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

CHILDERIC MAXY,

Petitioner,

v.

WILLIAM POLLARD, Warden,
Green Bay Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

05-C-0479-C

REPORT

Childeric Maxy, an inmate at the Green Bay Correctional Institution, has petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Maxy collaterally attacks the October 2000 judgment of conviction entered against him in the Circuit Court for La Crosse County for attempted first-degree intentional homicide, burglary-battery and bail jumping, for which he is serving a term of 60 years' confinement followed by 40 years' extended supervision. For the reasons stated below, I am recommending that this court deny Maxy's petition and dismiss this case.

Maxy alleges that his custody is in violation of the laws and Constitution of the United States because: 1)his trial lawyer was ineffective for numerous reasons; 2) the prosecutor violated Maxy's right to a fair trial by failing to disclose a crime lab report, thereby thwarting Maxy's ability to present a fair defense; and 3) Maxy's postconviction attorneys were ineffective for failing to raise these same issues.

The state does not dispute that Maxy has met the statutory prerequisites for filing a federal petition. The state contends that Maxy has defaulted all of his claims except three regarding ineffective assistance of trial counsel that were addressed in the April 21, 2005 decision of the Wisconsin Court of Appeals. The state contends that the court of appeals' decision on these claims accorded with controlling United States Supreme Court law, thereby foreclosing federal habeas relief. The state is correct.

The following facts are drawn from the petition, documents attached to the state's answer and the transcripts. Some facts are taken verbatim from prior orders in this case.

FACTS

'Round midnight on February 26, 2000, John Pfister of La Crosse awoke to the sound of someone thrashing about in the downstairs guest bedroom of his house. Thinking it was one of his college-aged children, Pfister went downstairs prepared to mete out a scolding. Upon opening the bedroom door, Pfister was surprised to confront a stranger wearing no shirt, standing at the foot of the bed. This man was petitioner Childeric Maxy.

Pfister asked Maxy what he was doing in there. As his response, Maxy pounced on Pfister and grabbed him by the throat. The two men struggled until Pfister's wife entered the scene and began smashing small household items (an empty wine bottle and a decorative totem pole) over Maxy's head. Maxy was sufficiently stunned for Mr. Pfister to break free and administer the *coup de grace* by clocking Maxy with a bar stool.

Responding police officers observed that Maxy's eyes were very red and bloodshot. When asked if he was injured besides the cuts on his head, Maxy asked "Where am I?" He stated that he didn't remember what had happened. He was taken to the hospital by ambulance. At the hospital, Maxy said that he had been drinking at his girlfriend Julie's house and that was the last thing he remembered. A blood sample obtained from Maxy roughly three hours after the attack was tested by the state crime lab for the presence of alcohol and numerous other drugs, including opiates, cocaine, methamphetamine, phencyclidine (PCP) and marijuana. The toxicology screen revealed the presence of marijuana but no other drugs or alcohol.

The state charged Maxy with attempted first degree homicide, burglary (with a battery committed during the course thereof) and bail jumping. Maxy insisted that he did not remember what had happened. He hypothesized that he had been slipped a Mickey by someone earlier that evening. To verify this, Maxy asked the court to order the crime lab to test his blood sample for five named substances, including formaldehyde that might have been overlooked during the first drug screen.[1]

The crime lab told Maxy's lawyer that it could test for the five substances. The prosecutor had no objection, so the court ordered a re-test. The results came back negative

[1] Street lore has it that some people sprinkle formaldehyde (embalming fluid) on their marijuana, seeking a hallucinogenic experience similar to PCP. Whether formaldehyde actually is used this way is debatable. *See infra* at 17 n.2.

for four of the substances. However, contrary to its original assurance, the lab reported that it was unable to test for the presence of formaldehyde. Maxy filed a motion for a continuance so that he could find a lab that could test for formaldehyde, but the court denied the motion because Maxy had adduced no scientific evidence to suggest that formaldehyde could affect a person's conduct.

At trial, a toxicologist from the state lab testified about the testing performed on Maxy's blood sample. He reported that the second round of testing had revealed the presence of ibuprofen and caffeine in Maxy's blood. Apparently, Maxy was not aware of these results before trial because the prosecutor had not provided him with a copy of the second lab report.

Also testifying in the state's case-in-chief was Julia Meyer, who had been with Maxy most of the day preceding the attack. Meyer testified that she had been allowing Maxy to crash at her place because he was going to be evicted from his apartment and needed a place to store his belongings and his car. She also lent him $100 to get his car fixed so he could look for jobs. Meyer testified that on the day of the attack, Maxy was very angry because she had asked him to leave her apartment and take his stuff with him. From about 1 p.m. until 10 p.m. that day, Meyer saw Maxy consume a couple of beers and half a shot of brandy.

In the defense case, Maxy testified that he had spent most of the day of the attack at Meyer's house with Meyer and her neighbor, Roxanne Theison. Maxy testified that over the

course of the day, he drank some Miller Lite beer and had a couple shots of brandy. He said that around 8:00 or 8:30 p.m., he smoked some marijuana that Theison provided, although he did not specify how much. Maxy testified that around 11 p.m., he left Meyer's house because he felt scared and paranoid. He started running and hiding in backyards because he was afraid, but he did not know of what. Maxy told the jury that he entered the Pfister residence thinking it was Meyer's house, but once he got inside, he realized it wasn't. At that point, he said, he became very tired, so he crawled onto the bed in the downstairs bedroom. Maxy testified that he remembered seeing Pfister enter the bedroom wearing a robe and that he had a vague memory of a struggle, but at that time he was "out of his head" and losing consciousness, perhaps from the marijuana and alcohol he had consumed. Maxy testified that the next thing he remembered was waking up in the hospital.

In rebuttal, the state called Roxanne Theison. She testified that she had been with Maxy and Meyer at Meyer's house from about 1 p.m. to 11 p.m. on February 26. Theison saw Maxy drink brandy but did not see him drinking beer. She denied providing marijuana to Maxy, smoking marijuana with him or seeing him smoke any. Theison described Maxy as very angry and hostile because Meyer had asked him to move out. She testified that at around 11 p.m., Maxy left without saying a word. Theison testified that up until that time, he had been working on installing a new board in Meyer's computer. Theison did not note anything about Maxy's behavior indicating that he was incoherent or delusional.

The jury convicted Maxy of all three charges. After sentencing (60 years in prison followed by 40 years of extended supervision) he filed and lost his direct appeal. The only ground raised was that his sentence was excessive. Maxy's direct appeal ended when the Wisconsin Supreme Court denied his petition for review on May 21, 2002.

While Maxy's direct appeal was wending through the upper courts, Maxy, through two successive lawyers, requested and was granted permission by the trial court to have his blood sample tested for the presence of formaldehyde and for Paxil. The formaldehyde testing apparently was never performed because Maxy could not find a lab that could do the testing. The state crime lab tested his blood sample for paroxetine (the active ingredient in Paxil) and found none.

On August 11, 2003, Maxy filed a *pro se* state court postconviction motion under Wis. Stat. § 974.06. Although a complete copy of the § 974.06 motion is not in the record, it appears that Maxy alleged that his trial lawyer had been ineffective in various ways, including:

> 1) Failure to request instructions on a lesser included offense on the attempted homicide charge;
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> 2) Failure to ensure that the jury instruction on intoxication applied to the burglary charge;
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> 3) Failure to enter a stipulation or to plead guilty to the bail jumping count to avoid the jury hearing that he was on bond for a felony offense at the time of the Pfister attack;
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> 4) Failure to object on duplicity grounds to the charge of burglary-battery;

> 5) Failure to poll the jurors;
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> 6) Failure to conduct a proper investigation by failing to obtain an alleged videotape and to subpoena the clerk from a Kwik Trip store that Maxy alleged he had been in just prior to the assault and failing to present his pants to the jury, which had blood and mud on them;
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> 7) Failure to seek suppression of statements that Maxy claimed were obtained in violation of his rights under *Miranda* and were involuntary; and
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> 8) Suggesting during his closing argument that Maxy had entered the Pfister home to look for marijuana.

See State's Mem. in Opp. to Def.'s § 974.06 Motion, dkt. 8, exh. E, at R-Ap. 105-109. In addition, Maxy contended that the lawyers appointed to represent him during earlier postconviction proceedings had been ineffective for failing to file a postconviction motion alleging ineffective assistance of trial counsel.

In an order issued December 2, 2003, the trial court concluded that Maxy's motion was barred by Wis. Stat. § 974.06, as interpreted by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W. 2d 157 (1994), because Maxy had not shown a "sufficient reason" for his failure to raise the claims on direct appeal or in a previous postconviction motion. *See* dkt. 8, Exh. D, at A102. The court also found that even if the motion was not procedurally barred, it was plain from the records and proceedings in the case that Maxy was not entitled to relief on any of his claims. *Id.*; *see also* Tr. of Postcon. Hrg., Nov. 26, 2003, dkt. 16, exh. 106, at 9-10 (agreeing with state that Maxy's claims did not warrant new trial, noting that Maxy had failed to show prejudice). With respect to this latter ruling, the court indicated

that it was adopting the reasoning set forth in the state's brief in opposition to Maxy's § 974.06 motion, as supplemented by the court's comments at the November 26 hearing. *Id*.

In a decision issued April 21, 2005, the state court of appeals disagreed with the trial court's conclusion that Maxy's motion was procedurally barred, finding that Maxy's allegation of ineffective assistance of appellate counsel was sufficient to allow his claims to be heard. *State v. Maxy*, 2005 WI App 111, ¶ 3, 282 Wis. 2d 507, 698 N.W. 2d 132 (unpublished opinion). The court then addressed the merits of those claims that it was able to discern from Maxy's brief, which the court described as inadequate, confusing and difficult to understand. *Id*. at ¶ 4. The court reviewed these three claims:

> 1) Trial counsel should have had Maxy's blood sample tested by an independent laboratory, apparently to look for formaldehyde, which Maxy argued would have supported some kind of intoxication defense;
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> 2) Trial counsel should have obtained an expert witness to testify on the effects of the caffeine, ibuprofen and other substances found in Maxy's blood; and
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> 3) Maxy's *Miranda* rights were violated because he was questioned after he had received medical treatment and been advised to rest.

As for the ineffective assistance of counsel claims related to intoxication, the court rejected them because Maxy had made no showing that he had been prejudiced by counsel's alleged omissions. *Id*. at ¶ 6. As for the *Miranda* claim, the court noted that "[t]he evidence [Maxy] believes should be suppressed is the testimony by the two witnesses who Maxy claimed drugged him and whose identity he gave to police during questioning." *Id*. at ¶ 7.

The court found that the claim failed because "it would have been necessary for Maxy to identify these witnesses in order for him to present the defense that he was drugged." *Id*.

On July 28, 2005, The Wisconsin Supreme Court denied Maxy's petition for review. Maxy filed his federal habeas petition on August 2, 2005 and a supplement to the petition on October 31, 2005. The petition, as supplemented, raises essentially the same claims that Maxy raised in his state court postconviction motion. In addition, Maxy claims that the prosecutor violated his right to a fair trial by failing to disclose exculpatory evidence and thwarting Maxy's ability to present a defense.

ANALYSIS

I. Procedural Default–Fair Presentment

A federal court may not review the merits of a claim raised by a state prisoner in a habeas petition unless the petitioner has (1) exhausted all remedies available in the state courts; and (2) fairly presented any federal claims in state court first. *Lemons v. O'Sullivan*, 54 F.3d 357 (7th Cir. 1995). A petitioner has exhausted his state court remedies where he has "no further available means for pursuing a review of one's conviction in state court." *Wallace v. Duckworth*, 778 F.2d 1215, 1219 (7th Cir.1985). The state concedes that Maxy has no further state court avenues through which to challenge his conviction. Therefore he has exhausted his state court remedies for purposes of federal habeas review.

But exhaustion entails more than merely shepherding one's claims through the appropriate paths of state court review; along the way, a petitioner must present his federal

claims fully and fairly to the state courts. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts.") *See also Bocian v. Godinez*, 101 F.3d 465, 469 (7th Cir. 1996). In order to comply with the "fair presentment" component of exhaustion, a petitioner must have placed both the operative facts and the controlling legal principles before the state courts. *Chambers v. McCaughtry*, 264 F.3d 732, 737-38 (7th Cir. 2001). A petitioner's failure fairly to present his federal claims to the state courts is a procedural default that bars the federal courts from considering the merits of the claims unless petitioner can demonstrate cause for the default and prejudice resulting therefrom, or alternatively, that a miscarriage of justice would result if the claim were not entertained on the merits. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004).

Having carefully reviewed Maxy's briefs in the state appellate courts, I agree with the state that Maxy failed fairly to present most of his claims. Maxy's appellate brief in the court of appeals rambled on at great length, primarily about the failings of his postconviction lawyers and why the trial court had erred when it concluded that his claims were barred by *Escalona-Naranjo*. Dkt. 8, Exh. D. Maxy paid scant attention, however, to the trial court's alternative conclusion that the record demonstrated conclusively that Maxy was not entitled to relief on his claims even if he had not defaulted them. True, on page 30 of his brief, Maxy listed his claims of ineffective assistance of trial counsel that he had raised in his post-

conviction motion, and he complained that the trial court had not addressed these claims. But this was not enough: Maxy failed to develop most of these claims or to argue that the trial court had been wrong when it concluded that none of the claims had any merit.

The state pointed all of this out in its state appellate response, but Maxy failed to ask the appellate court for another opportunity to develop his arguments; in fact, Maxy did not even file a reply brief. Instead, he filed a motion to stay his appeal so that he could file a postconviction motion for DNA testing under Wis. Stat. § 974.07. The court of appeals denied this motion.

Maxy's brief to the Wisconsin Supreme Court seeking review is more of the same, repeating Maxy's assertions that none of his lawyers tried hard enough to discover what he had ingested that led him to commit the crimes of which he was convicted and that the prosecutor had procured Maxy's unlawful conviction by withholding evidence.

The only claim besides those identified by the state court of appeals (and the state in its answer to Maxy's habeas petition) that Maxy arguably presented to both the state court of appeals and the state supreme court is his claim that his trial lawyer failed to obtain a videotape and testimony from a Kwik Trip clerk (apparently named Kevin Larson) that would have established that Maxy was disoriented and confused minutes before breaking into the Pfisters' home. Even if Maxy has not defaulted this claim, he loses on its merits. Maxy has never offered any proof beyond his own unsworn assertion that any videotape ever existed. As for the clerk, Maxy asserts that his lawyer knew of Larson but told Maxy that

he had been unable to locate him to subpoena him for trial. Maxy has presented no evidence (such as an affidavit) to suggest that Larson could have been located, much less that he had any exculpatory evidence to offer at trial. To establish that trial counsel was ineffective for failing to investigate a potential witness, a petitioner must make a "comprehensive showing" as to what testimony the potential witness would have offered. *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987); *accord Strickland v. Washington*, 466 U.S. 668, 695 (1984) (to establish "prejudice" component of ineffective assistance claim, petitioner must establish reasonable probability that, absent alleged errors of counsel, outcome at trial would have been different). Maxy's unsupported and self-serving assertion that Larson saw Maxy in his "state of confusion" and was "readily available" for trial falls woefully short of the showing he must make in order to state a viable claim of ineffective assistance of counsel for failure to investigate.

Maxy also claims that counsel erred by failing to introduce into evidence Maxy's pants, which apparently were muddy. To what end? Again, Maxy fails to elucidate how this failure prejudiced him. Does Maxy think the muddy pants would have corroborated his testimony that he was so paranoid and confused that he had been creeping about on his stomach in other backyards in the neighborhood? Perhaps; but the jury also heard evidence at trial that Maxy and Pfister knocked over houseplants in Pfister's home during Maxy's attack; that was just as likely the source of the dirt. Even if the jury believed that Maxy had been hiding in backyards, it still could have rejected his claim that he did not intend to

burglarize the Pfister home or strangle John Pfister. Maxy has not shown a reasonable probability that he would have won his trial if the jury had seen his muddy pants.

Finally, Maxy littered his state appellate briefs with accusations against the prosecutor, most aimed at the alleged failure to disclose the second crime lab report. This is the report stating that the lab had not detected in Maxy's blood any of the specific drugs suggested by Maxy but did detect ibuprofen and caffeine. The state court of appeals likely did not address these accusations because Maxy had not included this claim in his postconviction motion, a point that Maxy conceded.

Again, however, even if this court were to give Maxy the benefit of the doubt and deem this claim fairly presented, Maxy would not win. To be entitled to habeas relief for the prosecutor's alleged misconduct, Maxy would have to establish that this misconduct affected the fairness of his trial. *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (touchstone of due process analysis in cases alleging prosecutorial misconduct is fairness of trial, not culpability of prosecutor). Even when the misconduct is "egregious," such as the knowing use of perjury, it is only the "misconduct's effect on the trial, not the blameworthiness of the prosecutor" that could establish a due process violation. *Id*. at 220 n. 10.

Maxy suggests that if he had known before trial about the ibuprofen and caffeine in his blood, then he could have retained an expert to opine that these substances, along with the THC found in his blood, could have catalyzed his violent criminal behavior. Maxy, however, has produced no evidence beyond the standard over-the-counter warnings about

drug interactions to suggest that his drug interaction theory has any merit, much less that his lawyer could have found an expert to propound this theory at trial. Maxy has failed to show that anything in the allegedly withheld crime lab report was exculpatory or useful to his defense. He is not entitled to relief on his prosecutorial misconduct claim.

Maxy's failure fairly to present his other claims to the state courts means that this court cannot consider them unless Maxy establishes cause for this default and prejudice from it, or establishes that he will suffer a fundamental miscarriage of justice if his claims are not heard. To establish cause for default, a petitioner ordinarily must show that some external impediment blocked him from asserting his federal claim in state court. *Murray v. Carrier*, 477 U.S. 478, 488, 492 (1986).

The only "cause" that Maxy asserts is that he pursued his postconviction motion and appeal without the help of a trained lawyer. The fact that Maxy had to file the petition on his own does not constitute "cause" for petitioner's default. *Harris v. McAdory*, 334 F.3d 665, 668 (7th Cir. 2003). Similarly, Maxy's lack of education or legal knowledge are not "external impediments" that would excuse a procedural default. *See, e.g., Dellinger v. Bowen*, 301 F.3d 758, 763 (7th Cir. 2002) (petitioner's youth and lack of education did not constitute cause); *Henderson v. Cohn*, 919 F.2d 1270, 1272-73 (7th Cir. 1990) (petitioner's illiteracy and limited education insufficient to establish cause).

Having failed to show cause, Maxy's only hope is to establish that a miscarriage of justice would result if his claim is not considered on the merits. This exception is limited

to situations where the constitutional violation probably has resulted in the conviction of an innocent man. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). To show "actual innocence," a petitioner must present clear and convincing evidence that, but for the alleged error, no reasonable juror would have convicted him. *Id*. Maxy has not presented any evidence of this nature. His blood sample was tested and re-tested, yielding nothing that would support his claim that he was drugged. There has been no "fundamental miscarriage of justice" in this case as defined by United States Supreme Court precedent.

II. Merits

As noted previously, the state court of appeals reviewed these claims and rejected them as meritless: 1) Trial counsel should have had Maxy's blood sample tested by an independent laboratory, apparently to look for formaldehyde, which Maxy argued would have supported some kind of intoxication defense; 2) Trial counsel should have obtained an expert witness to testify on the effects of the caffeine, ibuprofen and other substances found in Maxy's blood; and 3) Maxy's *Miranda* rights were violated because he was questioned after he had received medical treatment and had been advised to rest. Section 2254(d) mandates that a federal court cannot overturn a state court judgment on any claim adjudicated on its merits in the state courts unless this adjudication resulted in a decision based on an unreasonable application of established Supreme Court law to the facts or a decision based on an unreasonable determination of the facts.

The state court of appeals reasonably applied the law and determined the facts when it rejected Maxy's claims. The court recognized that Maxy's claims of ineffective assistance of counsel were governed by the two-part, performance-prejudice test laid out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and the court correctly recited the prejudice standard. *Maxy*, 2005 WI App 111 at ¶ 5(noting that under *Strickland*, defendant has burden to show reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different). The court also properly noted that it did not need to address the performance prong if it found that Maxy could not establish prejudice. *Id*. (citing *Strickland*, 466 U.S. at 697).

The court concluded that Maxy's allegations were insufficient to establish prejudice. *Id*. at ¶ 6. With respect to Maxy's claim that his trial lawyer should have had his blood tested by a private laboratory for formaldehyde, the court noted that Maxy had "provide[d] no reason to believe additional blood testing would have found some other substances or that the additional substance would support the claimed defense." *Id*.

This was a reasonable conclusion. The only evidence that Maxy has adduced to support his formaldehyde intoxication theory is a letter from Dr. Ted Thompson, a family practitioner in La Crosse, stating that "formaldehyde that makes marijuana stronger can affect you more than marijuana." Dkt. 4, Exhs. 43 & 44. It is unclear from the record whether Maxy provided a copy of Dr. Thompson's letter to the state courts. Even if he did, the letter fails to establish a reasonable probability that the outcome at trial would have been

different if Maxy's blood been tested for formaldehyde. Presumably, Maxy is suggesting that the marijuana that he smoked on the night in question must have been dipped in formaldehyde.[2]

But Dr. Thompson's letter too vague to establish to a reasonable degree of medical certainty that formaldehyde-laced marijuana could have caused Maxy's violent conduct that evening. Additionally, Maxy has not pointed to anything besides his behavior to support his suggestion that the marijuana he smoked was laced with formaldehyde. For example, although Maxy testified that he was a regular marijuana smoker, he has not averred that the marijuana he smoked that evening smelled or tasted unusual or that he obtained it from an untrustworthy source. The state court of appeals reasonably concluded that Maxy had provided no foundation for his claim either that formaldehyde was likely to be found or that it was responsible for his behavior.[3]

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[2] The website for the Center for Substance Abuse Research at the University of Maryland reports that "[s]ome drug users claim they dip marijuana or tobacco cigarettes in embalming fluid (known as 'loveboat' or 'dippers') to enhance the high." http://www.cesar.umd.edu/cesar/drugs/pcp.asp. However, researchers speculate that the fluid is actually phencyclidine (PCP) or formaldehyde cut with PCP. *See* Julie A. Holland, Lewis Nelson, P.R. Ravikumar and William N. Elwood, *Embalming Fluid-Soaked Marijuana: New High or New Guise for PCP?* Journal of Psychoactive Drugs 30(2): 215-219, *available at* http://www.inch.com/~jholland/julie/illie.htm.

In this case, the crime lab tested Maxy's blood for PCP but found none.

[3] In reaching its conclusion, the state court of appeals seems to have assumed that Maxy's blood could be tested by *someone* for formaldehyde. Perhaps this is true, but Maxy has never actually proved it. Maxy's submissions show that he found a lab that performed formaldehyde testing, then obtained an order from the trial court to transmit his blood sample to that lab for testing. Dkt. 4, Exhs. 10 & 11. But then the lab cancelled the test because it needed a sample of urine or serum, not blood. *Id.*, Exh. 10.

It was reasonable for the appellate court to conclude that Maxy had not shown prejudice resulting from counsel's failure to obtain an expert on the interaction between caffeine, ibuprofen and marijuana. Maxy's assertion that these substances could become so volatile when combined as to cause mindless burglaries and vicious attacks on strangers is wild speculation.[4] None of the documents submitted with his petition remotely supports Maxy's drug interaction theory.

Finally, the court of appeals concluded that counsel was not ineffective for failing to seek suppression of Meyer's and Theison's testimony on the ground that it was derived from and tainted by unlawful police questioning of Maxy. In analyzing Maxy's claim, the court assumed implicitly that the police obtained the names of Meyer and Theison through unlawful questioning of Maxy. It concluded, however, that Maxy's claim failed "because it would have been necessary for Maxy to identify these witnesses in order for him to present the defense that he was drugged."

Although the court's reasoning is not clear, the court appears to have adopted the state's argument that to prevail on his claim that Meyer and Theison's testimony could and should have been suppressed, Maxy had to show that the witnesses became known to the police only as a result of their illegal interrogation of Maxy. State's Br., dkt. 8, Exh. E at 11.

[4] If Maxy's theory were correct, then one would expect waves of unprovoked attacks in campus coffee shops on weekend mornings. Madison is home to the University of Wisconsin and to this court's knowledge, such attacks are not an occupational hazard routinely encountered by the baristas on State Street.

Although the state cited to cases addressing the "attenuation" exception to the exclusionary rule, *see United States v. Ceccolini*, 435 U.S. 268 (1978), and *United States v. Iencoe*, 182 F.3d 517 (7th Cir. 1999), its argument actually was an application of the independent source/ inevitable discovery exception. Under this doctrine, evidence that is otherwise suppressible as "poisonous fruit" of a constitutional violation may be admissible if the government obtained (or could have obtained) the same evidence from an untainted independent source. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Contrary to the state's position in its appellate brief, however, once a defendant establishes that the evidence he seeks to suppress is the product of illegal governmental activity, it becomes the *government*'s burden to show by a preponderance of evidence that the information was or inevitably would have been discovered by lawful means. *See Nix v. Williams*, 467 U.S. 431, 444 & n.5 (1984).

The court of appeals' opinion suggests that it adopted the state's contention that, even without the allegedly improper questioning, police would have discovered the identities of Theison and Meyer "as soon as Maxy articulated his theory of defense," namely that Meyer and Theison surreptitiously had drugged Maxy. But this analysis is based on an incorrect factual premise: the record does not show that Maxy ever articulated such a theory, before trial or during trial.

Maxy's first attorney did aver, in connection with his request for additional blood testing, that Maxy believed his actions on the night in question might have been the result

of "someone" slipping a Mickey in his drink, but he did not identify whom that "someone" might be. Maxy testified at trial his conduct must have been a bizarre reaction to the booze and dope he consumed, but he never claimed that Meyer or Theison had drugged him.[5]

Next, as a practical matter it is a stretch to label Maxy's trial testimony an untainted independent source by which the state could have discovered Meyer and Theison. This is because Maxy might have felt coerced into testifying at trial because he knew that the police were aware of Meyer and Theison by virtue of his having previously told the police (presumably in response to their coercive tactics) that Meyer and Theison were event witnesses. That said, in the ordinary case, Maxy's decision to testify at trial would have erased any taint: a defendant who feels "compelled" to testify at trial in order to counter prosecution evidence that the should have been suppressed (but wasn't) has made a tactical choice that forfeits the suppression claim on appeal. *Cf. United States v. Paladino,* 401F.3d 471, 477 (7th Cir. 2005)(to preserve the right to appeal an improper evidentiary ruling by the trial court, defendant must let the harm vest). Therefore, if Maxy's trial attorney had

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[5] During his opening statement, Maxy's attorney did make this cryptic prediction:

> Now the evidence will indicate that on the evening of the incident, the Defendant did spend time with Julie Meyer. And he will tell you that both alcohol and drugs were consumed that evening, the drugs being marijuana placed in cigars, and we do not have an explanation for him, he will not be able to answer. One is as to why there was no alcohol showing up in his bloodstream, but we suspect the people that were there. So the answer to that, we don't know.

Tr. Transcript, Aug. 17, 2000, dkt. #8, Exh. 81, at 23. It is impossible, however, to wrest a claim of involuntary intoxication at Meyer's hands from this scumbled presentation.

moved to suppress Maxy's post-arrest statement that led the police to Meyer and Theison, then Maxy could not complain on direct appeal or in a collateral claim for relief that he was "forced" to testify in order to minimize the damage at trial.

But Maxy's attorney never filed a pretrial suppression motion, and as noted earlier in this report, this is one of the few claims that Maxy has not defaulted. Therefore, Maxy's decision to testify at trial cannot, on this record, be deemed a waiver of his right to seek suppression. The upshot of all this is that the state never has established that it had an untainted source of information from which to discover the identities of Meyer and Theison.

That said, I agree with the state court's ultimate conclusion that Maxy was not harmed by his lawyer's failure to seek suppression of Meyer and Theison's testimony. Although the Supreme Court has declined to hold that third-party witness testimony is always admissible no matter how closely it is linked to a constitutional violation, it has indicated that exclusion of live witness testimony requires a "closer, more direct link" than that required for documentary evidence to the illegal evidence and a consideration of the free will of the witness. *United States v. Ceccolini*, 435 U.S. 268, 275-78 (1978).

> The exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object.

Id. at 280.

In *Ceccolini*, the Court emphasized five factors for courts to consider when considering whether live witness testimony is attenuated sufficiently from the primary illegality so as to allow its admission:

> (1) Whether the testimony given by the witness "was an act of her own free will in no way coerced or . . . induced by official authority" as a result of law enforcement's discovery of the tainted evidence;
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> (2) Whether tainted evidence was used in questioning the witness;
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> (3) Whether substantial time elapsed between the time of the illegal act and the initial contact with the witness;
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> (4) Whether the identity of the witness was known before the illegal police conduct; and
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> (5) Whether there is evidence that law enforcement initiated the illegal activity for the purpose of finding a witness to testify against the defendant.

Id. at 279-80.

Although the record has not been developed concerning the circumstances leading up to Meyer and Theison testifying, a motion to suppress their testimony likely would have failed. Cases in which third-party testimony has been suppressed as a poisonous "fruit" under *Ceccolini* are those in which the witness was a person implicated in the criminal activity revealed by the initial illegality; the rationale is that such a witness would not have come forward voluntarily or been discovered through another source. *See*, *e.g.*, *United States v. Iencoe*, 182 F.3d 517, 530-31 (7th Cir. 1999) (co-defendant's testimony at defendant's trial

for extortion-related crimes should have been suppressed where co-defendant's decision to plead guilty and testify against defendant was induced by trial court's erroneous ruling that evidence obtained from searches of van and hotel room rented by co-defendants was admissible); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1398 (9th Cir. 1989) (testimony of illegal aliens discovered as direct result of illegal search not admissible at defendant's trial on charge of illegally transporting aliens). *Cf. Satchell v. Cardwell*, 653 F.2d 408, 409-10 n. 7 (9th Cir. 1981) (unlike persons implicated in illegal activity, brutally beaten multiple-rape victim probably would have come forward to testify even if she had not been discovered as result of illegal entry).

In contrast, Meyer and Theison were innocent third parties who had nothing to do with Maxy's illegal conduct. They just happened to have been with him in the hours before he went berserk. Nothing in their testimony suggests that they were reluctant to testify or that they would not have come forward voluntarily if Maxy had not provided their names to police. Under these circumstances, even assuming that Maxy established that the police questioned him illegally and as a result learned of Meyer and Theison, it is unlikely that the trial court would have excluded their testimony. *Ceccolini*, 435 U.S. at 277 ("the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness's willingness to testify").

Even clearer from the record is that Maxy cannot show a reasonable probability that the outcome at his trial would have been different if his lawyer had filed and the state trial

court had granted a motion to bar Meyer and Theison from testifying. Any suppression order would have applied only to the state's case-in-chief. *Harris v. New York*, 401 U.S. 222, 225 (1971) (exclusionary rule does not prevent state from introducing illegally-obtained evidence to impeach defendant's testimony). Once Maxy took the stand and claimed that he became intoxicated in the hours before the Pfister assault, the state could have presented one or both women to refute that story.

True, the state presented Meyer's testimony during its case-in-chief; however, this could not have affected the outcome of the trial. None of Meyer's testimony was necessary to establish any elements of any crimes charged. By itself, Meyer's testimony was downright innocuous. Maxy cannot credibly contend that he was forced to take the stand to rebut Meyer's testimony that he did not appear intoxicated, since almost anything could have happened in that hour between Maxy's departure from Meyer's residence and his entry into the Pfister home. Maxy does not suggest how his trial would have been different if Meyer had not testified in the state's case-in-chief and there is no valid reason to surmise that the outcome would have changed. Accordingly, the state court of appeals reasonably applied *Strickland* when it concluded that counsel was not ineffective for failing to seek suppression of Meyer and Theison's testimony.

CONCLUSION

Having carefully considered Maxy's petition, I conclude that he is not entitled to habeas relief from this court. Most of his claims are defaulted and the rest do not establish entitlement to a writ under § 2254.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court DENY all of petitioner Childeric Maxy's claims and DISMISS his petition with prejudice.

Entered this 3rd day of April, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

April 3, 2006

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Re: Maxy v. Pollard
Case No. 05-C-479-C

Dear Mr. Maxy and Attorney O'Brien:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before April 21, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by April 21, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge