

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

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A'KINBO J.S. HASHIM-TIGGS,

Petitioner,

v.

RICHARD SCHNEITER, Warden,  
Wisconsin Secure Program Facility,

Respondent.  
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ORDER

06-C-0536-C

Petitioner A'Kinbo J.S. Hashim-Tiggs has filed objections to the report and recommendation entered herein by the United States Magistrate Judge on January 17, 2007, in which the magistrate judge recommended denial of petitioner's petition for habeas corpus, brought pursuant to 28 U.S.C. § 2254. Petitioner contends that the recommendation is wrong, for five reasons. (1) the magistrate judge mischaracterized facts in his report to fit a preconceived legal theory; (2) the magistrate judge failed to take into consideration the totality of the circumstances relating to petitioner's claim of constitutionally inadequate advice from his trial counsel; (3) in order to defeat petitioner's claim of judicial coercion by the state trial court, the magistrate judge relied improperly on statements made by the state

court judge at a hearing at which petitioner was not present; (4) the magistrate judge erred in advancing his own theory of procedural default when he should have remanded the unexhausted claims to state court for proper and adequate presentation there; and (5) the magistrate judge erred in finding that the doctrines of fundamental miscarriage of justice, actual innocence and prosecutorial misconduct did not entitle petitioner to habeas corpus relief.

Like many other litigants, petitioner does not appreciate the constraints under which federal courts operate when considering the merits of petitions for habeas corpus relief brought by persons in state custody. The federal court is not free to evaluate the state trial court's procedures and decide for itself whether the petitioner's conviction and sentence were constitutional. It must operate as if through a scrim, not looking at the trial procedures directly but determining whether the state appellate courts' evaluations of the constitutionality of those procedures either resulted in a decision that was contrary to clearly established federal law or reflected an unreasonable application of federal law or an unreasonable determination of the facts. Whether the federal court agrees with the state courts' resolution of petitioner's appeal is irrelevant; the court cannot issue a writ of habeas corpus unless the state courts' decision was so wrong as to be objectively unreasonable.

1 & 2. Alleged inaccuracy of the facts and failure to consider totality of circumstances

Petitioner believes that the magistrate judge misrepresented the facts about the crime, about the state trial court's retraction of its ban on plea bargaining after the status conference had taken place and about the plea negotiation, which in petitioner's view occurred in open court and resulted in an agreement that petitioner would enter an Alford plea. Whether petitioner is correct about the magistrate judge's view of the facts is irrelevant because the facts about trial counsel's performance played no part in the state court of appeals' opinion. In deciding petitioner's appeal, the court of appeals paid no attention to his contention that his trial attorney gave him ineffective assistance. It rejected his appeal because it concluded that he had not demonstrated any prejudice flowing from the advice he had been given. This conclusion made it unnecessary to decide whether the advice itself was inadequate. In the absence of any showing by petitioner that he would not have entered a plea of guilty had it not been for his attorney's advice, his claim failed under Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing of both ineffective assistance *and* prejudice resulting from the ineffectiveness.

The magistrate judge found, correctly, that the court of appeals' decision rejection of petitioner's claim of constitutionally ineffective assistance of counsel was well within the bounds of reasonableness. It does not matter whether, as petitioner asserts, the magistrate judge (or the court of appeals) misunderstood the facts leading up to the plea agreement or

whether he failed to consider the totality of the circumstances in finding that petitioner had not shown ineffectiveness. As I have explained, the court of appeals never relied on those facts.

Petitioner says now that had he known that the entry of a no contest plea would not allow him to explain the facts of the case to the presiding judge, he would have gone forward with a trial at which he could have shown that the victim's claims of injuries were unfounded. However, it is too late for him to make such an assertion. If petitioner had the factual basis for showing that he would not have entered his guilty plea but for the bad advice he received from his attorney, the time for making that showing was in the state court. This court's review of the state court of appeals' decision is limited to the record that was before the state court.

### 3. Alleged judicial coercion

In challenging the magistrate judge's conclusion that the state court of appeals found correctly that the state trial court did not coerce petitioner into pleading guilty, petitioner alleges that the state trial judge made certain comments to petitioner's trial attorney "designed to prompt and encourage Attorney Keane to pursue a resolution in the criminal case through plea negotiation to defeat petitioner's claim of judicial coercion in the overall plea process." Pet.'s Objs., dkt. #13, at unnumbered page 5. It is difficult to understand

what petitioner is alleging. He attached to his objections the transcript of a telephonic motion hearing held before the state trial judge on July 9, 2003. At page 16, the judge said that he would retract his usual policy of not allowing a person to plea bargain after the status conference “and allow [petitioner] to plea bargain right up to the day of the status since he has now a new and his third attorney.” Petitioner does not explain how such a statement could amount to coercion or to a coverup of any prior coercion. (Apparently, petitioner characterizes as “coercion” the trial judge’s earlier refusal to entertain a plea bargain after the February 4, 2003 status conference. If so, he is wrong. Such a position merely governs the time limits for a plea; it does not require one. It falls far short of constituting “coercion.”)

#### 4. The magistrate judge’s reliance on an unargued claim of procedural default

Petitioner takes issue with the magistrate judge’s decision to reject the claim of procedural default advanced by respondent and rely instead on another form of procedural default. Petitioner does not argue that the magistrate judge’s resolution of the issue of procedural default was erroneous; he objects to the magistrate judge’s reaching the issue.

It was proper for the magistrate judge to consider on his own whether petitioner had given the state court an adequate opportunity to consider his claims. Unless petitioner had done so, the federal court could not consider the claim. Complete exhaustion is a prerequisite to federal court review of a state conviction. A petitioner cannot establish

complete exhaustion of claims that he did not bring to the attention of the state court. The federal courts can make an exception to this rule only if the petitioner shows both cause for his default and prejudice that would result if his claim is not heard or, alternatively, that it would constitute manifest injustice not to entertain his claim. In this proceeding, petitioner did not try to show cause and prejudice and his only ground for a finding of manifest injustice is an allegation of prosecutorial misconduct. He alleges that the victim's medical reports show that the prosecutor acted improperly when he knew from the medical records that the victim had not been injured but charged petitioner with battery anyway. Such misconduct would allow petitioner to qualify for the fundamental miscarriage of justice exception only if petitioner could show that the claim is supported by new and reliable evidence that could not have been produced earlier and "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." R&R, dkt. #12, at 22-23 (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)). The magistrate judge found that the medical records were new evidence but that they did not show that petitioner's claim of innocence was well founded. Petitioner's victim complained of pain and decreased sensation immediately after being hit by petitioner and again at the preliminary hearing. These complaints were sufficient to allow a reasonable jury to find petitioner guilty of the crime of battery.

Petitioner objects to the magistrate judge's failure to remand his petition to state

court once he found that petitioner had not exhausted his claims fully. The law makes no provision for a remand under these circumstances. Petitioner is not entitled to multiple challenges to his conviction, either in this court or in state court.

5. Alleged prosecutorial misconduct

\_\_\_\_\_The magistrate judge found that petitioner never presented this claim to the state court of appeals. Petitioner takes issue with this finding, asserting that the claim never had time to mature until the postconviction hearing at which petitioner learned for the first time of the prosecutor's knowledge that the victim had presented false evidence of injuries. Assuming for the sake of argument that this assertion is accurate, it does not explain why petitioner never raised the misconduct claim as part of his state court appeal from the denial of his postconviction motion. Petitioner's failure to exhaust this claim bars this court from considering it.

CONCLUSION

After reviewing petitioner's objections in detail, I am persuaded that he has failed to show that the magistrate judge's recommendation should not be adopted by the court.

ORDER

IT IS ORDERED that the recommendation of the United States Magistrate Judge is ADOPTED. FURTHER, IT IS ORDERED that petitioner A’Kinbo J.S. Hashim-Tiggs’s petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254, is DENIED.

Entered this 20th day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge