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

LARRY SPENCER,

Petitioner, OPINION AND ORDER

v. 05-C-666-C

CATHY FARREY, Warden,
New Lisbon Correctional Institution,

Respondent.

This is a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254. Larry Spencer, an inmate at the New Lisbon Correctional Institution, challenges two convictions entered by the Circuit Court for Dane County: case 01 CF 1125, a case involving multiple forgery counts, and 01 CF 1242, a case involving multiple drug counts. Background facts are set forth in this court's order to show cause entered June 6, 2006, and are incorporated herein by reference. Second Superseding Order to Show Cause, June 6, 2006, dkt. #20, at 2-6.

Before the court is respondent's motion to dismiss the petition in its entirety. Respondent contends that petitioner's attack on the forgery conviction must be dismissed because petitioner did not file his habeas petition within one year after that conviction became final, as required by 28 U.S.C. § 2244(d)(1). She contends that the claims attacking the drug conviction must be dismissed under the doctrine of procedural default because

petitioner failed to petition the Wisconsin Supreme Court for review of the court of appeals' decision upholding his conviction. Because petitioner's attack on his forgery conviction is untimely and no equitable grounds exist to toll the statute of limitations, I will dismiss the claims attacking the forgery conviction. I also will dismiss petitioner's claims attacking the drug conviction because petitioner procedurally defaulted those claims and he has failed to make the difficult showing of actual innocence that is required to excuse his default.

As a preliminary matter, I address petitioner's motion to dismiss the pending motion on the ground that respondent's reply was untimely. The motion will be denied. Respondent filed a letter in response to petitioner's brief on July 26, 2006, which was within her 10-day deadline set forth in the second superseding order to show cause. Moreover, in her response, respondent indicated that she was waiving her right to file a reply brief.

From the documents attached to the motion to dismiss and other documents in the record, I find the following facts for the purpose of deciding the motion.

FACTS

A. Forgery Conviction

On February 6, 2002, the Circuit Court for Dane County entered a judgment of conviction finding petitioner guilty of 9 counts of forgery. On appeal, petitioner's lawyer, Tim Edwards, filed a post-conviction motion alleging that petitioner's trial lawyer had been ineffective for failing to seek a competency evaluation of petitioner before he entered his

Alford pleas to the charges. After an evidentiary hearing, the circuit court denied the motion; the court of appeals affirmed the decision on appeal. State v. Spencer, 269 Wis. 2d 889, 675 N.W. 3d 810, 2004 WI App 37 (Ct. App. Jan. 8, 2004) (unpublished decision). The Wisconsin Supreme Court denied petitioner's petition for review on April 20, 2004.

Petitioner did not petition the United States Supreme Court for a writ of certiorari. He filed his federal habeas petition on September 6, 2005.

B. Drug Conviction

On March 4, 2002, petitioner entered Alford pleas in the Circuit Court for Dane County to three counts of delivering five grams or less of cocaine. Petitioner was sentenced on February 21, 2003. Petitioner appealed his conviction. Petitioner's appointed counsel filed a no merit report in which he raised the following potential issues for appeal: 1) whether the trial court denied petitioner's right to self representation at the plea hearing on February 4, 2002; 2) whether the trial court misinformed petitioner that after his entry of an Alford plea, petitioner would have the opportunity to prove his innocence; and 3) whether trial counsel was ineffective for not seeking a competency evaluation of petitioner before he entered his plea. In a decision issued September 20, 2004, the court of appeals agreed that none of these claims had any merit. The court also reviewed petitioner's voluminous response to the no-merit report and found no issues of arguable merit. Accordingly, it affirmed the judgment of conviction summarily and relieved petitioner's

appointed lawyer of further representation. State v. Spencer, 03-3465-CRNM, (Ct. App. Sept. 17, 2004), attached to Mot. to Dismiss, dkt. #24, Exh. E.

Petitioner did not petition the Wisconsin Supreme Court to review the court of appeals' decision.

OPINION

A. Timeliness of Petition with Respect to Forgery Conviction

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year statute of limitations period for all habeas proceedings. 28 U.S.C. § 2244. The one-year limitation begins to run from the latest of: 1) the date on which judgment in the state case became final by the conclusion of direct review or the expiration of the time for seeking such review; 2) the date on which any state impediment to filing the petition was removed; 3) the date on which the constitutional right asserted was first recognized by the Supreme Court, if that right was also made retroactively applicable to cases on collateral review; or 4) the date on which the factual predicate of the claims could have been discovered through the exercise of due diligence. § 2244(d)(1)(A)-(D). Pursuant to 28 U.S.C. § 2244(d)(2), time is tolled during the pendency of any properly filed application to the state for post-conviction relief.

Petitioner's conviction in the forgery case became final on July 19, 2004, the last date on which he could have filed a petition for a writ of certiorari in the United States Supreme

Court. Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (time for seeking direct review under § 2244(d)(1)(A) includes 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court). Respondent contends that petitioner's attack on his forgery conviction is untimely because petitioner did not file his federal habeas petition until more than one year later, on September 6, 2005.

Petitioner makes three arguments in opposition to the motion to dismiss the claims attacking the forgery conviction: 1) the petition is timely because petitioner has been seeking habeas relief from this court since April 2004; 2) the limitations period should be tolled because of "state interference"; and 3) this court should entertain the petition even if it is untimely because petitioner is actually innocent of the forgery charges.

In support of his first argument, petitioner has submitted a four-page, handwritten document titled "Petition for Writ of Habes [sic] Corpus" that petitioner contends he submitted to this court on April 19, 2004. Pet.'s Aff. in Sup. of Mot. of Incompetence, Work Record and Timely Response, dkt. #22, at exh. 1. The petition bears an April 19, 2004 date stamp from this court, suggesting that this court received it. However, a thorough search of the court's files has not unearthed the original petition that petitioner claims he filed or a record showing that the court ever received such a petition. Furthermore, it is not this court's practice to mail a copy of a petition back to an applicant unless it was expressly asked to do so, particularly without docketing the petition and assigning it a case number.

Because the document that petitioner relies upon to support his claim that his petition is timely is not self-authenticating, Fed. R. Evid. 902, petitioner must establish the document's authenticity before this court will deem it admissible. Fed. R. Evid. 901(a). Although it is possible that the court lost the petition, it is highly unlikely. This court treats documents labeled as habeas petitions very seriously, attends to them carefully and takes prompt action on them.

On the other hand, there are various reasons to question the authenticity of the document petitioner has submitted. First, the first page of the document (the page bearing the date stamp) is a photocopy, but the remaining three pages are originals (although purportedly hand-copied from the original document). Second, it appears that the words on the top of the first page were printed over the stamp, as opposed to the stamp having been printed over the words. Third, petitioner has offered no explanation why this court would have taken the unusual action of returning a stamped, undocketed copy of his petition and he has not provided copies of any orders or correspondence from the court that might provide that explanation. Fourth, correspondence from petitioner in this case indicates that he does not hesitate to contact this court in the event he does not receive a response as quickly as he would like; however, this court has no correspondence from petitioner asking about the status of the purported April 2004 habeas petition. Fifth, in letters dated September 6, 2005 and November 8, 2005, petitioner indicated that he filed his habeas petition after he was directed on April 20, 2005 by a state court judge to do so; he made no

mention in those letters of having filed a federal habeas petition a year earlier. Sixth, it would have been premature for petitioner to have filed a federal habeas petition in April 2004 when he was still in the process of litigating his claims in state court. 28 U.S.C. § 2254(b)(1)(A) (state prisoner seeking federal habeas relief must first exhaust state court remedies). Taken together, these indicia of lack of authenticity undermine petitioner's claim that the April 19, 2004 habeas petition bearing this court's date stamp is an authentic copy of a document that was filed in this court.

The only document this court has in its files apart from the September 6, 2005 petition is a document filed by petitioner on July 28, 2005 captioned "Notice and Motion for Petition of John Doe Jury Trial to Demonstrate Dane County Court and Court Officers Committed Crimes and Prevented U.S. Constitutional Rights of Petitioner." The case caption identifies Spencer as the petitioner and this court as the respondent; petitioner indicated that the case number of the case was 01-CF-1125. In the document, petitioner complains about the conduct of Joseph Sommers, asserting that he committed various "ethical violations and crimes" while representing petitioner in state court. However, nowhere in his petition did petitioner seek relief in the form of a writ of habeas corpus or release from custody, allege that he was being held in custody in violation of his constitutional rights, or make any other statement suggesting that he was seeking relief from his conviction. To the contrary, petitioner's choice of caption and his allegations against Sommers indicate that the relief he was seeking was the issuance of charges against

Sommers. Although this court construes *pro se* pleadings liberally, even under a liberal construction petitioner's John Doe petition looks nothing like a habeas corpus petition. See Rule 2 of the Rules Governing Section 2254 Cases (specifying the form of a § 2254 petition). In any case, even if that document *could* be construed as a habeas petition, petitioner did not mail it until July 24, 2005, which was after his one-year deadline had expired.

Accordingly, I find that petitioner did not file any § 2254 federal habeas petition until September 6, 2005, when he filed the instant petition. Although petitioner might have complained to various courts, including this one, about the conduct of his state court lawyers and the state court proceedings, the only document that constitutes a properly filed petition for a federal writ of habeas corpus is the September 6, 2005 petition. Because that petition was not filed until more than one year after his conviction became final, it is untimely.

Petitioner suggests that his failure to file his habeas petition on time was caused by the state's interference. Under 28 U.S.C. § 2244(d)(1)(B), the one-year clock stops running if an unconstitutional state action prevents the petitioner from filing a federal habeas application. The "interference" to which petitioner refers is that relating to the state court proceedings, including the alleged refusal of the state courts to allow petitioner to represent himself and the alleged plot by petitioner's trial lawyer, the prosecutor and the state trial court to trick him into waiving his right to trial and entering an Alford plea. However,

nothing in petitioner's submissions indicates that the state prevented him from filing a federal habeas petition. Accordingly, tolling is not warranted under § 2244(d)(1)(B).

Petitioner insists that this court must consider his challenges to his forgery conviction even if his petition is untimely because he is actually innocent of the crimes. However, in Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005), the court explained that a claim of actual innocence alone is not enough to allow a petitioner to avoid the operation of the statute of limitations. A petitioner can bring an otherwise untimely claim only if he shows actual innocence *and* the discovery of a factual predicate for his claims that could not have been discovered earlier. Id. at 872; Gildon v. Bowen, 384 F.3d 883, 887 (7th Cir. 2004). Actual innocence without a newly discovered claim"does nothing at all." Escamilla, 426 F.3d at 872. In this case, petitioner's claim of actual innocence is not based upon the discovery of any new fact that could prove that innocence. Instead, his claim is based on the same story he has told since he was first charged in state court. Because petitioner has known of these facts for many years but failed to present them in a timely fashion in a federal habeas petition, this court has no basis to extend the time for filing his habeas petition.

Finally, I have considered whether any basis might exist to warrant tolling the statute of limitations for equitable reasons. Equitable tolling is available when "extraordinary circumstances outside of the petitioner's control prevent timely filing of the habeas petition." Gildon, 384 F.3d at 886. Although petitioner has not alleged that he should be entitled to

equitable tolling because of any mental limitations, I have considered whether that might provide a basis to toll the statute. In order to be entitled to equitable tolling on the basis of mental limitations, petitioner must show that he was prevented by his mental condition from "managing his affairs and thus from understanding his legal rights and acting upon them" during the time during which he ought to have filed his habeas petition. Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996). Accord Lawrence v. Florida, 421 F.3d 1221, 1227 (11th Cir. 2005) (petitioner who alleges mental incapacity must establish causal connection between mental condition and ability to timely file petition); Fisher v. Gibson, 262 F.3d 1135, 1145 (10th Cir. 2001) (petitioner's mere allegations of incompetency at time of guilty pleas did not suffice to warrant equitable tolling of limitations period).

Petitioner cannot make the required showing. Although petitioner's competence during the state trial court proceedings was the subject of his appeal from his forgery conviction, it was raised only in the context of an ineffective assistance of trial counsel claim and not as an independent basis for reversal. That is, the lawyer appointed to represent petitioner in postconviction proceedings and on appeal did not present any psychological or other medical evidence to suggest that petitioner actually was incompetent at the time he entered his pleas. Further, the trial court indicated that it had had no reason to doubt petitioner's competence during the plea proceedings, pointing out, among other things, that petitioner had denied having any mental illnesses. Tr. of Mot. Hrg., 01-CF-1125, Oct. 18, 2002, attached to Pet. for Writ of Habeas Corpus, dkt. # 14, exh. D, at 75-77. Moreover,

postconviction/appellate counsel did not assert any reason to doubt petitioner's competency during the postconviction or appellate proceedings, as counsel would have been required to do under state law if he had a good faith basis for that doubt. State v. Debra A.E., 188 Wis. 2d 111, 131, 523 N.W. 2d 727 (1994) ("[A]fter sentencing, if state or defense counsel has a good faith doubt about a defendant's competency to seek postconviction relief, counsel should advise the appropriate court of this doubt on the record and move for a ruling on competency."); see also United States v. Graves, 98 F.3d 28, 260 (7th Cir. 1996) (although defendant's incompetence does not ordinarily affect appeal, determination of competence should be made if there is reason to doubt whether defendant is competent to assess risk in challenging guilty plea). Finally, petitioner's submission of numerous documents in response to his lawyer's no-merit brief in the drug delivery case, as well as his filing of the John Doe petition in this court just days after his one-year deadline expired show that he was capable of preparing and filing a federal habeas petition earlier than he did.

In sum, there is no evidence in the record from which I can find that petitioner was incapacitated by any mental illness from bringing his federal petition earlier. Moreover, neither petitioner's *pro se* status nor his lack of legal knowledge are the sort of "extraordinary circumstances" of the kind that warrant equitable tolling. Montenegro v. United States, 248 F.3d 585, 594 (7th Cir. 2001) (defendant's limited education and lack of knowledge of United States legal system not sufficient to warrant equitable tolling). Nothing else in the record supports a finding that petitioner was prevented from filing his petition on time by

any circumstance far beyond his control. Accordingly, petitioner is not entitled to equitable tolling.

In sum, petitioner did not file his federal habeas petition until September 6, 2005, more than one year after his forgery conviction became final. Because petitioner has failed to show that either a statutory or equitable basis exists to toll the statute of limitations, his petition is untimely under 28 U.S.C. § 2244(d)(1)(A) insofar as it relates to the forgery conviction.

B. Procedural Default of Claims Related to Drug Conviction

Respondent concedes that petitioner's habeas petition is timely with respect to the claims attacking petitioner's conviction for drug charges in case 01-CF-1242. However, she contends that this court cannot entertain those claims because petitioner committed a procedural default when he failed to petition the Wisconsin Supreme Court for review of the court of appeals' decision after that court rejected his claims and affirmed his conviction.

A federal court may not review the merits of a claim raised by a state prisoner in a habeas petition unless the petitioner has (1) exhausted all remedies available in the state courts; and (2) fairly presented any federal claims in state court first. Lemons v. O'Sullivan, 54 F.3d 357 (7th Cir. 1995). In O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999), the United States Supreme Court held that in order to comply with the exhaustion requirement, a state prisoner "must give the state courts one full opportunity to resolve any constitutional

issues by invoking one complete round of the State's established appellate review process." This means that state prisoners must seek discretionary review of their claims in the state's highest court "when that review is part of the ordinary appellate review procedure in the State . . . ." Id. at 847. Thus, in Wisconsin, a prisoner seeking federal habeas review must first complete the state appellate review process by presenting his claims on direct appeal to the state court of appeals and then to the state supreme court in a petition for review. Moore v. Casperson, 345 F.3d 474, 486 (7th Cir. 2003). Failure to seek such review constitutes a procedural default.

Petitioner has presented no evidence to refute the state's contention that he failed to petition the state supreme court for review of the court of appeals' adverse decision. As a result, this court cannot review the merits of the claims attacking the drug conviction unless petitioner demonstrates (1) cause for the default and actual prejudice as a result of the alleged violations of federal law; or (2) that enforcing the default would lead to a " 'fundamental miscarriage of justice.'" Steward v. Gilmore, 80 F .3d 1205, 1211-12 (7th Cir. 1996) (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977)). To meet the "cause" requirement, there must have been some external impediment that prevented petitioner from raising the claim. Murray v. Carrier, 477 U.S. 478, 488 (1986). Although petitioner levels numerous accusations against the state courts and the lawyers whom he says the state "forced" upon him, nowhere in his submissions does he suggest that any "external impediment" prevented him from petitioning the Wisconsin Supreme Court for review after

the court of appeals affirmed his conviction and released his lawyer from further representation of petitioner. (As with equitable tolling, petitioner's *pro se* status, lack of legal knowledge and limited education do not constitute "external impediments" that would excuse his default. See Harris v. McAdory, 334 F.3d 665, 668 (7th Cir. 2003) (petitioner's *pro se* status does not constitute adequate grounds for cause); Dellinger v. Bowen, 301 F.3d 758, 763 (7th Cir. 2002) (petitioner's youth and lack of education did not constitute cause); Henderson v. Cohn, 919 F.2d 1270, 1272-73 (7th Cir. 1990) (petitioner's illiteracy and limited education insufficient to establish cause).) Instead, petitioner appears to rely solely on the miscarriage-of-justice exception.

The miscarriage-of-justice exception recognizes that in "extraordinary" cases, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" Carrier, 477 U.S. at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)). Under this exception, "prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" House v. Bell, 126 S. Ct. 2054, 2076-77 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 319-322 (1995)). Although Schlup was a case involving a state court jury trial, the Court has indicated that the Schlup standard applies in guilty or no contest plea cases when the petitioner contests the validity of his plea. Bousley v. United States, 523 U.S. 614, 623 (1998). In such cases, the reviewing court is

to consider as part of its inquiry the government's proffer regarding the factual basis for the plea. Id. at n.3.

At the plea hearing on the drug charges, the state trial court asked the state to make an offer of proof concerning the evidence it would have presented had the case gone to trial. According to the prosecutor, the state would have shown that on three occasions, March 5, March 7 and March 20, 2001, an undercover police officer contacted petitioner by telephone and asked whether petitioner could supply the officer with cocaine base. On March 7 and March 20, after receiving confirmation from petitioner that he could supply cocaine base, the undercover officer met with petitioner, at which time petitioner provided a quantity of cocaine base directly to the officer. With regard to the March 5 transaction, petitioner contacted a third party who subsequently showed up with the cocaine base at petitioner's apartment, at which time it was provided to the undercover officer. All of the drugs obtained by the undercover officer were tested by the state crime lab and tested positive for the presence of cocaine base. Tr. of Plea Hrg., 01-CF-1242, March 4, 2002, attached to Pet. for Writ of Habeas Corpus, dkt. #14, exh. C, at 8-11.

In his response to the state's motion, petitioner insists that the "drug deals" were set up by an individual named Dan Durst who used petitioner's wireless telephone. Pet.'s Mot. to Grant Pet. for Writ of Habeas Corpus, dkt. #25, at 42. However, the state did not accuse petitioner of being a "drug dealer" or being the source of the drugs, but merely of knowingly delivering cocaine base to an undercover police officer on three occasions, in violation of

Wis. Stat. § 961.41(1)(cm)1. In Wisconsin, "deliver" is statutorily defined as to "transfer from one person to another." Wis. Stat. § 161.01(6); State v. Pinkard, 2005 WI App 226, ¶ 10, 287 Wis. 2d 592, 706 N.W. 2d 157. The facts proffered by the state at the plea hearing, as set out in more detail in the criminal complaint (dkt. #31), provide strong evidence that petitioner was guilty of transferring cocaine base to UC-193 on March 5, March 7, and March 20, 2001. Petitioner's unsupported and self-serving declaration that the drug deals were not "his" falls far short of the showing he must make to show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."

Because petitioner can satisfy neither the cause-and-prejudice nor fundamental-miscarriage-of-justice exceptions to the procedural default rule, this court is precluded from reviewing the merits of his constitutional attacks on his drug conviction. Accordingly, the state's motion to dismiss will be granted.

ORDER

IT IS ORDERED that:

1. Petitioner's motion to dismiss the motion to dismiss as untimely (dkt. # 28) is DENIED.

2. Petitioner's motion for the appointment of standby counsel and a paralegal (dkt. #33, page 3) is DENIED.

3. The motion of respondent to dismiss the petition in its entirety is GRANTED. The petition is DISMISSED WITH PREJUDICE. The clerk of court shall enter judgment in favor of respondent and close this case.

Entered this 19th day of September, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge