

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

GEROLD A. HAUT,

Petitioner,

ORDER

v.

05-C-149-S

GREG GRAHMS,

Respondents.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. §2254. On April 22, 2005 respondent moved to dismiss petitioner's petition as untimely. Petitioner replied on May 16, 2005.

FACTS

On October 23, 2000 petitioner Gerold A. Haut was convicted of one count first degree intentional homicide and one count attempted first degree intentional homicide in Shawano County, Wisconsin Circuit Court. The Wisconsin Court of Appeals affirmed petitioner's conviction on October 1, 2002. The Wisconsin Supreme Court denied his petition for review on December 10, 2002.

On February 19, 2004 petitioner filed a postconviction motion. The circuit court denied the motion and the Wisconsin Court of Appeals affirmed that denial on December 21, 2004. The Wisconsin Supreme Court denied petitioner's petition for review on February

9, 2005. Petitioner signed his petition for a writ of habeas corpus on March 7, 2005 and it was filed March 10, 2005.

MEMORANDUM

Pursuant to 28 U.S.C. § 2244(d) a one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to judgment of a state court. The period commences from the date on which judgment becomes final by the conclusion of direct review. The statute further provides that the time during which a properly filed application for state post-conviction review concerning the pertinent judgment is pending shall not be counted toward this period of limitation. This statute took effect on April 24, 1996.

The one year period begins to run on the expiration of the time to petition the United States Supreme Court for certiorari to review the state court conviction on direct appeal, which is ninety days following the decision of the state supreme court. Anderson v. Litscher, 281 F. 3d 672, 675 (7th Cir. 2002). Pursuant to calendars for 2002 and 2003 ninety days from the denial of petitioner's petition for review (December 10, 2002) would be March 11, 2003. The one year limitation period commenced on March 12, 2003.

Petitioner filed his properly filed state postconviction motion on February 19, 2004 which tolled the one-year statute of

limitations at 344 days. This postconviction motion was pending until February 9, 2005 when the Wisconsin State Supreme Court denied his petition for review of the denial of the motion. The one year time period commenced on February 10, 2005. Petitioner had 21 days remaining on his one year period to file his petition for a writ of habeas corpus in this court. The date the petitioner signed the petition, March 7, 2005 is the date it is deemed filed. The 21 days remaining on his one year time limit expired on March 3, 2005. Accordingly, his petition must be dismissed as untimely because he has shown no reason for equitable tolling of the time period.

In his reply petitioner advises the Court that there are numerous errors in page 5 of respondent's brief. The brief incorrectly refers to February 20, 2005 as the date petitioner's time period begins to run. The correct date is February 10, 2005 because Exhibit F indicates that the Wisconsin Supreme Court denied petitioner's petition for review on February 9, 2005 and not February 19, 2005. This error does not affect this Court's decision based on the record that petitioner's petition is untimely.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition for

a writ of habeas corpus must be dismissed. See Newlin v. Helman,
123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas
corpus is DISMISSED as untimely.

Entered this 17th day of May, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge