UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BRYAN EDWARD JASA, Petitioner, vs. JOHN MATHES, Respondent.	No. C03-4095-MWB **REPORT AND RECOMMENDATION ON MOTION TO DISMISS**

This action was commenced on October 6, 2003, by the filing of a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 by the petitioner, Bryan Edward Jasa ("Jasa"). (Doc. No. 3) On December 24, 2003, the respondent John Mathes ("Mathes") filed an Answer (Doc. No. 10), and a Motion to Dismiss and supporting brief (Doc. No. 11). Jasa filed a resistance to the motion to dismiss and a supporting brief on March 12, 2004 (Doc. No. 17), and an appendix in support of his resistance on March 16, 2004 (Doc. No. 18). Mathes did not file a reply to the resistance.

I. PROCEDURAL HISTORY

The following procedural history is taken from Mathes's description as set forth in his brief[1] (Doc. No. 11), and from documents filed in the state courts of Iowa.

On October 1, 1996, Jasa was charged by trial information in Woodbury County with the following violations of Iowa law: attempted murder, first-degree robbery, assault

[1]Jasa does not object to Mathes's characterization of the procedural history of this case in the state courts of Iowa. (*See* Doc. No. 17)

while participating in a felony, willful injury, going armed with intent, and displaying a dangerous weapon in connection with the foregoing offenses. On or about October 25, 1996, Jasa's attorney filed a motion asking the court to determine whether or not Jasa was competent to stand trial. A hearing was scheduled. The State resisted the motion, and moved to depose Rodney Dean, M.D., a psychiatrist who had been treating Jasa. In addition, the State moved for permission to retain Michael Taylor, M.D., a forensic psychiatrist, as a consultant and expert witness for the State. Jasa resisted both of the State's motions. The State's motion to retain Dr. Taylor apparently was granted, and Dr. Taylor examined Jasa on October 21, 1996. The State advised the court Dr. Taylor would not be called as a witness at trial, but would be called as a witness at the competency hearing. The court entered an order allowing the State to question Dr. Taylor only about "his testing, observations, findings and conclusions arising out of his visit with [Jasa]," but not about any other matters outside the scope of Dr. Taylor's examination of Jasa on October 21, 1996. The court also granted the State's motion to depose Dr. Dean.

On November 7, 1996, Jasa moved for an order directing the Woodbury County Sheriff to allow Dr. Dean to visit Jasa "at any time on any day and that such visit be conducted confidentially." Jasa asserted he was in need of "continuing psychiatric consultation and treatment," including monitoring of his medications. The same day, a judge of the Iowa District Court for Woodbury County granted the motion, directing the Woodbury County Sheriff to allow "confidential consultation between [Jasa] and Dr. Rodney Dean at all times and on all days as permitted by the operational Rules and procedures of the Woodbury County Jail."

On November 27, 1996, Jasa filed a "Withdrawal of Motion for Determination of Competency and Motion for Trial Setting." In the motion, Jasa's trial counsel made the following representation:

> The undersigned counsel assures the Court and the prosecutor that after consultation with two mental health experts known to this Court, no defense of insanity or diminished responsibility will be filed or relied upon by this Defendant. As such, the State is unable to claim reasonably that additional time is required to prepare for such defense. The Defendant will not object to a motion for continuance in the event the Defendant does file a notice of intent to rely on insanity and /or diminished responsibility as a defense herein.

The State objected, and filed its own motion asking the court to make an on-the-record determination of Jasa's competency. The State noted that in his original competency motion, Jasa's attorney had stated "in his professional judgment . . . the Defendant is not able to assist effectively in his defense and may otherwise not be competent." The State noted further that in a letter dated December 3, 1996, from Jasa's attorney to the prosecutor, Jasa's attorney stated, "I continue to feel that [Jasa] is not competent." The State pointed out that in his motion to withdraw the request for competency hearing, Jasa nowhere alleged he was competent, nor did he disavow his counsel's statements that he was not competent. The State therefore asked the court to make a formal determination regarding Jasa's competency.

Jasa resisted the State's motion, arguing, *inter alia*, that such a ruling would constitute an advisory ruling because "there is no justiciable interest in an issue which has been withdrawn by the movant." Jasa also argued the State could not ask the court to act *sua sponte*, but rather was required to provide "some legal support to bear its burden." Jasa also moved to quash a subpoena issued by the State to Dr. Dean, requesting that the doctor be present at the December 11, 1996, competency hearing.

The trial court held as follows: "The Defendant has withdrawn his (11-27-96) request for a competency hearing after the Defendant has seen two psychiatrists (Dr. Dean

& Taylor). No evidence presently exists for the Court to proceed under [Iowa Code] § 812.3 *et seq*. Hence the State's request is denied and the Defendant's motion to quash is sustained. The trial of this matter is now set for Jan. 7, 1997 at 9:30 AM."

Jasa proceeded to trial and was convicted by a jury of attempted murder, first-degree robbery, assault while participating in a felony, willful injury, and going armed with intent. He received various sentences totaling fifty-five years. Jasa filed a direct appeal in which he asserted only one issue, to-wit: whether the trial court erred in denying his motion for new trial based on alleged juror misconduct. The Iowa Court of Appeals affirmed Jasa's conviction. His request for further review was denied.

Jasa filed an application for post-conviction relief ("PCR"), in which he raised several issues. On October 8, 2002, the PCR court granted the State's motion for summary judgment and dismissed the PCR application. While the PCR application was pending, Jasa filed a *pro se* "Motion for Correction of Illegal Sentencing," using the same case caption and case number as the PCR action. Jasa's attorney later informed him that the PCR court had overruled the motion orally. (*See* Doc. No. 18, Ex. B) In any event, the State asserts the PCR court's order dismissing the PCR action implicitly denied the motion, and Jasa does not contest this conclusion. (*See* Doc. No. 11, n.1; Doc. No. 17)

Jasa did not appeal the dismissal of his PCR application. By letter dated October 15, 2002, Jasa's attorney sent him a copy of the PCR court's October 8, 2002, order dismissing the PCR action. (*See* Doc. No. 18, Ex. A) In the letter, counsel advised Jasa, "Please contact me after you have read the decision." (*Id.*) Jasa reviewed the decision and wrote his attorney a letter dated November 11, 2002, postmarked November 12, 2002, in which he apparently asked his attorney to appeal the dismissal of the PCR application. (*Id.*, Ex. B) Jasa's attorney responded, in part, as follows:

> Unfortunately, it would be too late to appeal the postconviction decision since that was issued on October 8, 2002, (thirty day limit for appeals) but I do not think that you would have had any success based upon Iowa law even if the decision had been appealed. I would recommend that you consider a 28 U.S.C. § 2254 action (habeas corpus). The time limit for that action is one year, and some courts consider that year to be running when no pending legal action is occurring, so it is very important that you get started on it as soon as you can. . . . The Court did receive your motion for Correction of Illegal Sentence and orally overruled it. Your motion brought up some issues you may want to address in habeas corpus.

(*Id.*) Jasa filed the present petition in this court on October 6, 2003.

II. DISCUSSION

In his motion to dismiss, Mathes asserts the only claim Jasa preserved for review was the single issue raised in his direct appeal, which Mathes argues involved a question of state law that did not implicate federal constitutional rights. Jasa apparently agrees (*see* Doc. No. 17, Brief, p. 2), and he further notes that any claim for ineffective assistance of appellate counsel has been procedurally defaulted. (*Id.*, n.1) However, Jasa argues the court should reach the merits of his constitutional claim of juror misconduct (ground two in Jasa's petition, Doc. No. 3, ¶ 12(B)) because he can demonstrate that a failure to do so will result in a fundamental miscarriage of justice. (*Id.*) To support his argument, Jasa cites *Maynard v. Lockhart*, 981 F.2d 981, 985 (8th Cir. 1992), in which the court characterized as "extremely narrow" the fundamental miscarriage of justice exception to the ordinary "cause" and "prejudice" standard to overcome procedural default. The court explained:

> In the absence of a finding of cause and prejudice, a federal court is precluded from reviewing procedurally defaulted

claims on its own motion. *Stewart v. Dugger*, 877 F.2d 851, 854-55 (11th Cir. 1989), *cert. denied*, 495 U.S. 962, 110 S. Ct. 2575, 109 L. Ed. 2d 757 (1990). A rule to the contrary could result in the undermining of several policies behind the procedural default doctrine and the cause and prejudice standard. For example, absent a showing of cause and prejudice, the principle of comity teaches that a state court should have the initial opportunity to consider and correct an alleged constitutional error that occurred in state court. *See, e.g., Coleman [v. Thompson]*, 501 U.S. [722, 749-50], 111 S. Ct. [2546,] 2555[, 115 L. Ed. 2d 640 (1991)]; *Engle [v. Isaac]*, 456 U.S. [107,] 128-29, 102 S. Ct. [1558,] 1572[, 71 L. Ed. 2d 783 (1982)]. Allowing federal courts to side-step the procedural default doctrine would also undermine the Supreme Court's express desire to protect the legitimacy of state procedural rules, *see, e.g., Wainwright v. Sykes*, 433 U.S. 72, 88-90, 97 S. Ct. 2497, 2507-08, 53 L. Ed. 2d 594 (1977), and to promote finality in criminal proceedings, *see, e.g., id.*; *Engle*, 456 U.S. at 126-28, 102 S. Ct. at 1571-72.

. . .

> A narrow exception to the cause and prejudice standard exists where the petitioner can "demonstrate that failure to consider [his] claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at ----, 111 S. Ct. at 2565. A case falls within this exception if the petitioner can show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397 (1986). To establish actual innocence, a federal habeas petitioner must "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have" convicted him.

> *Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (en banc) (quoting *Sawyer v. Whitley*, 505 U.S. 333, ----, 112 S. Ct. 2514, 2517, 120 L. Ed. 2d 269 (1992)).

Maynard, 981 F.2d at 985; *accord*, *Wyldes v. Hundley*, 69 F.3d 247, 254 (8th Cir. 1995) (court "may appropriately implement this narrow exception where it appears that a 'constitutional violation has probably resulted in the conviction of one who is actually innocent. . . .'") (citing *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397 (1986)).

Jasa cites *Wyldes*, asserting the case "is virtually identical to Jasa's juror misconduct claim." (Doc. No. 17, Brief, p. 2) While that may be true, the cases are similar in another respect, as well. Both in *Wyldes* and in the present case, the petitioners failed to come forward with "new reliable evidence [of actual innocence] that was not presented at trial." *Wyldes*, 69 F.3d at 254 (internal quotation marks and citations deleted). Jasa has offered nothing more than his unsupported assertion that he was "wrongly convicted of a crime [he] did not commit." (Doc. No. 18, Ex. C, ¶ 12)

The court finds Jasa has not sustained the heavy burden required for the court to consider his procedurally defaulted constitutional claim of juror misconduct. Mathes's motion to dismiss should be granted as to ground two of Jasa's petition.

All of Jasa's remaining claims (grounds one and three through six) involve allegations that his trial and appellate attorneys were ineffective. Mathes argues all of these claims are procedurally defaulted because Jasa failed to appeal the summary dismissal of his PCR application. Jasa "again acknowledges procedural default," but "he again argues an exception to excuse procedural default." (Doc. No. 17, Brief, pp. 3-4) He claims he can show cause for the procedural default, and he asks the court to delay ruling

on the prejudice prong to allow the development of further evidence to support his claim of prejudice. (*See id.*, p. 4)

As cause to excuse his failure to appeal the PCR ruling, Jasa asserts two arguments. First, he argues his PCR attorney failed to advise him of the thirty-day deadline to appeal the PCR ruling. Second, Jasa argues he is mentally ill, and his mental illness interfered with or impeded his ability to comply with the state procedural requirements. (*Id.*, pp. 4-5)

Jasa's first argument must fail. There is no right to counsel in a PCR action, and therefore, there can be no cognizable claim for ineffective assistance of PCR counsel, either as an independent claim or as "cause" for procedural default. *See Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999), *and Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (both citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991)[2]). As a result, even though Jasa's PCR attorney failed to advise him properly of the time limit for appealing the dismissal of his PCR application, such failure cannot serve as the cause for Jasa's failure to file a timely appeal from that ruling.

Turning to Jasa's second argument, Jasa claims he "was and continues to be mentally ill." (Doc. No. 17, Brief, p. 5, citing Doc. No. 18, Ex. 3) He states he has been diagnosed with severe obsessive compulsive disorder and bipolar disorder, and he takes 600 mg. of Lithium and 40 mg. of Prozac daily. (Doc. No. 18, Ex. 3, ¶¶ 3 & 4) He claims his mental incapacity prevented him from understanding his legal rights, obtaining

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[2] "There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See Wainwright v. Torna*, 455 U.S. 586, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance)." *Coleman*, 501 U.S. at 752, 111 S. Ct. at 2566.

assistance from other prisoners that might have helped him assert his legal rights, communicating effectively with his attorneys, comprehending the meaning and legal import of correspondence from his attorneys, and acting to assert his legal rights subsequent to his sentencing. (*Id.*, ¶ 8) Jasa claims he has suffered "terrible and prejudicial" consequences due to his failure to assert his legal rights due to his mental incapacity, causing him "to remain wrongly convicted of a crime [he] did not commit." (*Id.*, ¶ 12)

Of particular import in this action, Jasa argues his mental incapacity prevented him from filing a timely appeal from the summary denial of his PCR application. In his affidavit in support of his resistance to Mathes's motion to dismiss, Jasa asserts:

> 14. On or about October 18, 2002, I received a letter dated October 15, 2002 from . . . my appointed legal counsel in my state post-conviction relief, providing me a copy of the adverse decision in state district court, and advising me to contact him "after you have read the decision." [Citation omitted.]
>
> 15. Upon receiving [the attorney's] letter of October 15, 2002, I was not aware of my right to appeal, nor of the 30 day deadline to appeal, nor did I comprehend there being any urgency regarding contacting [the attorney.]
>
> 16. As soon as I became aware, from another prisoner, that I had a right to appeal the adverse district court ruling, on or about November 11, 2002 I sent a letter to [the attorney] requesting that he appeal.
>
> 17. On November 19, 2002, [the attorney] wrote to me advising me that it was already too late to appeal the adverse decision. [Citation omitted.]

(*Id.*, ¶¶ 14-17)

The sequence of events makes it clear that Jasa's failure to appeal was due to his PCR attorney's failure to advise him of the time within which an appeal had to be filed, *not* due to Jasa's inability to understand his attorney's instructions, or Jasa's failure to

comprehend his legal rights. The result of counsel's failure to communicate the time limit to file an appeal could have had the same result on an inmate without any mental illness.

In addition, Jasa's claim that he learned, shortly after he received his attorney's letter, of his right to appeal from another prisoner contradicts his assertion that his mental incapacity prevented him from obtaining assistance from other prisoners that might have helped him assert his legal rights. He also appears to have sought the assistance of another prisoner in drafting his affidavit in support of his resistance (*see id.*, ¶ 2), again indicating he possesses the mental capability to ask for assistance.

The court finds Jasa has failed to show his mental disease, disorder, or defect substantially affected his ability to appreciate his position "and make a rational choice with respect to continuing or abandoning further litigation." *Anderson v. White*, 32 F.3d 320, 321 (8th Cir. 1994). "A showing that [Jasa] suffers from a mental disorder, 'without more, is wholly insufficient to meet the legal standard that the Supreme Court has laid down' for determining a defendant's competence to pursue post-conviction relief." *Id.* (quoting *Smith v. Armontrout*, 865 F.2d 1502, 1506 (8th Cir. 1988) (*en banc*)). Although Jasa has alleged he takes medication, there is no indication in the record that, appropriately medicated, he is incompetent. The record indicates Jasa's trial counsel had him evaluated by two different doctors, and based on their conclusions, counsel withdrew Jasa's motion for a competency hearing, and "determined not to call into question Jasa's mental health." Ruling on Respondent's Motion for Summary Judgment, at 6, *Jasa v. State*, No. PCCV118104 (Woodbury County Dist. Ct., Oct. 8,2002). Counsel assured the trial court and the prosecutor that Jasa would not rely on a defense of insanity or diminished responsibility, and asked that the case proceed to trial. There simply is nothing in the record to support Jasa's claim that his mental illness rendered him unable to comprehend or comply with the State's procedural requirements.

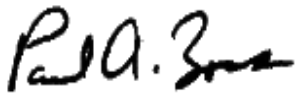
For these reasons, the court finds Jasa's mental illness cannot serve as cause for his procedural default. Accordingly, the court does not reach the issue of whether Jasa could meet the prejudice prong of the analysis, or whether he should be allowed to develop further evidence to show prejudice.

III. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[3] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, that Jasa's petition for writ of *habeas corpus* be denied.

IT IS SO ORDERED.

DATED this 28th day of June, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[3]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).