IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALBERT L. HOWARD,

Petitioner,

v.

WILLIAM POLLARD, Warden,
Waupun Correctional Institution,

Respondent.

ORDER

11-cv-793-bbc

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Albert Howard, an inmate at the Waupun Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his November 2005 conviction in the Circuit Court for Dane County on one count of first-degree sexual assault of a child in violation of Wis. Stat. § 948.02(1). On January 13, 2012, I dismissed several of petitioner's claims and ordered the state to respond to petitioner's claims regarding the ineffective assistance of his trial counsel and the sufficiency of the evidence adduced at trial. Dkt. #3. Also, I denied petitioner's motion to stay this habeas petition while he exhausts additional claims in state court, concluding that the only unexhausted claim petitioner had identified was an unexhausted state law claim that was subject to dismissal.

Petitioner has filed a motion for reconsideration, asking the court to reconsider its

decision denying his request to hold his habeas petition in abeyance. Dkt. #7. He explains that the reason he wants the court to stay his petition is not so he can exhaust state law claims, but because he hopes to prevail on his pending appeal in the Wisconsin Court of Appeals, in which he seeks reversal of the order denying his motion for postconviction DNA testing under Wis. Stat. § 974.07. Petitioner believes that DNA testing will provide new evidence on which he can base a motion for a new trial, a constitutional claim under Brady v. Maryland, 373 U.S. 83 (1963), and a claim for ineffective assistance of counsel. In other words, petitioner hopes to add constitutional claims to his federal habeas petition on the basis of his current appeal related to DNA testing. He is concerned that if his federal habeas petition is not stayed, he will be barred from bringing his potential constitutional claims in a successive habeas petition later. Also, he is concerned that if his petition is dismissed while he waits for a decision on his motion for DNA testing, he will not have sufficient time left on his habeas clock to refile it.

In Rhines v. Weber, 544 U.S. 269 (2005), the Supreme Court considered whether a federal district court has discretion to stay a mixed federal habeas petition, that is, a petition containing both exhausted and unexhausted claims, to allow the petitioner to present his unexhausted claims to the state court and return to federal court for review of his perfected petition. The Court ruled that a district court has such discretion in situations in which outright dismissal of a mixed petition could jeopardize the petitioner's ability to later file a timely habeas petition, such as when the petitioner files his application "close to

the end of the 1-year period" in which a petitioner must filed a habeas claim under 28 U.S.C. § 2244(d)(1)(A). Id. at 275.

It is not clear how much time is left on petitioner's federal habeas clock. It appears from the records on the Wisconsin Court Access Program that petitioner's conviction became final on May 12, 2009, 90 days after the Wisconsin Supreme Court denied his petition for review of his direct appeal. The one-year statute of limitations began running the next day, on May 13, 2009. On May 22, 2009, petitioner filed a motion for postconviction relief under Wis. Stat. § 974.06, thereby tolling the federal limitations period on that date. The trial court denied the § 974.06 motion and the Wisconsin Court of Appeals denied petitioner's appeal. On January 13, 2011, the Wisconsin Supreme Court denied his petition for review of the § 974.06 motion, and petitioner's federal habeas clock began running again the next day. If petitioner filed no other motions for collateral review or postconviction relief, his federal habeas clock continued to run until he filed his federal habeas petition on November 28, 2011. This would mean that 328 days have run on petitioner's federal habeas clock, with 37 days remaining.

However, it is not clear whether petitioner's pending motion for DNA testing, which was filed on January 24, 2011, tolled his federal habeas clock. Under 28 U.S.C. § 2244(d)(2), the one-year statute of limitations for federal habeas actions is tolled while the petitioner is pursuing "State post-conviction or other collateral review" of the judgment. In Price v. Pierce, 617 F.3d 947 (7th Cir. 2010), the court of appeals considered whether a

motion for DNA testing under Illinois Statute 725 ILCS 5/116-3 was a collateral attack on a judgment that tolled the one-year statute of limitations for filing a habeas petition. The court concluded that the motion for DNA testing was not a collateral attack because under the Illinois statute,

> the best that can happen is that the trial court grants the motion, the tests are performed, and the defendant receives the results. The defendant may choose to use the results of the DNA test in a separate post-conviction petition for relief claiming his or her actual innocence, but no hearing automatically follows. Further, nothing in the plain language of the statute or in any of the state court opinions of which we are aware gives the trial court the authority to release a defendant from custody under § 116-3.

Id. at 952-53.

The court went on to say that although a motion for DNA testing does not toll a prisoner's habeas clock, prisoners should not be forced to "choose between pursuing habeas corpus relief in federal court or DNA testing in state court." Id. at 954. Rather, "a prisoner who wishes to pursue both federal habeas relief and move for DNA testing under § 116-3 may timely file his or her habeas petition and then move to stay the federal proceedings while the Illinois courts consider the DNA testing motion." Id. at 955. The court explained that "the principles of comity, finality, and federalism should strongly militate in favor of staying a prisoner's federal habeas petition while Illinois courts have an opportunity to consider the prisoner's § 116-3 motion, and where appropriate, subsequent collateral attack on the underlying judgment." Id.

Although the court of appeals concluded in Price that a motion for DNA testing

under Illinois law does not toll the federal habeas clock, the court of appeals' reasoning would not necessarily apply to motions brought under Wis. Stat. § 974.07. Unlike the Illinois statute, Wis. Stat. § 974.07 states that if the results of DNA testing ordered under the statute "support the movant's claim, the court *shall* schedule a hearing to determine the appropriate relief to be granted to the movant." Wis. Stat. § 974.07(10)(a). After the hearing, the judge may enter

> any order that serves the interests of justice, including . . . [a]n order setting aside or vacating the movant's judgment of conviction. . .[;] [a]n order granting the movant a new trial or fact-finding hearing[;] [a]n order granting the movant a new sentencing hearing . . .[;] [or] [a]n order discharging the movant from custody. . . ."

Id. Thus, in contrast to the Illinois statute, Wis. Stat. § 974.07 states that any prisoner who files a motion for DNA testing and receives results supporting his claim is entitled to a hearing. Further, it appears that the trial court has the authority to release the prisoner on the basis of the DNA results without requiring the prisoner to file a new postconviction motion. Thus, a motion for DNA testing under Wisconsin law may qualify as a collateral attack within the meaning of 28 U.S.C. § 2244(d)(2). Price, 617 F.3d at 954 (distinguishing Illinois's statute from DNA-testing statutes in Texas, Delaware and New York, which have potential to release prisoners if DNA evidence supports their claim).

Under the particular circumstances of petitioner's claim, I conclude that it would be appropriate to stay petitioner's federal habeas petition. It is an open question whether motions for DNA testing under Wis. Stat. § 974.07 toll the federal habeas clock. The state

did not this issue, but it did file a brief suggesting that a stay may be appropriate in this case. Dkt. #8 (citing Price). Moreover, even if petitioner's habeas clock is tolled while he is pursuing his motion for DNA testing, he may have a difficult time refiling his perfected habeas petition within the one-year limitation. Petitioner hopes that his motion for DNA testing will provide him an opportunity to pursue new claims for postconviction relief in state court, which will need to be exhausted. Then, petitioner will need to amend his habeas petition to add those new claims. Petitioner's habeas clock will run during any time that he is not actively pursuing a motion for postconviction or collateral review. I conclude that petitioner's motion for a stay should be granted to allow him to exhaust state court remedies as to all of his claims. Accordingly, this matter will be stayed until further order of the court, and the clerk shall administratively close the file, subject to reopening on motion of any party. Plaintiff is to promptly seek exhaustion as to any unexhausted claims and notify the court as soon as he has completed his state court proceedings so that the court can reopen the case and set the matter for briefing or for such other proceedings as are necessary.

ORDER

IT IS ORDERED that

1. Petitioner Albert Howard's motion for reconsideration, dkt. #7, is GRANTED. Further proceedings on his petition for a writ of habeas corpus under 28 U.S.C. § 2254 are STAYED until the conclusion of plaintiff's pending proceeding under Wis. Stat. § 974.07

and any related state collateral review and postconviction proceedings.

2. The clerk of court is directed to close these cases administratively. If, after the conclusion of the pending state proceedings, petitioner wishes to resume proceedings on his federal habeas petition, the case will be reopened immediately upon his motion, with the parties retaining all rights they would have had the case not been closed for administrative purposes.

Entered this 2d day of March, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge