IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES J. HOMESLEY aka
Charles Mayberry,

ORDER

Petitioner,

12-cv-835-bbc

v.

MICHAEL MEISNER
and HAZEL BROWN,

Respondents.

- -

Charles J. Homesly has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his convictions for three counts of second-degree sexual assault and one count of false imprisonment. He has paid the $5 filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.

In his direct appeal petitioner argued that he was entitled to a new trial as a result of newly discovered evidence, but the state court of appeals rejected this argument on the ground that there was no reasonable probability the new evidence would lead to a different verdict. State v. Homesley, 2011 WI App 121, 337 Wis. 2d 89, 803 N.W.2d 868. Petitioner does not challenge that conclusion in his petition, but raises a new claim that he calls "Right of Access to the Courts":

> When the Supreme Court of Wisconsin denied the petition for review the Court did not exercise its discretionary power to independently decide a[n]

> issue of ineffective assistance of both trial and appellate counsel[, who were] alleged to have provided deficient performance and prejudice when the court after becoming aware of Homesley's/prisoner's alleged incompetency failed to appoint him legal counsel to gather and present to the court evidence from Homesley to consider at a[n] evidentiary granted/ordered by the court, yet undecided.

Dkt. #1 at 6.

Although petitioner seems to be challenging the Wisconsin Supreme Court's refusal to take his case, that is not a claim; the supreme court is not required to take any particular appeal. Wis. Stat. § 809.62. Liberally construed, the petition's real claim seems to be that trial and appellate counsel provided constitutionally ineffective assistance by failing to argue that petitioner was incompetent to stand trial. Galowski v. Berge, 78 F.3d 1176, 1180 (7th Cir. 1996) ("A defendant has a due process right not to be tried for, or plead guilty to, a criminal offense unless he is competent.").

However, petitioner cannot bring a claim for ineffective assistance in this court because he has not finished presenting it to the state courts. Before a federal court may consider the merits of a state habeas petitioner's claims, the petitioner must exhaust the remedies available to him in the state courts. 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). To comply with the exhaustion requirement, "the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review)." Baldwin v. Reese, 541 U.S. 27, 29 (2004).

In this case, petitioner concedes that he has not exhausted his remedies in state court. He has attached a motion dated November 8, 2012, dkt. #1-1 at 19, in which he raises his

ineffective assistance claims with the circuit court, but he admits that he has not yet received a decision. Even if the circuit court had ruled on his motion, he still would need to seek review in the Wisconsin Court of Appeals and the Wisconsin Supreme Court. Accordingly, I am dismissing the petition for petitioner's failure to exhaust his remedies in state court.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated, reasonable jurists would not debate the decision that Homesley's petition should be dismissed because he failed to exhaust his state court remedies. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

1. Charles Homesley's petition for a writ of habeas corpus under 28 U.S.C. § 2254

is DISMISSED WITHOUT PREJUDICE for his failure to exhaust his remedies in state court. Petitioner is free to refile a timely petition after he has finished presenting his claims to the Wisconsin state courts.

2. Petitioner is DENIED a certificate of appealability. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 7th day of January, 2013.

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