

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

EDWARD DUTY,

Petitioner,

ORDER

v.

03-C-673-C

STEVE WATTERS, Director, Sand Ridge
Secure Treatment Center,

Respondent.

Before the court is petitioner Edward Duty's motion for discovery (dkt. #14). Petitioner asks this court to order the state to produce a copy of a post-trial memorandum that his trial attorney was to have filed in opposition to the state's Chapter 980 petition. In addition, petitioner seeks other unspecified documents that he claims are necessary to answer questions he has about when the state public defender's office appointed successor counsel to replace his trial attorney, who died on August 17, 2000; why the court did not issue its written decision granting the state's Ch. 980 petition until nearly one month after petitioner's trial lawyer died and nearly two months after the post-trial memorandum was to have been submitted; and why petitioner did not hear from successor counsel until two days after the trial court had issued its written decision.

A § 2254 petitioner is allowed to invoke discovery, but only "if and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but

not otherwise." Habeas Corpus Rule 6(a); *see also Bracy v. Gramley*, 520 U.S. 899, 904 (1997). In order to meet the Rule 6(a) requirements, petitioner must "(1) make a colorable claim showing that the underlying facts, if proven, constitute a constitutional violation; and (2) show 'good cause' for the discovery." *Henderson v. Walls*, 296 F.3d 541, 553 (7th Cir. 2002) (citing *Harris v. Nelson*, 394 U.S. 286, 298-300 (1969)).

Petitioner has not shown good cause for the discovery he seeks. Although I understand petitioner's desire to have answers to his questions concerning the timing of the appointment of successor counsel and the trial court's issuance of its written decision, these questions are not material to whether petitioner is in custody in violation of his constitutional rights. At the time petitioner's trial attorney died, the trial court had already heard all the evidence and probably had received a post-trial memorandum from trial counsel. At that point, the lawyer's work was done; there was nothing further to do except wait until the trial court issued its decision. Thus, even if the state public defender's office took too long to appoint successor counsel, it did not prejudice petitioner because there was nothing that any lawyer could have done for him until the trial court issued its decision. The record indicates that two days after the trial court issued its decision, petitioner was contacted by successor counsel, who took steps to preserve petitioner's right to an appeal. Petitioner simply cannot show that the outcome of his case would have been any different if successor counsel had been appointed more quickly.

Likewise, petitioner cannot show that he was deprived of any constitutional right as a result of the length of time it took for the trial court to decide the petition. Chapter 980 does not place any time limits on the trial court for issuing a decision on the petition. As noted in this court's previous order, it is not unusual or illegal for some time to lapse between the submission of the evidence at trial and the judge's decision.

Finally, it is not necessary for the state to produce a copy of the post-trial memorandum that was supposed to have been submitted by petitioner's trial attorney. As noted in this court's previous order, assuming the memo was submitted, it would contain only legal arguments, not evidence. The only issue before this court is whether the state courts reasonably decided the facts and applied federal law when they found petitioner to be a sexually violent person under Chapter 980. *See* 28 U.S.C. § 2254(d). Because petitioner appealed his commitment to the state court of appeals, this court will be reviewing the court of appeals' decision. Further, this court will be limited to considering only those issues that petitioner raised in his appeal to the court of appeals; any other challenges that petitioner may have to his commitment are waived unless petitioner can show cause for his default and prejudice therefrom. *See Chambers v. McCaughtry*, 264 F.3d 732, 737 (7th Cir. 2001) (petitioner who fails to present his federal claims fully and fairly to state courts commits procedural default that bars federal court from considering merits of claim absent showing of cause and prejudice). On appeal, petitioner did not raise any claim that Attorney Bramscher was ineffective at trial. Accordingly, his representation of petitioner is not a

viable issue in this habeas proceeding, so any legal memorandum that he may have submitted is irrelevant. This court can review the legal analysis employed by the state court of appeals from the court's decision and the evidence it considered from the trial transcript.

The bottom line is that the memorandum does not appear to be relevant to the issues before this court on habeas review. Accordingly, petitioner's motion for an order requiring the state to produce that document is denied at this time. However, as a consolation to petitioner, I note that if for some reason this court should determine later that a copy of the memorandum *is* indeed relevant, this court will order the state to produce it then.

ORDER

IT IS ORDERED that petitioner's motion for discovery is DENIED.

Dated this 29th day of March, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge