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

SEBASTIAN MOLINA,

Petitioner,

ORDER

v.

05-C-282-C

PHIL KINGSTON, Warden, Waupun Correctional Institution,

Respondent.

Donald Lee Pippin, Jr. has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on behalf of Sebastian Molina, who is named as the petitioner in this case. He has paid the five dollar filing fee. The petition is before the court for preliminary consideration pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

As an initial matter, I note that the petition is not signed by Molina but by Pippin, who says he is Molina's "power of attorney" with respect to legal matters. (Pippin does not hold himself out as a licensed attorney.) Attached to the petition is a document entitled "Specific Power of Attorney" signed by Molina that authorizes Pippin to "handle all legal issues" associated with Molina's Dane County conviction that is the subject of the petition. In a cover letter, Pippin asserts that he prepared the petition and intended to forward a copy to Molina for him to sign, but the original papers got lost. In order to ensure the petition

was filed on time, Pippin asserts, he signed and filed the new petition on Molina's behalf instead of resending the documents to Molina.

Although Rule 2 of the Rules Governing Section 2254 Cases was amended recently to remove the requirement that the petition be signed personally by the petitioner, a petition that is not so signed must nonetheless be signed by someone "authorized to sign it for the petitioner under 28 U.S.C. § 2242." Rule 2(c)(5). 28 U.S.C. § 2242 provides that a petition must be signed and verified "by the person for whose relief it is intended or by someone acting in his behalf." This statutory language reflects a congressional decision in 1948 to codify the practice of some federal courts to allow "next friend" standing in connection with petitions for writs of habeas corpus. Whitmore v. Arkansas, 495 U.S. 149, 162 (1990) (discussing history of "next friend" status in habeas context).

In the notes to the 2004 Amendments to Rule 2 of the Rules Governing Section 2254 Cases, the advisory committee stated that it "envisions that the courts will apply third-party, or 'next-friend,' standing analysis in deciding whether the signer was actually authorized to sign the petition on behalf of the petitioner." The committee's remarks make clear that the removal of the requirement that the petition be personally signed by the petitioner was not meant to allow a petition to be filed by any party on behalf of another. Rather, the amended rule now comports with the statutory language of § 2242, which in turn contemplates a "next friend" standing analysis.

"'Next friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another." Whitmore, 495 U.S. at 163. Rather, to qualify for "next friend" standing, a third party must: 1) provide an adequate explanation, such as inaccessibility, mental incompetence, or other disability, why the real party in interest cannot appear on his own behalf to prosecute the action; 2) be truly dedicated to the best interests of the person on whose behalf he seeks to litigate; and 3) have some significant relationship with the real party in interest. Id. at 163-64 (citations omitted).

Although it is not at all clear whether Pippin is seeking to pursue the petition as Molina's "next friend," I conclude that he is not authorized to do so and that Molina must sign the petition. There has been no showing that Molina cannot appear on his own behalf. In fact, insofar as Pippin asserts in his cover letter that he signed the petition on Molina's behalf merely to ensure that it was filed on time, it appears that Molina is available to pursue and sign his own petition. For the time being, however, I will overlook the defect and proceed to evaluate the petition under Rule 4.

Molina is in custody pursuant to a January 7, 2002 judgment of conviction for three counts of sexual assault of a child. Although he is in custody at the Waupun Correctional Institution, which is in the Eastern District of Wisconsin, his conviction was entered by the Circuit Court for Dane County, which is in the Western District. The petition is properly filed in this district. 28 U.S.C. § 2241(d).

The petition names Matthew Frank, Secretary of the Wisconsin Department of Corrections, as the respondent. Although Secretary Frank has custody of Molina in a legal sense, "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 (2004). In accordance with this rule, I have amended the caption to show that Phil Kingston, the warden of the Waupun Correctional Institution, is the respondent in this action. Rule 2(a) of the Rules Governing Section 2254 Cases. I will direct the clerk's office to do the same.

According to the petition, Molina is in custody in violation of the laws or Constitution of the United States because his trial and appellate lawyers failed to provide him with the effective assistance guaranteed by the Sixth Amendment. The petition alleges that Molina's trial lawyer was ineffective for 1) failing to object to an improper cross-examination question by the prosecutor; 2) failing to object to improper expert opinion testimony by a nurse, Stacy Laufenberg; and 3) failing to file a motion in limine to exclude evidence that Molina had adult pornography on his home computer. It appears that Molina has exhausted his state court remedies on each of these claims by presenting the claims on direct appeal to the state court of appeals and then filing a petition for review with the Wisconsin Supreme Court. State v. Molina, 2004 WI App 88, 272 Wis. 2d 854, 679 N.W. 2d 926 (per curiam) (unpublished); Pet., dkt. #1, ¶ 9(a)-(e).

In addition to the claims of ineffective assistance of trial counsel, the petition alleges that Molina's appellate lawyer was ineffective. According to the petition, appellate counsel had to ask for several extensions and was "unable to provide an adequate defense" as a result of family problems. Pet., dkt. #1, at ¶ 12D. Apart from these general assertions, the petition sets forth only one specific omission by appellate counsel: he "fail[ed] to provide expert testimony to counter the claims made by the state." Id.

According to the petition, Molina never presented his claim of ineffective assistance of appellate counsel to the state courts. It is well established that a prisoner seeking a writ of habeas corpus must exhaust his state remedies before seeking federal relief. Moleterno v. Nelson, 114 F.3d 629, 633 (7th Cir. 1997) (citing cases). Principles of comity require that the habeas petitioner present his federal constitutional claims initially to the state courts in order to give the state the "'opportunity to pass upon and correct alleged violations of its prisoners' federal rights."' Duncan v. Henry, 513 U.S. 364, 365 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971) (internal quotation marks omitted)). Claims are exhausted when they have been presented to the highest state court for a ruling on the merits of the claims or when state remedies no longer remain available to the petitioner. Engle v. Isaac, 456 U.S. 107, 125 n. 28, 1570 n. 28 (1982). Failure to exhaust one's claims "constitutes a procedural default," Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001), 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).

A Wisconsin prisoner who contends that his appellate lawyer was ineffective on appeal may present that claim to the state court of appeals by filing a petition for a writ of habeas corpus. State v. Knight, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992). If the basis for the ineffective assistance of appellate counsel claim is that counsel failed to take actions that should have occurred before the trial court -- the filing of a postconviction motion, for example -- then the prisoner must present that claim to the trial court by filing a postconviction motion under Wis. Stat. § 974.06. State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 682, 556 N.W. 2d 136, 139 (Ct. App. 1996). Thus, contrary to the assertion made at paragraph 13 of the petition, there still are avenues of relief available to Molina in the state courts through which he could present his claim that his postconviction/appellate lawyer was ineffective.

Rose v. Lundy, 455 U.S. 509 (1982), instructs federal district courts to dismiss a petition like this one that presents a mix of exhausted and unexhausted claims. Id. at 510. Alternatively, the petitioner may choose to amend his petition by deleting the unexhausted claims and then proceed solely on the exhausted claims. Id., at 520. Before dismissing the petition, I will give Molina the opportunity to decide whether he prefers to abandon his unexhausted claim of ineffective assistance of appellate counsel and proceed solely on the claims that have been exhausted.

In deciding which course of action to pursue, Molina should consider the following: If he decides to give up his unexhausted claim and present only the ones that he has already exhausted, it is unlikely that this court would allow him to raise the unexhausted claim in a subsequent federal habeas petition. Lundy, 455 U.S. at 521 ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions") (citing 28 U.S.C. § 2254 Rule 9(b), authorizing dismissal for abuse of the writ). However, he should consider that his chances of success on his unexhausted claim is slim unless he can support his conclusory allegations of ineffective assistance of appellate counsel with specific facts that actually establish prejudice as required under Strickland v. Washington, 466 U.S. 668, 691 (1984) (error by counsel, even if professionally unreasonable, does not warrant setting aside criminal judgment if error had no effect on judgment).

Last, Molina should keep in mind that under the federal statutes governing habeas petitions, a state prisoner has only one year from the date his judgment became "final" in which to file a federal habeas petition. 28 U.S.C. § 2244(d)(1)(A). Most of that time elapsed between the time the Wisconsin Supreme Court denied his petition for review on May 12, 2004 and the time he filed his habeas petition in this court on May 12, 2005. Accounting for the 90 days during which Molina could have filed a petition for a writ of certiorari in the United States Supreme Court, Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (where petitioner does not file petition for writ of certiorari, one-year statute

of limitations begins to run with expiration of 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court), he has approximately 85 days remaining on his federal habeas clock. If he chooses to have this court dismiss his petition so that he may pursue his unexhausted claim in state court, he will not get a new one-year clock. Although a properly filed application for postconviction relief in state court would toll the statute of limitations for the time period during which the application is pending, 28 U.S.C. § 2244(d)(2), Molina should consider whether 85 days affords him enough time to take the steps necessary to exhaust his claim without jeopardizing the timeliness of a future federal habeas petition.

ORDER

IT IS ORDERED that:

1. The clerk of court shall mail the original petition to Sebastian Molina. Molina must sign and date the petition and return it to this court no later than May 31, 2005.

2. Molina has until May 31, 2005 within which to advise the court whether he wishes to pursue his unexhausted claim in state court or whether he prefers to amend his petition to delete the unexhausted claim and proceed solely on the exhausted claims. If he chooses the former, or if he does not report his choice by the deadline, then his petition will be dismissed without prejudice for his failure to exhaust his state court remedies, pursuant

to Rose v. Lundy. If he chooses the latter, then the state will be ordered to respond to the exhausted claims identified in this order.

3. The clerk of court is directed to amend the case caption to reflect that Phil Kingston, Warden of the Waupun Correctional Institution, is the respondent.

Entered this 18th day of May, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge