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

WILLIAM LEE,

Petitioner,

v.

JON LITSCHER, Secretary,
Wisconsin Department of Corrections,

Respondent.

REPORT AND
RECOMMENDATION

01-C-130-C

Petitioner William Lee, a Wisconsin prisoner currently incarcerated at the Whiteville Correctional Facility in Tennessee, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges his 1998 conviction for first degree sexual assault of a child, to which petitioner pleaded no contest in the Circuit Court for Marathon County. I ordered the state to respond to four claims raised in Petitioner's petition: 1) ineffective assistance of counsel voided petitioner's no-contest plea; 2) petitioner was denied his Sixth Amendment right to confront his accusers; 3) petitioner was denied the opportunity to review his presentence investigation and as a result was denied his right to be sentenced on the basis of accurate information; and 4) petitioner's plea was not knowing and intelligent.

The state has moved to dismiss the petition on the ground that petitioner did not file it within the statute of limitations, or in the alternative, because it includes claims that are unexhausted. Alternatively, the state contends that the petition should be denied on grounds of procedural default, or on the merits.

Because I conclude that petitioner filed his petition within the one-year statute of limitations and has exhausted all of the cognizable claims presented, I recommend that this court not dismiss the petition on the grounds raised by the state in its motion. Nonetheless, this court *should* dismiss the petition with prejudice on ground of procedural default because petitioner failed to properly preserve his claims for review.

The following facts are drawn from the decision of the state court of appeals in *State v. Lee*, 238 Wis. 2d 94, 617 N.W. 2d 677 (Ct. App. 2000) (unpublished order) and from other documents in the state court record:

Facts

In December 1996, the district attorney for Marathon County filed a criminal complaint against petitioner charging him with first degree sexual assault of a child. The complaint alleged that petitioner had sexual contact with a six-year-old boy while the boy and his family were living with petitioner. At a preliminary hearing, the victim testified that petitioner had "tapped" his penis during an occasion when he was sleeping in the same bed with petitioner. The boy also testified that approximately one year later, petitioner tried to

again touch his private area. That time, testified the victim, he used his hand to block petitioner's hand. According to the complaint, when police asked petitioner about the first incident, petitioner said that he "didn't think" that it happened.

Before trial, the state filed a motion seeking admission of "other acts" evidence against petitioner. The state sought to introduce evidence that the petitioner had engaged in sexually assaultive conduct with Bill Harless, the father of the six-year-old victim, when Harless was 10 to 12 years old. The trial court ruled that the evidence was admissible at trial.

Subsequently, petitioner entered a plea of no contest to the charge pursuant to a plea agreement. The terms of the agreement provided in part that if the presentence investigation recommended that petitioner be placed on probation, the State would not argue for prison and would agree to cap its recommendation at six months in the county jail as a condition of probation. If the presentence investigation recommended prison, the State would be free to recommend any amount of prison time and could make arguments as to why such time would be appropriate.

Before accepting petitioner's plea, the court conducted a colloquy with petitioner. Petitioner assured the trial court that he understood his rights and that his plea was voluntary. Additionally, petitioner signed a plea questionnaire in which he provided the same information. Petitioner stated that he understood the elements of the charge, that he

had had sufficient time to discuss the case and the plea decision with his lawyer and that he was satisfied with his lawyer's representation.

As it turned out, petitioner badly misplayed his hand. The presentence report came back recommending a lengthy prison sentence, prompting petitioner to move to withdraw his plea. At a hearing on his motion, petitioner testified that he had entered a plea of no contest because he thought the presentence investigation would be in his favor. Petitioner acknowledged that he was aware that the presentence investigation might recommend prison, but he did not think that it would. Also, petitioner testified that one of the factors that led to his decision to enter a plea was the court's pretrial ruling allowing the state to present the prior bad acts evidence regarding Harless at trial. Petitioner stated that he was innocent of the charge and wanted to take his chances at trial, although he acknowledged that he had understood the rights he was giving up when he had entered his plea.

The court denied petitioner's motion. The court found that petitioner's plea had been knowing, voluntary and intelligent and that he had understood at the time he entered his plea that the presentence investigation could come back recommending prison. The court found that it would not be fair or just to allow petitioner to withdraw his plea simply because the presentence investigation's recommendation did not match petitioner's personal predictions. The court noted that petitioner would have the opportunity to challenge the presentence report at the sentencing hearing.

At the April 3, 1998 sentencing hearing petitioner did not present any witnesses. His lawyer argued that the charges against petitioner and the reports of prior bad acts had been fabricated by Harless and that petitioner had only entered a plea because he did not want to take his chances at trial and he thought the presentence investigation would be favorable. Unmoved, the court sentenced petitioner to nine years in prison.

Petitioner did not pursue a direct appeal of his conviction. On November 20, 1998, petitioner filed a postconviction motion pursuant to Wis. Stat. § 974.06. Petitioner alleged that his lawyer had been ineffective for advising him that he would get at most nine months in jail if he pled guilty and that, as a result, he should be allowed to withdraw his plea. Also, petitioner contended that he had never had the opportunity to review his presentence report before sentencing and that he had been unsuccessful in his efforts to review his report after sentencing.

Before filing his motion, petitioner had filed a motion requesting that the court appoint standby counsel to assist him at his § 974.06 motion hearing. On November 12, 1998, the trial court wrote to petitioner and informed him that he was denying his request for standby counsel because petitioner had stated in his motion that he was skillful enough to represent himself. The court informed petitioner that he could attempt to obtain representation from the public defender's office, could obtain a lawyer of his own choosing at his own expense or could request a hearing for the purpose of determining whether the court should appoint counsel at county expense.

On December 22, 1998, the court held a hearing on petitioner's ineffective assistance of counsel claim. Petitioner appeared in person with no witnesses or attorney. Ruling from the bench, the court denied petitioner's motion because petitioner had failed to secure his trial lawyer's attendance as a witness and therefore had failed to meet his burden of persuasion. Petitioner protested that he had misunderstood what the court expected him to do before the hearing. In response the court read its November 12, 1998 letter into the record, then found that petitioner had had an ample opportunity to obtain an attorney to help him prepare for the hearing yet had made no attempt to seek such assistance. Therefore, concluded the court, petitioner had no one to blame but himself for losing his motion by default. The court did not address petitioner's claim that he had been denied access to his presentence report.

Petitioner filed a notice of appeal from the court's ruling on March 3, 1999. On May 13, 1999, the court of appeals dismissed the appeal for lack of jurisdiction because the trial court had not entered a written judgment or order. The court stated that petitioner would be allowed to file a new appeal upon the entry of a written order.

On May 28, 1999, the trial court entered a written order denying petitioner's motion for postconviction relief. Petitioner filed a new notice of appeal on July 8, 1999. Petitioner argued that the trial court had abused its discretion when it denied him an evidentiary hearing on his ineffective assistance of counsel claim. Also, petitioner re-raised his claims

of ineffective assistance of counsel, involuntary plea and lack of access to his presentence investigation report.

In a decision issued June 20, 2000, the court of appeals rejected petitioner's arguments and affirmed the decision of the trial court. *See State v. Lee*, 238 Wis. 2d 94, 617 N.W. 2d 677 (Ct. App. 2000) (unpublished order), attached as Exh. EE to the response (Dkt. 7). The court of appeals found that the trial court had acted properly in refusing to hold an evidentiary hearing on petitioner's ineffective trial counsel claim because petitioner had failed to call his trial lawyer as a witness. Because trial counsel's explanatory testimony was a precondition to appellate review of petitioner's ineffective assistance claim, the court found that it had no basis to review this claim.

The court of appeals also rejected petitioner's contention that his no contest plea was not knowingly and intelligently made. The court found that petitioner's claim contradicted the representations he made at the plea hearing and in his plea questionnaire. In what appears to be a reference to the hearing on petitioner's motion to withdraw his plea in the trial court before sentencing, the court of appeals found that "[t]he trial court resolved Lee's conflicting claims in favor of those from the plea hearing." *Id.* at 3. Deferring to the trial court's credibility determination, the court rejected petitioner's postjudgment claim that his plea was involuntary.

The court found that petitioner had waived any claim that he had not reviewed his presentence investigation before sentencing by failing to ask to review the presentence

investigation personally and failing to voice concern over any inaccuracies beyond those identified by his trial lawyer. As for his claim that he was denied his right to review the presentence report after sentencing, the court noted that the reports are confidential unless the petitioner shows relevance and a substantial need for postconviction review. The court found that petitioner had failed to make the necessary threshold showing that any trial court sentencing findings rested on erroneous information. *Id.* at 3-4.

Finally, the court refused to consider petitioner's arguments that he was not guilty of the crime, noting that petitioner had waived all nonjurisdictional defects by pleading no contest.

On August 29, 2000, the Wisconsin Supreme Court denied petitioner's petition for review. Petitioner filed the instant petition for habeas corpus on December 11, 2000.

Analysis

I. Timeliness

Under 28 U.S.C. § 2244(d)(1), state prisoners wishing to challenge their convictions via a federal habeas action have one year in which to do so. This one-year limitation runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). (There are other alternative starting points, *see* 28 U.S.C. § 2254(d)(1)(B)-(D), but none are applicable here.) The judgment of conviction in petitioner's case was entered on April 3, 1998.

Because petitioner did not pursue a direct appeal of his conviction, his conviction became final on April 23, 1998, which was the last day on which he could have filed a notice of appeal. *See* Wis. Stat. § 809.30(2)(b) (notice of intent to pursue postconviction relief from criminal conviction must be filed within 20 days); *see also Rowsey v. Gudmanson*, 56 F. Supp. 2d 1059, 1061 (E.D. Wis. 1999) (time to seek direct review in Wisconsin expires 20 days after sentencing when no direct appeal filed).

Petitioner took no action to challenge his conviction until November 20, 1998, when he filed his motion for collateral relief pursuant to Wis. Stat. § 974.06. 28 U.S.C. § 2244(d)(2) provides that "the time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted" towards the limitation period. The state concedes that petitioner's submission constituted a "properly filed" motion for collateral review. Therefore, petitioner's filing of his postconviction motion tolled the statute of limitations with 152 days remaining.

At this point that the parties diverge. The state contends that petitioner's habeas clock restarted when the trial court denied petitioner's postconviction motion orally on December 22, 1998 and did not stop running until petitioner filed his second notice of appeal on July 8, 1999.[1] At that point, contends the state, petitioner's habeas clock

[1] The state contends that petitioner's first appeal did not stop the clock because it was dismissed for lack of jurisdiction, which meant that it was not "properly filed." *See Artuz v. Bennett*, ___ U.S. ___, 121 S. Ct. 361, 364 (2000) (state court application for collateral relief is not properly filed if it is accepted erroneously by court lacking jurisdiction).

remained tolled until the Wisconsin Supreme Court denied discretionary review on August 29, 2000. Petitioner filed his habeas petition approximately three and a half months later, on December 11, 2000. By the state's calculation, petitioner filed his habeas petition over four months too late.

Petitioner disagrees generally with the state's claim that his petition is untimely, although his reasons are not entirely clear. He appears to contend that his one-year deadline remained tolled for the entire time from the filing of his postconviction motion on November 20, 1998 until the Wisconsin Supreme Court denied review on August 29, 2000. If this is the case, then petitioner's habeas application was timely, with 49 days to spare.

Resolving this dispute requires this court to determine the point at which petitioner's motion for collateral relief stopped "pending" in the state courts. The only support that the state offers for its position that the motion stopped pending when the trial court issued its oral order is the rule that oral orders are effective as soon as they are announced. *See, e.g.*, *State v. Malone*, 136 Wis. 2d 250, 257, 401 N.W. 2d 563, 566 (1987). This reasoning is unpersuasive. The fact that an oral order may be "effective" does not mean that the action in which it was made is no longer "pending." According to *Black's Law Dictionary*, "an action or suit is 'pending' from its inception until the rendition of final judgment." Black's Law Dictionary 1134 (6th Ed. 1990). Under Wisconsin law, a judgment is not finally rendered until it is entered in writing. *State v. Malone*, 136 Wis. 2d at 257-58, 401 N.W. 2d at 566.

Thus, under *Black's* definition, petitioner's postconviction motion was "pending" in the trial court from the time he filed it until the court entered a written order on May 28, 1999.

Alternatively, the Court of Appeals for the Seventh Circuit has indicated that an action continues to be "pending" during the period "between one court's decision and a timely request for further review by a higher court," provided that such a request is filed. *Fernandez v. Sternes*, 223 F.3d 977, 980 (7th Cir. 2000). This language not only supports petitioner's contention that his motion was "pending" during the post-judgment interims in which he was appealing one court's decision to the next highest court (a position with which the state agrees), but it also supports his contention that his motion was pending continuously from the date he filed it on November 20, 1998 until he filed his second notice of appeal in the court of appeals on July 8, 1999. Although the court of appeals dismissed petitioner's first appeal for lack of jurisdiction, when petitioner filed his July 8, 1999 appeal after the trial court entered its order in writing, the court accepted it with no indication that petitioner's time for filing an appeal had expired. In other words, petitioner's July 8, 1999 appeal was a "timely request for further review by a higher court." Accordingly, even if December 28, 1998 is the date of the trial court's "decision," the entire time following that decision until petitioner filed his timely notice of appeal on July 8, 1999 gets tolled under *Fernandez*.

Under either analysis, the state's contention that petitioner's motion for postconviction relief was not "pending" from December 28, 1998 to July 8, 1999 is without

merit. I find that the motion was pending from November 20, 1998 until the state supreme court denied review on August 29, 2000. Under § 2244(d)(2), this time must be excluded, so the petition is timely.

II. Exhaustion of State Remedies

Next, the state contends that the petition must be dismissed because it presents a mix of exhausted and unexhausted claims. First, it contends that if this court construes the petition to present any ineffective assistance of appellate counsel claim, then such a claim is unexhausted. I find no such claim. As the state points out, petitioner did not even file a direct appeal; perforce he could not have received ineffective assistance on appeal. To the extent that petitioner's isolated references to appellate counsel in his filings could be construed as a claim that he was denied his appellate rights by his trial lawyer's failure to pursue a direct appeal, such a claim would be dead on arrival. That is because petitioner has not pointed to any claim that he wanted to raise on direct appeal that he was subsequently prevented from raising on collateral attack. In other words, he could not possibly establish prejudice. Accordingly, I do not construe the petition as raising any claim of ineffective appellate counsel.

The state also contends that petitioner's third claim (denial of access to his pre-sentence investigation report) is unexhausted to the extent that petitioner seeks relief from the denial of his post-sentencing request for a copy of the report. Specifically, the state

points out that petitioner has a motion pending in state court seeking access to his presentence investigation. Even if this is true, I see no need to dismiss the petition for failure to exhaust. The state court of appeals addressed the issue of petitioner's post-sentencing access to the PSI in its decision, finding that petitioner had failed to show that the report was relevant or that he needed it for postconviction review.

More importantly, although petitioner's claim that he was denied access to his PSI *before* sentencing is cognizable in a federal habeas proceeding, no federal constitutional interest is implicated by the state denying petitioner access to the report *after* sentencing and *after* the expiration of his direct appeal. Such a claim is governed solely by Wisconsin law. Accordingly, because this aspect of petitioner's third claim is not cognizable on federal habeas review, there is no need to dismiss the petition for petitioner's failure to exhaust it. *See, e.g., Koo v. McBride*, 124 F.3d 869, 874 (7th Cir. 1997) (federal habeas relief does not lie for errors of state law).

III. Petitioner's Substantive Claims

In his brief in support of his petition, petitioner contends that he was deprived of his right to a fair trial, his right to confront his accusers and his right to put on a defense. However, petitioner waived all of these rights when he entered a no contest plea to the charge. Therefore, petitioner can obtain federal habeas relief on these claims only if he first establishes that his plea was invalid and unconstitutional. Petitioner cannot establish this.

Petitioner contends that his plea was involuntary because he entered it in reliance on his attorney's erroneous advice that he would not receive a prison sentence. In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court held that where a defendant is represented by counsel during the plea process and enters a plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Id.*, 474 U.S. at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). So far, so good.

But the state courts held that petitioner defaulted this claim by failing to call his trial lawyer as a witness at the evidentiary hearing on his § 974.06 motion. Principles of comity and federalism require this court to defer to that decision so long as the state court's decision is both "independent" and "adequate" to support that court's judgment. *Thomas v. McCaughtry*, 201 F.3d 995, 1000 (7th Cir. 2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991)).

A state court's decision is "independent" if the court "actually . . . relied on the procedural bar as an independent basis for its disposition of the case." *Id.* (quoting *Harris v. Reed*, 489 U.S. 255, 261-62 (1989) (in turn quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327(1985)). "Whether a ground is independent depends on state law; therefore, in order for the state judgment to bar federal habeas review, the last state court to render a judgment in the case must have clearly and expressly stated that its judgment rests on a state procedural bar." *Id.* (citations and quotations omitted).

Whether a state court's finding of procedural default is "adequate" to support that court's judgment and preclude federal review depends on whether the procedural rule applied by the state court is "firmly established and regularly followed." *Id.* "We shall defer to a state court's application of a procedural rule when that rule is applied in a consistent and principled way, but a rule that is infrequently, unexpectedly, or freakishly applied is not an adequate state ground that bars federal habeas review." *Id.* (citations and quotations omitted). Thus, if a prisoner could not be said to have known of the rule's existence at the time he committed the procedural misstep, the state court's judgment is not an adequate ground that would bar federal habeas review. *Id.*

Here, the last state court to render a judgment–the court of appeals–found that petitioner had defaulted his ineffective assistance of counsel claim by failing to secure his trial counsel's presence at the hearing. Citing *State v. Machner*, 92 Wis. 2d 797, 803, 285 N.W. 2d 905 (Ct. App. 1979), the court noted that an ineffective assistance of counsel claim cannot go forward without counsel's testimony. I find that the court's application of the *Machner* rule was both independent and adequate to support the state court's judgment.[2]

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[2] Specifically, the *Machner* court held:

> When the competency of trial counsel is questioned, it is incumbent upon one who seeks to show that incompetency to give notice to trial counsel that his handling of a criminal matter is being questioned on post-trial or post-conviction proceedings. We do not believe that the professional competence of a lawyer should be determined Ex parte on the unsupported allegations of a disappointed defendant that another choice of strategy might have been preferable.

Machner, 92 Wis. 2d at 803, 285 N.W. 2d 905.

Wisconsin courts have been applying *Machner* consistently since 1979 by refusing to consider ineffective assistance of trial counsel claims in the absence of testimony from the trial lawyer.

Therefore, petitioner has procedurally defaulted his ineffective assistance of counsel claim unless he can establish both cause for his default and actual prejudice resulting therefrom. *See Wainwright v. Sykes*, 433 U.S. 72, 91 (1977). Petitioner argues that his failure to secure his counsel's presence at the evidentiary hearing was the fault of the circuit court judge, whose October 12, 1999 letter failed to alert petitioner that he should "explain to the court if he needed an attorney or needed the court to find or call petitioner's defense counsel," and who abused his discretion by refusing to allow petitioner to make a record on his ineffective assistance of counsel claim. Petitioner's Brief in Support of Habeas Petition, Dkt. 3 at 3; Petitioner's Traverse, Dkt. 9 at 8.

These arguments are insufficient to establish cause. The Supreme Court has defined "cause" as some external objective factor, such as interference by officials or unavailability of the factual or legal basis for a claim, which impeded compliance with the state's procedural rule. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Petitioner's contention that the circuit court judge should have done more to assist him in presenting his ineffective assistance of counsel claim does not amount to the sort of official interference contemplated by the Supreme Court. The circuit court was not responsible for securing petitioner's trial lawyer's presence at the hearing.

Moreover, the court properly denied petitioner's request for standby counsel in light of petitioner's assertion that he was able to represent himself. The circuit court judge informed petitioner of the various ways in which he could attempt to obtain a lawyer if he so desired; petitioner chose not to pursue any of these options. Although the court in its discretion could have allowed petitioner a second chance to secure the presence of his attorney, it was not required to do so. So, petitioner's failure to comply with the state's procedural rule was his own fault. That petitioner chose to proceed pro se does not alter this conclusion. *See Barksdale v. Lane*, 957 F.2d 379, 385-86 (7th Cir. 1992)(because there is no constitutional right to attorney in state post-conviction proceedings, petitioner's "failure to act or think like a lawyer cannot be cause for failing to assert a claim,"quoting *Henderson v. Cohn*, 919 F.2d 1270, 1272 (7th Cir. 1990)).

Because petitioner cannot show cause, this court may review his defaulted claims only if a refusal to do so would result in a "fundamental miscarriage of justice," that is, where "a constitutional violation has probably resulted in the conviction of one who is actually innocent . . .". *Murray*, 477 U.S. at 495-96 (internal quotations and citations omitted); *see also Coleman*, 501 U.S. at 750. This standard requires petitioner to establish that it is more likely than not that no reasonable juror would have convicted him. *Schlup v. Delo*, 513 U.S. 298, 329 (1995).

In an attempt to meet this burden, petitioner has submitted letters from several people who assert that Harless and his son are untrustworthy and have lied in the past.

Petitioner also contends that there are other people who would testify that petitioner is innocent of the crime charged against him, but he has not submitted affidavits or statements to corroborate this contention. These letters and contentions do not come close to showing that it is more likely than not that no reasonable juror would have voted to convict petitioner. Petitioner's submissions are nothing more than second- or third-hand contrary assertions which at most would create a swearing contest for a jury to decide. If petitioner's evidence were so strong as to make it unlikely that a jury would have voted to convict him, why would he even contemplate pleading no contest? Why would he wait until after his sentencing and post-conviction evidentiary hearing to proffer these witnesses? It doesn't add up. There is no proof that petitioner is probably innocent of the charge. Therefore, this court cannot excuse his procedural default. This precludes substantive consideration of petitioner's claim that his plea was involuntary as a result of his lawyer's ineffective assistance.

Even if this court were to review the merits, petitioner would lose. A guilty plea is intelligent and knowing when the defendant is competent, aware of the charges, and advised by competent counsel. *Brady v. United States*, 397 U.S. 742, 748 (1970). A guilty plea is voluntary when it is not induced by threats or misrepresentations and the defendant is made aware of the direct consequences of the plea. *Brady*, 397 U.S. at 755. As the court of appeals found, petitioner's statements during his plea colloquy and in his plea questionnaire established that his plea was knowing and voluntary. His subsequent recantations are

weightless. The court of appeals found that the trial court had properly concluded that plaintiff's representations during the plea hearing were more credible than his subsequent contrary claims. The trial court's credibility finding, as adopted by the court of appeals, is a finding of fact to which this court must defer. *See* 28 U.S.C. § 2254(e)(1)(state court's determination of a fact presumed correct). Further, having reviewed the record of the plea hearing, I find reasonable the state courts' determination that petitioner's plea was knowing, intelligent and voluntary. Accordingly, under 28 U.S.C. § 2254(d), petitioner is not entitled to relief on his claim that his plea was unknowing and involuntary.

IV. Access to Presentence Investigation Report

Petitioner contends that he was denied his right to be sentenced on the basis of accurate information because he never got to review his presentence report. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977)(due process prevents court from sentencing defendant to death on basis of information that defendant had no opportunity to deny or explain). The court of appeals found that petitioner's counsel had reviewed the report and identified errors in it at the sentencing hearing. The court found that petitioner had waived his claim that he wanted to review the report personally because he failed to ask the trial court before sentencing if he could see the report and he failed to identify any inaccuracies other than those noted by his attorney.

The court of appeals cited *State v. Romero*, 147 Wis. 2d 264, 274, 432 N.W. 2d 899, 903 (1988), which holds that a party must object to errors at the trial level in order to preserve them for appeal. As the court noted in *State v. DeMars*, 171 Wis. 2d 666, 676, 492 N.W. 2d 642, 647 (Ct. App. 1992),

> When a defendant, or defense counsel, believes an order unconstitutionally restricts the defendant's access to the PSI, we hold that the challenger has a duty to raise that claim in a timely fashion. One cannot proceed quietly with sentencing and then, on appeal, assert for the first time a . . . violation [of his right to review the PSI] and claim entitlement to resentencing."

This is an independent and adequate state procedural rule that bars this court from considering petitioner's claim unless he can show cause and prejudice for his default. Petitioner has not attempted to meet either of these requirements. Further, for the reasons cited in the previous section, petitioner has failed to show that a fundamental miscarriage of justice will result if this court does not review this claim. Accordingly, petitioner has procedurally defaulted this claim, and this court should dismiss it with prejudice. This disposes of petitioner's petition.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court dismiss with prejudice petitioner William Lee's petition for a writ of habeas corpus.

Dated this 18th day of July, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge