

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

JAVIER REYES OTERO,

Petitioner,

v.

REED RICHARDSON,

Respondent.

OPINION & ORDER

14-cv-760-jdp

Petitioner Javier Reyes Otero is in custody at the Stanley Correctional Institution. He seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge his 2007 conviction in the Waukesha County Circuit Court. Dkt. 1. Petitioner has also moved to stay the case. Dkt. 3. Petitioner has paid the filing fee in this court and I may now preliminarily review the case under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. I will order the petition served on respondent. But I will deny petitioner's requested stay. Finally, because petitioner's case is complicated and will depend in part on expert testimony, I will appoint counsel for this.

Petitioner was convicted of three counts of first-degree sexual assault of a child, Wis. Stat. § 948.02(1), on September 11, 2007, following a jury trial in case number 2007CF000017. He appealed his conviction, but the Wisconsin Court of Appeals affirmed the conviction on June 26, 2013, and the Wisconsin Supreme Court denied review on November 26, 2013. *State v. Otero*, 2013 WI App 94, 349 Wis. 2d 524, 835 N.W.2d 290, *review denied*, 2014 WI 3, 352 Wis. 2d 351, 842 N.W.2d 359. Petitioner filed his habeas petition in this court on November 5, 2014. It appears that petitioner also filed a state habeas petition on November 28, 2014, and that both the Wisconsin Court of Appeals and

the Supreme Court of Wisconsin denied the state petition in January and May of 2015, respectively.

The petition outlines three grounds for relief: (1) ineffective assistance of trial counsel; (2) new evidence justifying a new trial; and (3) ineffective assistance of postconviction and appellate counsel. Petitioner moved to stay his case for 180 days to further develop it and exhaust his claims of ineffective assistance of postconviction and appellate counsel. Dkt. 3. “[F]ederal district courts have the discretion to stay a mixed habeas petition—one that contains some exhausted claims and some unexhausted claims—in ‘limited circumstances’ not inconsistent with the ‘timeliness concerns reflected in AEDPA.’” *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Petitioner must show that there is good cause to stay his case and that it is not plainly meritless. *Tucker v. Kingston*, 538 F.3d 732, 735 (7th Cir. 2008) (“whenever good cause is shown and the claims are not plainly meritless, stay and abeyance is the preferred course of action.”).

Petitioner’s claims do not plainly lack merit. And his attempt to exhaust his claims in state court before proceeding here could demonstrate good cause. However, given the developments in the state court since petitioner moved to stay the case, it appears that he has now exhausted his claims of ineffective assistance of counsel. He therefore does not need a stay to exhaust them. Because petitioner’s claims appear timely and exhausted, I conclude that the petition should be served on respondent.

But petitioner offers another reason to stay his case: he has been working to secure *pro bono* representation and would like additional time to allow his potential lawyers to review his case. Dkt. 3-1, at 5. Petitioner has submitted correspondence with both the Wisconsin Innocence Project and a private attorney about their potential *pro bono* representation, but

neither has entered an appearance in this case. If petitioner has not yet secured counsel and he is eligible, the court may appoint counsel for him.

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). 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.*

To be financially eligible for appointment of counsel, petitioner does not have to be indigent; he must demonstrate only that he is financially unable to obtain counsel. *United States v. Sarsoun*, 834 F.2d 1358, 1362 (7th Cir. 1987) (“The Criminal Justice Act . . . merely requires that a defendant be financially unable to obtain counsel—a lower standard than indigency.”). Although petitioner bears the ultimate burden of demonstrating his financial eligibility, “[a]ny doubts as to a person’s eligibility should be resolved in the person’s favor; erroneous determinations of eligibility may be corrected at a later time.” Admin. Office of the U.S. Courts, Guide to Judiciary Policies and Procedures, Vol. 7, pt. A, § 210.40.30(b), available at <http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja>. Petitioner has submitted an affidavit attesting to his financial condition. Dkt. 4. Under this court’s standards for indigence, I would allow him to proceed in

forma pauperis in a civil action under 28 U.S.C. § 1915. *See, e.g., Harrison v. Vlack*, No. 10-cv-230, 2010 WL 2430954, at *1 (W.D. Wis. June 11, 2010). Applying the principles discussed above, and based on petitioner's financial information, I conclude that petitioner is financially unable to obtain counsel, and I will grant his motion for appointment of counsel. Petitioner should be aware that if the court later finds that he is financially able to retain counsel, the court may terminate the appointment of counsel as the interests of justice dictate, and also may direct him to reimburse his attorney for the cost of representation. § 3006A(c), (f).

I am also persuaded that appointing petitioner counsel would serve the interests of justice. Petitioner has attempted to obtain counsel on his own. Because no attorney has appeared in this case, I will assume that petitioner's attempts were unsuccessful, despite his effort. Petitioner's case is also particularly difficult because it seems likely to require expert testimony relating to, among other things, the medical evidence. Therefore, despite petitioner's apparent competency to litigate his case this far, the difficulty of navigating the evidentiary complexities will likely exceed his ability.

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.
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. The court will recruit counsel for petitioner under the terms of the court's Criminal Justice Act Plan.
4. The court will set a new schedule following input from the parties upon recruitment of counsel.
5. Petitioner's motion for stay and abeyance, Dkt. 3, is DENIED.

Entered September 24, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge