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

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ANDREW MATTHEW OBRIECHT,

Petitioner, ORDER

v. 05-C-230-C

BYRAN BARTOW, Director, Wisconsin Resource Center,

Respondent.

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On April 15, 2005, Andrew Matthew Obriecht filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging two judgments entered by the Circuit Court for Dane County. In an order entered April 21, 2005, I found that because petitioner had not yet exhausted his state court remedies with respect to one of the judgments, Dane County Case 00-CF-2286, the petition would have to be dismissed in its entirety unless petitioner amended his petition to delete his challenge to the as-yet unexhausted judgment.

In response to that order, petitioner has filed two documents. The first, which the court received on April 22, 2005, is titled "Amendment to U.S.C. § 2254 Writ of Habeas Corpus." In the amended petition, petitioner attacks only the judgment in the first Dane County case, 96-CF-2331. The second document is a letter from petitioner dated April 22, 2005. In it, petitioner challenges this court's conclusion that he has not exhausted his state court remedies with respect to 00-CF-2286. Petitioner points to certain documents that he

filed with his petition that he contends show that the state court of appeals consolidated his appeals in 96-CF-2331 with his appeal in 00-CF-2286.

I construe petitioner's April 22, 2005 letter as a motion to reconsider my order of April 21, 2005. Having reviewed the documents that petitioner submitted with his petition, I am not convinced that they demonstrate that petitioner has completed the state appellate process with respect to his attack on the conviction in 00-CF-2286. Although the court of appeals appears to have accepted a document filed by petitioner relating to that conviction and construed it as an amendment to the petition for a writ of habeas corpus that petitioner filed with respect to 96-CF-2331, there is no evidence that the court consolidated the appeals in the two cases. Moreover, as noted in this court's April 21 order, there is nothing in the caption or language of the appellate court's December 1, 2004 opinion denying the writ to suggest that the court was considering the validity of any judgment but that entered in 96-CF-2331. Finally, petitioner has not disputed this court's finding that as of April 4, 2005, he still had an appeal of 00-CF-2286 pending in the state court of appeals. For these reasons, I decline to reconsider my order of April 21, 2005.

In his April 22, 2005 letter, petitioner states that in the event this court declines to reverse its conclusion regarding exhaustion of 00-CF-2286, then petitioner would like to proceed solely on his claims attacking the judgment in 96-CF-2331, as set forth in his amended petition. Accordingly, I will dismiss from the original petition those claims that attacked the judgment in the second case, 00-CF-2280.

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, I must conduct a preliminary review of the amended petition to determine whether the respondent must respond to it. "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court," I must dismiss the petition.

Petitioner's challenge to the judgment in 96-CF-2331 must be dismissed for lack of jurisdiction. In the amended petition, petitioner asserts that he has served the entirety of the two-year sentence that he received under that judgment. Federal district courts have jurisdiction to entertain petitions for habeas relief only from persons who are "in custody in violation of the laws or treaties of the United States." 28 U.S.C. § 2254(a). Because petitioner is no longer serving the sentence imposed pursuant to the conviction in 96-CF-2331, he cannot bring a federal habeas action directed at that conviction. Maleng v. Cook, 490 U.S. 488, 492 (1989).

Petitioner asserts that he satisfies the "in custody" requirement because the sentence imposed in 96-CF-2331 was the sentence from which he was charged with escaping in 00-CF-2286. Also, petitioner asserts that the conviction in 96-CF-2331 was the basis for a habitual offender penalty enhancement that he received in a third Dane County Case, 98-CF-271. However, in Maleng, 490 U.S. 488, the United States Supreme Court concluded that the effect of a judgment on a petitioner's future sentence does not render a petitioner "in custody" pursuant to the original judgment if the petitioner is no longer serving the sentence imposed pursuant to that judgment. Id. at 492. The petitioner had filed a § 2254

petition listing as the conviction under attack a 1958 conviction for which he had already served the entirety of his sentence. Id. at 489-490. He also alleged that the 1958 sentence had been "used illegally to enhance his 1978 state sentences." Id. The Court held that petitioner was not "in custody" on his 1958 conviction merely because that conviction had been used to enhance a subsequent sentence; therefore petitioner could not bring a federal habeas petition directed solely at those convictions. Id. at 492. However, insofar as the petition could be read as asserting a challenge to the 1978 sentences, as enhanced by the allegedly invalid prior conviction, respondent satisfied the "in custody" requirement for federal habeas jurisdiction. Id. at 493-494.

Like the petitioner in Maleng, petitioner in this case has served the entirety of the sentence imposed pursuant to the conviction imposed in the 1996 case; therefore, he cannot bring a habeas petition directed solely at that conviction. Insofar as petitioner asserts that the allegedly invalid conviction in 96-CF-2331 was a predicate for a sentence that he is presently serving for the escape conviction imposed in 2001, petitioner might satisfy the "in custody" requirement insofar as the petition could be read as asserting a challenge to the 2001 conviction. However, as found previously, any challenge to that conviction must be dismissed because petitioner has not yet exhausted his state court remedies with respect to that conviction. Finally, although petitioner asserts that his conviction in the 1996 case was used illegally to enhance his sentence in 98-CF-271, I do not read either the original or the amended petition as asserting a challenge to that judgment. Petitioner provides no

information regarding that judgment apart from his assertion that he received an enhanced sentence in that case as a result of the conviction in case 96-CF-2331. Absent some clearer indication from petitioner that he seeks in his current petition to attack the judgment in case 98-CF-271, I decline to construe the petition in that fashion.

It is worth noting that even if petitioner can satisfy the procedural prerequisites for habeas relief with respect to the judgments in 98-CF-271 or 00-CF-2286 and even if it is true that the conviction in 96-CF-2331 was used to enhance his sentences in those cases, he is unlikely to be able to obtain federal habeas relief on those judgments on the ground that the conviction in 96-CF-2331 is invalid. In Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001), the Supreme Court held that "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid." Id. at 403 (citing Daniels v. United States, 532 U.S. 374, 382 (2001)). Documents attached to the original petition show that petitioner has failed in his state court attempts to prove that the conviction in 96-CF-2331 is invalid. Accordingly, unless petitioner falls under one of the narrow exceptions identified in Coss, he cannot collaterally attack his conviction in 96-CF-2331 through a federal habeas petition directed at his other, allegedly enhanced state sentences.

ORDER

IT IS ORDERED that:

1. Petitioner's motion to reconsider the order of April 21, 2005 is DENIED.

2. The petition for a writ of habeas corpus is DISMISSED. Petitioner's challenge to his conviction in Dane County Case 96-CF-2331 is DISMISSED WITH PREJUDICE for lack of jurisdiction. Petitioner's challenge to his conviction in Dane County Case 00-CF-2286 is DISMISSED WITHOUT PREJUDICE for petitioner's failure to exhaust his state court remedies.

Dated this 26th day of April , 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge