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

LARRY SPENCER,

Petitioner, ORDER

v. 05-C-0666-C

CATHY FARREY, Warden,
New Lisbon Correctional Institution,

Respondent.

In response to this court's order entered November 30, 2006, petitioner Larry Spencer has filed a set of motions in which he asserts that he does not understand how to respond to the issues identified in that order and that he will need more time or the assistance of a lawyer in order to properly respond to it. In addition, petitioner states that he disagrees with this court's determination that the state does not need to submit copies of certain documents filed by petitioner in state court. As he has several times before in these proceedings, he asks the court to order the state to copy "all records, document and letters."

Petitioner's renewed request for the appointment of counsel is denied for the same reasons this court denied his last request. Order, October 25, 2006, dkt. #45. Nothing in this case has changed significantly since I issued that order. Moreover, the following explanation should help petitioner to prepare his response.

As an initial matter, this court has already determined that it may not review any of petitioner's claims relating to his drug conviction. Petitioner procedurally defaulted those claims by failing to present them to the state supreme court. The court is concerned now only with state court proceedings on the forgery case.

The state has taken the position that this court may review only one of petitioner's claims. That one is petitioner's claim that his trial attorney, Paul Nesson, was ineffective because he did not ask for a competency evaluation of petitioner before allowing him to enter an Alford plea. The state's contention is based on the exhaustion doctrine. Under that doctrine, a petitioner must raise in state court every constitutional issue he has. If he does not do so, no federal court can reverse his conviction even if the petitioner is right about the constitutional violation. In this case, petitioner presented a postconviction motion to the state trial court. It appears that petitioner raised all the claims this court identified in the second superseding order to show cause. Those claims are: 1) petitioner's Alford plea was not entered knowingly and voluntarily; 2) the trial court violated petitioner's right to self-representation; and 3) Nesson was ineffective for failing to seek a competency evaluation. However, when petitioner filed his direct appeal to the state court of appeals, the only issue he raised was the third one. Unless petitioner raised *all* of his issues on direct appeal, he did not exhaust those issues.

This court cannot consider the claims that petitioner did not present on direct appeal unless petitioner can show one of two things. First, he could show that his failure to raise

the other issues on direct appeal (1) was caused by a circumstance beyond his control and (2) that he was harmed by the alleged violation of federal law. Second, he could show that a "fundamental miscarriage of justice" will result if this court does not consider the claims he did not raise on direct appeal. (If petitioner wants an explanation of the cause-and-prejudice and fundamental-miscarriage-of-justice exceptions to the procedural default rule, he should read this court's order of September 19, 2006, dkt. #35, at 13-15.) *If* petitioner is able to show that he satisfies either the cause-and-prejudice or fundamental-miscarriage-of-justice exceptions to the procedural default rule, then this court will order further briefing on the merits of the claims that petitioner did not present to the state courts on direct appeal.

As I explained in the November 30, 2006 order, the most likely way for petitioner to obtain federal review is to show that his appellate lawyer, Timothy Edwards, was ineffective in representing petitioner. To do this, petitioner must show that Edwards failed to raise a significant and obvious issue on appeal that was clearly stronger than the issues that he did raise.

Petitioner asks whether he may simply argue to this court why Edwards was ineffective or whether he must also show that he presented this same argument to the state courts. The answer is: it depends. In general, because a claim of ineffective assistance of appellate counsel is *itself* a constitutional claim, a petitioner must first exhaust it in state court. However, a state may agree that the federal court can decide the merits of a

constitutional claim even if the petitioner has not exhausted his state court remedies for that claim.

In this case, we do not know the state's position on petitioner's claim of ineffective assistance of counsel against Edwards. That claim had been dismissed until I issued the November 30, 2006 order reinstating it.

It is clear from petitioner's latest motions that he has questions about what documents he must provide in order to show that he exhausted his claim of ineffective assistance of counsel against Edwards. In the hopes of making things easier for petitioner, I will direct the state to respond to the ineffective assistance of appellate counsel claim before petitioner must respond. The state may agree that petitioner has exhausted his claim in state court or it may agree that this court can consider the claim even if petitioner did not exhaust it. If it agrees to either thing, then petitioner will not have to submit documents to the court showing that he presented the claim to the state court. If the state contends that petitioner did *not* exhaust his claim, however, then it will become necessary for petitioner to submit documents to show that the state is incorrect.

If we reach that point, petitioner should keep in mind that only documents that he filed *in state court* will be relevant to show that he fairly presented his claim against Edwards to the state court. For example, petitioner asserts that he filed a Knight petition in his forgery case on June 13, 2004. So long as petitioner followed the state's rules of procedure when he filed that petition, that petition could show that he presented his appellate counsel

issue to the state courts. However, documents that the state court refused to accept because petitioner did not file them properly will not count. In addition, letters that petitioner sent to his lawyer or to the Office of Lawyer Regulation do not count. If he keeps all this in mind, petitioner should have far fewer documents to copy than he predicts.

Finally, I address petitioner's claim that Nesson was ineffective for failing to seek a competency evaluation of petitioner before petitioner entered his Alford plea. The state has agreed that petitioner exhausted this claim by presenting it to the state appellate courts on direct appeal. That means that this court may consider the merits of that claim. However, the law that applies to habeas petitions filed by state prisoners limits this court's ability to grant habeas relief to petitioner on that claim. That law is 28 U.S.C. § 2254(d). According to that law, it is not enough for petitioner to convince the federal court that the state appellate court was wrong. Rather, he must show that the state court of appeals decided his claim in an "unreasonable" way. 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). Petitioner should keep this standard in mind when he addresses this claim in his response.

ORDER

IT IS ORDERED that:

1. The briefing schedule set forth in the order of November 30, 2006 is VACATED. The new schedule is as follows:

Respondent has until December 28, 2006 in which to respond to petitioner's claim of ineffective assistance of appellate counsel against Timothy Edwards. If respondent contends that petitioner did not properly exhaust this claim and it does not intend to waive the exhaustion requirement, respondent should indicate whether it located the Knight petition that petitioner says he filed on June 13, 2004.

Petitioner shall have until January 18, 2007 in which to file a reply. In addition to addressing any response that the state files on or before December 28, petitioner should also respond to the state's answer to the petition dated November 9, 2006.

2. Petitioner's motions for reconsideration of the order of November 30, 2006 (dkt. #s 56, 57 and 59) and for the appointment of counsel (dkt. #58) are DENIED.

3. Petitioner's motion for an extension of time in which to response to the court's order of November 30, 2006 (dkt. #55) is DENIED as unnecessary.

Entered this 8th day of December, 2006.

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