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

COURTNEY M. COWINS,

Petitioner,

v.

GARY BOUGHTON,

Respondent.

OPINION & ORDER

16-cv-22-jdp

Courtney M. Cowins, a prisoner housed at the Wisconsin Secure Program Facility, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging a conviction entered in the Circuit Court for Dane County, Wisconsin. Petitioner has paid the $5 filing fee. The next step is for the court to conduct a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Under this rule, I must dismiss the petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." In reviewing this pro se petition, I must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam). After review of the petition with this principle in mind, I conclude that the petition should be served upon the state.

FACTS

The following facts are drawn from the habeas petition and public court records.

In September 2009, following a trial, petitioner was found guilty of armed burglary, burglary with intent to commit sexual assault and battery, first-degree reckless endangerment

and four counts of first-degree sexual assault, all as a repeater. On appeal, counsel filed a no-merit report, and petitioner responded, raising some of the arguments contained in his habeas petition: that he was prejudiced by a juror sleeping during testimony of key witnesses, that photographs show that a prosecution expert was lying when he testified that marks on the victim were consistent with pressing a gun against her or hitting her with it, that the two-year delay in charging and prosecuting petitioner resulted in exculpatory evidence being destroyed before petitioner was even aware that he would need to put on a defense, and that his trial counsel was ineffective for failing to raise these and other issues. The Wisconsin Court of Appeals affirmed the conviction, and petitioner's ensuing petition for review was denied by the Wisconsin Supreme Court on June 12, 2012.

In June 2013, petitioner filed a postconviction motion under Wis. Stat. § 974.06 raising many of the issues he had raised in his appeal, but also other issues, particularly regarding ineffective assistance of both trial and appellate counsel, that were not part of the appeal. The circuit court denied the postconviction motion. On appeal, the court of appeals concluded that issues already raised by petitioner in the previous no-merit appeal were procedurally barred by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."), and the issues newly raised in the postconviction motion were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because they should have been raised in the previous appeal. The court rejected petitioner's claim that appellate counsel was ineffective for failing to fully investigate the case or send petitioner all of the discovery materials, stating that petitioner failed to make a showing that any further investigation or

delivery of materials would have made a difference in the outcome. Petitioner's petition for review was denied by the Wisconsin Supreme Court on November 4, 2015.

ANALYSIS

In his habeas petition, petitioner brings several claims he raised in his no-merit appeal, and others that he brought for the first time in his later postconviction motion. The claims that were litigated via no-merit appeal appear to be timely, exhausted, and I cannot otherwise say that it plainly appears that relief must be denied.

As for the claims raised in petitioner's pro se postconviction motion under § 974.06, but ruled to be procedurally defaulted by the state courts, such a default would usually mean that this court could not consider his claims unless he could demonstrate either "that (1) there was good cause for the default and consequent prejudice, or (2) a fundamental miscarriage of justice would result if the defaulted claim is not heard." *Johnson v. Foster*, 786 F.3d 501, 505 (7th Cir. 2015) (citations omitted).

But the specific type of procedural default at issue here has been treated differently by the Seventh Circuit. The *Escalona-Naranjo* rule is generally recognized as an "independent and adequate" state procedural rule sufficient to bar federal habeas corpus review. But the *Escalona-Naranjo* rule does not apply when a petitioner defaults by failing to raise a claim of ineffective assistance of trial or postconviction counsel in a no-merit response on appeal. *Page v. Frank*, 343 F.3d 901, 908-09 (7th Cir. 2003). This is because a criminal defendant is constitutionally entitled to effective counsel through the first appeal as of right. *Id*. at 909. It would undermine the right to counsel to require a pro se response to an *Anders* no-merit brief to articulate a claim of ineffective assistance of counsel. Based on the limited record before

me, it appears that at least some of petitioner's claims may be subject to the *Page* exception to procedural default under *Escalona-Naranjo*, because the root cause of the alleged defects in his conviction was the ineffective assistance of counsel. Therefore, I will order the petition served on the state.

Petitioner has also filed a motion for appointment of counsel. Dkt. 4. In the context of a petition under § 2254, a federal court may appoint counsel for a financially eligible petitioner when "the interests of justice so require." 18 U.S.C. § 3006A(g); *Johnson v. Chandler*, 487 F.3d 1037, 1038 (7th Cir. 2007). Appointment of counsel in this context is discretionary "unless denial would result in fundamental unfairness impinging on due process rights." *Wilson v. Duckworth*, 716 F.2d 415, 418 (7th Cir. 1983) (quoting *LaClair v. United States*, 374 F.2d 486, 489 (7th Cir. 1967)).

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). Here, petitioner paid the filing fee and has not submitted any financial documentation, so he has not shown that he is financially eligible for appointed counsel.

Even assuming that petitioner would qualify financially, he does not show that the interests of justice require appointing counsel for him at this stage. Petitioner faces challenges in litigating the petition, such as his status as an incarcerated person without legal training, but these are common barriers facing pro se habeas petitioners that do not in themselves call for appointment of counsel. My denial of petitioner's motion will be without prejudice so that petitioner may renew his motion if grounds for doing so are revealed through briefing of the petition.

ORDER

IT IS ORDERED that:

1. Petitioner Courtney M. Cowins's motion for appointment of counsel, Dkt. 4, is DENIED without prejudice.

2. **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, in his official capacity as warden of petitioner's institution.

3. **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.

4. **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 his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

5. **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.

6. **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. Therefore, the parties shall adhere to the following briefing schedule with respect to the merits of petitioner's claims:

    a. Petitioner shall file a brief in support of his petition within 30 days after respondent files his answer.

    b. Once petitioner submits additional briefing or gives written notice that he does not intend to do so, respondent shall file a brief in opposition 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 August 18, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge