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

LOREN ALLIET,

Petitioner,

ORDER

v.

06-C-0261-C

PAMELA WALLACE, Warden,
Stanley Correctional Institution,

Respondent.

Petitioner Loren Alliet, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his August 2001 conviction in the Circuit Court for Washington County for armed robbery. On June 7, 2006, this court entered judgment dismissing the petition without prejudice because petitioner failed either to pay the $5 filing fee or request leave to proceed *in forma pauperis*. Petitioner has now paid the filing fee but has not submitted a new petition. Instead of asking petitioner to refile his petition, I will vacate the prior judgment and reopen the case. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.

A federal court may entertain a habeas petition filed by a state prisoner only on the ground that the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner claims that he is in custody in

violation of his Sixth Amendment right to conduct his own defense, recognized by the Supreme Court in Faretta v. California, 422 U.S. 806 (1975). More specifically, petitioner alleges that his standby counsel undermined petitioner's right to self-representation by failing to advise him how to preserve witnesses called by the state for further questioning during the defense case and for advising petitioner to forgo bringing the issue to the trial court's attention after petitioner learned that the witnesses had been released from their subpoenas. See McKaskle v. Wiggins, 465 U.S. 168, 178 (1984) (outlining limits on extent of standby counsel's unsolicited participation). It appears that petitioner has pursued his available state court remedies with respect to this claim and has filed his petition within the limitations period prescribed by 28 U.S.C. § 2244(d).

Standby counsel's alleged failure to advise petitioner how to ensure the appearance of certain witnesses during the defense case does not give rise to any constitutional violation. As the state courts recognized, having opted to proceed *pro se*, petitioner, not standby counsel, was responsible for ensuring that his witnesses were under subpoena and present to testify. Petitioner cannot complain that he was denied assistance to which he had no right in the first place. As the Supreme Court recognized in Faretta, 422 U.S., at 834 n.46, a defendant who exercises his right to appear *pro se* "cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Further, standby counsel's alleged failure to advise petitioner of all of the intricacies of trial preparation is not the sort of excessive involvement in the case that the Supreme Court

censured in McKaskle. 465 U.S. at 178-182. McKaskle was concerned about standby counsel doing too much, not too little. The state will not be ordered to respond to this aspect of his claim.

More substantial is petitioner's allegation that his standby lawyer actively prevented him from telling the trial court about his witness problems. In this instance, counsel was not merely failing to provide petitioner with something to which he was not entitled, but was taking an active role in petitioner's case. Although it is doubtful that this sole action by counsel so interfered with petitioner's right to represent himself as to give rise to a Faretta violation, it could have interfered with petitioner's right to present a defense. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Without reviewing the trial transcript, it is impossible to tell what right, if any, of petitioner's might have been violated by the actions of standby counsel. Accordingly, I will order the state to respond to this claim.

ORDER

IT IS ORDERED that:

1. The judgment entered June 7, 2006, dismissing this case without prejudice is VACATED and the case is REOPENED.

2. The clerk shall serve by mail a copy of this order and the petition to Warden Wallace and to the Wisconsin Attorney General.

3. Not later than 30 days from the date of service of the petition, the state shall file a response to petitioner's claim that he was denied his right to self-representation or a fair trial when his standby lawyer advised him not to bring to the trial court's attention petitioner's desire to have two state witnesses recalled to testify in the defense case.

4. Petitioner's claim related to his standby lawyer's failure to properly advise him about how to ensure that state witnesses were present to testify in the defense case is DISMISSED WITH PREJUDICE for failure state a constitutional claim.

5. If the state contends that petitioner's claim is subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations, it should file a motion to dismiss and all supporting documents within its 30-day deadline. The state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such 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.

If at this time the state wishes to argue petitioner's claim on its merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claim, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claim. The state also must file and serve any additional portions of the record that are material to

deciding whether the legal conclusions reached by state courts on these claims were unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

6. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

7. The federal mailbox rule applies to all submissions in this case.

Entered this 17th day of July, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge