IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD A. NEWELL, ORDER

Petitioner, 12-cv-432-bbc

v.

JUDY P. SMITH, Warden,
Oshkosh Correctional Institution,

Respondent.

- -

State inmate Donald A. Newell has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges an August 2, 2007 judgment of conviction on ten counts of second-degree sexual assault for having intercourse with a person suffering a mental deficiency. He proceeds pro se and he has paid the $5 filing fee.

On preliminary review under Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts, I determined that only one of the 24 claims raised in the petition was exhausted and not subject to dismissal as barred from federal review by the doctrine of procedural default. I gave petitioner thirty days to show whether his claims fit within an exception to the procedural bar, and he filed multiple responses to that order. After considering those responses, I concluded that petitioner's unexhausted claims were procedurally barred and dismissed those claims (claims 1-2 and 4-24) on October 11, 2012. In that same order, I directed the state to respond to petitioner's

only remaining claim, concerning the sufficiency of the evidence to corroborate his confession (claim 3).

Now petitioner has filed a motion to reconsider the dismissal of his procedurally barred claims. He concedes that claims 1-2 and 4-24 are unexhausted and that a procedural default occurred with respect to these grounds for relief. Nevertheless, he seeks reconsideration of the dismissal order, for two reasons. First, he argues that his default should be excused because he was denied effective assistance of counsel in state court. Second, he argues that I should overlook his default because the failure to review his claims would constitute a miscarriage of justice. I will deny the motion because I have addressed both of these arguments previously and found them unavailing.

A motion for reconsideration is not an appropriate vehicle for relitigating arguments that the court previously rejected or for arguing issues that could have been raised during the consideration of the motion presently under reconsideration. Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1270 (7th Cir. 1996). Motions for reconsideration are utilized for a very limited purpose: to correct manifest errors of law or fact, to present newly discovered evidence, or where there has been an intervening and substantial change in the controlling law since the submission of the issues to the court. Cosgrove v. Bartolotta, 150 F.3d 729, 732 (7th Cir. 1998). Petitioner meets none of these criteria here.

As I explained previously on October 11, 2012, where a petitioner has procedurally defaulted a claim in state court, federal habeas corpus review is available only if he can

demonstrate (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law," or (2) that "failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991); Steward v. Gilmore, 80 F.3d 1205, 1211-12 (7th Cir. 1996). Cause to overcome a procedural default requires a showing "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). To show prejudice, a petitioner must present evidence that the errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Perruquet, 390 F.3d at 515 (quoting United States v. Frady, 456 U.S. 152 (1982) (emphasis omitted). The fundamental-miscarriage-of-justice exception requires a showing "that a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent' of the substantive offense." Dretke v. Haley, 541 U.S. 386, 393 (2004) (quotation omitted).

I gave petitioner an opportunity to overcome his default by supplementing his petition to explain (1) what cause he may have for his failure to properly present his defaulted claims (grounds 1-2 and 4-24) to the trial court in the first place and his failure to raise these claims on appeal or in a motion for postconviction relief before raising them on appeal; and (2) what prejudice he suffered as a result of his failure to raise these claims properly; or (3) whether he is actually innocent of the crime for which he is imprisoned.

In an effort to establish cause, petitioner argued that his default should be excused because he received inadequate assistance from "the State of Wisconsin courts, Appellate

system, State Public Defender's Office, and the Legal Aid for Incarcerated Prisoners (L.A.I.P.) (from the University of Wisconsin Law School)." Construed liberally, petitioner blamed the failure to exhaust his defaulted claims on inadequate legal advice or ineffective assistance of counsel.

I noted that ineffective assistance of counsel may constitute cause for a procedural default. Murray v. Carrier, 477 U.S. 478, 488-89 (1986). As I explained to petitioner, "[n]ot just any deficiency in counsel's performance will do . . . ; the assistance must have been so ineffective as to violate the Federal Constitution." Edwards v. Carpenter, 529 U.S. 446, 451 (2000). "In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is *itself* an independent constitutional claim." Id. (emphasis in original).

As I observed in the order entered on October 11, 2012, petitioner did not raise an independent ineffective assistance claim in state court concerning his attorney's failure to raise his defaulted claims in a procedurally proper way. His federal petition does not include an independent claim of ineffective assistance alleging deficient performance by counsel on appellate or post conviction review. Under these circumstances, petitioner cannot rely on an ineffective assistance claim to show cause for his procedural default. Carpenter, 529 U.S. at 452. Because petitioner failed to establish cause for his default, there was no need to consider whether actual prejudice was shown. McClesky v. Zant, 499 U.S. 467, 502 (1991); Promotor v. Pollard, 628 F.3d 878, 887 (7th Cir. 2010).

Petitioner argued further that the victim was not mentally deficient and his

relationship with her was consensual. He argued, therefore, that he should not have been convicted of second-degree sexual assault for having intercourse with a person suffering a mental deficiency. As petitioner acknowledged, the jury disagreed and found him guilty of sexually assaulting a person suffering from a mental deficiency. Therefore, I concluded that petitioner did not establish that he was actually innocent and failed to demonstrate that his case fits within the fundamental-miscarriage-of-justice exception. Schlup v. Delo, 513 U.S. 298, 326-27 (1995). Because petitioner did not establish both cause and prejudice or meet the exception reserved for fundamental miscarriages of justice, I concluded that the unexhausted grounds for relief lodged in claims 1-2 and 4-24 were procedurally barred.

In his motion for reconsideration, petitioner repeats his allegations of ineffective assistance but he does not demonstrate that the order dismissing his claims was incorrect. Petitioner also repeats his contention that the victim was not mentally deficient, that their relationship was consensual and that he could not be convicted of sexually assaulting a person who suffered from a mental deficiency. He presents no facts or evidence, however, in support of his argument and does not show that he is actually innocent under the gateway standard for obtaining federal review of a defaulted claim. House v. Bell, 547 U.S. 518, 538 (2006) (discussing the "gateway actual-innocence standard" for overcoming a procedural default under Schlup).

Petitioner does not show that a manifest error of law or fact occurred or that his procedurally defaulted claims (claims 1-2 and 4-24) were dismissed by mistake. Accordingly, I will deny his motion for reconsideration.

ORDER

IT IS ORDERED that the petitioner Donald A. Newell's motion for reconsideration, dkt. # 25, is DENIED.

Entered this 15th day of November, 2012.

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