

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

JAMES MERCER,

Petitioner,

OPINION AND ORDER

v.

05-C-0726-C

GREGORY GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

James Mercer, a Wisconsin inmate confined at the Columbia Correctional Institution in Portage, Wisconsin, has filed an application for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. I have granted his application for leave to proceed *in forma pauperis* in a separate order. Because the petition and attachments show plainly that petitioner is not entitled to relief, I am dismissing his petition summarily with prejudice.

BACKGROUND

The subject of Mercer's petition is his 1979 conviction in the Circuit Court for Dane County for one count of first degree intentional homicide, for which he is serving a life sentence. Petitioner contends that his conviction is unlawful because the jury found him not guilty. According to petitioner, upon hearing the jury's verdict of acquittal, the trial judge -- in open court -- refused to accept the verdict and told the jury to return to the jury room

to deliberate further. Upon further deliberation, petitioner alleges, the jury changed its verdict to guilty “so that they would finally be allowed to go home.” Petitioner also claims that unnamed court officials then tampered with the transcript to cover up the trial judge’s misconduct. According to petitioner, he was somehow able to obtain a copy of the “unaltered” original transcript that proves the court’s misconduct and the subsequent cover-up.

Petitioner presented the same claims and a copy of what he claimed was the “original” transcript to the Dane County Circuit Court in a petition for a writ of habeas corpus filed January 13, 2003. In a scathing memorandum decision issued February 13, 2003, a copy of which is attached to the petition, the circuit court rejected petitioner’s claims, finding that the transcript submitted by petitioner was a fake and that he was attempting to perpetrate a fraud on the court. In its decision, the circuit court compared the official transcript to that submitted by petitioner and found numerous “glaring, obvious, and mendacious changes and additions” that showed that petitioner’s transcript was bogus. The doctored sections of the transcript included a statement in which petitioner purportedly told the trial court that he was going to appeal because the jury had acquitted him. The court also noted that although petitioner had pursued a direct appeal of his conviction in 1979, he made no mention in that appeal of the egregious misconduct that he was alleging in his habeas petition.

In a decision issued June 2, 2004, the Wisconsin Court of Appeals affirmed the trial court’s decision, upholding the trial court’s determination that the transcript was so clearly

a fake that no evidentiary hearing was necessary. The Wisconsin Supreme Court denied petitioner's petition for review on December 15, 2004.

OPINION

Petitioner's claims are patently incredible. As if it were not fantastic enough for petitioner to expect a court to believe that a trial judge would risk his career by engaging openly in the misconduct that petitioner alleges, it is perhaps even more fantastic for him to expect a court to believe that none of the bailiffs, court reporters, lawyers or jurors who were present would breathe a word about it for more than 23 years. Indeed, according to the transcript petitioner submitted to the state court, even *petitioner* knew in 1979 about the trial judge's alleged refusal to accept the jury's not guilty verdict, yet petitioner made no mention of it on direct appeal. Apart from the procedural ramifications of sitting on his claim for more than 23 years, petitioner's unexplained silence virtually proves that his allegations are fabricated.

After reviewing petitioner's claims and the transcript he submitted in support, the Wisconsin state courts determined that the transcript was fake and that petitioner was attempting to defraud the court. To obtain federal habeas relief, petitioner must show that it was unreasonable in light of the evidence presented for the state courts to make this determination. 28 U.S.C. § 2254(d)(2). Moreover, because state court findings of fact are entitled to a presumption of correctness, petitioner bears the additional burden of coming

forth with “clear and convincing” evidence to rebut the state courts’ finding. 28 U.S.C. § 2254(e)(1).

I am certain that petitioner cannot come forth with any clear and convincing evidence to rebut the state court’s finding that his claims are a complete falsehood. Petitioner fails in his habeas petition to explain how he supposedly obtained a copy of the “undoctored” transcript, provide facts to support his claim that the original transcript in the circuit court file was tampered with by court officials or to otherwise show that the state courts erred in finding that his transcript was a fake. These omissions, along with the inherently suspect nature of the claims, make plain that he is not entitled to relief. Accordingly,

ORDER

IT IS ORDERED that the petition of James Mercer is DISMISSED WITH PREJUDICE pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Entered this 31st day of January, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge