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

LARRY SPENCER,

Petitioner, OPINION AND ORDER

v. 05-C-0666-C

CATHY FARREY, Warden,
New Lisbon Correctional Institution,

Respondent.

This is an application for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Larry Spencer, an inmate at the New Lisbon Correctional Institution, collaterally attacks the judgments of conviction imposed upon him by the Circuit Court for Dane County following petitioner's entry of Alford pleas in two cases, 01 CF 1125, a case involving multiple forgery counts, and 01 CF 1242, a drug case. This court previously dismissed petitioner's attack on the latter case on grounds of procedural default. Now before the court for decision are the claims attacking the validity of the forgery conviction. Those claims, as construed by this court in previous orders, are the following:

> 1) petitioner's plea was involuntary because a) it was coerced; b) his lawyer misled him about the nature of an Alford plea and c) the trial court said nothing at the plea hearing to correct petitioner's misunderstanding;
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> 2) the trial court violated petitioner's Sixth Amendment right to self-representation by refusing to allow petitioner to represent himself at trial;
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> 3) petitioner's trial lawyer was ineffective for failing to seek a competency evaluation of petitioner before allowing petitioner to enter an Alford plea; and

4) petitioner's appellate lawyer was ineffective for raising only this last issue on appeal.

There is no dispute that petitioner has procedurally defaulted his first two claims by failing to fairly present them to the state courts on direct appeal. The question this court must decide is whether it may excuse petitioner's default, either because it was caused by the ineffectiveness of the lawyer who represented him during state postconviction proceedings and the subsequent appeal or because a fundamental miscarriage of justice will result if this court does not consider the claims. Respondent contends that this court is barred from considering the merits of petitioner's ineffective assistance of postconviction/appellate counsel claim because petitioner has also procedurally defaulted *that* claim by failing to properly exhaust it in state court. As explained below, however, the documents upon which respondent relies do not establish procedural default and leave open the possibility that petitioner still may have state remedies available to him on this claim.

Nevertheless, because it is plain from the record before this court that petitioner's appellate lawyer did not provide constitutionally ineffective assistance, I will deny that claim on the merits without regard to whether petitioner exhausted his state court remedies. Petitioner's failure to show that appellate counsel's performance was ineffective means that he is unable to establish cause for his failure to present his first two claims to the state courts on appeal. Further, petitioner cannot satisfy the demanding fundamental-miscarriage-of-justice exception. Accordingly, petitioner's first two claims will be dismissed on grounds of procedural default. Petitioner's third claim will be denied because the state court of appeals

made a reasonable determination of the facts and reached a decision consistent with federal law when it concluded that petitioner's trial attorney had not been constitutionally ineffective for failing to seek a competency evaluation of petitioner before he entered his Alford plea.

From the record of the state court proceedings, I find the following facts.

FACTS

STATE COURT PROCEEDINGS

On May 31, 2001, the state charged petitioner with eight counts of forgery pursuant to Wis. Stat. § 943.38(2). The case was assigned to Dane County Circuit Court Judge Stuart Schwartz. From the time the charges were filed until the time petitioner entered an Alford plea to those and additional charges on October 8, 2001, petitioner fired or developed conflicts with five successive attorneys appointed by the state public defender's office to represent him on the state court charges. He was ultimately represented by attorney Paul Nesson.

Against Nesson's advice, petitioner filed a number of *pro se* motions with the court and sent letters to other public officials, including the prosecutor and the district attorney. Petitioner's *pro se* submissions to the court included a letter from one of petitioner's former attorneys, Joseph Sommers, to petitioner that contained highly damaging statements implicating petitioner in the forgeries. Petitioner insisted that Sommers had damaged his

case and was turning other attorneys against petitioner. In other letters, petitioner offered to assist the state in solving a notorious murder (the Father Kunz murder) and to give information regarding a bodyguard who allegedly attempted to assassinate former governor Tommy Thompson.

The parties appeared for jury selection on February 4, 2002. Outside the jury's presence, Nesson told the court that petitioner had indicated that he was not happy with Nesson's representation and that petitioner might either hire a different lawyer or ask the court for permission to represent himself. Tr. of Jury Selection and Motions, Feb. 4, 2002, attached to Pet. for Writ of Habeas Corpus, dkt. #14, exh. A, at 4. Petitioner indicated that several lawyers had agreed to represent him but then had failed to appear in court. Petitioner told the court that, in the event he could not hire a new attorney, he would rather handle the trial on his own than proceed with Nesson.

The court asked petitioner a series of questions about his background, education and mental health. In response to those questions, petitioner said he was 52 years old. He said his formal education ended in grade school, although petitioner purportedly did "home studies and self education" while residing in a "home for cancer" during his high school years. Petitioner said he was admitted to the hospital for a year to be treated for "cancer and subsequent other things" when he was 12 years old. When the court asked whether petitioner had completed seventh grade, petitioner replied: "Maybe a little beyond that, sir. Some of those years of my life were kind of real hazy for the drugs and experimental things

that they were doing to me." Id., at 8. Petitioner denied taking any medications apart from some topical ointment that he used. Petitioner said he used the ointment because his body was "stripped of certain antibodies" as a result of radiation treatment. Id. When asked if he was taking medication for any mental health conditions, petitioner replied: "I don't have any mental health conditions." Id. at 9. Petitioner indicated that he had used recreational drugs on occasion in the past. Id. at 13-14.

The court denied petitioner's request to represent himself. The court indicated that it was denying the request on the basis of petitioner's lack of education, questionable ability to act in his best interest, low level of literacy and difficulty communicating in the courtroom. The court stated that it was "concerned about any physical or psychological disabilities that you may have that affect your ability to communicate within the courtroom because I believe that you have in your own mind a theory which may not be a viable theory under the law, and I won't know that until I hear how the evidence comes in in this matter." Id., at 19.

The prosecutor indicated that she had made an offer to settle the case if petitioner would agree to plead to the charges. In exchange for petitioner's plea, the prosecutor would agree to recommend a sentence of five years' confinement followed by five years' extended supervision on each count, with each sentence to run concurrently with each other and with a five-year parole revocation sentence that petitioner had been ordered to serve on a prior

conviction. Petitioner indicated that he would not accept the plea. The parties then proceeded to select the jury.

Before trial was to begin on February 6, 2002, petitioner renewed his request to proceed *pro se*. Tr. of Plea and Sentencing, Feb. 6. 2002, attached to Answer, dkt. #48, at exh. L. Petitioner told the court that if his request was denied, he would make a deal with the prosecutor. Petitioner said he believed he could not win with Nesson and therefore, if the court denied his request to proceed *pro se*, he would have no choice but to enter a plea. After the court indicated that it was reaffirming its previous finding that petitioner was not competent to represent himself and that he would have to proceed with Nesson, petitioner indicated that he wanted to enter a plea. Petitioner said that his lawyer had told him "something about an *Albert* [sic] law or something where I'm claiming that I'm still innocent and until I believe I can come forward." Id. at 16. The court told petitioner that if he wanted to prove his innocence, then he should proceed to trial. Petitioner rejected the court's suggestion that he discuss the matter with Nesson, indicating that there was no point in going to trial because he was going to "lose anyway." Id. at 19.

The court took a recess to allow petitioner to confer with his attorney and to complete a "Plea Questionnaire and Waiver of Rights" form. After the hearing reconvened, the parties indicated that they had agreed to resolve the case under the terms proposed by the prosecutor prior to jury selection. The court then engaged in a colloquy with petitioner. Contrary to his statements at the previous hearing, petitioner indicated that he had

completed the eleventh grade. Petitioner indicated that he had gone over the plea questionnaire with Nesson and that Nesson was able to explain things to him. The colloquy proceeded in part as follows:

> THE COURT: Do you understand that if you enter an Alford plea, which in this case would be a plea of no contest, an Alford plea means that you are entering a plea for strategic reasons, although you are not necessarily admitting to any guilt. I will nevertheless find you guilty based upon the facts that are set forth in the criminal complaint and I'm going to ask the State for an additional offer of proof. When you enter an Alford plea, you are admitting that there is strong evidence of your guilt within the documentation and the evidence or statements that the District Attorney will make to me. You understand all of that?
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> PETITIONER: I don't believe that that shows I'm guilty. I believe that I'm going to lose anyway. You won't let me represent myself and with--
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> THE COURT: Mr. Spencer --
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> PETITIONER: -- letting Paul go up against Ann, what I'm agreeing to is I'll probably lose with Paul representing me and Ann prosecuting me.
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> THE COURT: Mr. Spencer, I want you to listen carefully to what I'm saying and if you can answer those questions, that's fine, otherwise I'm simply going to go ahead with the trial.
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> An Alford plea will result in my finding you guilty. You would be entering your Alford plea for strategic purposes. Whatever your reasons are, and you've just articulated them, that's part of your strategic thinking, that's part of your assessment and discussion with Mr. Nesson. I will, nevertheless, in order to accept your plea, be making findings and you would be acknowledging that there is strong evidence of your guilt. Do you understand that?
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> PETITIONER: Yes, it can be conceived that way if that's what you want to say.
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> THE COURT: I'm asking you.

PETITIONER: I guess I understand as best I can.

THE COURT: Well, if you don't understand and you want me to explain it, ask me.

PETITIONER: No, I'm fine.

THE COURT: Do I take that -- I don't want to put words in your mouth -- do I take that as yes, you understand it?

PETITIONER: Yes, I understand it.

THE COURT: When you enter a plea, you give up certain constitutional rights. Those rights are listed on the form that you signed. They include the right to remain silent and not have that silence used against you, the right to confront and cross-examine the State's witnesses, the right to bring your own witnesses into court to testify on your behalf, your right to a trial to a jury. All twelve jurors would have to agree you're guilty beyond a reasonable doubt before you could be convicted. Do you understand that you're giving up those rights by entering a plea?

PETITIONER: Yes.

THE COURT: Do you have any questions about those rights?

PETITIONER: No.

Id., at 28-30.

After petitioner indicated that he understood the potential penalties and collateral consequences he faced if the court accepted his plea, the court went over each of the nine forgery counts individually, explaining the elements that the state would have to prove if the case went to trial. Petitioner stated that he understood the elements of each count. He also indicated that no one had made him any promises or threatened him in order to get him to enter a plea or to waive his constitutional rights. Id., at 32-37. The court then asked the

state for an offer of proof. The prosecutor outlined the evidence supporting each count in detail, pointing out that petitioner had acknowledged cashing certain checks but was disputing only whether the state could prove he knew they were forged. Id., at 38-47.

After hearing the state's proffer, the court asked petitioner how he wished to plead. Petitioner replied, "Alford plea." The court indicated that it understood that petitioner was entering an Alford plea, but that petitioner would either have to plead guilty or no contest. Petitioner responded that his plea was no contest. Id. at 48. Nesson and defendant agreed that from the allegations of the complaint, the testimony adduced at the preliminary hearing and the prosecutor's offer of proof, the court could find strong evidence sufficient to support a finding of guilty. Id., at 48-49.

The court found that petitioner had freely, knowingly and voluntarily entered his plea and that strong evidence of guilt existed to support petitioner's conviction on the forgery counts. Accordingly, the court accepted petitioner's plea, adjudged him guilty and proceeded to sentencing. The court accepted the parties' joint recommendation and sentenced petitioner to 10 years (five years' confinement plus five years' extended supervision) on each forgery count, to run concurrently with each other and with the prison sentence that petitioner was already serving.

Petitioner filed a notice of his intent to pursue postconviction relief. The state public defender's office appointed a new lawyer, Tim Edwards, to represent petitioner on appeal. Edwards filed a postconviction motion on petitioner's behalf, requesting the court to set

aside petitioner's plea. In the motion, petitioner alleged that 1) Nesson was ineffective for failing to seek a competency evaluation of petitioner before he entered his plea; 2) the trial court erred in accepting petitioner's Alford plea without first requiring petitioner to submit to a competency evaluation; 3) there was insufficient evidence in the record from which the court could have reasonably concluded that petitioner was incompetent to represent himself; and 4) petitioner's Alford plea was not entered intelligently, knowingly or voluntarily.

The circuit court convened a hearing on the motion on October 18, 2002. Ans. to Pet. for Writ of Habeas Corpus, dkt. #48, exh. F. Nesson was present to testify. At the outset of the hearing, Edwards informed the court that petitioner was not happy with Edwards's representation and that petitioner wanted to question Nesson himself. The court indicated that Edwards would be responsible for questioning the witness, but that petitioner could write down questions that he wanted Edwards to ask and the court would grant recesses if needed so that Edwards and petitioner could discuss any points that petitioner wanted raised. However, the court indicated that it would defer to Edwards's professional judgment as to whether any questions petitioner wanted asked were appropriate. Id., at 4-9.

Nesson testified that he had more than 30 years' experience as a criminal defense attorney. Nesson testified that he had no concerns about petitioner's competency during the time he was representing him. Id., at 39. According to Nesson, petitioner was able to discuss the facts of the case, appeared to comprehend them and suggested relevant avenues of defense. Id., at 50. Nesson indicated that he was not aware of anything in petitioner's

past that would suggest that petitioner had any mental disability, although he conceded that he did not investigate that issue. Nesson testified that he had reviewed petitioner's parole file in preparation for a parole revocation hearing and had not come across anything indicating that petitioner had any mental impairments. In Nesson's view, petitioner's conflicts with his prior attorneys, various *pro se* filings against Nesson's advice and accusations that Nesson was not investigating his case were not a sign of a mental defect but were rather petitioner's attempt to "throw as many monkey wrenches into the system hoping that he would raise appealable issues in the event that he was convicted." Id., at 23.

> On redirect, Edwards asked Nesson this question:
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> > If I understand your testimony correctly, you believe based upon your experience with Mr. Spencer that Mr. Spencer is calculated, able to understand the theory of defense in his case, and was able to even think ahead to this type of proceeding in terms of planning the outcome of the various things that he was putting into place?

Nesson replied:

> > That's right. I had even told Mr. Spencer that, and he appeared to be planning on appealing and being able to withdraw his plea and go to trial later on down the line with another attorney, and I explained to him that -- that the possibility of him being able to withdraw his plea was anything but open and shut. It would be very difficult.

Id. at 52. In Nesson's view, petitioner had a fairly sophisticated understanding of the legal system and was able to calculate ahead and attempt to manipulate the legal system to his advantage. Id. at 53-54.

After Edwards completed his redirect examination of Nesson, the court took a 20 minute recess to allow Edwards to talk to petitioner to see whether there were additional questions that petitioner wanted asked. When the hearing resumed, the only questions Edwards asked Nesson pertained to his investigation of a witness nicknamed Sky. Id. at 54-55. Petitioner did not testify.

The court denied petitioner's motion. With respect to petitioner's claim that Nesson should have requested an evaluation of petitioner's competency, the trial court acknowledged that Nesson was aware that petitioner was uncooperative, had discharged several attorneys prior to Nesson and had filed numerous pro se motions with the court. However, said the court, none of petitioner's behaviors or personality traits necessarily led to the conclusion that petitioner did not understand the roles of the parties, the courtroom procedures, the various types of pleas or the nature of the charges. The court pointed out that Nesson testified that petitioner was able to articulate a plausible theory of defense, was focused and understood what was going on and could assist in his defense. Also, the court pointed out, Nesson had not seen anything in petitioner's files that suggested that petitioner had any mental health issues. The court concluded that Nesson had not provided deficient performance by failing to raise a concern about petitioner's competency. Id., at 70-75.

The court also found that there had been no reason for *it* to question petitioner's competency. It noted that in connection with petitioner's request to represent himself, the court had engaged in a fairly lengthy question-and-answer session with petitioner. During

that exchange, petitioner denied having any mental health issues and expressed an understanding of the charges he was facing. The court pointed out that petitioner's answers were responsive to the questions asked and that petitioner indicated "very articulately those things that he does not understand" and "goes on to indicate what he does understand." Apart from the fact that petitioner was a difficult client for his attorney, the court said, it could find nothing in the court proceedings to suggest that it should have ordered a competency evaluation before accepting petitioner's plea. Id., at 75-77.

Finally, the court rejected petitioner's claim that his Alford plea had not been entered knowingly and intelligently. The court noted that the thrust of the motion was that petitioner was innocent of the charges and really wanted to go to trial, but thought that he would not be successful as long as he was represented by Nesson. The court acknowledged that a plea could be withdrawn if it was entered upon the ineffective assistance of counsel; however, the court found that petitioner had not made a "sufficient showing here that there were specific acts or omissions of Mr. Nesson in that regard." Id., at 81. The court noted that petitioner's protestations of innocence were consistent with his Alford plea. Reviewing the transcript from the plea hearing, the court concluded that petitioner "clearly understood what an Alford plea entailed" and "knew that eventually he would have been found guilty by the trial court in accepting that plea." Id., at 81, 84. The court found that the record from the plea hearing demonstrated that petitioner had entered his plea freely, knowingly

and voluntarily and that petitioner had adduced "virtually no credible information" to the contrary. Id., at 84.

Edwards filed an appeal on petitioner's behalf. The only issue pursued on appeal was whether Nesson had been ineffective by failing to request a competency evaluation of petitioner. The court of appeals affirmed the trial court's determination that Nesson had not been ineffective. State v. Spencer, 2004 WI App 37, 269 Wis. 2d 889, 675 N.W. 3d 810 (unpublished decision). The court recognized that a defendant may be denied his right to the effective assistance of counsel if his lawyer has reason to doubt the defendant's competency yet fails to request a competency evaluation. However, the court found that the trial court had properly exercised its discretion when it found that Nesson had no reason to doubt petitioner's competency. The court noted that Nesson had testified that petitioner was able to understand and assist in the proceedings and that he believed that petitioner's self-defeating actions were an attempt to delay the case and create issues for appeal.

In an order entered January 30, 2004, the court of appeals granted Edwards's motion to withdraw as counsel for petitioner. On or about January 28, 2004, petitioner filed a *pro se* petition for review in the Wisconsin Supreme Court.

On March 9, 2004, while his petition for review was still pending, petitioner filed a *pro se* petition for a writ of habeas corpus in the court of appeals in which he claimed that Edwards had provided ineffective assistance of appellate counsel. State v. Knight, 168 Wis. 2d 509, 520, 484 N.W. 2d 540 (1992) (defendant challenging appellate counsel's

performance must file petition for writ of habeas corpus in court of appeals). Pet. for Writ of Habeas Corpus, attached to Response to Pet., dkt. #64, exh. M. On March 22, 2004, the court of appeals issued an order denying the petition. State ex rel. Spencer v. Bertrand, 04-0802-W, Order (Ct. App. March 22, 2004), attached to dkt. #70, exh. O. The court noted that the supreme court had not yet ruled on the petition for review of the appeal for which petitioner was alleging Edwards had provided ineffective assistance; in the absence of exhaustion of the direct appeal, the extraordinary remedy of habeas corpus was not available to petitioner. Id. (citing Wis. Stat. § 974.06(8) and State ex rel. Fuentes v. Wisconsin Court of Appeals, 225 Wis. 2d 446, 451, 593 N.W. 2d 48 (1999)).

The Wisconsin Supreme Court denied petitioner's *pro se* petition for review with respect to petitioner's direct appeal on April 20, 2004. On June 8, 2004, petitioner filed a "Petition to Government to Correct Grievances and Fraud by Courts and Officers" in the Wisconsin Supreme Court. Dkt. #64, exh. N. The court construed the document as a petition to review the court of appeals' March 22, 2004 order denying petitioner's petition for a writ of habeas corpus. The court dismissed the petition for review on the ground that it was untimely. It added that even if petitioner had filed it on time, the court would still have dismissed it because the "court of appeals properly disposed of the habeas petition." State ex rel. Spencer v. Bertrand, 04-0802-W, Order (June 17, 2004), attached to dkt. #70, exh. P.

PROCEEDINGS IN THIS COURT

Petitioner filed his federal habeas petition on September 6, 2005. Pursuant to petitioner's request, the court appointed counsel to represent petitioner. Counsel filed an amended petition on petitioner's behalf. Shortly thereafter, however, the court discharged counsel from further representation of petitioner after receiving a letter from petitioner in which he accused his lawyer of lying to the court.

On May 26, 2006, with leave of the court, petitioner filed an amended *pro se* petition raising challenges to his convictions in both the drug case and the forgery case. Reviewing the petition in accordance with Rule 4 of the Rules Governing Section 2254 Cases, I determined that it mostly reasserted the same claims made in the petition that petitioner filed initially. I ordered respondent to respond to the following claims:

> 1) petitioner's plea in both cases was involuntary because a) it was coerced; b) his lawyer misled him about the nature of an Alford plea and c) the trial court said nothing at the plea hearing to correct petitioner's misunderstanding;
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> 2) the trial court in both cases violated his Sixth Amendment right to self-representation by refusing to allow Spencer to represent himself at trial; and
>
> 3) Nesson was ineffective in both cases for failing to seek a competency evaluation of petitioner before allowing petitioner to enter an Alford plea.

All the other claims in the petition were dismissed, including petitioner's claim that Edwards and other post-conviction lawyers had been ineffective. In dismissing that claim, I found that

> [a]part from his continued allegations that these lawyers, like everyone else involved in his case, "lied" and sought to prevent the truth, I am unable to

> determine precisely what petitioner is claiming any of these lawyers did that led to his current confinement. The mere fact that they might not have handled his case in the way petitioner wanted them to is not enough to give rise to a valid claim of ineffective assistance of counsel.

Sec. Superseding Ord. to Show Cause, June 6, 2006, dkt. #20, at 10.

Respondent filed a motion to dismiss the petition in its entirety. She contended that petitioner's attack on the forgery conviction had to be dismissed because petitioner did not file his habeas petition within one year after his conviction became final, as required by 28 U.S.C. § 2244(d)(1). She contended that petitioner's challenge to his drug conviction had to 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.

To counter respondent's claim that he did not file his federal habeas petition until September 6, 2005, petitioner submitted a copy of a four-page habeas petition bearing an April 19, 2004 date stamp from this court. I granted respondent's motion and dismissed the petition. Opinion and Order, Sept. 19, 2006, dkt. #35. For various reasons, I declined to accept the petition that petitioner purportedly filed on April 19, 2004 as an authentic copy of a document that was filed in this court. I concluded that petitioner did not file any § 2254 federal habeas petition until September 6, 2005, which was after petitioner's one-year deadline had passed. Finding no basis to apply equitable tolling or to use one of the alternate starting dates set out in § 2244(d), I found that petitioner's challenge to his forgery conviction was untimely. I dismissed petitioner's challenge to the drug conviction on

procedural default grounds, finding that petitioner had failed to petition the Wisconsin Supreme Court for review of the court of appeals' decision.

Petitioner filed a motion for reconsideration. In support, he submitted what appeared to be the original copy of the April 19, 2004 habeas petition. After examining the document, I determined that it appeared to be authentic and that therefore, I had erred when I found that petitioner had not filed any § 2254 federal habeas petition until September 6, 2005. Further, because my conclusion regarding the untimeliness of the petition rested on that finding, I granted petitioner's motion for reconsideration and vacated the judgment with respect to the forgery conviction. I ordered respondent to respond to the petition insofar as it challenged the forgery conviction. Although I directed respondent to respond to the merits of the petition, I indicated that she was not precluded from re-raising a statute of limitations defense in her response. I denied petitioner's motion to reconsider my conclusion that petitioner procedurally defaulted his challenge to his drug conviction. Op. and Order, Oct. 11, 2006, dkt. #42.

On November 13, 2006, respondent filed an answer to the petition. Respondent averred that, "given this court's October 11, 2006, order determining Spencer filed his petition for habeas relief on April 19, 2004," respondent was admitting that the petition was timely. Ans. to Pet. for Writ of Habeas Corpus, dkt. #48, ¶ 3. Respondent contended that this court should deny the petition under 28 U.S.C. § 2254(d) because the state court of appeals had reasonably applied federal law when it concluded that trial counsel had not been

ineffective for failing to seek an evaluation of petitioner's competency prior to the entry of his plea. Id., ¶ 8. In a footnote, respondent pointed out that this was the only claim that petitioner had presented to the state courts on direct appeal. Thus, respondent argued, "[t]o the extent that Spencer raises any other claim for relief . . . the claim has not been properly exhausted and is now procedurally defaulted." Id., at n.2.

In response, petitioner disputed respondent's contention that he had not exhausted all of his claims. Petitioner submitted a letter dated October 25, 2006 from Judge Schwartz in which the judge indicated that he had received "another series of *pro se* motions filed by you wherein you again raise issues related to the ineffective assistance of both your trial and appellate counsel, this court's alleged errors during your court proceedings, and your inability to receive a fair hearing." Dkt. #49, exh. M. Judge Schwartz denied the motions, indicating that all of the matters presented "have been addressed at both the trial court and appellate court level." To the extent that petitioner might have "inadvertently asserted any new claims, or rephrased old claims," said the judge, petitioner had not offered any reason, let alone a sufficient reason, for not raising them previously.

Interpreting petitioner's submissions broadly, I found that petitioner appeared to be blaming Edwards's allegedly deficient performance for petitioner's failure to raise any issue on appeal except for Nesson's alleged ineffectiveness with respect to petitioner's competency. Accordingly, in an order entered November 30, 2006, I vacated the portion of the June 7, 2006 order to show cause dismissing petitioner's claim that Edwards had provided

ineffective assistance and reinstated it. Order, dkt. #54, at 5. Noting that nothing in the record compiled up to that point showed that petitioner had exhausted *this* claim in state court, I indicated that it was up to respondent to decide whether she wanted to search for documents showing exhaustion or whether she wanted to waive the exhaustion requirement and seek a ruling on the merits of petitioner's claim against Edwards. 28 U.S.C. §2254(b)(3).

Respondent has now filed her response regarding petitioner's allegation that Edwards provided ineffective assistance and petitioner has responded to it. Respondent contends that petitioner procedurally defaulted this claim by failing to properly exhaust it in the state courts. She has not articulated her position with regard to the merits of the claim.

OPINION

Before turning to the merits of the petition, two preliminary comments are in order. First, petitioner is a prolific writer who has submitted hundreds of handwritten pages in support of his claim that he is in custody in violation of his constitutional rights. Many of petitioner's submissions are various documents styled as "motions," some of which I have ruled on and others which I have not. Having re-read each of those submissions, I am confident that none of them require any particular action or ruling by this court that would make any difference to the outcome of the petition. For the most part, petitioner's various "motions" do little more than repeat the reasons why petitioner thinks he was wrongly convicted. I have considered all of those arguments in arriving at the various conclusions set

forth in this opinion. To the extent that I have not addressed a particular argument or request made by petitioner, it is either because it has no merit, is irrelevant or has been addressed in a previous order. Accordingly, all of petitioner's pending motions will be denied.

Second, I find it necessary to express my disappointment in the work done in this case by respondent's attorneys. The state's responses to the petition and various orders of the court are not as thorough and accurate as I would expect from the attorney general, who left it largely to the court to identify issues and potential defenses to the petition. Although it is understandable that petitioner's voluminous filings would evoke impatience, this court expects more from the state when it is asked to defend against a claim that it is holding one of its citizens in custody unlawfully.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

I begin with petitioner's claim that Nesson was ineffective for failing to seek a competency evaluation of petitioner before petitioner entered his plea. Ironically, although this is the one claim that petitioner exhausted in the state courts, it is the one to which he has paid the least attention. Indeed, it has never been entirely clear from petitioner's submissions whether he seeks habeas relief on this basis. Nevertheless, I address the claim for the sake of completeness.

The Antiterrorism and Effective Death Penalty Act provides that when a petitioner brings a claim in federal court that was adjudicated on its merits in state court, the federal court may grant relief only when the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

When applying this statute, the federal court reviews the decision of the last state court that ruled on the merits of petitioner's claims, Simelton v. Frank, 446 F.3d 666, 669 (7th Cir. 2006), which in this case is the Wisconsin Court of Appeals. A decision is "contrary to" federal law when the state court applies a rule that "contradicts the governing law set forth by the Supreme Court," or when an issue before the state court "involves a set of facts materially indistinguishable from a Supreme Court case," but the state court rules in a different way. Boss v. Pierce, 263 F.3d 734, 739 (7th Cir. 2001) (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). "'A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular petitioner's case' qualifies as a decision involving an unreasonable application of clearly established federal law." Id. (quoting Williams, 529 U.S. at 407-08).

A federal court may not issue a writ of habeas corpus simply because the court concludes in its independent judgment that a state court applied the law incorrectly. Relief is available under 28 U.S.C. § 2254(d)(1) only if the state court's decision is objectively unreasonable. Yarborough v. Alvarado, 541 U.S. 652, 665, 666 (2004). An "unreasonable" state court decision is one that is "well outside the boundaries of permissible differences of opinion." Hardaway v. Young, 302 F.3d 757, 762 (7th Cir. 2002).

When evaluated against these demanding standards, the court of appeals' determination that Nesson was not ineffective for failing to seek a competency evaluation was not unreasonable. First, the court properly recognized that a lawyer fails to provide constitutionally effective assistance if he has reason to doubt the defendant's competency but fails to bring that doubt to the attention of the trial court. Accord Matheney v. Anderson, 253 F.3d 1025, 1039 (7th Cir. 2001) (evaluating defense team's alleged failure to pursue competency hearing under Strickland). Thus, the court's decision was not "contrary to" any clearly established federal law.

Second, the court deferred to the trial court's finding that Nesson did not provide deficient performance under Strickland because he had no reason to doubt petitioner's competency. This determination was not based on a unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Petitioner's claim that Nesson had reason to doubt petitioner's competency is premised upon the following actions by petitioner before he entered his plea:

> petitioner had a demonstrated inability to trust his lawyers;
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> petitioner told trial counsel that he had information regarding an incident in which Wisconsin Governor Tommy Thompson allegedly over-powered a bodyguard who wanted to kill him;
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> petitioner told trial counsel that he had information related to the mysterious murder of Father Kunz, a Catholic priest in Dane, Wisconsin;
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> petitioner repeatedly told trial counsel that he had hired alternative legal representation, when in fact he had not;
>
> petitioner submitted documents to the court that directly harmed his defense after being repeatedly advised not to by his attorney and the court; and
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> petitioner told trial counsel that he sent letters about his case to Governor Thompson and President Bush, apparently believing they would come to his aid in the court system.

Br. of Def.-Appellant, attached to Answer, dkt. #48, exh. G, at 9-10. Admittedly, it would be reasonable for a defense attorney to view these behaviors as demonstrating that petitioner was "out of touch with reality," "paranoid" and "delusional," as petitioner argued in his state court appellate brief. However, it would also be reasonable, as Nesson did, to view these behaviors as efforts by defendant to throw a monkey wrench into the proceedings and forestall his conviction. As the Court of Appeals for the Seventh Circuit has stated:

> Many defendants express dissatisfaction with counsel, assert that their rights have been denied at every turn (because they have an unreasonable view of what rights they possess), demonstrate that they do not understand how the legal system handles witnesses and investigators (that's why they need lawyers, after all), and forget or choose to ignore what judges said earlier. Many defendants even dismiss their lawyers because they suppose without justification that more should be done to assist them.

Timberlake v. Davis, 409 F.3d 819, 823 (7th Cir. 2005) (citations omitted). Such remarks and behavior, however, do not necessarily lead to the conclusion that the defendant is not competent. Id.

A defendant is competent to stand trial if he has the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense. Drope v. Missouri, 420 U.S. 162, 171 (1975). Nesson testified that petitioner was able to do these things. Nesson testified that petitioner suggested various lines of investigation and articulated a defense based upon his contention that he was not aware that the checks had been forged. In Nesson's view, petitioner had a fairly sophisticated understanding of the legal system and his various letters and statements were part of a calculated effort to gain an advantageous bargaining position with the state.

The trial court did not act unreasonably when it accepted this testimony. As the trial court pointed out, Nesson's assessment was supported by the court itself, which detected nothing about petitioner's courtroom behavior to suggest that a competency evaluation was warranted. The court noted that petitioner had been responsive to the questions asked in court and was able to articulate what he did and did not understand. Moreover, apart from the actions listed above, petitioner did not present any evidence indicating that he had been diagnosed with any mental condition either before or after the plea hearing.

Overall, the record reasonably supports the state courts' determination that Nesson had no reason to doubt petitioner's competency. Accordingly, petitioner is not entitled to habeas relief on this claim.

PROCEDURAL DEFAULT OF CLAIMS 1 AND 2

As explained in previous orders in this case, before seeking federal review of constitutional claims, a state prisoner must first exhaust the remedies that are available to him in the state courts. This rule is based upon the principle known as comity that recognizes that state and federal courts are bound equally to apply and enforce federal law and that states are entitled to administer their criminal justice systems without federal court interference. Ex parte Royall, 117 U.S. 241, 251-52 (1886). Therefore, "when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999).

In Boerckel, the 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." Id., 526 U.S. at 845. Along the way, the petitioner must "fairly present" his federal claims by placing both the operative facts and the controlling legal principles governing the claims before the state courts. Chambers v. McCaughtry, 264 F.3d 732, 737-

38 (7th Cir. 2001). When a prisoner has failed to fairly present all of his federal claims to the state courts at all levels of appellate review and his opportunity for doing so has passed, his failure to exhaust his state court remedies is deemed a procedural default. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004).

When a claim has been procedurally defaulted, the federal court is barred from considering it unless petitioner satisfies the cause-and-prejudice test or shows that a fundamental miscarriage of justice will result if the court does not consider the merits of the defaulted claim. Steward v. Gilmore, 80 F .3d 1205, 1211-12 (7th Cir. 1996) (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977)). A petitioner may be able to satisfy the cause-and-prejudice test if he establishes that his procedural default was the result of constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986).

There is no dispute in this case that the only claim that petitioner raised on direct appeal from his forgery conviction is whether Nesson had been ineffective for failing to seek a determination of petitioner's competency before petitioner entered his plea. This means that this court is barred from considering the merits of petitioner's other claims unless petitioner can show that his failure to present the other claims on direct appeal was the result of ineffective performance by his lawyer, Edwards. However, before a federal court can excuse a default based upon a lawyer's ineffective assistance, the state prisoner must first

have exhausted *that* claim of ineffectiveness in the state courts. Edwards v. Carpenter, 529 U.S. 446, 453 (2000).

A. Ineffective Assistance of Postconviction/Appellate Counsel

1. Exhaustion

A Wisconsin defendant who contends that he was denied his right to the effective assistance of counsel on appeal has two avenues of relief available to him, depending upon the type of error alleged. Where the defendant contends that his lawyer erred by failing to raise on appeal claims of trial error that were preserved in the appellate record and did not require the filing of a postconviction motion before the trial court, the defendant may file a petition for a writ of habeas corpus in the state court of appeals. State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 683-84, 556 N.W. 2d 136, 140 (Ct. App. 1996); State v. Knight, 168 Wis. 2d 509, 522, 484 N.W. 2d 540, 545 (1992). If, however, the lawyer's alleged error was failing to preserve issues for appeal that required the filing of a postconviction motion in the trial court, the defendant must present that claim to the trial court by filing either a petition for habeas corpus or a postconviction motion under Wis. Stat. § 974.06. Rothering, 205 Wis. 2d at 681, 556 N.W. 2d at 139. Examples of the types of claims that fall under the Rothering umbrella are claims of ineffective assistance of counsel and motions for plea withdrawal. Id., at 67, 556 N.W. 2d at 137.

Respondent contends that petitioner cannot establish cause based upon Edwards's alleged ineffectiveness because, like his other claims, petitioner's claim against Edwards is procedurally defaulted. Although respondent acknowledges that petitioner attempted to raise a claim of Edwards's ineffectiveness by filing a petition for a writ of habeas corpus in the state court of appeals pursuant to Knight, she contends that that attempt did not satisfy the exhaustion requirement because the petition was unreasonably vague. Dkt. #64, ¶ 2. Although respondent's position is not entirely clear, I infer that she is contending that petitioner defaulted his claim by failing to "fairly present" it. Further, argues respondent, after the state court of appeals denied the petition, petitioner failed to file a timely petition for review in the Wisconsin Supreme Court. Id., at ¶ 5. According to respondent, these missteps mean that petitioner's claim that Edwards was ineffective is procedurally defaulted, which in turn means that petitioner cannot establish cause for defaulting his other claims.

In taking this position, respondent turns a blind eye to the reason cited by the court of appeals for denying the Knight petition. The court of appeals explained that because petitioner's petition for review in his direct appeal was still pending, he might still obtain relief on direct appeal and therefore it was premature to resort to the extraordinary remedy of habeas corpus. The state supreme court affirmed that ruling. Neither court ever ruled on the merits of the petition or found that petitioner had forfeited or waived his right to bring it. To the contrary, the clear import of the court of appeals' order was that petitioner could refile his petition after he had completed the direct appeal process. In other words, the

rulings made by the Wisconsin appellate courts on petitioner's habeas petition show at most that petitioner has failed to exhaust his state court remedies on his ineffective assistance of appellate counsel claim. They do not show, however, that petitioner has procedurally defaulted that claim.

Where state remedies remain available to a habeas petitioner who has not fairly presented his constitutional claim to the state courts, a federal court ordinarily must dismiss the entire habeas petition without prejudice so that the petitioner may return to state court in order to litigate the claim. Castille v. Peoples, 489 U.S. 346, 349 (1989); Rose v. Lundy, 455 U.S. 509, 522 (1982). Whether Wisconsin's courts still would entertain a motion brought by petitioner claiming that Edwards provided ineffective assistance of counsel is not clear from the existing record and has not been addressed by respondent. Nevertheless, it is unnecessary to resolve this question because it is plain that petitioner could not succeed on his claim that Edwards provided ineffective assistance of counsel. In these circumstances, this court has the authority to deny the claim on the merits even if petitioner still could raise the claim in the state courts. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"); Rhines v. Weber, 544 U.S. 269, 275-277 (2005).

2. Merits

a. Petitioner's alleged misunderstanding of consequences of plea

In order to prevail on his claim of ineffectiveness on the part of Edwards, petitioner must prove that (1) Edwards's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant "'bears a heavy burden when seeking to establish an ineffective assistance of counsel claim.'" Jones v. Page, 76 F.3d 831, 840 (7th Cir. 1996) (quoting Drake v. Clark, 14 F.3d 351, 355 (7th Cir. 1994)). To satisfy the first prong of the Strickland test, the performance element, a defendant must identify the acts or omissions of counsel that form the basis of his claim of ineffective assistance and must show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690; United States v. Moya-Gomez, 860 F.2d 706, 763-64 (7th Cir. 1988). A court's review of counsel's performance is highly deferential, presuming reasonable judgment and declining to second-guess strategic choices. Strickland, 466 U.S. at 689. When it comes to appellate advocacy, a lawyer is not required to "raise every non-frivolous issue under the sun." Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996). Moreover, even an unreasonable error on the part of counsel will not warrant setting aside a judgment unless the outcome of the proceeding would have been different. Strickland, 466 U.S. at 691.

Petitioner contends that Edwards provided ineffective assistance at the postconviction hearing by failing to argue for plea withdrawal on the ground that Nesson had told petitioner that by entering an Alford plea, petitioner was merely waiving his right to trial temporarily until some later date. As proof that Nesson told him this, petitioner points to the transcript from the plea hearing where petitioner is recorded as saying that Nesson had told him something about a plea "where I'm claiming that I'm still innocent and until I believe I can come forward." Petitioner swears to this court that he truly believed that by entering an Alford plea, he would be allowed to establish his innocence at a later date.

Petitioner's contention is nothing short of fantastic. He asserts first, that a seasoned criminal defense attorney with more than 30 years' experience told him that an Alford plea was nothing but a temporary delay in the proceedings and second, that he believed it. Whatever the patent incredibility of petitioner's allegation, petitioner has never explained the circumstances in which Nesson allegedly conveyed this erroneous advice regarding the nature of an Alford plea. Where and when did this conversation occur? How did it come about? Also missing are any details about petitioner's alleged understanding of when and how he was supposedly going to be able to "come forward" to prove his innocence after entering his plea. Presumably, if petitioner entered his plea with the understanding that he was going to be able to go to trial at a later date, he also had some understanding of when and under what circumstances that would occur. Would he merely have to ask the court to schedule his case for trial? Was there some time frame in which he would have to "come

forward?" Among all of his voluminous pleadings, this court has found no document in which petitioner endeavors to provide these sorts of details.

Petitioner supports his self-serving allegation (and his claim that Edwards was ineffective for failing to pursue it) solely by pointing to his statement at the plea hearing. Although that statement is troubling, it alone is insufficient to support petitioner's claim. First, the record demonstrates that petitioner was prone to making remarks on the record that were disputed by his attorneys about what his attorneys supposedly did or did not tell him. For example, petitioner told the court that Nesson had told him that petitioner was going to lose at trial, a comment that Nesson denied making. Tr. of Plea and Sentencing, Feb. 6, 2002, attached to dkt. #48, exh. L, at 19. At the postconviction motion hearing, petitioner told the court that he and Edwards had not discussed the attorney-client privilege, but Edwards told the court they had. Tr. of Motion Hrg., Oct. 18, 2002, attached to dkt. #48, exh. F, at 19. In light of these discrepancies, petitioner's statements on the record must be approached with some degree of suspicion.

Second, the record following petitioner's "until I can come forward" remark defeats petitioner's claim that at the time he entered his plea, he believed he would be able to prove his innocence later. After petitioner's remark, the court told petitioner that if he wanted the chance to prove his asserted innocence, he should proceed to trial. The court gave petitioner the opportunity to confer with Nesson, after which petitioner proceeded to complete a waiver of rights form acknowledging the constitutional rights he was waiving by entering his

plea. During the plea colloquy, the court reviewed those rights with petitioner. The court never suggested that petitioner was waiving those rights on a temporary basis or that an Alford plea was any less binding than an ordinary no contest plea.

Further, when the court asked petitioner whether he had any questions about the rights he was waiving, petitioner indicated that he had no questions. In light of the contradiction between the court's statements regarding the effects of petitioner's plea and petitioner's alleged understanding at the time, one would have expected petitioner to have voiced some concern at that point whether he was waiving his right to trial forever or just temporarily. Throughout the proceedings, petitioner had demonstrated a willingness to speak on his own behalf and ask questions of the court, yet he never said anything. Petitioner also indicated that no one had made him any promises in order to get him to enter a plea or to waive his constitutional rights. Finally, Nesson never informed the court that petitioner was entering his plea based upon an understanding that he would be able to withdraw it later and proceed to trial.

As the trial court found at the conclusion at the postconviction hearing, the transcript of the plea colloquy establishes that petitioner understood what it meant to enter an Alford plea and knew that the court would find him guilty on the basis of that plea. Petitioner's vague and unsupported allegation to the contrary based on a single remark he made before entering his plea is insufficient to show that he had any chance of success on appeal on his claim that Nesson misled him about the nature of an Alford plea. It follows that petitioner

has failed to overcome the strong presumption that Edwards exercised reasonable professional judgment in declining to pursue that claim at the postconviction hearing.

Moreover, although Edwards did not ask Nesson whether he had told petitioner that an Alford plea meant that petitioner could prove his innocence later, Nesson testified in response to a different question that he had informed petitioner that it would be very difficult for petitioner to withdraw his plea once he had entered it. This testimony contradicts petitioner's assertion that Nesson informed him that his plea was only temporary. In ruling on petitioner's postconviction motion regarding Nesson's alleged ineffectiveness, the trial court accepted Nesson's testimony, implicitly finding him credible. Thus, even if Edwards erred in failing to pursue the claim that Nesson had misinformed petitioner about the nature of an Alford plea, petitioner cannot show that the outcome of the proceeding would probably have been different. Faced with deciding whether to believe Nesson's testimony that he had cautioned petitioner that he was not likely to be able to withdraw his plea or petitioner's claim, based on a single, inherently suspect remark made at the plea hearing, that Nesson told him that an Alford plea was only temporary, it is not reasonably probable that the court would have chosen to believe petitioner.

Because petitioner cannot establish that Edwards provided ineffective assistance regarding the Alford issue, it follows that petitioner cannot show cause for his failure to present this issue to the state courts at the postconviction hearing or on direct appeal.

b. Denial of right to self-representation

Petitioner also contends that Edwards was ineffective for failing to argue on appeal that the trial court had erred when it determined that petitioner lacked the competence to represent himself at trial. The claim that the trial court erred in denying petitioner's request to proceed *pro se* was an appealable issue even without the filing of a postconviction motion. Petitioner can overcome the presumption that Edwards's performance on appeal was effective only if petitioner shows that this claim was "clearly stronger" than the issue Edwards raised on appeal. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). The ultimate question is whether, but for counsel's errors, there is a reasonable probability that the outcome of petitioner's appeal would have been different. Mason, 97 F. 3d at 893.

Petitioner cannot make this showing. Even if it is true, as petitioner contends, that valid objections could have been raised on appeal to the trial court's denial of petitioner's request to proceed *pro se*, petitioner waived his right to raise those objections when he entered his Alford plea. "[A] guilty plea, voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea." Mack v. State, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). This is true of all pleas that result in conviction, even those denominated as an "Alford" plea. State v. Kazee, 192 Wis.2d 213, 219, 531 N.W.2d 332 (Ct. App.1995) (citation omitted). This guilty-plea-waiver rule applies to a defendant's claim that the trial court erred in determining that the defendant was not competent to represent himself.

Gomez v. Berge, 434 F.3d 940, 942 (7th Cir. 2006) (with entry of knowing and voluntary plea, defendant waives right to contest alleged constitutional violations that occurred before plea, including alleged denial of right to self-representation); State v. Jens, WI App 38, ¶ 18, 279 Wis. 2d 517,693 N.W. 2d 146 (Ct. App. Jan. 25, 2005) (unpublished opinion). Petitioner was not prejudiced by Edwards's failure to raise a claim that petitioner had waived by virtue of his plea.

Of course, petitioner insists that his plea was not voluntary because he had "no choice" but to enter it because he was going to lose with Nesson. However, the mere fact that petitioner might not have been happy with the choice of either proceeding to trial with Nesson or entering a plea did not mean that his plea was coerced or otherwise not a product of free will, as it must have been in order to qualify as "involuntary." The trial court flatly rejected petitioner's claim that his plea was not entered voluntarily, finding petitioner's allegation to the contrary to be incredible. This conclusion was virtually unassailable on appeal. State v. Trochinski, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W. 2d 891 (court of appeals accepts trial court's findings of historical and evidentiary facts unless they are clearly erroneous). For these reasons, I cannot say that Edwards failed to exercise reasonable professional judgment in choosing to forgo this claim and focus on the ineffective assistance of counsel issue.

B. Fundamental Miscarriage of Justice Exception

Having failed to establish ineffective appellate representation as cause for his procedural default, petitioner has only one remaining avenue for obtaining federal review of his claims, which is to demonstrate that a fundamental miscarriage of justice will result if the court does not consider the merits of the defaulted claims. The miscarriage-of-justice exception makes allowance for "extraordinary" cases in which "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)). This standard for obtaining federal review of a constitutional claim despite a state procedural default "is demanding and permits review only in the 'extraordinary' case." Id. at 2077 (quoting Schlup, 513 U.S. at 327)). 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.

The state's proffer concerning the evidence it would have presented at trial is set forth at pages 38-48 of the transcript from the plea hearing. Tr. of Plea and Sentencing, Feb. 6, 2002, attached to dkt. #48, exh. L. In large part, that proffer restated the allegations contained in the criminal complaint, which is in the record at dkt. #31. The complaint alleged that petitioner had, at various locations in Madison between December 12 and December 16, 2000, cashed eight checks written on a Housing Limited account with knowledge that the checks were forged. (Apparently, the state amended the complaint or filed an information adding more counts.) The checks were purported to have been made out by Roy Schenck, the authorized signer of the account. Schenck denied writing the checks or authorizing anyone else to do so.

At the plea hearing and in numerous submissions to this court, petitioner admits that he cashed the checks. His claim of innocence rests upon his contention that he did not know that the checks were forged and that he had been duped into passing the checks unknowingly by Frank Ratcliffe, an employee of Schenck. Indeed, according to the criminal complaint, on December 18, 2000, petitioner came to the police department and told this same story to Officer Radovan. However, the prosecutor explained that the state had evidence showing that petitioner's story was concocted. First, when petitioner was interviewed about a month later by Detective Aguilu, petitioner's story changed in two significant respects regarding the circumstances surrounding the cashing of the first check written on Schenck's account. Second, although petitioner told Officer Radovan that he had

participated in cashing only three checks, eight checks had been cashed showing petitioner as the endorser. Third, although petitioner told Officer Radovan that he had become suspicious that Ratcliffe was forging checks on Schenck's account on Saturday, December 16 and that he had refused to cash any more checks from that account after that, the evidence showed that petitioner cashed a check on that date at 6 p.m. Fourth, a witness named Cindy Geoffrey, who went by the nickname "Sky," told police that she knew petitioner and that she, petitioner and Ratcliffe had been cashing checks on Schenck's account, knowing they were forged. She said she got rides from petitioner many times and had been with him several times when they went to Kohl's to cash checks. Geoffrey also told police that when she asked petitioner why he was using his own name on the forged checks, petitioner stated that it didn't matter because petitioner would just go to the police and tell them that he didn't know the checks were forged. Geoffrey said she heard petitioner say things like "Watch, I'm gonna get out of this." Fifth, petitioner admitted knowing a person named "Sky" and told police that he had taken her to the bank on December 12, 2000 to cash a check, although he denied knowing what check she was cashing.

In support of his claim of actual innocence, petitioner contends that he has evidence to show that he did not meet Geoffrey until December 12 or 13, 2000 and therefore Geoffrey lied when she said that she had met petitioner in November of that year. Dkt. #25, at 38-40. However, I have not discovered any allegation by the state or statement by Geoffrey indicating that petitioner met Geoffrey before December 12, 2000 or that he was

involved in cashing checks with her before that date. Petitioner also contends that he has evidence to show that he reasonably believed that Schenck had authorized Ratcliffe to write out checks on the Housing Limited account. Although petitioner has described that evidence only generally, I accept his contention that it would support his claim that he had reason to believe that Ratcliffe had authority to make out checks bearing Schenck's signature. However, I am not convinced that no reasonable juror hearing this evidence would find petitioner guilty beyond a reasonable doubt. The state's evidence outlined above would have been extremely damaging to any defense presented by petitioner to the effect that he did not know the checks were forged. In light of the strong evidence presented by the state establishing petitioner's knowledge, petitioner's weak showing of innocence falls far short of demonstrating that his is the extraordinary case warranting consideration of defaulted claims through the actual innocence gateway.

Having found that petitioner cannot satisfy either the cause-and-prejudice or fundamental-miscarriage-of-justice exception, petitioner's first and second claims must be dismissed on grounds of procedural default.

ORDER

IT IS ORDERED that the petition of Larry Spencer for a writ of habeas corpus with respect to his forgery conviction in the Circuit Court for Dane County is DENIED.

All additional pending motions are DENIED.

The clerk of court is directed to enter judgment in favor of respondent and close this case.

Entered this 14th day of March, 2007.

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