IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JACK JORDAN,

Petitioner,

v.

RICARDO MARTINEZ, Warden,
FCI Oxford,

Respondent.

OPINION and ORDER

06-C-748-C

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Petitioner Jack Jordan is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. He has filed an application for a writ of habeas corpus and has paid the five dollar filing fee. The petition is before the court for preliminary consideration pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Although petitioner has styled his pleading as a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 (the statute governing writs of habeas corpus issued to prisoners who are being confined illegally on federal charges), he is not challenging his federal sentence. Instead, he challenges a 1992 assault conviction in the Circuit Court for Wayne County, Michigan. Petitioner contends that the conviction was constitutionally

invalid because his jury was tainted and his lawyer ineffective. It is not clear from the petition whether petitioner's present custody is the result of his Michigan conviction. It appears unlikely that it is, in which case this court would have no authority to grant his petition. 28 U.S.C. § 2241. However, setting aside for the moment any procedural defects that may be present, the petition lacks sufficient facts from which I may determine whether petitioner's constitutional rights may have been violated by his state conviction. Therefore, I will stay a decision on the petition and provide petitioner with the opportunity to supplement his complaint with an affidavit answering the questions set forth on pages 11-12 of this opinion.

From the petition and the documents attached to it, I discern the following factual allegations.

FACTUAL ALLEGATIONS

Petitioner Jack Jordan is an inmate at the Federal Correctional Institution in Oxford, Wisconsin, serving a federal sentence for a firearms conviction. In 1992, petitioner was charged with "assault with intent to do bodily harm less than murder" in the Circuit Court for Wayne County, Michigan, Case No. 92-8097. He was also charged with felony possession of a firearm.

Initially, petitioner was represented by private counsel. However, two weeks before

trial, he was appointed a public defender, James O'Donnell, who represented him at trial and "on his appeal." Although O'Donnell knew that potential witness Ernest Johnson had "exculpatory evidence," Johnson was not "allowed to testify due to counsel's ineffectiveness." O'Donnell failed to interview several witnesses whom petitioner wanted him to interview. During voir dire, one of the jurors revealed that he was a neighbor of the presiding judge. O'Donnell did not move to strike the juror, who ultimately served on the panel that convicted petitioner.

On January 13, 1993, petitioner was given an indeterminate sentence between 6 years, 8 months' and 10 years' imprisonment on the assault conviction and a determinate sentence of 2 years on the firearms conviction. The sentences were to run consecutively to one another. (Elsewhere, petitioner alleges that he served eight years' imprisonment on these convictions.)

On December 14, 2005, petitioner filed a petition for postconviction relief in the state circuit court, raising the claims he has made in his petition in this court: that his counsel was ineffective and his right to a jury trial compromised by the inclusion of the judge's neighbor on his jury panel. He did not file any affidavits in support of the motion.

On April 20, 2006, the circuit court in Case No. 92-8097 returned petitioner's request for postconviction relief to him unfiled, stating, "Appellate review of Defendant's Judgment of Conviction and sentence is only reviewable in accordance with the provisions

of MCR 6.501 et al. [sic]." Petitioner attempted to appeal the decision. On August 16, 2006, the Michigan Court of Appeals, Third Circuit, issued an order stating:

> The delayed application for leave to appeal and the motion to appoint counsel are DISMISSED for lack of jurisdiction as the April 20, 2006 order denying appellant's motion for relief from judgment under MCR 6.500 et seq. stems from a successive motion requesting this type of relief since 1995 where no newly discovered evidence or retroactive change in law can be found. MCR 6.502(G).

Again, petitioner tried to appeal the decision, this time to the Michigan Supreme Court. On October 18, 2006, the clerk of court sent petitioner a letter stating:

> This office recently received from you pleadings intended for filing with this Court. We are not able to file same because your pleadings were received beyond the rule-prescribed time limitation. See MCR 7.302(C)(2):
>
> 56 days from the Court of Appeals decision in criminal cases.
>
> Because the rules provide no exception to the time limitation, your papers are herewith returned and the Court will not accept any further pleadings with respect to this matter.

OPINION

When a prisoner contends that he is "in custody in violation of the Constitution or laws . . . of the United States," he may petition a federal court for a writ of habeas corpus. 28 U.S.C. § 2254. Rule 4 of the Rules Governing Section 2254 Cases in the United States "provides that district courts 'must promptly examine' state prisoner habeas petitions and must dismiss the petition '[i]f it plainly appears . . . that the petitioner is not entitled to

relief.'" Day v. McDonough, 126 S. Ct. 1675, 1682 (2006) (citing Rule 4). Under Rule 4, if the court determines that a petition and any attached exhibits either fail to state a claim or are factually frivolous, the court may dismiss the petition summarily, without reviewing the record or ordering the state to respond. Small v. Endicott, 998 F.2d 411, 414 (7th Cir. 1993). Several aspects of the petition call into question its timeliness and the factual grounds upon which it rests.

First, the allegations contained in the petition suggest strongly that petitioner may no longer be "in custody" as a result of his conviction in Case No. 92-8097. According to petitioner, he served an eight-year sentence. Assuming he served his term uninterrupted from his 1993 sentencing to his release, petitioner would have completed his sentence in 2001. If his sentence has ended (and his current confinement in federal prison suggests that it has), he may no longer challenge the conviction because it is not the source of his present confinement. He cannot seek release from a sentence he has served.

Second, the documents attached to the petition and the information petitioner has provided about his criminal appeals suggest that the statute of limitations has run on petitioner's request for a writ of habeas corpus. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the general rule is that a prisoner in state custody must bring his petition for a writ of habeas corpus within one year of the date his conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). Under 28 U.S.C. § 2244(d)(2), time is tolled

during the pendency of any properly filed application to the state for postconviction relief.

Petitioner does not appear to be seeking habeas relief on the basis of any newly recognized constitutional right or newly discovered facts, or contending that the state impeded his efforts to file his habeas petition sooner. Accordingly, the relevant starting date for statute of limitations purposes is the date on which petitioner's conviction became "final," as described in § 2244(d)(1)(A). Petitioner alleges that his trial counsel filed an appeal of some variety following his sentence in 1993, but he has not provided any information about that appeal. Instead, petitioner has submitted copies of his recent attempts to challenge his sentence in the Michigan state courts. The trial court, intermediate appellate court and Michigan Supreme Court each refused to consider petitioner's attempt to challenge his conviction, citing MCR Ch. 6.500, which

> establishes a procedure for postappeal proceedings challenging criminal convictions. It provides the exclusive means to challenge convictions in Michigan courts for a defendant who has had an appeal by right or by leave, who has unsuccessfully sought leave to appeal, or who is unable to file an application for leave to appeal to the Court of Appeals because 18 months have elapsed since the judgment. The rules are similar in structure to the federal rules governing proceedings under 28 USC 2255, though there are a number of differences in substance and language.

MCR 6.501 (internal citations omitted). From the state courts' repeated reference to the statutes governing untimely and successive petitions, and the Michigan Court of Appeals' reference to petitioner's "successive motion requesting this type of relief since 1995," it

appears that petitioner has raised the matters mentioned in his petition on previous occasions over many years. Because his conviction would have become final within one year of the state courts' first denial of any timely filed direct appeal or postconviction motion, it appears extremely unlikely that petitioner has brought his request within the one year statute of limitations prescribed by § 2244(d)(1)(A).

However, even if petitioner is in custody pursuant to his state conviction and even if his petition is timely under § 2244(d)(1)(A), it is not clear that petitioner's constitutional rights were violated by the conduct he is challenging. Petitioner alleges that his Sixth Amendment rights were violated in two distinct ways: (1) when a neighbor of the presiding judge served as a juror in his case and (2) when petitioner's lawyer failed to interview several potential witnesses and procure the testimony of Ernest Johnson, all of whom petitioner asserts would have provided "exculpatory evidence." I address each in turn.

A. Juror Bias

The Supreme Court has long recognized that the Sixth Amendment prohibits biased jurors from serving on criminal juries. Conaway v. Polk, 453 F.3d 567, 584-585 (4th Cir. 2006) (citing United States v. Wood, 299 U.S. 123, 133 (1936)). A "touchstone of a fair trial is an impartial trier of fact— a jury capable and willing to decide the case solely on the evidence before it." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554

(1984). A juror's bias may be established by showing (1) that the juror "failed to answer honestly a material question on voir dire"; and (2) that "a correct response [to that question] would have provided a valid basis for a challenge for cause." Id. at 556. In addition, a litigant must show that the fairness of his trial was affected either by the juror's "motives for concealing [the] information" or the "reasons that affect [the] juror's impartiality." Conway, 453 F.3d at 585.

Petitioner does not contend that any jurors lied during his voir dire. Instead, he asserts that the juror who knew the judge should have been stricken. As petitioner sees it,

> the court should have disallowed this juror due to conflict of interest, because the juror was [the judge's] next door nei[g]hbor, and it's obvious the juror would rule against the defendant.

Petitioner admits that his lawyer did not object to the juror's impanelment, which alone is reason to consider that he forfeited his freestanding claim for juror bias. (As I will discuss below, the claim may be styled as one for ineffective assistance of counsel.)

More important, there is no reason to believe that the juror was biased by virtue of her acquaintance with the judge. A juror closely acquainted with a party or a party's attorney might be suspected of bias toward the side with whom he is familiar. See, e.g., United States v. Polichemi, 219 F.3d 698, 704 (7th Cir. 2000) (court must excuse juror for cause if juror is related to party, or if juror has any financial interest in case); Caterpillar Inc. v. Sturman Industries, Inc., 387 F.3d 1358, 1368 (Fed. Cir. 2004) (juror married to

employee of plaintiff company implicitly biased). However, a judge's role is to be impartial. Therefore, a prospective juror's acquaintance with the judge does not in itself imply that the juror will be partial to either party.

Petitioner has not suggested any reason (other than his unfounded assumption) to believe that the juror favored the prosecution over him merely because the juror was one of the judge's neighbors. Because there is no indication that petitioner's jury was tainted by bias, petitioner's Sixth Amendment rights were not violated by the inclusion of the judge's neighbor.

B. Ineffective Assistance

Next, petitioner contends that his lawyer was ineffective because he failed to interview witnesses and procure the testimony of Ernest Johnson and failed to object to the impanelment of the judge's neighbor as a juror. To make out a successful ineffective assistance of counsel claim, petitioner must demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced his defense that it deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 688-94 (1984). When a petitioner challenges the failure of his lawyer to perform an adequate investigation, the lawyer's decisions must be assessed "for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at

691.

"With regard to the performance prong, petitioner must direct the court to the specific acts or omissions which form the basis of his claim." United States v. Hall, 212 F.3d 1016, 1021 (7th Cir. 2000). The court must then determine whether, in light of all the circumstances, the alleged acts or omissions were outside the wide range of professionally competent assistance. Id. Should the defendant show that his lawyer's conduct was deficient, he then must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Matheney v. Anderson, 253 F.3d 1025, 1039-40 (7th Cir. 2001). Conclusory allegations do not satisfy Strickland's prejudice requirement. United States v. Farr, 297 F.3d 651, 658 (7th Cir. 2002); United States v. Boyles, 57 F.3d 535, 550 (7th Cir. 1995).

As I explained above, petitioner's lawyer would not have performed deficiently by failing to strike a juror merely because she lived in the same neighborhood as the presiding judge. Petitioner has provided no indication that the juror was biased against him as a result of her acquaintance with the judge. Without such evidence of bias, petitioner's lawyer would have had no ground on which to object to the juror's impanelment. Therefore, petitioner's layer was not ineffective for failing to object to the juror's participation in petitioner's trial.

Petitioner alleges that his lawyer was ineffective also because he failed to interview unidentified witnesses and failed to secure the testimony of prospective witness Ernest

Johnson. Petitioner has not identified what testimony each prospective witness would have supplied (other to say it would have been "exculpatory") and has not indicated how the testimony would have changed the outcome of his trial. Conclusory allegations such as these are insufficient to state a claim for ineffective assistance of counsel. Gallo-Vasquez v. United States, 402 F.3d 793, 797 (7th Cir. 2005) ("A hearing [on the habeas petition] is not necessary if the petitioner makes conclusory or speculative allegations rather than specific factual allegations."); Daniels v. United States, 54 F.3d 290, 293 (7th Cir.1995).

Because petitioner has not provided enough information to permit me to conclude that his constitutional rights were violated by the ineffective assistance of his counsel or by the presence of a biased juror on his jury panel, I will not require the government to respond to his petition at this time. Instead, I will stay a decision on the petition and permit petitioner to supplement his petition with an affidavit answering each of the following questions:

1. Have you served your sentence in Wayne County Case No. 92-8097, including any parole revocation time you may have been required to serve?

2. Did you or your lawyer file an appeal of your conviction in Case No. 92-8097? When? What happened to each one? Be sure to list each attempt you have made to file a direct appeal or postconviction motion.

3. Who were the witnesses you asked your lawyer to interview? What evidence

would each one of them have offered that would have helped your case?

Petitioner may have until February 20, 2007, in which to provide the court with an affidavit answering each of these questions. If, by February 20, 2007, petitioner has not filed a response as directed, the petition will be dismissed.

ORDER

Accordingly, IT IS ORDERED that a decision on petitioner Jack Jordan's petition for a writ of habeas corpus is STAYED. Petitioner may have until February 20, 2007, in which to provide the court with an affidavit answering each of the questions posed above. If, by February 20, 2007, petitioner has not filed a response as directed, his petition will be dismissed.

Entered this 31st day of January, 2007.

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