

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

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ADRIAN ALEXANDER STARKS,

Petitioner,

v.

MICHAEL MEISNER, Warden,

Respondent.

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OPINION & ORDER

14-cv-844-jdp

Petitioner Adrian Starks is in custody at the Redgranite Correctional Institution. He seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge his 2008 conviction from the Dane County Circuit Court. Dkt. 1 and Dkt. 9.<sup>1</sup> Petitioner has paid the filing fee and this case is now before me for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. After considering the petition, subsequent documents filed by petitioner, and the state court records at issue, I conclude that the petition may be served on respondent.

Petitioner is appealing his conviction in case number 2006CF002750 for two counts of first-degree reckless homicide and one count of conspiracy to deliver more than 50 grams of heroin under Wis. Stat. §§ 940.02(2)(a), and 961.41(1)(d). Petitioner appealed his conviction to the Wisconsin Court of Appeals, which affirmed the conviction on April 14, 2011. *State v. Starks*, 2011 WI App 75, 334 Wis. 2d 145, 799 N.W.2d 928. He then appealed that decision to the Wisconsin Supreme Court, which denied review on June 15, 2011. *State v. Starks*, 2011 WI 86, 335 Wis. 2d 147, 803 N.W.2d 849. Following his conviction, petitioner moved the circuit court several times for postconviction relief, tolling

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<sup>1</sup> I will use the later-filed petition, Dkt. 9, as the operative petition.

his habeas clock. Those motions were denied and, on appeal, the Wisconsin Court of Appeals affirmed the denial of relief. *State v. Starks*, 2014 WI App 110, 357 Wis. 2d 720, 855 N.W.2d 903. Petitioner then appealed that decision to the Wisconsin Supreme Court, which denied review on January 12, 2015. *State v. Starks*, 2015 WI 24, 862 N.W.2d 602. Petitioner's operative habeas petition was filed on February 26, 2015. Dkt. 9.

The operative petition alleges 10 grounds for habeas relief:

- Ineffective assistance of trial counsel for:
  - Failing to inform petitioner that one victim's death was ruled accidental;
  - Failing to investigate and impeach with exculpatory evidence of phone records;
  - Failing to investigate petitioner's alibi defense;
  - Failing to investigate and present evidence that the intermediate dealer had other heroin sources;
  - Failing to object to inappropriate closing argument;
- Prosecutorial misconduct by making inappropriate closing arguments;
- Error by the court in failing to adequately explain the ramifications of petitioner's stipulation that heroin was a substantial factor in one victim's death;
- Newly discovered evidence of alleged police misconduct that mandated postconviction relief or evidentiary hearing;
- *Brady* violation for failing to discover and disclose the alleged police misconduct; and
- Violation of petitioner's Sixth Amendment right to present a defense.

Petitioner alleges that he raised each of these claims in his post-conviction motions and on direct appeal. It appears that petitioner has exhausted his state court remedies and that his

petition is timely. And it is not plainly without merit. Accordingly, I will direct service of the petition on respondent.

Petitioner also requests that the court assist him by recruiting counsel. Dkt. 2 and Dkt. 6. Unlike in a criminal case, a civil habeas petitioner has no automatic right to court-appointed counsel. *Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006). However, the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), authorizes district courts to appoint counsel for a petitioner seeking habeas relief under 28 U.S.C. § 2254. But first, the district court must determine that the appointment of counsel would serve “the interests of justice” and that the petitioner is “financially eligible.” 18 U.S.C. § 3006A(a)(2). Petitioner has filed an affidavit of indigency, Dkt. 7, as well as his prisoner trust fund account statement, Dkt. 8. Based on petitioner’s submissions, he is financially eligible for appointment of counsel.

Two additional considerations are relevant to the interest of justice consideration: whether petitioner has attempted to obtain representation on his own, *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992), and whether the difficulty of the case exceeds petitioner’s ability to litigate his claims himself, *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). To determine a petitioner’s competence to litigate his own case, the court considers his literacy, communication skills, educational level, and litigation experience. *Id.*

Petitioner asserts that he has reached out to at least 10 attorneys for *pro bono* representation, but that the only response offering to represent him was for paid representation that he could not afford. He has attached letters from several different attorneys declining to represent him. Dkt. 2-1 and Dkt. 6-1. One of those lawyers, attorney Joseph Bugni of the Federal Defender Services of Wisconsin, Inc., responded that he would

be interested in representing petitioner, but cannot do so unless he is appointed by the court. Dkt. 6-1, at 7.

Petitioner has represented himself reasonably well so far, but he contends that the issues in his case are complex and nuanced, and thus beyond his ability to litigate without the assistance of counsel. However, because the case is in its early stages in this court, I have yet to be convinced that the difficulty of the case in fact exceeds petitioner's abilities. Therefore, I will deny his motion to appoint counsel without prejudice to his renewing the motion later.

#### ORDER

IT IS ORDERED that:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on the respondent, Michael Meisner, in his official capacity as warden of the Redgranite Correctional Institution.
2. **Answer deadline.** Within 60 days of the date of service of this order, respondent must file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.
3. **Motions to dismiss.** If the state contends that the petition is subject to dismissal on its face—on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default—then it is authorized to file within 30 days of this order, a motion to dismiss, a supporting brief and any documents relevant to the motion. Petitioner shall have 20 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.
4. **Denial of motion to dismiss.** If the court denies such a motion to dismiss in whole or in part, then it will set deadlines for the state to file its answer and for the parties to brief the merits.
5. **Briefing on the merits.** In the event that the respondent does not file a motion to dismiss as outlined above, the court will proceed to consider the merits. Therefore, the parties shall adhere to the following briefing schedule with respect to the merits of petitioner's claims:

- a. Petitioner shall file a brief in support of his petition within 30 days after respondent files his answer.
  - b. Once petitioner submits additional briefing or gives written notice that he does not intend to do so, respondent shall file a brief in opposition within 30 days.
  - c. Once respondent files a brief in opposition, petitioner shall have 20 days to file a reply if he wishes to do so.
6. Petitioner's motion to appoint counsel, Dkt. 6, is DENIED.

Entered September 23, 2015.

BY THE COURT:

/s/

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JAMES D. PETERSON  
District Judge