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

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LARRY SPENCER,

Petitioner, ORDER

v. 05-C-0666-C

CATHY FARREY, Warden,
New Lisbon Correctional Institution,

Respondent.

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On November 21, 2006, this court entered an order requesting the state to provide copies of certain briefs filed by petitioner in the state court proceedings and to conduct a search for any postconviction motions or habeas corpus petitions that petitioner might have filed in state court. That request was prompted by petitioner's contention that he had properly exhausted his state court remedies on all of his challenges to his forgery conviction, notwithstanding the state's contention to the contrary.

At the time I issued that order, I had not read in detail the transcript from the state court evidentiary hearing held on petitioner's postconviction motion in his forgery case, 01-CF-1125, attached to the state's answer to the petition, dkt. #48, exh. F. That transcript indicates that one of petitioner's grounds for setting aside his plea and conviction was that his plea had not been entered knowingly and voluntarily because he did not understand the nature of an Alford plea, which is one of the claims that petitioner pursues in his federal

habeas petition.[1] At the conclusion of the hearing, the trial court rejected petitioner's contention that his plea was not freely, knowingly and voluntarily made as "simply incredible" and lacking evidence to support it. Tr. of Mot. Hrg., Oct. 18, 2002, dkt. #48, exh. F, at 52.

Petitioner's having raised the involuntary plea issue in his post-conviction motion does not shield him from the state's claim that he committed a procedural default: the fact remains that petitioner did not present the issue to the state appellate courts on direct appeal. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (to comply with exhaustion requirement, 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."). However, because the transcript in the existing record shows that the claim was presented to and adjudicated by the state trial court in the initial postconviction proceedings, it is unnecessary to review any subsequent postconviction motions that petitioner might have filed in which he re-raised that issue. Any subsequent motion that petitioner might have filed in the trial court would have been barred under principles of *res judicata* or because petitioner did not raise the issue on direct appeal. State v. Escalona-

[1]As noted in previous orders in this case, with the exception of the claim that petitioner's lawyer was ineffective for failing to seek a competency evaluation of petitioner, petitioner cannot obtain habeas relief on his other claims unless he shows that his plea was not knowingly and voluntarily made. Gomez v. Berge, 434 F.3d 940, 942 (7th Cir. 2006) (by entering knowing and voluntary plea, defendant waives right to contest alleged constitutional violations that occurred before plea, including alleged denial of right to self-representation).

Naranjo, 185 Wis. 2d 168, 517 N.W. 2d 167 (1994) (defendant precluded from raising in postconviction motion brought under Wis. Stat. § 974.06 constitutional issues that were or could have been raised on direct appeal unless he has "sufficient reason" for failing to do so).

It appears that petitioner is attributing his failure to pursue the involuntary plea issue on appeal to the alleged ineffectiveness of his appellate lawyer, Timothy Edwards. It is well-settled that a lawyer's performance, if constitutionally ineffective under the standard established in Strickland v. Washington, 466 U.S. 668 (1984), can provide "cause" for a petitioner's failure to present a claim to the state courts, Murray v. Carrier, 477 U.S. 478, 488 (1986); a showing of prejudice under Strickland is also likely to satisfy the prejudice component of the cause and prejudice test. Belford v. United States, 975 F.2d 310, 314 (7th Cir. 1992) (noting that cause and prejudice test and Strickland test "seem to overlap") (overruled in part on other grounds by Castellanos v. United States, 26 F.3d 717, 719-20 (7th Cir. 1994)); Ouska v. Cahill-Masching, 246 F.3d 1036, 1050 n. 13 (7th Cir. 2001) (noting "continuing ambiguity" as to whether finding of prejudice under Strickland would be sufficient to establish prejudice for purposes of cause and prejudice analysis). However, to overcome the presumption that Edwards's performance was effective, petitioner must show that Edwards omitted a "significant and obvious" issue that was "clearly stronger" than those presented. Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996). Stated differently, petitioner must show that, but for counsel's errors, there is a reasonable probability that the outcome of the appeal would have been different. Id. This will be a difficult showing for

petitioner to make in light of the findings made on the record by the trial court concerning the circumstances surrounding the taking of petitioner's plea, trial counsel's testimony that he had explained to petitioner that he was unlikely to be able to withdraw his plea once made and the trial court's adverse credibility determination. However, at this stage of the proceeding, I cannot say that he could not make the showing.

As the case now stands, then, I see three issues before the court regarding petitioner's challenge to the forgery conviction:

> 1) In deciding the sole issue petitioner pursued on direct appeal, whether trial counsel was ineffective for failing to seek a competency evaluation of petitioner before he entered his plea, did the state court of appeals reasonably apply clearly established Supreme Court law and reasonably determine the facts in light of the evidence presented, thereby precluding petitioner from habeas relief under 28 U.S.C. § 2254(d)?
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> 2) Did Edwards's failure to pursue on direct appeal the other claims decided by the trial court amount to the constitutionally ineffective assistance of appellate counsel so as to excuse petitioner's procedural default?
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> 3) If petitioner cannot satisfy the cause and prejudice exception, then can he show that a fundamental miscarriage of justice will result if this court does not consider the merits of his defaulted claims?

Given the existing state of the record, reviewing all the various motions and petitions that petitioner filed *pro se* in either the forgery case or the drug case is simply not necessary to decide these issues. Accordingly, I will vacate the order of November 21, 2006. The state need not obtain or search for additional documents. Petitioner's most recent request for the appointment of a lawyer to ensure the production of every document petitioner has ever sent to any state court judge (dkt. #53) will be denied. Instead, we will proceed as follows:

1. Petitioner has until December 22, 2006 in which to submit a response to this order. Petitioner's response should address the three issues set forth above.

2. The state has until January 8, 2007 in which to reply to petitioner's response.

A few additional comments are in order. First, in an order entered June 7, 2006, I dismissed any claim that petitioner might have pertaining to Edwards's performance because I was unable to tell from the petition precisely what petitioner was claiming Edwards did that led to petitioner's current confinement. Second Superseding Order to Show Cause, June 7, 2006, dkt. #20, at 10. That portion of that order will be vacated and petitioner's claim that Edwards provided ineffective assistance of counsel reinstated.

Second, nothing in this order should be read to preclude the state from raising a defense based on exhaustion of the claim of ineffective assistance of appellate counsel. Carrier, 477 U.S. at 489 (claim that counsel's ineffective performance was "cause" for default must be "presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."). In Wisconsin, a defendant claiming that he received ineffective assistance of counsel on appeal must petition the appellate court that heard the appeal for a writ of habeas corpus. State v. Knight, 168 Wis. 2d 509, 520, 484 N.W. 2d 540 (1992). Apart from a letter to petitioner from Dane County Circuit Court Judge Stuart Schwartz in which he asserts that all of petitioner's claims have been addressed at both the trial and appellate court level (dkt. #49, exh. M), the record contains no documents showing that petitioner ever presented a claim of ineffective assistance of

appellate counsel to the state court of appeals.[2] I leave it to the state to determine whether it wants to search for such documents and any state appellate court ruling on the issue, or whether it wants to waive the exhaustion requirement with respect to petitioner's claim of ineffective assistance of appellate counsel and seek a ruling on the merits. 28 U.S.C. § 2254(b)(3).

ORDER

1. The order entered November 21, 2006 is VACATED.

2. Petitioner's motion for the appointment of counsel (dkt. #53) is DENIED.

3. The order entered June 7, 2006 is VACATED with respect to the court's determination that petitioner could not proceed on a claim of ineffective assistance of appellate counsel against attorney Edwards. That claim is REINSTATED.

4. Petitioner has until December 22, 2006 in which to submit a response to this order. Petitioner's response should address the three issues set forth on page 4.

[2]A review of Wisconsin court system electronic records shows that petitioner filed a petition for a writ of habeas corpus related to his forgery case in the court of appeals on March 9, 2004; the court denied the petition on March 22, 2004. In an order entered June 9, 2004, the state supreme court indicated that the court of appeals had properly disposed of the petition. The contents of these documents are not available in electronic format.

5. The state has until January 8, 2007 in which to submit a reply to petitioner's response.

Entered this 30th day of November, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge