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

OMENE J. KNIGHT,

Petitioner,

ORDER

v.

09-cv-018-slc

WILLIAM POLLARD, Warden,
Green Bay Correctional Institution,

Respondent.

Omene J. Knight, an inmate at the Green Bay Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the $5 filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner challenges his January 27, 2005 conviction in the Circuit Court for Rock County of being party to the crime of attempted first degree intentional homicide by use of a dangerous weapon. He contends that his custody resulting from that conviction is in violation of his right to the effective assistance of counsel at trial and on direct appeal. More specifically, he alleges that his trial lawyer was ineffective for inducing petitioner to enter into a plea agreement, failing to object when the state breached it and failing to seek suppression of statements petitioner made to a jailhouse informant. He contends that his appellate lawyer was ineffective for raising only the suppression issue and abandoning the other ineffectiveness claims in the petition for review that he filed in the Wisconsin Supreme Court.

According to 28 U.S.C. § 2254(b)(1)(A), a habeas petition shall not be granted unless the petitioner "has exhausted the remedies available in the courts of the State." The principles of comity underlying the exhaustion doctrine require the petitioner to give the state courts a "full

and fair opportunity to resolve constitutional claims" before raising those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). To comply with this requirement, the petitioner must assert his claims through one complete round of state court review. *Id.*; *Lewis v. Sternes*, 390 F.3d 1019, 1025-26 (7th Cir. 2004). For a Wisconsin prisoner, this means that he must assert each of his claims in a petition for review to the Wisconsin Supreme Court. *Moore v. Casperson*, 345 F.3d 474, 485-86 (7th Cir. 2003) (Wisconsin Supreme Court's discretion to grant judicial review is similar to that of Illinois Supreme Court, and *Boerckel* requires presentation of all issues to that court).

According to the petition, petitioner filed a petition in the Wisconsin Supreme Court for discretionary review of the state appellate court's order affirming his conviction, but he did not include in that petition all of the constitutional claims that he now seeks to raise in federal court. This means that petitioner has procedurally defaulted, that is, forfeited, his right to federal review of those claims. *Lewis*, 390 F.3d at 1026 ("A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim.") If a petitioner has procedurally defaulted his claim, he may obtain federal habeas relief only upon a showing of cause and prejudice for the default or upon a showing that a failure to grant him relief would work a fundamental miscarriage of justice. *Steward v. Gilmore*, 80 F.3d 1205, 1211-12 (7th Cir. 1996) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). Cause for a default ordinarily is established by showing that some external obstacle prevented the petitioner from presenting his claim to the state courts. *Lewis*, 390 F.3d at 1026. A fundamental miscarriage of justice occurs when "a

constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1996).

In the petition, petitioner alleges that ineffective performance by his appellate lawyer was the cause for his failure to raise all of his claims in his petition for review. Here, however, petitioner runs into another obstacle. In order to constitute "cause" to excuse a procedural default, there must be a constitutional right to assistance of counsel in the state proceeding. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). There is no constitutional right to counsel in second-tier discretionary review to the state's highest court. *Ross v. Moffitt*, 417 U.S. 600, 610 (1971). Accordingly, the alleged ineffectiveness of petitioner's counsel in connection with the petition for discretionary review neither establishes "cause" (as the law defines that term) for his default nor stands as an independent constitutional claim.

Although doubtful, the possibility remains that petitioner has other valid grounds for cause apart from the performance of his appellate counsel or that he can show that he satisfies the fundamental miscarriage of justice exception. In addition, petitioner has properly exhausted his claim that his trial lawyer was ineffective for failing to seek suppression of statements petitioner made to a jailhouse informant. Accordingly, I am ordering the state to respond to the petition.

For the sake of completeness, I alert the parties to one more issue. Petitioner alleges and my independent research confirms that the Wisconsin Supreme Court issued its order denying the petition for review on October 10, 2007. Pursuant to 28 U.S.C. § 2244(d)(1)(A), a petitioner has one year from the date on which his conviction "became final by the conclusion

of direct review or the expiration of the time for seeking such review." Under this provision, direct review does not conclude until the availability of direct review in the state courts *and* the United States Supreme Court has been exhausted. *Jiminez v. Quarterman*, -- S. Ct. --, 2009 WL 63833, *4 (Jan. 13, 2009); *Anderson v. Litscher*, 281 F.3d 672, 675 (7th Cir. 2002). Allowing for the 90 days in which petitioner could have applied for certiorari from the Supreme Court, petitioner's conviction became final on January 8, 2008. He had one year from that date, or until January 8, 2009, in which to file his federal habeas petition. His petition is dated one day later, January 9, 2009. I leave it up to the state to decide whether it wants to raise untimeliness as a defense to the petition.

ORDER

IT IS ORDERED THAT:

1. Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on Warden Pollard.

2. The state shall file a response to the petition not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that any of petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address in its supporting brief the issue of cause, prejudice and staying this action while petitioner exhausts his state court

remedies. Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

3. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should include on

each of his submissions a notation indicating that he served a copy of that document upon the state.

4. The federal mailbox rule applies to all submissions in this case.

Entered this 15th day of January, 2009.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge