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

JAMES P. BOHANAN,

Petitioner,

v.

SCOTT ECKSTEIN, Warden,
Green Bay Correctional Institution,[1]

Respondent.

ORDER

13-cv-808-wmc

In 2013, state inmate James P. Bohanan filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge a state court conviction on two grounds. On December 10, 2014, after respondent filed an answer, but before petitioner submitted his brief in support of his petition, the court granted Bohanan's motion to stay this matter to permit him to return to state court to exhaust his remedies with respect to a third claim alleging ineffective assistance of counsel.

After now exhausting that claim through the state system, Bohanan moves to reopen the case, and he has submitted an amended petition asserting his two previously-reviewed claims, plus his ineffective assistance of counsel claim.

As before, Rule 4 of the Rules Governing Section 2254 Cases requires the court to screen his petition. For the reasons the court previously explained, petitioner will be permitted to proceed on his first two claims for relief, but his ineffective assistance of counsel claim must be dismissed since he is plainly not entitled to relief.

[1] The court substitutes the current warden of Green Bay Correctional Institution as the proper party respondent pursuant to Rule 2(a) of the Rules Governing Habeas Corpus Cases under 28 U.S.C. § 2254 and Fed. R. Civ. P. 25(d).

## BACKGROUND

Bohanan was charged with first-degree intentional homicide in Dane County Case No. 07CF1445. After several witnesses testified that they saw Bohanan shoot the victim multiple times, including several shots at close range, a jury found him guilty, and thereafter the circuit court sentenced Bohanan to life in prison. The Wisconsin Court of Appeals affirmed the conviction, *see State v. Bohanan*, 2012 WL App 88, 343 Wis. 2d 677, 819 N.W.2d 562, and the Wisconsin Supreme Court denied his petition for review on January 14, 2013.

Bohanan originally sought relief before this court on two grounds: (1) he was denied the right to confront and cross-examine a witness in violation of the Sixth Amendment; and (2) the circuit court erred by admitting hearsay evidence. In his amended petition, Bohanan adds a third claim: his trial attorney was ineffective in failing to challenge the fact that his criminal complaint was not endorsed by the district attorney or one of his assistants as required by state law. Both the state circuit court and Wisconsin Court of Appeals denied him post-conviction relief on this latter claim under Wis. Stat. § 974.06. *State v. Bohanan*, 2015AP1175-CR. In its December 9, 2016, decision, the Wisconsin Court of Appeals explained its holding:

> The lack of the district attorney's signature on the criminal complaint was a defect of form. As such, the criminal complaint was not invalid. *See* Wis. Stat. § 971.26 ("No … complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."). Even if Bohanan had successfully moved to dismiss the criminal complaint, there is no doubt under the facts here that the State would have filed a second complaint. *See* Wis. Stat. § 971.31(6) ("If the court grants a motion

> to dismiss based upon a defect in the … complaint, … it may order that the defendant be held in custody or that the defendant's bail be continued for not more than 72 hours pending issuance of a new … complaint."). Here, although a district attorney did not sign the criminal complaint, the district attorney prosecuted the case, including showing probable cause at the preliminary hearing and presenting proof beyond a reasonable doubt at trial. Therefore, Bohanan was not prejudiced by his attorneys' failure to challenge the form of the criminal complaint.

*State v. Bohanan*, 2016 WL 8650430, at *2 (Wis. Ct. App. Dec. 9, 2016). On May 17, 2017, the Wisconsin Supreme Court denied his petition for review of that decision.

## OPINION

Having previously screened petitioner's first two claims for relief, the court will direct a response as to both. The petitioner's new ineffective assistance of counsel claim, however, does not cross the "threshold of plausibility" showing required before the state can be compelled to respond to a writ of habeas corpus. *Harris v. McAdory*, 334 F.3d 665, 669 (7th Cir. 2003); *Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996). Accordingly, that claim must be dismissed.

To make out a claim of ineffective assistance of counsel after *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) he was prejudiced by his counsel's errors. *Id.* at 687-88. To establish prejudice in particular, the Supreme Court explained in *Strickland* that:

> [t]he defendant must show that there is a reasonable probability that, *but for counsel's unprofessional errors*, the result of the proceeding would have been

> different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Id.* at 694 (emphasis added).

In deciding whether a defendant has cleared *Strickland*'s high bar, this court must defer to counsel's reasonable judgments and avoid second-guessing. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). When reviewing a claim of ineffective assistance of counsel asserted by a state prisoner in a habeas petition brought under § 2254(d), as here, this review must be even more deferential. That is because § 2254(d) also requires courts to defer to reasonable state court applications of federal law. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (internal citations and quotations omitted). As the court stated in *Knowles*,

> The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.

*Id.* at 123 (internal quotations and citations omitted).

This so-called "double deference" means that "only a clear error in applying *Strickland* would support a writ of habeas corpus." *Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997). So long as the Wisconsin Court of Appeals "t[ook] the [constitutional standard] seriously and produce[d] an answer within the range of defensible positions," *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000), this court must deny the writ. Under this standard, this threshold issue is not even arguably close.

As laid out above, the Wisconsin Court of Appeals deemed it unnecessary to review trial counsel's decision not to challenge the validity of the criminal complaint against petitioner because the undisputed record established that petitioner suffered no prejudice. This court is compelled to agree. Even though the district attorney did not sign the criminal complaint, the state circuit court not only found that the charge itself was supported by probable cause at a preliminary hearing, but also that the prosecution proved all of the elements beyond a reasonable doubt at trial. Moreover, the Wisconsin Court of Appeals held that even if petitioner's counsel had successfully moved to dismiss the complaint prior to jury empanelment, there was no doubt that the district attorney would have simply refiled a signed identical complaint, since double jeopardy would not have attached. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 561 (1977). While petitioner attempts to cast doubt as to whether the district attorney would have actually re-filed the complaint, he provides no basis for that theory, much less that this court could disturb this finding by the Wisconsin Court of Appeals. § 2254(e) (factual issues made by a state court shall be presumed correct, rebuttable only by clear and convincing evidence).

Given that petitioner's amended petition neither suggests that his counsel's challenge to the complaint would or could have thwarted the district attorney's ability to successfully pursue the first-degree intentional homicide charge, nor that this court is authorized to overrule such a finding in a collateral attack, petitioner's claim of prejudice due to ineffective assistance of counsel is wholly implausible. Therefore, while the court

will reopen this matter and set further deadlines as to petitioner's other two claims, his ineffective assistance of counsel claim will be dismissed.

ORDER

IT IS ORDERED THAT:

1. Petitioner James P. Bohanan's motion to reinstate (dkt. #31) is GRANTED.

2. Petitioner's motion to amend his petition (dkt. #32) is GRANTED, and he may proceed on claims 1 and 2, while his claim 3 for ineffective assistance of counsel is DISMISSED.

3. **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, Scott Eckstein, in his official capacity as warden of the Green Bay Correctional Institution.

4. **Answer deadline**. Within 60 days of the date of service of this order, respondent must file an answer to the amended petition, as construed in this order, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.

5. **Motions to dismiss**. If the state contends that the petition is subject to dismissal on its face - - on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default - - then it is authorized to file within 30 days of this order, a motion to dismiss, a supporting brief and any documents relevant to the motion. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve a responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

6. **Denial of motion to dismiss**. If the court denies such a motion to dismiss in whole or in part, then it will set deadlines for the state to file its answer and for the parties to brief the merits.

7. **Briefing on the merits**. In the event that the respondent does not file a motion to dismiss as outlined above, the court will proceed to consider the merits. Petitioner has already filed a brief on the merits (*see* dkt. #31), but he may file a supplemental brief if he chooses. The parties shall adhere to

the following briefing schedule with respect to the merits of petitioner's claims:

a. If petitioner wishes to file a supplemental brief in support of his petition, he must do so within 30 days after the respondent files an answer.

b. Once petitioner submits his brief or his time to submit a brief expires, respondent shall file a brief in response to the petition within 30 days.

c. Once respondent files a brief in opposition, petitioner shall have 20 days to file a reply if he wishes to do so.

Entered this 7th day of May, 2018.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge