 2d 276, 683 N.W. 2d 93 (unpublished decision) (Wis. Stat. § 948.12 concerns child pornography involving actual children). Petitioner's entire "actual innocence" argument is founded upon language in the criminal complaint indicating that the discs found in petitioner's home contained images of "what appeared to be" children. However, there is no credible support for petitioner's suggestion that the "appeared to be" language in the complaint was a reference to virtual images. Rather, the language appears to be a reference to the age of the individuals depicted.

In any case, no matter what was alleged in the complaint, petitioner entered a guilty plea to the charge of possessing a picture of a "child engaged in sexually explicit conduct," not of "what appeared to be" such a child. As the magistrate judge pointed out, if petitioner wanted to argue that the images on his computer discs were not produced using actual children but were "virtual images" worthy of First Amendment protection, he could have done so before Free Speech Coalition was decided:

> [T]he fact that petitioner did not realize until he read the Court's decision in [Free Speech Coalition] that he might have been able to present a defense to the child pornography charge by showing that the hundreds of pornographic pictures of which he was charged with possessing were digitally altered or

> "virtual" images and were not pictures of "actual" children is not a scenario [warranting tolling of the statute of limitations].

Order, June 6, 2005, dkt. #1, at 3. See also Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2001) (time runs from when evidence could have been discovered through diligent inquiry, not when it was actually discovered or its significance realized). It is telling that although petitioner insists that this court should consider his petition because he is actually innocent of possessing images of real children, he has not alleged anywhere in his submissions that the images were virtual and not real. Petitioner's actual innocence claim is not credible and fails to provide a basis to consider his untimely petition.

ORDER

IT IS ORDERED that the petition of James Kaufman for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE for his failure to file it within the one-year limitations period prescribed by 28 U.S.C. § 2244.

Entered this 27th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge