

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

HOWARD GRADY,

Petitioner,

ORDER

v.

04-C-717-C

DAN BENIK, Warden, Stanley Correctional
Institution,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Howard Grady challenges an August 1, 2002, judgment of conviction entered by the Circuit Court for Jefferson County. In an order entered October 8, 2004, I found from the petition and its attachments that petitioner had procedurally defaulted his claims by failing to properly exhaust his state court remedies. In response to that order, petitioner has filed a supplement to his petition in which he attempts to show that he satisfies either the cause-and-prejudice or fundamental-miscarriage-of-justice exception to the procedural default rule.

In his supplement, petitioner asserts that he was left to proceed *pro se* after the state appellate court agreed with his appellate counsel that his appeal had no merit and that his lawyer could be relieved of further representation of petitioner. Petitioner asserts that he has no legal training and was not aware that he could seek review in the Wisconsin Supreme

Court of the court of appeals' decision on direct appeal or that he could appeal the denial of his postconviction motion to the court of appeals. With respect to the latter, he also alleges that the state court misled him into thinking such an appeal was not possible when it wrote "we do not now start the process all over again" on his petition for leave to proceed in forma pauperis in connection with a postconviction motion.

Petitioner's allegations fail to show cause for his failure to file a petition for review with the Wisconsin Supreme Court. To show "cause," petitioner must show that "some objective factor external to the defense impeded counsel's [or petitioner's] efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). A letter from petitioner's appellate lawyer that petitioner attached to his supplement refutes petitioner's claim that he was not aware that he could petition the Wisconsin Supreme Court for review of the court of appeals' decision affirming his conviction. In the letter, petitioner's lawyer advised petitioner that he had a right to petition the Wisconsin Supreme Court for review and explained when and how the petition should be filed. The fact that petitioner had to file the petition on his own does not constitute "cause" for petitioner's default. See Harris v. McAdory, 334 F.3d 665, 668 (7th Cir. 2003) (petitioner's *pro se* status does not constitute adequate grounds for cause). Similarly, petitioner's lack of education or legal knowledge are not "external impediments" that would excuse a procedural default. See, e.g., Dellinger v. Bowen, 301 F.3d 758, 763 (7th Cir. 2002) (petitioner's youth and lack of education did not constitute cause); Henderson v. Cohn, 919 F.2d 1270, 1272-73 (7th Cir. 1990) (petitioner's

illiteracy and limited education insufficient to establish cause). Because petitioner's failure to file a petition for review in the Wisconsin Supreme Court is a default sufficient to bar this court from considering the merits of his petition, Moore v. Casperson, 345 F.3d 474, 486 (7th Cir. 2003) (Wisconsin prisoner seeking federal habeas review must first complete state appellate review process by presenting claims on direct appeal to state court of appeals and then to state supreme court in petition for review), it is not necessary to consider whether petitioner has shown cause for his other default.

Absent a showing of cause, a "defaulted claim is reviewable only where a refusal to consider it would result in a fundamental miscarriage of justice." United States ex rel. Bell v. Pierson, 267 F.3d 544, 551 (7th Cir. 2001). This relief is limited to situations where the constitutional violation has probably resulted in a conviction of one who is actually innocent. See Schlup v. Delo, 513 U.S. 298, 327 (1995). To show "actual innocence," petitioner must present clear and convincing evidence that, but for the alleged error, no reasonable juror would have convicted him. Id. Petitioner has not presented any evidence of this nature. Thus, there has been no "fundamental miscarriage of justice" as defined by United States Supreme Court precedent.

Having failed to demonstrate cause for his default or that a fundamental miscarriage of justice will result if his claims are not heard, petitioner is barred from having his claims considered by this court. The petition will be dismissed with prejudice.

ORDER

IT IS ORDERED that Howard Grady's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE on grounds of procedural default.

Dated this 2nd day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge