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

MICHAEL NEWAGO, JR.,

Petitioner,

v.

GREG GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

07-C-091-C

REPORT

Michael Newago, Jr., is an inmate at the Columbia Correctional Institution who was convicted in 2004 in the Circuit Court for Bayfield County for controlled substance offenses, intimidating a witness and bail jumping. He has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, raising two issues:

> 1) Were two trial errors–namely, admission of statements by a witness who died before trial, and admission of petitioner's prior drug convictions–harmless under the standard announced in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)?
>
> 2) Was the evidence sufficient to support petitioner's conviction for possession of cocaine with intent to deliver?[1]

The answer to both questions is yes. Petitioner is not entitled to habeas relief on his first claim because the evidentiary errors did not have a substantial or injurious effect or influence in determining the jury's verdict. As for the second claim, the state court of appeals did not act

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[1] In his petition, petitioner also claimed that his trial lawyer was ineffective for failing to request a certain cautionary instruction and that the prosecutor made inflammatory comments during his rebuttal argument. Petitioner now concedes that these claims are procedurally defaulted, and he makes no attempt to demonstrate cause-and-prejudice or that a fundamental miscarriage of justice will result if the claims are not considered. Accordingly, these claims must be dismissed.

contrary to clearly established federal law and it did not apply that law unreasonably when it determined that the evidence was sufficient to convict petitioner of possession of cocaine with intent to deliver. Therefore, this court should deny the petition.

According to 28 U.S.C. § 2254(e)(1), state court findings of fact are presumed correct unless rebutted by clear and convincing evidence. Petitioner has not challenged any of the state courts' factual determinations. Rather, he challenges the resulting legal conclusions the state courts drew. So, I have adopted (often verbatim) the findings made by the Wisconsin Court of Appeals in its opinion on petitioner's direct appeal, *State v. Newago*, 2005 WI App 254, 288 Wis. 2d 461, 706 N.W. 2d 703 (unpublished opinion), attached to Answer, dkt. 6, at exh. D.

FACTS

Around midnight on August 13, 2003, Bayfield County sheriff's deputy William Kurtz stopped a car being driven by Scott Maki for speeding. Maki's girlfriend, Kerri Flones, was in the front passenger seat; petitioner Michael Newago, Jr., his girlfriend and their five-year-old daughter were in the rear seats. Maki told Deputy Kurtz that "there was a large amount of cocaine and marijuana in the vehicle," and he consented to a search of his vehicle.

Deputy Kurtz found a brick of marijuana in the trunk. Inside a Rice Krispies box on the floor of the car (from which the child had been eating at the time of the stop), Deputy Kurtz found two one-ounce bindles of cocaine. Deputy Kurtz patted down petitioner and found $1130 cash, some marijuana joints; and a marijuana pipe. Deputy Kurtz subsequently obtained a search warrant for petitioner's residence; deputies found a small portable digital scale, a plate

containing marijuana seeds, "zigzag" cigarette papers for rolling marijuana cigarettes, and "little ziploc bags about an inch by an inch which [*are*] commonly used to hold drugs." A Bayfield County sheriff's investigator testified that the street value of the marijuana brick was $3800 and the value of the cocaine in the cereal box was $5600.

All the adult occupants of the vehicle were arrested and taken to the police station for questioning. Petitioner's girlfriend, Tammy Heberer, told police that the four had gone to Minneapolis to visit petitioner's daughter and to pick up a cat. She did not mention the drugs. However, when re-interviewed about five hours later, Heberer was more effusive. Her statement, all *sic,* reads:

> We left to Mpls. We made a stop at Mike's friends' house. He talked talked (sic) to our friend. She made a call we (myself, [Maki], & [Maki's girlfriend]) went to pick up the coke. While Mike stayed at the friends' house to make more calls. Then we drove down by D.Q. where Mike had picked up the marijuana. There [Maki] & Mike were wondering and debating were they could hide the drugs. We left D.Q. parking lot. Stopped at the last stop were Mike went in to purchase the methadone. Then we came back up north (Here). Mike packages the drugs and gets rid of them to a few people.

Heberer died in a car accident before petitioner's trial. Even so, the court allowed the state to read Heberer's this written statement to the jury and it provided a hard copy to the jury during deliberations. During cross-examination, petitioner's lawyer made Deputy Kurtz read Heberer's first, innocuous statement; it, too, was provided to jurors during deliberations. Defense counsel also established during this cross-examination that Heberer originally had told police that "she will take responsibility for" the drugs found in the car "if no one else will."

At trial the state's star witness was Maki, the driver, who testified that he had driven petitioner, who had no drivers license, to Minnesota "to purchase some drugs." They were accompanied by their girlfriends and petitioner's daughter. They went to "a lady's house" where petitioner or the lady made phone calls looking for drugs for petitioner to purchase. Maki witnessed petitioner purchase the pound of marijuana that was found in the trunk. Petitioner made more phone calls and Maki and the two women went to pick up two ounces of cocaine, which petitioner's girlfriend initially stored in her pocket. They eventually cached the cocaine the cereal box, whence it was seized by Deputy Kurtz. According to Maki, petitioner was "calling the shots" on the drug-buying excursion to Minneapolis, a city Maki never previously had visited. Maki had only about thirty dollars on him on the trip to Minneapolis, and he testified on re-direct that Newago told him to "go get the cocaine."

Maki also testified that after petitioner was released on bond, he visited Maki's workplace king and told Maki that if either he or Flones told anyone that the drugs found in the vehicle were petitioner's, then petitioner would have them shot. On another occasion, petitioner said something to Maki to the effect of, "If you take away my daughter, I'll take away yours."

Flones also testified for the state, largely corroborating Maki's account of the Minneapolis trip. She explained that the purpose of the trip was for petitioner "to pick up some drugs."

During the defense case, the court permitted petitioner to present two witnesses who testified that Heberer had told them that the drugs were hers, she had announced this to police but the police didn't believe her and would not credit her confession. Two other defense witnesses testified telephonically from Minneapolis. One suggested that Heberer had taken two

bottles of methadone from her purse. The second testified that when petitioner, Maki and their girlfriends visited her in Minneapolis, Heberer had made the only phone call, after which Maki gave her some money and the three visitors *other* than petitioner drove off while petitioner remained at the witness's house. Petitioner did not testify at trial.

Prior to trial, the state received permission to introduce in its case in chief petitioner's two previous drug convictions in Minnesota.[2] At the close of the state's case, the prosecutor, over petitioner's objection, introduced two "Criminal Courts Case Histories" from Hennepin County, Minnesota. In moving their admission in the jury's presence, the prosecutor said, "These are the defendant's prior criminal convictions for possession of controlled substances." Neither exhibit was shown or read to the jury, no details were provided about the prior offenses and the documents were not sent to the jury room during deliberations. During the defense case, a defense witness admitted on cross-examination, without objection from petitioner, that she was "aware [Newago] had been convicted of criminal possession of drugs."

In his closing argument, the prosecutor pointed to the largely unrefuted testimony of Maki and Flones as proof that the cocaine and marijuana found in the car belonged to petitioner. Several times while citing their testimony, he also cited Heberer's second police statement as corroboration of the live witnesses' trial testimony. The prosecutor did not, however, cite Heberer's statement to support any fact to which Maki and his girlfriend had not already testified at trial. To prove petitioner's intent to deliver, the prosecutor pointed to the

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[2] The state court of appeals could not discern any proper reason for admitting the convictions and found that "it appears the convictions had no connection to the present offenses other than establishing that Newago had a propensity for dealing in drugs, a prohibited purpose for admitting the evidence." *State v. Newago*, 2005 WI App 254, n.3.

large quantities and high street value of the two controlled substances, along with the scales and baggies found at petitioner's residence and the fact that he was carrying over $1000 in cash at the time of his arrest.

In the defense closing argument, petitioner's lawyer attempted to impeach the testimony of Maki and his girlfriend by suggesting that they had implicated petitioner out of fear of the consequences to them resulting from the discovery of the cocaine and marijuana in Maki's car. Defense counsel urged the jury to believe the contrary accounts provided by the allegedly disinterested witnesses from Minneapolis. Counsel also suggested that Heberer, in her second statement, told police what they wanted to hear so that she could be released to care for her five-year-old daughter.

In rebuttal, the prosecutor cited Heberer's second police statement once, noting only that it was given after the search warrant had been executed at her and petitioner's shared residence, which suggested that Heberer already knew that the police had evidence implicating petitioner in drug dealing. Most of the state's rebuttal was devoted to discrediting the testimony of the defense witness who suggested that Heberer had taken the methadone from her purse, and to emphasizing the credibility of Maki and Flones.

So far, not so bad. But there also was this exchange: During petitioner's closing argument, his attorney observed that "it's very, very strange that the two little lily white people [who were also occupants of the car when Newago was arrested] weren't charged but the Native American person [Newago] was charged." Later in her argument, counsel told jurors that "[f]airness [is] for everyone, no matter what their race is, no matter if they're Native American or lily white like [Maki and Flones]."

The prosecutor began his rebuttal by responding to this accusation:

> I do want you to give Mr. Newago the benefit of every reasonable doubt, not because I'm a racist as the defense apparently would have you believe, not because I prosecute poor people. I don't know whether Mr. Newago is rich or poor and nor do I care. I prosecuted him because he's been convicted twice before of drug offenses, and this time I want you to convict him again.

Defense counsel objected, and the court conducted an unreported side-bar with the attorneys, after which the prosecutor continued:

> I don't want you to convict him because I'm a racist.... I'm not prosecuting that man because he's poor. I don't know and I don't care. I'm prosecuting him because I believe and I want you to believe ... that he brought drugs into this county to poison our people, our children. I don't care whether they are red, white, green, black, yellow. You don't bring drugs into this county.

After the jury was excused to deliberate, the court made a record of its side-bar ruling. The court indicated that it had previously ruled the state could use the prior conviction evidence for certain, limited purposes, but "the evidence did not come in quite the way that [the prosecutor] was intending on using the evidence." The court also noted, however, that one of the defense witnesses had testified, without objection, "about knowledge of the defendant's prior record." In any event, the court had instructed the prosecutor during the sidebar "not to mention the prior record again." The court gave the attorneys the opportunity to add to its summary of the side-bar; petitioner's lawyer stated that she did not recall any witness referring to petitioner's prior drug convictions, but if that had been the testimony, "my point is moot." Counsel did not move for a mistrial.

The jury convicted petitioner on six out of seven charges.[3] After sentencing, petitioner moved for postconviction relief, which the court denied. On appeal, petitioner raised six claims: (1) trial counsel was ineffective for failing to request a cautionary instruction concerning the prior convictions; (2) the prosecutor's reference to the prior convictions during rebuttal denied petitioner a fair trial; (3) the evidence was insufficient to support a conviction for possession of cocaine with intent to deliver; (4) the trial court erred by allowing the state to present petitioner's prior convictions; and (5) admission of Heberer's statement violated petitioner's confrontation right guaranteed by the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36 (2004), which had been decided after petitioner's trial.

The court of appeals rejected petitioner's first three claims, finding them "plainly without merit." *State v. Newago*, 2005 WI App 254 at ¶ 7. Finding that the prosecutor's reference to petitioner's prior convictions during his rebuttal argument did not rise to the level of reversible error, the court explained that the prosecutor's reference to petitioner's prior convictions "was brief, and it was made in direct response to defense counsel's inflammatory suggestion that the State was prompted by racism to selectively prosecute Newago." *Id*. at ¶ 12 (citation omitted). The court also was unmoved by petitioner's insufficiency-of-evidence claim. The court reasoned that although there was no evidence that petitioner ever had touched the cocaine, if the jury found Maki and his girlfriend credible, then it reasonably could conclude that the cocaine found

[3] The jury found petitioner guilty of four felony offenses (possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, intimidating a witness, and bail jumping) and two misdemeanors (possession of marijuana and of drug paraphernalia). The jury acquitted petitioner of delivery of methadone, a heroin analog.

in the cereal box "was acquired at Newago's direction and that it was subject to his control thereafter." The court explained:

> Jurors could reasonably infer that the trip to Minnesota was undertaken at Newago's request for the purpose of his acquisition of the controlled substances, including the cocaine in question; that Newago made the arrangements for purchasing the cocaine; and that, at the time of its seizure, the cocaine was in his possession, given his proximity to the cereal box in which it was found. As for Newago's intent to deliver the cocaine, such an intent was readily inferable from its street value ($5600), the amount of cash on Newago's person at the time of his arrest, and the items seized in the search of his residence that were consistent with the division and repackaging of cocaine for resale (scale, small "Ziploc" baggies).

Id. at ¶ 20.

With respect to petitioner's last two claims, however, the court agreed (with no dispute from the state) that the trial court had erred by admitting petitioner's prior convictions and by admitting Heberer's statement. Nonetheless, the court concluded that a new trial was not warranted because these errors, individually and collectively, were harmless.

The court used a harmless error standard that required the state to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *id.* at ¶ 25 (quoting *State v. Hale*, 2005 WI 7, ¶ 60, 277 Wis. 2d 593, 691 N.W. 2d 637). The court began its analysis by noting that the errors only could have contributed to the jury's verdicts with respect to the charges for possessing with intent to deliver the cocaine and marijuana found in the car. The court explained that petitioner had all but conceded guilt on the misdemeanor charges for possessing marijuana and paraphernalia based on the items found on petitioner's person at the time of his arrest; the court also noted that the bail-jumping and

witness intimidation charges arose from petitioner's post-arrest threats to Maki about which Maki testified and which petitioner did not refute. *Id*. at ¶¶ 26-27.

The court then turned its attention to the possession-with-intent charges. Starting with petitioner's prior convictions, the court noted that this evidence consisted of two "Hennepin County Criminal Courts Case Histories," which were never read to or provided to the jury. The court acknowledged, however, that the jury heard the prosecutor say that he was introducing the defendant's "prior criminal convictions for possession of controlled substances" and a witness say that she was "aware [Newago] had been convicted of criminal possession of drugs." With the exception of the prosecutor's rebuttal comment, found the court, "these were the only two mentions of petitioner's prior convictions during the trial." *Id*. at ¶ 29. As for the prosecutor's rebuttal comment, the court noted that the prosecutor had referred to petitioner's prior convictions solely in response to defense counsel's "inflammatory suggestion" of racism and selective prosecution, not to support the elements of the drug charges. Citing to *State v. Wolff*, 171 Wis.2nd 161, 168-69 (Ct. App. 1992), the court noted that where a defense argument clearly invited and provoked an improper response from the prosecutor, the appellant could not complain because his ploy backfired. *Id*. at ¶ 12.[4] Looking then at the effect these statements would have had on the jury, the court concluded "thus, regardless of what use the State may have originally intended to make of the prior conviction evidence, it essentially made *no* use of them during the trial or during its closing argument." *Id*. at ¶ 29.

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[4] The court in *Wolff* cited to *United States v.Young*, 470 U.S. 1, 11-12 (1985), which held that although two wrongs during closings don't make for a right result, where defense counsel invites the prosecutor's improper reply, the court may factor defense counsel's conduct into its prejudice analysis.

Turning to Heberer's written statement to police, the court reviewed the statement in the context in which it was introduced at trial, and noted that the defense had elicited Heberer's first statement as well as other out-of-court statements she had made to others in which she had claimed responsibility for the drugs found in the car. The court also reviewed the use that the parties had made of the statement during their closing arguments, noting that the prosecutor had pointed to the statement as corroborating the live witness's accounts and not as proof of any fact not testified to by Maki and Flones. From this review, the court was convinced beyond a reasonable doubt that a rational jury would have convicted petitioner even if Heberer's statement had not been admitted. The court reasoned:

> Presumably, if the State had not been allowed to introduce her second statement to police, implicating Newago, the defense would also not have been allowed to admit her first statement and those she made to others, implicating herself. The fact that the deceased woman had given several conflicting accounts diminished the impact of the one statement in which she implicated Newago. Even so, had that statement been the only evidence tying Newago to the cocaine and marijuana found in the car, its admission would have been far from harmless. The deceased woman's account, however, was merely cumulative of the live testimony provided by the other two adult occupants of the car.
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> Jurors plainly found Maki to be a credible witness, otherwise, they could not have found Newago guilty of bail jumping and witness intimidation. Those verdicts rested entirely on Maki's testimony, and as we have discussed above, the verdicts on those charges were not affected by the erroneously admitted hearsay statement. Once jurors concluded Maki was a credible witness, his testimony, as corroborated by his girlfriend, together with the circumstantial evidence tending to show that Newago dealt in drugs (the scales, cigarette papers, and packaging materials at his residence, and the large amount of cash on his person), was more than sufficient to allow a rational jury to conclude beyond a reasonable doubt that Newago possessed both the cocaine and marijuana with the intent

> to deliver them. The deceased woman's testimony added little to the State's case, and its absence would not have prevented a rational jury from reaching the verdicts that the jury in this case did.

Id. at ¶¶ 35-36.

Petitioner petitioned the Wisconsin Supreme Court for review and was rebuffed on February 27, 2006.

ANALYSIS

I. Harmless Error

In responding to petitioner's habeas petition, the state concedes that it was error for the trial court to admit petitioner's prior drug convictions and Heberer's second statement at trial.[5] It contends, however, that petitioner is not entitled to habeas relief because the state court of appeals reasonably applied the harmless error standard, set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967), when it concluded that the errors did not warrant reversal of petitioner's

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[5] The state concedes that admission of Heberer's statement violated petitioner's right to confrontation as guaranteed by *Crawford v. Washington*, 541 U.S. 36 (2004).

As for the disclosure of petitioner's prior convictions, the state concedes only that this violated Wisconsin law. Nonetheless, the state has not disputed that this evidence was inherently prejudicial. *See Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557, 563 (1967) (holding that prior-crimes evidence is excluded due to, among other things, the "overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts"). As a result, the state has limited its argument to harmless error. Accordingly, I have assumed for the purposes of this report that admission at trial of petitioner's prior convictions amounted to constitutional error.

Interestingly, the Court of Appeals for the Seventh Circuit has concluded that, depending on circumstances not present in petitioner's case, it is not necessarily error at a drug trial for the government during its case in chief to alert the jury that the defendant previously had been convicted of drug crimes. *See, e.g., United States v. Jones*, 455 F.3d 800, 804, 806-09 (7th Cir. 2006); *but see id.* at 810-11 (Easterbrook, J., concurring) and *United States v. Simpson*, 479 F.3d 492, 496 (7th Cir. 2007) (urging caution and restraint on this issue).

conviction. In the alternative, the state contends that the errors were harmless under the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

In a decision issued after the state filed its amended answer in this case, the Supreme Court clarified that a federal habeas review of a state court judgment should evaluate assertions of harmless constitutional error by employing the *Brecht* test. *Fry v. Pliler*, ___ U.S. ____, 127 S. Ct. 2321, 2325-2327 (June 11, 2007). Under *Brecht,* a state prisoner is not entitled to habeas relief from a state court criminal judgment unless a federal constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Fry*, 127 S. Ct. at 2325 (quoting *Brecht*, 507 U.S. at 631, in turn quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court characterizes this as a less onerous burden than *Chapman*'s "harmless beyond a reasonable doubt" standard, which requires granting relief on nothing more than a reasonable possibility that trial error contributed to the verdict. *Brecht*, 507 U.S. at 637.

In *Fry*, the Court listed the reasons it had cited in *Brecht* for adopting this more forgiving standard on collateral review: to avoid undermining the states' interest in finality, to avoid infringing upon state sovereignty over criminal matters, to maintain the historic limitation of habeas relief to those "grievously wronged" and to avoid the imposition of significant "societal costs." *Fry*, 127 S.Ct at 2325 (citations omitted). Finding first that each of these concerns "applies with equal force whether or not the state court reaches the *Chapman* question," *id*., and second, that nothing in *Brecht* or the Antiterrorism and Effective Death Penalty Act of 1996 suggested that the standard for federal habeas review ought to change if the state court does not apply *Chapman*, *id*., at 2326-27, the Court held that a federal court reviewing a petition under

28 U.S.C. § 2254 should apply *Brecht* regardless whether the state court performed a *Chapman* analysis. *Id*. at 2327 ("[I]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former") (emphasis in original). *Accord*, *Aleman v. Sternes*, 320 F.3d 687, 691 (7th Cir. 2003) (court is free to take up *Brecht* analysis before reviewing state court adjudication under § 2254(d)). Accordingly, I consider independently the question whether the constitutional errors committed at petitioner's trial had substantial and injurious effect or influence in determining the jury's verdict.

As an initial matter, I agree with the state appellate court that the conceded errors clearly were harmless to petitioner's misdemeanor convictions for the simple possession of marijuana joints and drug paraphernalia found in his pockets. I also agree that neither Heberer's statement nor the prior convictions could have influenced the jury's guilty verdicts on the bail jumping and witness intimidation charges. As the court of appeals pointed out, both charges were based upon Maki's uncontradicted testimony that after petitioner was released on bond, petitioner visited Maki's at work and threatened him.

Petitioner argues that Heberer's statement indirectly played a role insofar as it "bolstered" Maki's testimony with respect to the drugs found in the car, and therefore the jury was likely also to conclude that Maki was credible with respect to his testimony concerning petitioner's threats. I disagree. As an initial matter, Heberer's statement was not the only evidence that corroborated Maki's account of the Minneapolis trip. Flones also testified at trial, corroborating Maki's account. Perhaps more to the point, petitioner has offered nothing else that would suggest that Maki had any motive to lie about being threatened by petitioner. Absent evidence

of motive or bias on Maki's part or any countervailing evidence about the threats, the jury had a rock-solid basis for returning guilty verdicts on the intimidation and bail jumping counts. The erroneously-admitted evidence caused no actual prejudice to petitioner on these convictions.

The question is closer with respect to the possession with intent to deliver charges. Starting with Heberer's statement inculpating petitioner, I agree with the court of appeals that this statement offered no information beyond that provided by Maki and Flones at trial. As the court of appeals noted, Maki's testimony, corroborated by Flones, by recovery of the drug scale and gem packs, and by petitioner's possession of $1130 cash, was powerful enough and credible enough to convict petitioner without regard to Heberer's statement.

Moreover, the inculpatory impact of Heberer's statement was diminished by Heberer's other out-of-court statements exculpating petitioner and inculpating herself, which petitioner introduced to support his theory of defense. Presumably, had the court not permitted the state to introduce Heberer's second statement, it would not have permitted petitioner to introduce her other statements; this would have left petitioner with no logical theory of defense. Petitioner is entitled to argue otherwise, namely that if he'd had his druthers, then *none* of Heberer's statements would have come in at trial. That would have been the legally correct outcome and it certainly would have made for a cleaner trial. But the statements did come in, and they provided petitioner with a serendipitous opportunity to present an alternate explanation without having to take the stand. Although it would have been preferable for the trial court to have prohibited admission of all this hearsay, under the totality of circumstances, petitioner did not

suffer actual prejudice as a result of the admission of Heberer's statement. He would have been convicted even if the jury never had heard it.

Then there was the other avoidable error: the trial court allowed the prosecution to alert the jury to petitioner's prior drug convictions. True, nobody dwelt on this during the evidentiary phase of the trial: the prosecutor merely stated that he was introducing evidence of petitioner's "prior criminal convictions for possession of controlled substances" and later a defense witness responded "I think I had some recollection of it" when asked by the prosecutor whether she was aware that petitioner "had been convicted of criminal possession of drugs." The prosecutor did not refer to the convictions in his opening statement, focus on them during the case in chief or mention them during his closing argument. Even so, I am less sanguine than the court of appeals that a couple of passing references to prior convictions don't amount to anything. This was still enough information for the jury to indulge in an improper propensity syllogism if it chose to do so.

There was more: the prosecutor referred to petitioner's priors in rebuttal to counter defense counsel's bald assertion of racism. The prosecutor defended himself, explaining that he was prosecuting petitioner because he had been convicted twice before of drug offenses and "I want you to convict him again." The court of appeals broke this into two parts, first finding that petitioner's attorney improperly had accused the prosecutor of racism in his charging decisions, which triggered the prosecutor's improper response, and second, finding that this additional reference to petitioner's priors had not unfairly infected the trial or prejudiced petitioner.

These findings are not unreasonable. The erroneous admission of and references to petitioner's prior convictions did not substantially sway the jury in reaching its guilty verdicts on the possession-with-intent charges. Even if the jury never had learned of petitioner's prior convictions, it would have convicted him. Both Maki and Flones testified that the purpose of the trip to Minneapolis was for petitioner to buy drugs. Maki testified that they went to a lady's house where either petitioner or the lady on petitioner's behalf made phone calls "looking for more drugs he could purchase." Both witnesses testified that they were with petitioner at a Dairy Queen where they saw him give money to a guy who gave him marijuana, which was placed in the trunk. Maki testified that at petitioner's direction, he drove Heberer to a location where a woman approached the vehicle and dropped the cocaine in the window. Maki and Flones both testified that the cocaine ended up in the Rice Krispies box, which at the time of the vehicle stop was on the lap of petitioner's daughter, who was seated between petitioner and Heberer. Maki testified that petitioner was "calling the shots" and that Maki did not know where to go in Minneapolis to purchase drugs, having never been there before. Flones also testified that she did not know anyone in Minneapolis from whom to buy drugs.

On cross-examination, the defense did little to impeach either Maki or Flones's credibility except to emphasize that neither had been charged in the incident. All that petitioner offered to suggest that the drugs were not his were Heberer's hearsay statements in which she claimed that the drugs were hers. As the prosecutor pointed out during closing argument, the defense's theory that Maki and Flones were lying about their involvement or that the drugs were actually

Heberer's was difficult to reconcile with the failure of either Maki or Flones to implicate Heberer.

Once the jury concluded–logically and almost inexorably–that the drugs belonged to petitioner, then it effortlessly could find intent to resell, based on the large quantities of drugs, the $1130 found on petitioner when he was arrested, and the scale and drug packaging materials found in his home. Finally, I note that the jury's finding that petitioner was not guilty of delivering methadone shows that it paid careful attention to the evidence and did not unfairly rush to convict him merely because petitioner had committed crimes in the past.

The erroneous admission of the prior convictions and Heberer's statement, considered either singly or jointly, did not have a substantial or injurious effect or influence in determining the jury's verdict. This is not one of those rare cases in which petitioner has been grievously wronged. Petitioner is not entitled to habeas relief.

II. Sufficiency of the Evidence

Petitioner alleges that the evidence adduced at trial was insufficient to support his conviction for possession of cocaine with intent to deliver. Petitioner contests the sufficiency of the evidence establishing the element of possession. As he did in the court of appeals, he points out that he did not accompany Maki and Flones when they purchased the cocaine, no witness testified having seen him in possession of the cocaine, no cocaine was discovered either on petitioner or at his residence and no one explained how the Rice Krispies box containing the cocaine ended up on the floor of the car where he had been seated.

In *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the Supreme Court enunciated the standard for evaluating challenges to the sufficiency of the evidence to support a conviction: "[T] he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Addressing petitioner's claim on appeal, the state court of appeals explained that it would not set aside a conviction for insufficiency of the evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Newago*, 2005 WI App 254 at ¶ 15 (citing *State v. Poellinger*, 153 Wis. 2d 493, 501 (1990)).

To be entitled to federal habeas relief, petitioner must show that in adjudicating his claim, the state court reached a decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). Petitioner does not contend that the rule applied by the state appellate court in adjudicating his sufficiency-of-the-evidence claim is "contrary to" the *Jackson* standard. *See Mitchell v. Esparza*, 540 U.S. 12, 16(2003) (per curiam) (state court need not even be aware of Supreme Court precedents so long as neither the reasoning nor result of state-court decision contradicts them). Further, as noted above, petitioner has not contested any of the court's findings of fact. Accordingly, this court's inquiry is limited to determining with the Wisconsin Court of Appeals

reasonably applied *Jackson* when it concluded that a rational jury could have convicted petitioner of possession of cocaine with intent to deliver.

The answer to this question should be obvious in light of the preceding analysis of the evidence. The evidence adduced at trial was sufficient to allow the jury to conclude without speculating that petitioner constructively possessed the cocaine. "Possession may be imputed if petitioner had knowledge of the presence of the drug and it is found in a place immediately accessible to and under her exclusive or joint dominion and control." *State ex rel. McCaffrey v. Shanks,* 124 Wis.2d 216, 236, 369 N.W.2d 743, 754 (Ct. App. 1985) (citing *Schmidt v. State*, 77 Wis.2d 370, 379, 253 N.W.2d 204, 208 (1977)). Petitioner's knowledge and possession of the drug was rationally supported by the testimony of Maki and Flones. Petitioner's control over the cocaine additionally was established by the testimony of Deputy Kurtz, who reported that when he stopped Maki's car, petitioner's daughter, who was seated between petitioner and Heberer, was holding the Rice Krispies box in which the drugs were hidden. Given petitioner's proximity to the cocaine and the evidence that it was procured at his direction, the jury reasonably could infer without speculating that petitioner possessed the cocaine.

Petitioner suggests that Maki and Flones both were incredible witnesses because they acknowledged that they were worried about charges being brought against them. Such an acknowledgment, which is routine in drug trials, does not render either witness patently incredible. It was up to the jury to evaluate the witnesses' motives as part of its determination whether to credit their testimony. As the Court emphasized in *Jackson*, 443 U.S. at 319, it is the jury's responsibility "fairly to resolve conflicts in the testimony, to weigh the evidence, and to

draw reasonable inferences from basic facts to ultimate facts." In this case, where the event witnesses' stories were consistent and materially unrefuted, a rational jury easily could conclude that Maki and Flones were telling the truth and that petitioner possessed the drugs with intent to distribute them. Petitioner is not entitled to habeas relief on this claim.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court deny Michael Newago, Jr.'s petition for a writ of habeas corpus and dismiss this case.

Entered this 10th day of July, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

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July 10, 2007

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Re: Newago v. Grams
Case No. 07-C-091-C

Dear Mr. Newago and Attorney Weinstein:

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 newly-updated 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 July 31, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 31, 2007, 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