

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

ANDREW MATTHEW OBRIECHT,

Petitioner,

v.

MICHAEL THURMER, Warden,
Waupun Correctional Institution,

Respondent.

ORDER

07-C-409-C

Petitioner Andrew Matthew Obriecht has filed a motion pursuant to Fed. R. Civ. P. 59(e) asking this court to alter or amend the judgment entered October 23, 2007, which dismissed the petitioner's habeas corpus petition with prejudice because it was untimely. Petitioner contends that I committed an error of fact in finding that he had not shown the extraordinary circumstances or due diligence necessary for equitable relief and an error of law in finding that the alleged defects in the criminal complaint did not deprive the state circuit court of subject matter jurisdiction.

"A court may grant a Rule 59(e) motion to alter or amend the judgment if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact." Matter of Prince, 85 F.3d 314, 324 (7th Cir. 1996). I have read the entirety of petitioner's motion and affidavit and re-reviewed his initial submissions. None of the

arguments or facts that petitioner advances in his Rule 59(e) motion convinces me that I erred in dismissing his petition as untimely.

As explained in detail in the October 23, 2007 order, the negligence of petitioner's lawyer in misinforming him that his federal deadline would be tolled so long as a state court appeal was pending is not an extraordinary circumstance justifying equitable tolling, even if that negligence rose to the level of gross misconduct. In his motion, petitioner argues that even putting aside the issue of his post-conviction lawyer's negligence, he still could not have filed his petition or any state court collateral attack at any time before June 2005 because he was mentally incompetent.

This argument is not persuasive. Although petitioner argues that it is "quite possible" that this court would find after an evidentiary hearing that he was not competent from February 2003 through June 2005, he has not presented any evidence that would support such a finding. Even more harmful to petitioner's claim, he admits that by mid- to late-2004, he was working diligently on *pro se* direct appeals of his convictions in other Dane County cases. Petitioner asserts that he did not file a *pro se* state court collateral attack in 98-CF-271 (the case at issue here) and instead hired a lawyer in July 2004 because the issues were too complex to handle on his own. However, petitioner's strategic choice was not a circumstance beyond his control. Even giving petitioner the benefit of considerable doubt and finding that he lacked the mental capacity to pursue his rights from February 2003 until July 2004, nothing prevented him from filing his state court motion during the time period

from July 2004 to June 2005. When those 330 days are added to the approximately 330 days of the one-year limitations period that elapsed before petitioner was placed in medical segregation, the sum far exceeds the 365 days allotted by Congress when it enacted the Antiterrorism and Effective Death Penalty Act's limitations period, set forth at 28 U.S.C. § 2244(d). This inexcusable delay defeats both petitioner's claims for equitable tolling and for vacatur of this court's order of January 23, 2003 dismissing the initial petition that he filed in December 2002.

As for petitioner's claim that the state court lacked subject matter jurisdiction, I have considered the arguments that he raises in his motion and find that they provide no basis for altering my conclusion that defects in an indictment do not deprive a court of its power to adjudicate a case.

ORDER

IT IS ORDERED that the motion of petitioner Andrew Matthew Obriecht to alter or amend the judgment entered October 23, 2007 is DENIED.

Entered this 8th day of November, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge