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

GERALD LEE LYNCH, JR.,

Petitioner, ORDER

v. 09-cv-0113-slc

RANDALL R. HEPP, Warden,
Jackson Correctional Institution,

Respondent.

Gerald Lee Lynch, Jr. has filed an application for a writ of habeas corpus under 28 U.S.C. § 2254. He is in custody at the Jackson Correctional Institution in Black River Falls, Wisconsin, where he is serving the initial confinement portion of a 35-year bifurcated sentence for homicide by intoxicated use of a vehicle. Petitioner has paid the five dollar filing fee. The petition is before me for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner contends that he is in custody in violation of the laws or Constitution of the United States because: 1) his plea was not entered knowingly and intelligently because the court did not advise him that by pleading no-contest to the charge of homicide by intoxicated use of a vehicle, he would be statutorily ineligible for the Earned Release Program, an early-release program for certain offenders who successfully complete a substance abuse treatment program (Ground One); 2) his plea was not entered knowingly and intelligently because his lawyer failed to advise him of the same (Ground Three); and 3) the state failed to disclose its knowledge of the Earned Release Program to the defense.

According to the petition and attached documents, petitioner has had two rounds of state court post-conviction review: 1) a post-conviction motion under Wis. Stat. § 974.02 followed

by a direct appeal under Wis. Stat. § 809.30; and 2) a post-conviction motion pursuant to Wis. Stat. § 974.06 followed by an appeal. Both appeals concluded with the Wisconsin Supreme Court declining to exercise its discretionary review. In addition, petitioner has recently filed another post-conviction motion in the circuit court seeking plea withdrawal on the ground that his ineligibility for the Earned Release Program was a direct consequence of which he was not informed during the plea colloquy. It appears that petitioner has filed his petition within the one year limitations period prescribed by 28 U.S.C. § 2244(d).

Petitioner's first two claims are sufficient to warrant a response from the state. However, this court is unlikely to reach the merits of either claim for one of two reasons: 1) petitioner all but concedes in his petition that he did not fairly present them to the state courts in either completed round of post-conviction review, Pet., dkt. 1, ¶23; or 2) he has not yet exhausted his state court remedies on those claims. I leave it to the state to address these issues in its response.

The state need not respond to petitioner's third claim. Prosecutors have a constitutional duty to disclose *evidence* in their possession that is material to a defendant's punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). They do not have a duty to inform the defendant of legislative changes that the defendant could discover on his own.

There's a final administrative matter for petitioner: as stated in the order dated June 20, 2008, a copy of which is attached, I have been designated to conduct all proceedings in this case, including issuing dispositive orders and entering judgment. The parties are required to advise the court whether they consent to this or not. If either party does not consent, then Judge Crabb will be in charge of this case. The clerk of court already has heard from the state regarding

consent, so petitioner needs to send in the form within two weeks letting the clerk know if he will consent or not.

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 Hepp.

2. Not later than March 17, 2009, petitioner must inform the court whether he consents or declines to have Magistrate Judge Crocker preside over the rest of this case. A form and a stamped return envelope are being mailed to petitioner for this purpose.

3. The state shall file a response to Ground One and Ground Three of the petition not later than 45 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, as an unauthorized successive petition, lack of exhaustion or procedural default, then it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion within 45 days of this order. If the state contends that the petition presents a mix of exhausted and unexhausted claims, then it must address in its supporting brief whether petitioner meets the criteria announced in *Rhines v. Weber*, 544 U.S. 269 (2005), for a stay in the event he opts to pursue his unexhausted claims in state court. Petitioner shall have 30 days following service of any dismissal 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 the court denies the motion to dismiss in whole or in part, then it will set a deadline within which the state must file an answer and supporting brief addressing any claims that have not been dismissed. Petitioner will be given the opportunity to reply to the state's submissions.

If the state does not file a motion to dismiss, then within its 45-day deadline it shall file an answer addressing the allegations in the petition in accordance with Rule 5 of the Rules Governing Section 2254. The answer must be accompanied by a brief containing a substantive legal response to petitioner's claims. In addition, the state must file the documents required by Rule 5(c) and (d). If the necessary records and transcripts cannot be furnished within 45 days, the state must advise the court when such papers will be filed. Petitioner shall have 30 days from the service of the state's response within which to file a substantive reply.

4. 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.

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

Entered this 3rd day of March, 2009.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge