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

LOREN ALLIET,

Petitioner, OPINION AND ORDER

v. 06-C-0261-C

PAMELA WALLACE, Warden,
Stanley Correctional Institution,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Loren Alliet, an inmate at the Stanley Correctional Institution, contends that his 2001 conviction in the Circuit Court for Washington County for armed robbery is 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 defense strategy 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).

Before the court is respondent's motion to dismiss the petition on the ground that petitioner has procedurally defaulted his Faretta/Wiggins claim by failing to fairly present it to the state courts. Because I agree that petitioner failed to give the state courts a full and fair opportunity to decide his claim and because petitioner does not satisfy either exception to the procedural default rule, I will grant respondent's motion. In the alternative, I conclude that even if petitioner had presented his claim, it would fail on the merits.

The following facts are drawn from the records of the state court proceedings that have been submitted by the parties.

FACTS

At approximately 10 or 10:30 p.m. on April 4, 2001, a man wearing a nylon stocking over his face and carrying a gun entered a Perkins restaurant in West Bend, Wisconsin. Working at the restaurant at the time were waitresses Charity Millard and Tiffany Gaedke and manager Ryan Cook. The robber pointed a gun at Cook and said, "C'mon, you got to help me play this joke on Tiffany." The robber put the gun in Cook's back and ordered him to open the safe, which Cook did. The robber also told Cook that even though he wanted "Tiffany" and Cook to think it was a fake gun, it was a real gun. After he got the money from Cook, the robber fled the restaurant. The amount stolen was $696.

Tiffany Gaedke was petitioner's roommate. On the night of the robbery, she was wearing a name tag with someone else's name on it. In a statement she gave to police on

April 6, 2001, Gaedke stated that petitioner was out of work and told her that he needed money and was going to rob the safe at Perkins. She stated that at approximately 10:15 p.m. on April 4, 2001, she observed petitioner standing by the counter at Perkins. She indicated that petitioner had a nylon stocking over his face, but that she could see through it. She stated that he had a backpack with him. She stated that when she got home, she saw the same backpack sitting on the floor of her living room, next to her BB gun. In her statement, Gaedke also indicated that she found $100 for rent money on top of her entertainment center, along with a note that said: "Here is rent. I don't trust the numbers on the bills." She stated that petitioner told her the next day that he did not get a lot, only $100 or $200.

The police searched the apartment shared by petitioner, Gaedke and a third person, Katie Conley. Police recovered a note from the entertainment center, a backpack and a BB gun. The note said: "I don't trust the numbers, like to launder it. Loren."

Cameron Kaplan, another of petitioner's friends, gave a statement to police on April 6, 2001. Kaplan indicated that in the months before the robbery, petitioner told him that he wanted money to leave the state and could rob a bank or a Pick 'N Save or Perkins. Kaplan also indicated that petitioner asked him and Conley to pick petitioner up at a location near the Perkins restaurant at about 10:30 p.m. on April 4, 2001. Kaplan's statement indicated that after they picked petitioner up, he was counting money in the back seat, and stated that he got about $650 and thought he "could have got more." Conley gave

a statement that was consistent with Kaplan's, indicating that petitioner was counting money in the back seat, and that he told her that he had held up the manager at Perkins.

The state filed a criminal complaint in the Circuit Court for Washington County charging petitioner with committing the armed and masked robbery of the Perkins restaurant. Frederick Van Hecke was appointed to represent petitioner. The case was tried to a jury on August 27 and 28, 2001. Before opening statements, petitioner requested permission to fire Van Hecke and proceed *pro se* with the rest of the trial. After an extended colloquy with petitioner, the court allowed petitioner to represent himself and ordered Van Hecke to serve as standby counsel. The court explained to petitioner that petitioner would be responsible for asking the appropriate questions and making the appropriate objections and that standby counsel would be available for consultation only.

Before opening statements, the court addressed several preliminary matters, including the sequestration of witnesses. After ordering the witnesses to be sequestered, the court instructed petitioner to look around the courtroom to see whether anyone was present whom petitioner expected to call as a witness. Petitioner asked a person sitting in the courtroom whether she was Charity Millard; the person replied that she was Millard's mother.

The first witnesses called by the state were Millard and Cook, the employees who were working at the Perkins when it was robbed. Both Millard and Cook identified petitioner as the masked man who had robbed the restaurant. Petitioner cross-examined Millard and Cook about their identifications and their recollections of the robber's clothing,

features and actions. After Millard testified and again after Cook testified, the court told the witness that he or she was released from the subpoena and was "free to go." Petitioner did not object or indicate that he intended to recall either witness during the defense case.

Before testimony began on the second day of trial, Van Hecke informed the court that he had been trying to act as petitioner's "victim witness coordinator" to ensure that defense witnesses appeared in court when it was time for the defense to proceed and that he had witnesses lined up for the afternoon. That afternoon, after the state rested, petitioner called three witnesses: Julie Wade, Frank Alliet, Sr., and Joshua Kahlhamer. Petitioner did not advise the court that he had more witnesses that he wished to call.

The jury returned a guilty verdict. Later, the court sentenced petitioner to a term of eight years' initial confinement followed by a term of 11 years' extended supervision.

Petitioner filed a motion for postconviction relief. Among the grounds raised was that Van Hecke was ineffective in his position as standby counsel because he had failed to advise petitioner how to keep Millard and Cook available for further questioning during the defense case. In support of his motion, petitioner submitted an affidavit in which he averred that after the state rested, petitioner asked Van Hecke to call Cook and then Millard to the stand as the defense's first witnesses, respectively, at which time Van Hecke informed petitioner that neither Cook nor Millard had been subpoenaed as a defense witness and that petitioner had not properly preserved them as witnesses after they testified for the state. Petitioner also submitted an affidavit from Van Hecke in which Van Hecke averred that he had read

petitioner's affidavit and that he had no basis to disagree with it. Mem. attached to Petition, dkt. #1, exh. 1, attachments 4 and 5.

The trial court rejected petitioner's claim without a hearing, finding that Van Hecke had been appointed as standby counsel only to assist the trial court and that by deciding to proceed *pro se*, petitioner bore responsibility for seeing that his witnesses were under subpoena. Dec. on Mot. for Postconviction Relief, June 10, 2003, dkt. #1, exh. 2, at 13. The court also determined that even if a claim of ineffective assistance could be raised against standby counsel, Van Hecke had not performed deficiently or in a manner that prejudiced petitioner, noting that petitioner had cross-examined Millard and Cook on the identification issue. Id. With respect to petitioner's related claim that a new trial was warranted in the interests of justice because the controversy had not been fully tried, the court noted that during trial petitioner had not asked the court to continue the subpoenas of Cook or Millard and he had not asked for an adjournment for the purpose of subpoenaing the witnesses to appear in defendant's case in chief. Id., at 9-10.

Petitioner appealed, reiterating his allegations regarding Van Hecke's failure to advise him properly concerning Cook and Millard. In addition, he asserted that Van Hecke was ineffective for failing to advise petitioner to ask the court for a continuance so he could try to subpoena Cook and Millard and for telling petitioner that there was nothing petitioner could do about the situation. Appellant's Br., attached to Mot. to Dismiss, dkt. #9, exh. A, at 40. Petitioner characterized his claim as a claim of "ineffective assistance of counsel,"

citing Van Heck's alleged failure to inform petitioner that he had not subpoenaed Cook and Millard as one of many errors that Van Hecke allegedly committed while serving both as petitioner's counsel and standby counsel. Id., at 31. Petitioner did not cite any cases, but asserted that the legal standard the court should apply was that which was "used in effectiveness of counsel claims." Id., at 40. Petitioner argued that Van Hecke did not "act in a manner that an ordinarily prudent attorney would have." Id. According to petitioner, Van Hecke's failure to advise petitioner how to preserve Cook and Millard's testimony "caused major issues to go completely unaddressed and devastated [the] defense strategy" because petitioner intended to question the witnesses during his case in chief about their having identified him as the perpetrator when they saw him in the hallway before trial and about physical evidence introduced by the state after Cook and Millard had testified in the state's case.

In its response brief, the state argued that having opted to proceed *pro se*, petitioner had essentially waived his right to raise a claim of ineffective assistance of counsel based upon alleged errors committed at trial. Br. of Plaintiff-Respondent, dkt. #9, exh. B, at 21. In addition, the state pointed out that petitioner's failure to mention at any point during the trial that he wanted to recall Cook and Millard failed to support his claim that he intended to call them as defense witnesses. Id., at 22. Finally, the state argued that because petitioner had had a full opportunity to question both Millard and Cook on the details of their identifications, the circumstances of the hallway confrontation and inconsistencies between

their testimony and previous statements, he had not shown that he had suffered any prejudice as a result of his inability to recall the witnesses. Id., at 22-23.

In his reply, petitioner disputed the state's allegations that he had not been prejudiced and asserted that he had a reasonable expectation of effective assistance from Van Hecke insofar as he had assumed the role as petitioner's "witness coordinator." Reply Br. of Defendant-Appellant, dkt. #9, exh. C, at 7, 11.

On March 2, 2005, the court of appeals issued a decision rejecting petitioner's claims and affirming his conviction. State v. Alliet, 2005 WI App 88 (Ct. App. 2005) (unpublished opinion), attached to dkt. #9, exh. D. The court analyzed petitioner's allegations regarding Van Hecke's actions as "witness coordinator" as a claim of ineffective assistance of standby counsel. The court rejected the claim, noting that petitioner had no right to hybrid representation and that, "when [he] waived his right to counsel in favor of proceeding pro se, he also waived his right to allege that he was denied his right to effective assistance of counsel at trial." Id. at ¶ 13. Therefore, the court declined to address the merits of petitioner's claim that Van Hecke's assistance while serving as standby counsel was ineffective. Id.

Petitioner filed a petition for review in the Wisconsin Supreme Court. He raised a single claim: that Van Hecke's conduct while serving as standby counsel had substantially prejudiced petitioner's ability to present his defense. In his petition, petitioner cited for the first time to the Supreme Court's decision in McKaskle v. Wiggins, 465 U.S. 168, arguing

that Van Hecke's failure to advise him how to preserve Cook and Millard for further questioning effectively inhibited petitioner's right to self-representation and that reversal was required without considering whether the outcome at trial might have been different. Petitioner maintained that, contrary to the finding of the lower courts, he had never sought to raise a claim of ineffective assistance of standby counsel. Pet. for Review and Appendix, dkt. #9, exh. E, at 5-9.

The state supreme court denied the petition for review. Petitioner then filed a motion for postconviction relief pursuant to Wis. Stat. § 974.06, Wisconsin's collateral attack statute. 974.06 Mot. for Postconviction Relief, dkt. #12, at 8-27. Petitioner argued that the court had misconstrued the standby counsel issue raised in his initial postconviction motion. He asserted that his claim was not that Van Hecke had provided ineffective assistance of counsel, but rather that the actions of Van Hecke with regard to the witnesses "inhibited [petitioner's] ability to present his defense" and violated petitioner's Sixth Amendment right to self-representation. Petitioner acknowledged that he had not clearly articulated his claim in his initial postconviction motion. Id., at 16.

The trial court denied the motion. In the trial court's view, the only context in which the issue of the alleged "misinformation" provided to petitioner by Van Hecke could be raised was in the context of a claim of ineffective assistance of counsel, and that claim had already been considered and rejected by both the trial court and court of appeals. Dec. and

Order, Aug. 22, 2005, dkt. #12, exh. 2, at 2. Apparently, petitioner did not appeal the denial of his § 974.06 motion.

On May 12, 2006, petitioner filed his federal habeas petition, asserting that his right to self-representation was violated by Van Hecke's conduct at trial. In the memorandum in support of the petition, petitioner reiterated his contention that Van Hecke had failed to properly advise petitioner about the procedure for procuring witness testimony. Also, petitioner alleged that when petitioner learned that Cook and Millard had not been subpoenaed to testify in the defense case, Van Hecke "physically block[ed]" petitioner from standing to inform the court about the problem and told petitioner that he could not bring the matter up to the court.

In an order to show cause entered July 17, 2006, I concluded that Van Hecke's alleged failure to advise petitioner how to ensure the appearance of Cook and Millard during the defense case did not give rise to any constitutional violation, agreeing with the state courts that, having opted to proceed *pro se*, petitioner could not claim that he had been denied his constitutional right to the effective assistance of counsel. I also concluded that Van Hecke's alleged failure to advise petitioner how to go about ensuring the appearance of his witnesses was not the sort of interference with the right to self-representation that the Supreme Court censured in Wiggins. However, I concluded that petitioner's allegation that Van Hecke had actively prevented petitioner from bringing his witness problems to the trial court's attention feasibly stated either a Faretta violation or a claim that petitioner had been

denied his right to present a defense, as guaranteed by Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Now respondent has moved to dismiss the petition on grounds of procedural default. He contends that this court cannot consider the merits of petitioner's claim that Van Hecke actively prevented petitioner from bringing his witness problems to the trial court's attention because petitioner did not present that issue to the state courts through one complete round of state court review.

OPINION

I. OVERVIEW

Before addressing respondent's motion, it is helpful to review the case law governing petitioner's claim. In Faretta v. California, 422 U.S. 806, 812-832 (1975), the Supreme Court held that the right to self-representation, though not stated explicitly, is "necessarily implied" by the structure and historical context of the Sixth Amendment. In recognizing the right, the Court took care to point out that a defendant exercising his right to self-representation would be expected to comply with relevant rules of procedural and substantive law and could not "thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Id., at n.46. The Court also noted that trial courts were free to appoint a "standby counsel" to assist the defendant if and when

he asked for help or to be available to take over the case in the event it became necessary to terminate the defendant's self-representation. Id.

In Wiggins, 465 U.S. 168, the defendant contended that his standby lawyer's active participation in his case had interfered with his right to self-representation. Outside the jury, standby counsel made motions, dictated proposed strategies into the record, registered objections to the prosecution's testimony, urged the summoning of additional witnesses and suggested questions that defendant should have asked of witnesses. Before the jury, counsel raised objections, interrupted Wiggins or witnesses being questioned by Wiggins and moved for a mistrial three times.

In its opinion, the Court first elaborated upon the scope of the right to self-representation. The Court explained that a *pro se* defendant "must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." Id. at 174. The primary question in deciding whether a defendant's Faretta rights have been respected, said the Court, was "whether the defendant had a fair chance to present his case in his own way." Id., at 177. The Court also made clear that because the right to self-representation is "a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant," denial of that right is not amenable to harmless error analysis. Id., 177-78 n. 8.

Recognizing that unsolicited participation by standby counsel had the potential to defeat a defendant's Faretta rights, the Court set out to outline the extent to which a lawyer appointed as "standby" counsel could participate in the case. The Court held that the Faretta right would be eroded if standby counsel made or substantially interfered with significant tactical decisions, controlled the questioning of witnesses or spoke instead of the defendant on any matter of importance. Id., at 178. In addition, "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." Id. Where a defendant invites or acquiesces in participation by standby counsel, however, he cannot thereafter complain that counsel interfered unacceptably, id., at 182, but the Court made clear that a judge need not permit "hybrid" representation. Id., at 183. Applying these guidelines, the Court found that standby counsel's unsolicited involvement in Wiggins's case was within reasonable limits. Id., at 180-188.

II. FAIR PRESENTMENT

Before seeking a writ of habeas corpus in federal court, a petitioner must first exhaust the remedies available to him in state court. 28 U.S.C. § 2254(b)(1)(A); Picard v. Connor, 404 U.S. 270, 275 (1971). The "fair presentment" corollary to the federal exhaustion doctrine requires a petitioner to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts.

O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). For the state courts to have a "full and fair" opportunity to resolve a federal claim, the petitioner must "fairly present" it at all levels of state court review, which means that he must "place[] both the operative facts and the controlling legal principles before the state courts." Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001). To determine whether a petitioner has accomplished this, courts in the Seventh Circuit consider whether petitioner's argument to the state court: 1) relied on pertinent federal cases employing constitutional analysis; 2) relied on state cases applying constitutional analysis to a similar factual situation; 3) asserted the claim in terms so particular as to call to mind a specific constitutional right; or 4) alleged a pattern of facts that is well within the mainstream of constitutional litigation. Verdin v. O'Leary, 972 F.2d 1467, 1473-74 (7th Cir. 1992). This is not a rigid formulation but an approach designed to determine whether the petitioner identified the substance of the federal claim clearly enough for the state court to have adjudicated it. Id. at 1474.

I agree with respondent that petitioner did not clearly present his Faretta claim to the state courts on direct appeal. Petitioner never cited Faretta or Wiggins or even invoked the right to self-representation. Instead, petitioner framed his argument in terms of "ineffective assistance of counsel," alleging that Van Hecke, having assumed the responsibility as petitioner's "witness coordinator," had the duty to perform that role as a reasonably prudent attorney would have. Although petitioner did not invoke explicitly the performance-prejudice test for evaluating claims of ineffective assistance of counsel laid out in Strickland

v. Washington, 466 U.S. 668 (1984), he made arguments in support of both parts of the test, explaining why Van Hecke's actions had been deficient and why those actions had affected the outcome of the trial. The manner in which petitioner asserted his claim clearly called to mind the Sixth Amendment right to the effective assistance of counsel, not the Sixth Amendment right to self-representation. In fact, petitioner did not object to the state's characterization of his claim as a claim of ineffective assistance of counsel or to its argument that petitioner could not succeed on his claim unless he showed prejudice.

To be sure, petitioner made arguments in his appellate brief that, in hindsight, allude to the right of self-representation. For example, petitioner argued that his "entire defense strategy" was centered on Cook and Millard and that Van Hecke's failure to inform him that the witnesses had not been subpoenaed by the defense "devastated" that strategy. However, absent a specific claim by petitioner that such conduct had eroded his right to self-representation, the state judges could not, as a practical matter, have been alerted that petitioner was seeking relief on that ground. Notably, unlike Wiggins, in which the defendant had alleged that his standby counsel's involvement in his case was excessive, petitioner alleged that his standby counsel had done too little. Petitioner did not allege that his standby lawyer had engaged in unsolicited conduct that deprived petitioner of actual control over his case or accuse his lawyer of the sort of interference typically alleged in most Faretta/Wiggins claims. Moreover, although arguably there is some factual overlap in the "ineffective assistance of standby counsel" claim asserted by petitioner and the Faretta claim

he now presses, from a legal standpoint the claims differ significantly in that a Faretta violation cannot be harmless. "A difference in legal theory between that urged in state courts and in a petition for a writ of habeas corpus precludes exhaustion." Wilks v. Israel, 627 F.2d 32, 38 (7th Cir. 1980). By choosing to proceed on a theory of ineffective assistance of counsel, petitioner deprived the state court of appeals of a full and fair opportunity to adjudicate his Faretta claim.

Petitioner points to the trial court's decision on his § 974.06 motion, in which he presented his claim in Faretta terms, as proof that he fairly presented the claim to the state courts on direct appeal. According to petitioner, the trial court's determination that the issue that petitioner was raising in his § 974.06 motion was "exactly the issue previously addressed" on direct appeal establishes that the state courts were presented with and had a fair opportunity to decide the Faretta issue.

Petitioner's argument is unpersuasive. A review of the trial court's decision on the § 974.06 motion indicates that the court understood the issue petitioner was raising as "relat[ing] generally to the Defendant's constitutional right to a fair trial" and it is *that* issue that the court found had been decided previously. Dec. and Order, Aug. 22, 2005, at 2, attached to Pet.'s Traverse, dkt. #12. It is plain from the court's order that it never found that petitioner had previously raised a claim that he had been denied his Sixth Amendment right to self-representation; in fact, the court did not recognize that that was the issue petitioner was trying to raise in his § 974.06 motion. Thus, even assuming that some

deference was owed to state court findings concerning prior litigation, in this instance the state trial court never found that petitioner had previously raised a Faretta/Wiggins claim.

Petitioner never asked the trial court for reconsideration and he did not appeal the denial of his § 974.06 motion. Thus, he never presented his Faretta claim through one complete round of state court review. This means that petitioner has procedurally defaulted his claim unless state remedies still are available through which he could present his claim to the state courts. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). In State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W. 2d 167 (1994), the Wisconsin Supreme Court held that a defendant is precluded from raising in a postconviction motion brought under Wis. Stat. § 974.06 constitutional issues that could have been raised on direct appeal unless he has "sufficient reason" for failing to raise the issue. In his § 974.06 motion, petitioner acknowledged that his failure to present his Faretta claim on direct appeal was attributable to his lack of legal knowledge. 974.06 Motion for Post Conviction Relief, attached to Traverse, dkt. #12, at 16 ("At the time of filing his [postconviction motion], Alliet was unaware of any case law that supported his argument and didn't know what else to label his issue."). However, the Wisconsin courts have held that a defendant's *pro se* status or lack of knowledge that a claim existed does not constitute "sufficient reason" to excuse a failure to raise a constitutional claim on direct appeal. State v. Henderson, 2006 WL 2596772, ¶ 9 (Ct. App. Sept. 12, 2006) (slip copy, publication pending); State v. Johnson, 2006 WL 2346399, ¶ 4 (Ct. App. Aug. 15, 2006) (unpublished opinion); State v. Williams,

256 Wis. 2d 695, 647 N.W. 2d 468 (Table) (Ct. App. May 14, 2002) (unpublished opinion). Thus, it is clear that the state courts would hold petitioner's claim to be procedurally defaulted, which in turn means that petitioner has procedurally defaulted his claim in this court. Perruquet, 390 F.3d at 514.

A federal court may not review a procedurally defaulted claim unless petitioner demonstrates cause for the default and prejudice resulting therefrom, or alternatively, he convinces the court that a miscarriage of justice would result if his claim were not entertained on the merits. Id. Petitioner has not disputed respondent's contention that he cannot establish "cause" for his failure to present his claim on direct appeal; instead, he focuses on the miscarriage of justice exception. To overcome a default under this exception, petitioner "must demonstrate that he is actually innocent of the crime for which he was convicted--that is, he must convince the court that no reasonable juror would have found him guilty but for the error(s) allegedly committed by the state court." Id.

Petitioner cannot meet this extraordinarily high burden. Petitioner argues that had he been able to recall Cook and Millard, he would have been able to question them about the jacket, backpack and BB gun that were seized from petitioner's residence, items that the state did not introduce until after Cook and Millard testified. Petitioner apparently is convinced that he would have elicited testimony from both indicating that the items did not match those they had seen in the robber's possession. However, Cook could only say that the backpack or bag carried by the robber was "dark" in color and he was never asked to

describe the gun; Millard testified that she was not sure whether the robber had a bag or a gun. As for the jacket, Millard and Cook gave conflicting descriptions: Millard said it was black and Cook said it was blue and gray plaid. Thus, the jury already heard conflicting testimony about the jacket's appearance. More important, even if Millard and Cook had confirmed that the jacket seized from petitioner's residence was not the one worn by the robber, that would hardly have tended to establish petitioner's innocence in light of the overwhelming evidence to the contrary, which included the testimony of petitioner's friends, Gaedke, Kaplan and Conley, and their prior statements to police, all of which implicated petitioner as the robber, as well as the incriminating note found in petitioner's apartment. The same is true for petitioner's claim that he would have been able to establish that Cook's and Millard's ability to identify him from the stand was tainted by their hallway encounter with him before trial: the evidence against petitioner was overwhelming even without Cook's and Millard's identifications. Petitioner does not qualify for the "actual innocence" exception to the procedural default rule. Accordingly, he is not entitled to federal review of his claim.

III. MERITS

Finally, I note that if petitioner had not defaulted his claim and had succeeded in showing that he was denied his right to self-representation, reversal would be required without regard to the effect that that denial had on the outcome: the Faretta right exists to

protect a defendant's right to present his defense his *own* way, whether that way is wise or not. However, I am confident that petitioner's Faretta claim has no merit. Petitioner has never presented any evidence to support his claim that Van Hecke knew he wanted to recall Cook and Millard in the defense case. Petitioner's entire claim rests on inferences that he insists Van Hecke should have drawn from comments petitioner made in the courtroom. With respect to Millard, petitioner argues that Van Hecke should have deduced that petitioner wanted to call Millard as a defense witness when petitioner referred to her as such in response to the court's inquiry about sequestration. With respect to Cook, petitioner argues that Van Hecke should have divined that petitioner wanted to recall Cook when he heard petitioner say after questioning Cook that he had no more questions of Cook "at this time."

These isolated remarks are far too shaky a foundation upon which to rest petitioner's claim that Van Hecke knew about petitioner's intent with respect to Cook and Millard. The fact that petitioner, a non-lawyer, referred to Millard as one of "his" witnesses to be sequestered does not establish that he wanted to call her in the defense case; Van Hecke could have thought that petitioner was simply identifying Millard as one of the witnesses whom he wanted to question. With respect to Cook, Alliet did not reserve use of the phrase "at this time" only for Cook; he also used the phrase after questioning witnesses Jared Spang and Cameron Kaplan. Dkt. #14, Vol. 1, at 186; Vol. II, at 89. Petitioner's strained attempt to impute knowledge to Van Hecke on the basis of stray remarks in the courtroom

undermines the veracity of his claim that Van Hecke knew petitioner intended to recall Cook and Millard.

Moreover, as the state courts noted, petitioner never informed the trial court of his desire to recall Cook and Millard even though he had the opportunity to do so. Before the defense rested, Van Hecke informed the court that he had conferred with petitioner and they had both agreed that it was not necessary to call one of the defense witnesses who was under subpoena because that witness's testimony would be cumulative. Neither at that point nor later when it came time to formally rest did petitioner inform the trial court that he wanted to recall Cook and Millard. Indeed, during a hearing outside the jury's presence earlier that day, petitioner acknowledged that he had not confronted Millard or Cook about the jacket because he had been "kind of unprepared" for the order in which the state presented its witnesses. Id., Vol. II, at 6. Petitioner's silence during the trial runs counter to his post-verdict claim that standby counsel "devastated" his defense strategy.

Absent clear evidence that Van Hecke knew that petitioner wanted to recall Cook and Millard, that he agreed to try to subpoena the witnesses or that he botched the job, petitioner has no Faretta claim. Even if Van Hecke "physically blocked" petitioner from standing up to tell the court about his witness problems, that single action was not a significant interference with petitioner's defense. In all other respects, petitioner presented his case as he saw fit. He gave an opening and closing statement, raised objections and argued motions, cross-examined all the witnesses and called and examined his own witnesses.

Petitioner has failed to adduce evidence giving rise to a colorable claim that he did not have a fair chance to present his case in his own way. Accordingly, even if I was to find that petitioner did not procedurally default his claim, I would deny it on the merits.

ORDER

IT IS ORDERED that respondent's motion to dismiss Loren Alliet's petition for a writ of habeas corpus is GRANTED. The clerk of court shall enter judgment dismissing the petition with prejudice.

Entered this 27th day of November, 2006.

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