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

KURT MEYER,

Petitioner,

v.

QUALA CHAMPAGNE, Warden, Racine Correctional Institution,

Respondent.

REPORT AND RECOMMENDATION

03-C-589-C

REPORT

Before the court for report and recommendation is Kurt Meyer's petition for a writ of habeas corpus under 28 U.S.C. § 2254. Meyer, who is confined at the Racine Correctional Institution, challenges his conviction in the Circuit Court for Sauk County for robbery, substantial battery, burglary and disorderly conduct, all as party to a crime. Petitioner contends that he is in custody in violation of the laws and Constitution of the United States for the following reasons: 1) his trial lawyer was ineffective for failing to ensure that the jury did not see petitioner in shackles during the trial and failing to ensure that jail officials allowed petitioner's family to deliver civilian clothing to petitioner to wear at trial; 2) the trial court denied his right to a fair trial by denying his motion for a continuance for the purpose of locating a witness; and 3) the trial court erroneously denied his motion for a new trial based upon newly-discovered evidence that establishes petitioner's

innocence. Because the state court of appeals' determination of these claims was neither contrary to nor an unreasonable application of clearly established federal law, I am recommending that this court deny Meyer's application for a writ of habeas corpus.

Facts

At approximately 3 a.m. on April 25, 1999, Nicholas Goetz was roused from his sleep by a knock on the back door of his apartment. Thinking it was his wife, who had been out with the Goetz's neighbor, Stacie Madsen, Goetz opened the door. To Goetz's surprise, the person outside his door was not his wife or Madsen; it was Madsen's boyfriend, Kurt Meyer, and another man named Albert Salinas. Salinas barged in, grabbed Goetz by the throat, threw him onto the bed and began asking questions about Madsen's whereabouts. When Goetz did not provide specific information, Salinas choked him again and threatened to kill him. After a short time, Salinas pulled Goetz off the bed and forced him to walk through Goetz's apartment and across the hall to Madsen's apartment. Meyer stood by and did not ask any questions, but eventually told Salinas to leave Goetz alone.

Alexander Salinas was in Madsen's apartment when Goetz, Albert Salinas and Meyer entered. About 30 seconds later, Meyer told Goetz to go back to his apartment and to leave the door unlocked. Goetz complied.

After about five or 10 minutes, Goetz heard voices and the sounds of a struggle coming from Terry Olson's apartment, which was directly above his apartment. One of the

voices was that of a male with a Hispanic accent. At the same time Goetz was hearing the scuffle upstairs, someone knocked on Goetz's door. When Goetz opened the door, Alexander Salinas was standing outside it. He told Goetz that Goetz had not seen or heard anything that night and that if Goetz talked to police, the group would come after him. Alexander Salinas told Goetz that he was leaving, and Goetz saw that Alexander had the outside door to the apartment complex, which was just outside Goetz's front door, pushed halfway open. Goetz closed his door and then heard the door to the complex close. Goetz went to his bedroom window, whence he saw Alexander running to a car that Goetz knew to be Meyer's. Around the same time, he heard the sound of someone running quickly down the stairs from the second floor, where Olson's apartment was located, and out the front door. Through his bedroom window, Goetz saw two individuals with cloth wrapped around the backs of their necks running to Meyer's car. Goetz testified that he thought the two were Albert Salinas and Meyer.

Olson was sleeping in bed when he was awakened by the sound of the door to his apartment being kicked or pushed in. Olson got up and encountered a man in the hallway, who eventually forced Olson back into his apartment where he began to threaten him and demand money. A short while later, a second man, who had a shirt pulled up around his face, entered the apartment and turned off the light. While the first man continued to threaten Olson, the second person went through Olson's belongings and took money from his wallet and then both men choked Olson until he lost consciousness. Olson was unable

to identify either of the assailants. He testified that the first man had spoken in an accented voice but the second man did not say anything. At one point, the first man had said something to the second man in Spanish.

The day before trial, Meyer asked for a continuance because he had been unable to locate a woman, Melissa Jackson, who lived across the hall from Olson and who was home on the night he was attacked. Jackson had told police that she had heard voices coming from Olson's apartment and that neither of the voices sounded like Meyer's. The trial court denied the motion on the ground that Meyer had been given ample opportunity to locate Jackson. Also, the court noted that the trial had already been rescheduled twice and that other cases had been taken off the calendar to accommodate it, and there was no information as to when Jackson would be located.

Meyer's counsel also requested the court to enter an order allowing Meyer to be dressed in civilian clothes during the trial. This exchange between the court and counsel followed:

> PROSECUTOR: I am not going to object. I will note a difficulty though. Mr. Meyer is going to be taken back and forth and back and forth. He will not be staying in our jail, so that may cause some difficulties where he can change, where he can switch over. I will ask that the Court order that Mr. Meyer remain in restraints, given his prior absconding from probation, as well as his escape that occurred in this case. Perhaps, however, arrangements can be made for the leg restraint that goes down underneath the trousers and locks into position, through our jail.

DEFENSE COUNSEL: I would ask that be done, your Honor. I think that looks really bad for my client to be sitting there manacled in front of a jury.

PROSECUTOR: The problem is that, since he's technically in custody of Corrections, they may not allow the leg brace.

THE COURT: All right, I will grant the request that Mr. Meyer may wear civilian clothes, provided that he can provide those and have those available. I will direct that he be – remain in restraints, he is a prisoner of the State of Wisconsin, in the least obvious type of restraint that is possible. I will direct that his hands may be unshackled, but his legs must be in some way restrained during the course of the day and, as many security personnel as the prison system deems appropriate may remain in close proximity to him.

At trial, the state presented the testimony of Goetz and Olson.[1] In addition, an individual named Jason Winge testified that while Winge and Meyer were in the same cellblock in the Jackson County, Meyer had told Winge that he and a friend named Albert had robbed and choked an older gentleman who lived in an apartment above someone whom Meyer knew. The state also presented evidence that Meyer had escaped in handcuffs from the back of a squad car after police stopped his car on the highway following the robbery of Olson.

[1] The state also called Albert Salinas, who testified as part of a plea agreement with the state. There are strong indications from the transcript, including the prosecutor's statements during closing argument, that his testimony was less than credible.

Before the defense presented its case, Meyer's attorney indicated that Meyer was going to testify. Counsel requested the court to make arrangements so that Meyer, who was shackled, did not have to walk up to the witness stand in front of the jury. The trial court indicated that it would take a brief recess and excuse the jury before Meyer testified so that he could be seated in the witness chair outside the jury's presence. However, the transcript does not indicate that the court took a recess or excused the jury before Meyer testified.

Meyer testified that he had not been in Olson's apartment and that he was outside talking to someone he knew when Albert and Alexander Salinas came running out of the apartment complex. Meyer acknowledged that he had nine prior convictions.

The jury found Meyer guilty of all counts. Meyer appealed, arguing that the trial court had abused its discretion when it refused to grant a continuance so that Meyer could attempt to locate Melissa Jackson. In addition, he argued that the trial court's refusal had prevented the real controversy from being fully tried, in that the jury never heard Jackson testify that she had not heard a voice that sounded like Meyer's coming from Olson's apartment.

The court of appeals rejected Meyer's arguments and affirmed the conviction. The court found that the trial court had exercised proper discretion, noting that the court's concerns about efficiency were sufficient to justify its decision. In addition, it found that Jackson's testimony was consistent with the other evidence presented at trial which indicated that only one of the intruders spoke and that that person had an accented voice.

The court found that the real controversy was which two of the three men that Goetz had seen that night had committed the upstairs robbery and battery, and that that matter had been fully tried. The Wisconsin Supreme Court denied Meyer's petition for review.

Meyer then filed a postconviction motion in the trial court pursuant to Wis. Stat. § 974.06. Meyer alleged that his trial lawyer had been ineffective for failing to ensure that the jury did not see him in shackles and that he had civilian clothes to wear at trial.[2] In addition, Meyer alleged that he was entitled to a new trial based upon newly-discovered evidence. In support of that claim, Meyer submitted a copy of a police report in which a jailhouse informant named Timothy Olson had told police that Albert Salinas had told him that he and his younger brother Alexander had been involved in a robbery and assault of a man in an upper apartment in the city of Baraboo.

The trial court denied the motion without a hearing. The court found that although the trial transcript did not indicate that any action was taken with respect to Meyer's restraints as he assumed the witness stand, it also did not establish whether or not Meyer was restrained at that time. The court also noted that the jury was aware that Meyer had been in custody for at least some time in the past. Accordingly, it concluded that Meyer had not shown either defective performance of counsel or prejudice on that issue.

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[2] Meyer also alleged that counsel was ineffective for failing to object to the prosecutor's describing Meyer as a "thug" during closing argument. He has not raised that claim in his habeas petition.

The trial court found that Meyer's allegation that jail personnel had not allowed his relatives to drop off civilian clothing was "not a trial issue." Finally, the trial court found that Timothy Olson's statement did not exonerate Meyer.

Petitioner appealed. Reviewing Meyer's claims under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the court of appeals agreed with the trial court that Meyer had not established that his trial attorney was ineffective. First, it found that even if Meyer was in restraints during the trial, he had not been prejudiced because the jury was aware that he had nine prior convictions. Second, with respect to Meyer's claim that his lawyer was at fault for Meyer's failure to appear in civilian clothes at trial, the court noted that Meyer had alleged that his family had delivered clothes to him but county clerk personnel refused to allow them to drop the clothes off at the courthouse. The court found that such allegations were insufficient to show "what the attorney failed to do that caused Meyer not to be able to have civilian clothes for trial."

Finally, the court found nothing in Timothy Olson's statement that suggested that the outcome would probably have been different had the evidence been introduced at trial. The court noted that Olson's description of the incident did "not provide any significant evidence on whether Meyer was involved."

The Wisconsin Supreme Court denied Meyer's petition for review on October 1, 2003.

Analysis

I. Standards of Review

According to 28 U.S.C. § 2254(d), if a constitutional claim is adjudicated on the merits by the state courts, a federal court may grant habeas relief based on that claim only if the state court's decision was "contrary to" or an "unreasonable application of" federal law as determined by the Supreme Court of the United States, or if the state court unreasonably determined the facts in light of the evidence presented in the state court proceeding. Review under this statute is "severely restricted." *Sanchez v. Gilmore*, 189 F.3d 619, 623 (7th Cir. 1999). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [federal law] incorrectly." *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002). Rather, the state court's application must also be unreasonable. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

In a case involving a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least

minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

To make out a successful claim of ineffective assistance of counsel, the petitioner must demonstrate that: 1) his counsel's performance feel below an objective standard of reasonableness; and 2) the deficient performance so prejudiced his defense that it deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 688-94 (1984). To satisfy the first prong, deficient performance, the petitioner must "direct [the court] to the specific acts or omissions which form the basis of his claim" and show that those acts or omissions were "outside the wide range of professionally competent assistance." *Id*. To prove that counsel's performance was deficient, petitioner must show that counsel acted "outside the wide range of professionally competent assistance." *Id*. at 690. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. To prove prejudice, petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "[B]ecause counsel is presumed effective, a party bears a heavy burden in making out a winning claim based on ineffective assistance of counsel." *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995).

A federal habeas petitioner claiming that the state courts applied *Strickland* unreasonably bears an even heavier burden: "*Strickland* calls for inquiry into degrees; it is a

balancing rather than a bright-line approach . . . This means that only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus." *Holman v. Gilmore*, 126 F.3d 876, 881 (7th Cir. 1997). This is because "*Strickland* builds in an element of deference to counsel's choices in conducting the litigation [and] § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard." *Id*.

Against this legal backdrop, I turn to Meyer's claims.

II. Shackling

Meyer contends that his lawyer was ineffective for failing to take precautions to ensure that the jury did not see his leg shackles when he took the witness stand. Central to a defendant's Fourteenth Amendment right to a fair trial is the principle that "'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986)(quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). The Supreme Court has held that some practices, like forcing the accused to appear in prison clothing or shackling him, are inherently at odds with this principle. *Estelle v. Williams*, 425 U.S. 501, 503-504 (1976); *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Nonetheless, a defendant's right to appear free from restraint is not absolute. *Allen*, 397 U.S. at 343. While the trial court should strive to impart to the jury the need to presume the defendant's innocence, there are

instances when state interests require the use of restrictive measures or noticeable security. *See Holbrook*, 475 U.S. at 567-68. A defendant may be shackled in the presence of a jury upon a showing of "extreme need," which has been defined as "necessary to maintain the security of the courtroom." *Fountain v. United States*, 211 F.3d 429, 436 (7th Cir. 2000). A court has wide discretion in determining when and what restraints are required. *Id*.

Although a court ordering a defendant to be shackled during trial should ensure that precautions are taken to prevent the jury from seeing the shackles, the failure to take such precautions does not amount to constitutional error where the "extreme need" standard has been met. In *Fountain*, the court of appeals found that the defendant had not been prejudiced by his attorney's failure to object to the jury's observations of his shackles because the facts were adequate to have supported a determination that restraints were necessary to maintain the security of the courtroom. 211 F.3d at 436. The defendant had been incarcerated in administrative segregation at a maximum security prison, had a criminal history of various military offenses including assault with a dangerous weapon and destroying government property and had an impulsive and quick temper. *Id*. In light of these facts, the court held that "assuming Fountain wore shackles at trial and the jury was able to see them, the trial judge was not required to sustain an objection [to the shackles] in light of the court's strong interest in maintaining courtroom security and its wide discretion in determining when and what restraints are required." *Id*.

Conversely, where there is no showing of extreme need but the court takes precautions to minimize the visibility of the shackles, the likelihood of constitutional error is reduced. In *Harrell v. Israel*, 672 F.2d 632, 637 (7th Cir. 1982), the court of appeals found that the trial court's order that the defendant and his witness remain in leg irons throughout defendant's trial was not fully justified, noting that there was no showing that either had "ever attempted to escape or disrupt a trial." Nonetheless, the court declined to grant the defendant's petition for habeas corpus, noting that "the trial judge made every effort and, insofar as the record shows, was successful, at least for the most part, in preventing the jury from becoming aware of the restraints." *Id*. Also, the court of appeals noted that defendant's status as an inmate of a maximum security prison raised a justifiable concern about courtroom security. *Id*. In light of these two factors, the court found no due process violation. *Id*. The court added that even though the court's precautions may not have prevented the jury from observing the leg irons when defendant and his witness were testifying, that fact was insufficient to show prejudice. *Id*.

Before applying these principles to Meyer's claim of ineffective assistance of counsel, I note that Meyer argues in his reply brief that the court did not have adequate reasons for shackling him in the first place. Meyer argues that the trial court abused its discretion by basing its decision to restrain him merely on the fact that he was an inmate of the Wisconsin Department of Corrections as opposed to any finding that Meyer presented a risk of escape or violent behavior.

Meyer did not frame his shackling claim in due process terms or raise any challenge to the initial shackling order in his § 2254 petition. However, his contention that the trial court abused its discretion is intertwined with his claim that his trial lawyer was ineffective for not doing more to protect his right to a fair trial by ensuring that he was not shackled or at least that appropriate off-set measures were taken. Furthermore, Meyer raised his claim in his post-conviction motion to the state trial court and on appeal from the denial of that motion. Accordingly, I will consider the claim without deeming petitioner to have waived it.

Meyer is correct insofar as he asserts that the only reason cited by the trial court for its decision to restrain Meyer at trial was his status as a prisoner of the state. However, when read in the context of the discussion that immediately preceded it, it is apparent that the court was also basing its decision on the facts proffered by the assistant district attorney, namely, that Meyer had escaped after being arrested for the burglary and that he had a history of absconding from probation. Meyer's previous escape from the back of a squad car while handcuffed was enough to support the trial court's conclusion that restraints were necessary to maintain the security of the courtroom. Therefore, even if the jury might have seen the shackles, Meyer cannot show that his right to a fair trial was violated.

Furthermore, even if the extreme need standard was not met, the trial transcript indicates that the court took precautions to ensure that the restraints were as unobtrusive as possible. The prosecutor mentioned that the local jail had a leg restraint mechanism that

went underneath the trousers, but she was unsure whether the state's Department of Corrections would allow that restraint to be used. In ordering Meyer to be restrained during trial, the court ordered that Meyer's hands were not to be shackled and that his legs were to be restrained "in the least obvious type of restraint that is possible."

Notably, although petitioner has suggested that the jurors could observe the shackles from the jury box, petitioner did not raise any objection at trial concerning the shackles. Indeed, defense counsel's concern that the jury would observe the shackles when petitioner approached the witness stand suggests that up to that point, the shackles had been concealed. Meyer has never presented any evidence, such as an affidavit from a juror or anyone else that was in the courtroom, to support his suggestion that the jury could view the shackles throughout the entire trial. As a result, the only inference that can be drawn from the record is that security personnel complied with the trial court's directive and restrained petitioner's legs in a manner that was not obvious.

Because the court was presented with legitimate security concerns and it took precautions to ensure that the jury did not observe Meyer's shackles during most of the trial, Meyer suffered no denial of due process. The fact that some jurors may have noticed that petitioner was in shackles when he took the witness stand does not require granting the petition. As the court noted in *Harrell*, "[c]ourts have generally found brief and inadvertent confrontations between a shackled accused and one or more members of the jury insufficient

to show prejudice . . . We see no reason why a different result should obtain here." 672 F.3d at 637 (citations omitted).

Finally, a petitioner who complains that his lawyer was ineffective for failing to take appropriate steps to ensure that the jury did not see him in shackles must show that the outcome of the trial would probably have been different if the jury had not seen the shackles. *Fountain*, 211 F.3d at 436. The state court of appeals found that Meyer could not show prejudice because the "jury was already aware that he had nine prior convictions." Absent evidence to suggest to the jury that those convictions were for violent offenses or that Meyer was serving a sentence on one or more of the convictions, I am not convinced that the jury's knowledge of Meyer's criminal history was enough to deflect any potential prejudice from the shackles. *See Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993) ("not all convicted felons are so dangerous and violent that they must be brought to court and kept in handcuffs and leg irons"). Nonetheless, I agree with the court of appeals' ultimate conclusion that Meyer cannot show prejudice under *Strickland*. In addition to hearing that Meyer had been convicted of nine previous crimes, the jury also heard about Meyer's escape, while bound, from the back of a police squad car. The jury could reasonably have assumed that that escape was the reason for the shackles. *Cf. Harrell*, 672 F.2d at 638 (jury that knew that defendant on trial for assaulting prison guard was inmate of maximum security prison would naturally expect adequate security measures to be taken with respect to defendant and inmate witnesses). Accordingly, the court of appeals did not apply *Strickland* unreasonably

when it determined that counsel was not ineffective for failing to make appropriate motions at trial or to raise on appeal the issue whether petitioner was denied a fair trial because he was required to wear leg shackles.

III. Prison Clothing

Next, Meyer contends that his trial attorney failed to take appropriate steps to ensure that he appeared at trial in civilian clothes instead of prison attire. On the day before trial, the court granted Meyer's motion to appear in civilian clothes at trial, provided that Meyer could provide the clothes and "make them available." In support of his postconviction motion, Meyer submitted an affidavit from a family friend, Marvin Bloss, in which he averred that he made two attempts, on or about February 8 and 9, 2000, to bring civilian clothes to Meyer at the Sauk County Courthouse. According to Bloss, court personnel refused to allow him to drop the clothing off for Meyer.[3]

The state court of appeals concluded that Meyer had not sufficiently alleged facts "that would tell what the attorney failed to do that caused Meyer not to be able to have civilian clothes for trial." I agree. In his reply brief in the state court of appeals, Meyer asserted that he did not learn until after the trial was over that staff had refused to deliver the clothing, asserting that he was prohibited during trial by Department of Corrections'

[3] In his submissions, Meyer asserts that the court officer to whom Bloss refers was a sergeant at the Sauk County jail.

policy from making any phone calls to his family. Brf. of Def.-App., dkt. #5, exh. F, at 9. Assuming that is true, then there could have been no error on the part of trial counsel. Counsel cannot be charged with failing to raise an issue that he could not have known about.

In his reply brief to *this* court, Meyer changes his story, asserting that he contacted his family after the first day of trial and learned then that Bloss had tried to drop off clothing for him. According to Meyer, he told his lawyer this the next day, February 9, 2000. Meyer contends that his lawyer was ineffective for not bringing the issue to the court's attention on February 9.

Meyer's differing versions of when he learned about the alleged refusal of jail personnel to accept his clothing makes it impossible for this court to find that the court of appeals' was unreasonable in concluding that Meyer did not have a viable *Strickland* claim concerning the clothing issue. Notably, Meyer has never submitted an affidavit to support his allegations.[4] Even if this court assumes that Meyer is telling the truth when he asserts that he and his lawyer were aware on the second day of trial of the clothing issue, he cannot obtain habeas relief on this claim. Even under this more favorable version of the facts, Meyer concedes that his attorney was not aware of any problem with respect to the clothing until the second day of trial. Accordingly, even if this court assumes first, that counsel was

[4] Also, there is reason to doubt Meyer's assertion that he wore prison clothing throughout the entire trial. On the first day of trial, one of the witnesses identified Meyer as wearing a green jumpsuit. Tr. of Jury Trial, Feb. 8, 2000, dkt. 8, exh. 63, at 164-65. The next day, a different witness identified Meyer as wearing a tan shirt and tan shoes. *Id.*, at 329.

ineffective for failing to complain to the trial court about the alleged obstinance of jail staff, and, second, that the trial court would have taken some action that would have ensured that Meyer had civilian clothing for the remainder of trial, Meyer cannot show that the outcome would probably have been different. The jury already had seen Meyer clothed in prison garb during the first day of trial. Therefore, the court of appeals' determination of this issue was not unreasonable under § 2254(d).

IV. Denial of Motion for Continuance

Petitioner contends that the trial court denied his right to a fair trial when it denied his request for a continuance for the purpose of locating Melissa Jackson. The state contends that this claim is not cognizable on habeas corpus because it raises an issue only of state law, namely, whether the trial court properly exercised its discretion in denying the continuance. The state's assertion is not accurate. A state trial court's failure to grant a continuance to secure the presence of a witness implicates federal due process concerns and can result in a writ of habeas corpus if the defendant can demonstrate the possibility that the error caused the trial to be fundamentally unfair. *Gardner v. Barnett*, 199 F.3d 915, 920 (7th Cir. 1999) (citing *United States ex rel. Searcy v. Greer*, 768 F.2d 906, 912 (7th Cir. 1985)).

The state would have been on more solid ground had it argued that Meyer defaulted this claim by failing to present it in constitutional terms to the state courts. *See Chambers*

v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001) (in order to avoid procedural default, petitioner must give state courts meaningful opportunity to pass upon substance of claims later presented in federal court by placing both operative facts and controlling legal principles before state courts). The state's failure to raise this argument means that it has waived the default, and this court must consider the merits of the claim. *Moore v. Casperson*, 345 F.3d 474, 494 n. 7 (7th Cir. 2003); *Kurzawa v. Jordan*, 146 F.3d 435, 440 (7th Cir. 1998).

To determine whether the trial court abused its discretion in denying the request for a continuance, thus rendering the trial fundamentally unfair, the court must determine (1) whether due diligence was exercised to secure the availability of the witness; (2) whether the witness would offer substantial favorable testimony; (3) whether the witness is both willing and available to testify; and (4) whether the defendant would be materially prejudiced by the denial of the continuance. *Gardner*, 199 F.3d at 920 (citing *Greer*, 768 F.3d at 913).

The state appellate court considered these factors under the rubric of state law, and concluded that "[Jackson's] testimony that she did not hear a voice that sounded like Meyer's would not have conflicted with any of the evidence presented at trial." As the court properly noted, Olson had testified that only one of the intruders, who had an accent, did all of the talking; Goetz testified that he could hear only Olson's voice and an accented voice in the apartment above him; and Meyer testified that he had been outside speaking with another resident when the crimes were committed. In addition, the court noted that there was "no indication" of when Jackson would be located. In short, the court reasonably

concluded that because Jackson's testimony would have been cumulative and therefore immaterial to Meyer's defense, the trial court did not abuse its discretion in denying the motion for an indefinite continuance.

Meyer has not disputed any of the court of appeals' findings or its conclusion that Jackson's testimony was not material to his defense. In any case, it is clear that the state court took the rule seriously; further, its conclusion that the trial court did not abuse its discretion was well "within the range of defensible positions." *Mendiola*, 224 F.3d at 591. Accordingly, § 2254(d) precludes Meyer from obtaining habeas relief on this claim.

V. Newly Discovered Evidence

Finally, Meyer contends that he is entitled to habeas relief on the basis of newly discovered evidence, namely, Timothy Olson's statements to the Baraboo Police Department. Again, the state contends that this claim does not state a cognizable claim for federal habeas relief. This time the state is correct.

The Supreme Court has expressly held that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend v. Sain*, 372 U.S. 293, 317 (1963). "For claims based on newly discovered evidence to state a ground for federal habeas relief, they must relate to a constitutional violation independent of any claim of innocence." *Johnson v. Bett*, 349 F.3d 1030, 1038 (7th Cir. 2003) (citing *Herrera v. Collins*, 506 U.S. 390 (1993)); *see also Guinan*

v. United States, 6 F.3d 468, 470 (7th Cir. 1993) ("refusal to grant a new trial on the basis of newly discovered evidence is not actionable in habeas corpus."). Meyer's contention that the trial court abused its discretion in failing to grant him a new trial on the basis of Olson's statement does not amount to an independent constitutional violation.

Even if this court could consider Timothy Olson's statement as a basis for habeas corpus, it does not clear Meyer. As the court of appeals noted, Olson's statement does not indicate that Meyer was not involved in the robbery in the Baraboo apartment. In fact, Olson said that he thought there may have been others involved besides the Salinas brothers, although he couldn't remember that specifically.

VI. Conclusion

None of Meyer's claims entitle him to habeas relief. His claim of newly-discovered evidence does not amount to any constitutional violation that can be remedied by this court. His remaining claims are foreclosed by 28 U.S.C. § 2254(d), which prohibits this court from granting habeas relief to a state prisoner, when, as here, the state courts reviewed his claims under the proper federal standards and applied those standards in a reasonable manner. The writ must be denied.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of Kurt Meyer for a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED.

Entered this 27th day of February, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge