IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES J. HOMELSEY, A/K/A CHARLES J. HOMESLEY, A/K/A CHARLES MAYBERRY,

Petitioner,

v.

COLUMBIA CORRECTIONAL INSTITUTION,

Respondent.

ORDER

16-cv-47-bbc

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Petitioner Charles J. Homelsey, a/k/a Charles J. Homesley, a/k/a Charles Mayberry, is an inmate at the Jackson Correctional Institution. He has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and paid the $5.00 filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases. Rule 4 requires the court to examine the petition and supporting exhibits and dismiss a petition if it "plainly appears" that petitioner is not entitled to relief. According to the Court of Appeals for the Seventh Circuit, this rule "enables the district court to dismiss a petition summarily, without reviewing the record at all, if it determines that the petition and any attached exhibits either fail to state a claim or are factually frivolous." Small v. Endicott, 998 F.2d 411, 414 (7th Cir. 1993). The petition must cross "some threshold of plausibility"

before the state will be required to answer. Harris v. McAdory, 334 F.3d 665, 669 (7th Cir. 2003); Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996).

As a preliminary matter, Michael Dittman is the warden of Columbia Correctional Institution and is therefore the state officer who has custody of petitioner. Under Rule 2(a) of the Rules Governing Section 2254 Cases, I will substitute Warden Dittman for the institution.

Petitioner challenges a judgment of conviction entered by the Dane County Circuit Court for three counts of second-degree sexual assault and one count of false imprisonment. He attacks his conviction on four grounds: 1) the state courts erred in denying his motion for a new trial based upon newly discovered evidence; 2) his trial lawyer was ineffective for failing to raise a question as to petitioner's competence to stand trial; 3) his appellate lawyer was ineffective for failing on appeal to raise the issue of trial counsel's ineffectiveness; and 4) the trial court violated the Americans With Disabilities Act when it failed to ensure that petitioner received "an ADA entitled and protected full, fair and meaningful opportunity to receive a hearing" on the merits of his claims of ineffective assistance of trial and appellate counsel.

Petitioner's claim that the state courts erred in denying him a new trial based upon newly-discovered evidence must be dismissed. The "refusal to grant a new trial on the basis of newly discovered evidence is not actionable in habeas corpus." Johnson v. Bett, 349 F.3d 1030, 1038 (7th Cir. 2003). See also Townsend v. Sain, 372 U.S. 293, 317 (1963) ("[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not

a ground for relief on federal habeas corpus."). For claims based on newly discovered evidence to state a ground for federal habeas relief, they must relate to a constitutional violation independent of any claim of innocence. Herrera v. Collins, 506 U.S. 390 (1993). Where "newly discovered evidence" consists of "witness recantations of trial testimony or confessions by others of the crime, most courts decline to consider it in the absence of any showing that the prosecution knowingly proffered false testimony or failed to disclose exculpatory evidence, or that petitioner's counsel was ineffective." Johnson v. Bett, 349 F.3d 1030, 1038 (7th Cir. 2003) (quoting Coogan v. McCaughtry, 958 F.2d 793, 801 (7th Cir. 1992)). Here, petitioner has not identified any constitutional violation that relates to his newly-discovered evidence. Accordingly, this claim shall be dismissed.

Ground Four also fails to state a constitutional claim. I construe this as a claim that the trial court should have appointed a lawyer to represent petitioner at his September 9, 2013 hearing on his post conviction motion brought pursuant to Wis. Stat. § 974.06. However, defendants do not have a constitutional right to the assistance of counsel in post conviction collateral attacks. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Further, I am not aware of any provision in the Americans with Disabilities Act that would have required the appointment of counsel.

This leaves petitioner's ineffective assistance claims. To succeed on those claims, petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing the familiar two-part "performance" and "prejudice" test

for ineffective assistance of counsel claims). "'Counsel has an obligation either to investigate possible defenses or make reasonable decisions that particular investigations are unnecessary.'" Warren v. Baenen, 712 F.3d 1090, 1100 (7th Cir. 2013) (quoting Burt v. Uchtman, 422 F.3d 557, 566 (7th Cir. 2005)). The test for competency to stand trial is whether the defendant "lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). Where, as here, a petitioner alleges ineffective assistance because of counsel's failure to investigate and request a fitness hearing, the Court of Appeals for the Seventh Circuit has interpreted the Strickland prejudice inquiry as asking "whether there is a reasonable probability the defendant would have been found unfit had a hearing been held.'" Warren, 712 F.3d at 1100 (quoting Burt, 422 F.3d at 567).

I am satisfied that petitioner has alleged facts sufficient to state a claim that his trial lawyer provided ineffective assistance of counsel by failing to raise the issue of petitioner's competence with the trial court, and further, that petitioner's appellate counsel was ineffective for failing to raise this claim of ineffective assistance on appeal. Although not compelling, the evidence that petitioner has submitted in support of his petition (namely, that he cannot read or write, has memory problems as a result of head trauma and was found incompetent to stand trial in 1999) are at least sufficient to raise a question as to petitioner's competency to stand trial in 2008 and to state a plausible claim that his trial and appellate lawyers were ineffective for failing to raise the issue. Accordingly, respondent will be ordered to respond to these claims.

Finally, petitioner has requested the appointment of counsel on the ground that his mental disabilities prevent him from representing himself adequately. The Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), authorizes a district court to appoint counsel for a petitioner seeking habeas relief under 28 U.S.C. § 2254. Before this is proper, however, this section requires the district court to 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).

I am deferring a ruling on petitioner's request for counsel until the state has filed its response to the petition. Although the petition and its attachments raise a significant question about petitioner's ability to litigate the merits of his ineffective assistance of counsel claims on his own, it is difficult to assess the complexity of this case until the state has filed its answer. For example, the possibility exists that the state may assert a procedural defense that rests on undisputed facts and for which the assistance of counsel would provide only marginal benefit. It is simply too early in this proceeding to tell whether appointment of counsel would serve the interests of justice.

In addition, this court has no information from which to conclude that petitioner is "financially eligible" for court-appointed counsel. Petitioner must submit a six-month trust account statement in support of his motion.

ORDER

IT IS ORDERED that

1. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on Warden Dittman.

2. Within 30 days of the date of service of this order, respondent must file an answer to petitioner's claims that he was denied the effective assistance of trial and appellate counsel when his lawyers failed to argue that he was not mentally competent to be tried. The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue.

3. **Dispositive motions**. If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. If the state contends that the petition presents a mix of exhausted and unexhausted claims, it must address in its supporting brief whether petitioner meets the criteria for a stay announced in Rhines v. Weber, 544 U.S. 269 (2005), in the event he opts to pursue his unexhausted claims in state court. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If the court denies the motion to dismiss in whole or in part, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

4. **When no dispositive motion is filed**. If respondent does not file a dispositive motion, the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of the answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:

    1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,

    2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

  28 U.S.C. § 2254(d). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

  NOTE WELL: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims dismissed for his failure to meet his burden of proof.

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.

- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

5. For the time being, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

6. Petitioner's claims that the state courts erred in rejecting his request for a new trial based upon newly-discovered evidence (Ground One) and in declining to appoint him counsel at his post-conviction hearing (Ground Four) are DISMISSED for failure to state a constitutional claim.

7. Petitioner's motion for the appointment of counsel is DEFERRED until after the state files its answer.

8. Not later than April 15, 2016, petitioner must submit a six-month trust fund account statement so that the court may make a determination regarding his financial eligibility for appointed counsel.

Entered this 15th day of March, 2016.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge