

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION



GLENN DALE SPIVEY,

Applicant,

v.

CASE NO. 8:13-cv-767-T-23TBM

SECRETARY, Department of Corrections,

Respondent.

ORDER

An earlier order (Doc. 61) stayed and administratively closed this action under *Rodriguez v. Fla. Dep't of Corr.*, 748 F.3d 1073, 1075 (11th Cir.), *cert. denied*, 135 S. Ct. 1170 (2015), which holds that “any exhibits or documents that are referenced in the answer and filed with the Court are part of the answer [and] service of these exhibits, like the answer itself, is procedurally required.” The respondent served Spivey with the exhibits and filed an amended response. (Docs. 63 and 66) Spivey moves (Doc. 67) to strike the response apparently based on Spivey’s conclusion that the response is longer than permitted under the local rules. Spivey’s motion lacks merit because the district court granted leave to file the extended response. (Doc. 65)

Additionally, Spivey moves to compel correctional officials to provide him his “legal documents” that are stored in a “property room.” Spivey represents that he needs the papers to prepare his reply, which is presently due by December 13, 2017,

but which this order extends. Although security concerns restrict the quantity of papers allowed in a cell, the respondent must nevertheless address Spivey's representations.

Accordingly, Spivey's motion to strike (Doc. 67) is **DENIED**. Not later than **WEDNESDAY, DECEMBER 6, 2017**, the respondent must respond to Spivey's motion to compel. (Doc. 68) Spivey's deadline to reply in support of his application is extended to **MONDAY, JANUARY 8, 2018**.

ORDERED in Tampa, Florida, on November 28, 2017.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GLENN DALE SPIVEY,

Applicant,

v.

CASE NO. 8:13-cv-767-T-23TBM

SECRETARY, Department of Corrections,

Respondent.

ORDER

On April 7, 2014, *Rodriguez v. Fla. Dep't of Corr.*, 748 F.3d 1073, 1075 (11th Cir.), *cert. denied*, 135 S. Ct. 1170 (2015), issued, which holds that “any exhibits or documents that are referenced in the answer and filed with the Court are part of the answer, whether the filings are made together or at different times, [and] service of these exhibits, like the answer itself, is procedurally required.” *Accord. Moore v. Sec’y, Dep’t of Corrs.*, 657 Fed. App’x 826 (11th Cir. 2016) (holding that a petitioner is “procedurally entitled” to a copy of the exhibits). This action pre-dates *Rodriguez*. The certificate of service for the response specifically states that the applicant was not served with the exhibits. (Doc. 18 at 2)

On September 27, 2017, the Eleventh Circuit Court of Appeals issued a certificate of service under *Rodriguez* in a case in which the applicant was not served with the exhibits and the omission of the exhibits was never raised to the attention of

the district court. *Ball v. Sec'y, Dep't of Corr.*, 8:14-cv-336-T-35TGW (Doc. 26). Even though Spivey has not objected to not having received the exhibits, the respondent must serve Spivey with a copy of each exhibit as required by *Rodriguez*.

Accordingly, this action is **STAYED AND ADMINISTRATIVELY CLOSED**. The respondent has until **MONDAY, OCTOBER 30, 2017**, to serve Spivey with a copy of the appendix and to file an updated response. On or before **MONDAY, DECEMBER 13, 2017**, Spivey may file an amended reply.

ORDERED in Tampa, Florida, on September 29, 2017.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX: M

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GLEN D. SPIVEY,

Petitioner,

v.

CASE NO. 8:13-cv-767-T-23TBM

SECRETARY, Department of Corrections,

Respondent.

ORDER

Spivey moves (Doc. 44) under Rule 60(b), Federal Rules of Civil Procedure, for relief from the earlier order (Doc. 42) that denies him leave to file a paper that exceeds the page limit established in Local Rule 3.01. The proposed paper is an “amendment” or a “supplement.” The earlier order understood the proposed paper as an attempt to include a claim that Spivey was denied the effective assistance of counsel during the state post-conviction proceeding. Section 2254(i) precludes that claim because “[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”

In the Rule 60(b) motion Spivey clarifies that he is attempting to add neither a claim of ineffective assistance of trial counsel nor a claim of ineffective assistance post-conviction counsel. Instead Spivey seeks to supplement the argument in his

reply to overcome the state's asserted procedural default of ground two (xi) and (xii). Spivey explains that supplementing the reply is necessary to meet his burden under *Hittson v. Warden*, 759 F.3d 1210, 1266 (11th Cir. 2014), in which Hittson's attempt to add claims of ineffective assistance of trial counsel was rejected in part because "he has alleged no facts to overcome the presumption that [post-conviction counsel] exercised reasonable professional judgment in deciding which claims to raise and which claims to omit." Spivey represents (1) that, to overcome the procedural default, *Hittson* requires that he prove that both trial and post-conviction counsel were ineffective and (2) that the supplement attempts to meet this burden.

Accordingly, Spivey's motion under Rule 60(b) (Doc. 44) is **GRANTED**. The earlier order (Doc. 42) is **VACATED**. Spivey's motion (Doc. 41) for leave to file a paper that exceeds the page limit established in Local Rule 3.01 is **GRANTED**. The clerk must file the proposed amendment. (Doc. 40) On or before **MONDAY, FEBRUARY 23, 2015**, the respondent may respond to Spivey's supplement.

ORDERED in Tampa, Florida, on February 5, 2015.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GLEN D. SPIVEY,

Petitioner,

v.

CASE NO. 8:13-cv-767-T-23TBM

SECRETARY, Department of Corrections,

Respondent.

ORDER

Spivey's application under 28 U.S.C. § 2254 is nearly one hundred fifty pages and his reply is thirty-seven pages (plus two hundreds pages of exhibits). (Docs. 1 and 22) Spivey moves (Doc. 41) for leave to file a paper that exceeds the page limit established in the local rules. The proposed paper is an "amendment" or a

"supplement" to his application. Spivey seeks to include a claim that he was denied the effective assistance of counsel during the state post-conviction proceeding.

Section 2254(i) precludes this claim because "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

Accordingly, Spivey's motion (Doc. 41) for leave to file a paper that exceeds the page limit established in Local Rule 3.01 is **DENIED**. The proposed amendment (Doc. 40) is **STRICKEN**.

ORDERED in Tampa, Florida, on January 16, 2015.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE