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

DAVID EVANS,

Petitioner,

v.

JUDY SMITH, Warden,
Oshkosh Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

05-C-468-C

REPORT

Before me for report and recommendation is the petition of David Evans for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Evans, a Wisconsin prisoner confined at the Oshkosh Correctional Institution[1], collaterally attacks a 2002 judgment of conviction entered by the Circuit Court for Rusk County for one count of attempted second degree sexual assault and one count of child enticement. Evans contends that he is in custody in violation of the laws or Constitution of the United States because:

> 1) His trial lawyer was ineffective because he failed to investigate, he failed to seek suppression of Evans's statement

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[1] At the time he filed his application, Evans was incarcerated at the New Lisbon Correctional Institution, which is located in this district. Although the Oshkosh Correctional Institution is located in the Eastern District of Wisconsin, the petition still is properly venued in this court because the county in which Evans was convicted (Rusk) is located in this district. 28 U.S.C. § 2241(d). However, Judy Smith, the warden of the Oshkosh Correctional Institution, should be substituted for Catherine Farrey as the respondent. I have changed the caption to reflect this. The clerk's office and the parties should do the same.

> to investigators, he failed to impeach the state's witnesses and he advised Evans not to testify at trial;
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> 2) His statement to investigators was involuntary and obtained in violation of *Miranda*;
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> 3) His conviction for attempted second degree sexual assault is void because no such crime exists in Wisconsin;
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> 4) He did not knowingly waive his right to testify at trial; and
>
> 5) The trial court erred by admitting unfairly prejudicial "other acts" evidence.

Because Evans failed fairly to present these claims to the state supreme court in his petition for review, I am recommending that the petition be denied on the ground of procedural default.

FACTS

On March 27, 2002, the state filed an information charging Evans with two counts of disorderly conduct and one count each of attempted second degree sexual assault, child enticement and the repeated sexual assault of a child. The charges arose from allegations that Evans had groped and kissed twin teenage girls while Evans was a guest in their father's home. On the morning of trial, the state dismissed the disorderly conduct counts and the repeated sexual assault of a child, opting to pursue only the child enticement and attempted second degree sexual assault charges. Evans moved to dismiss the attempted second degree sexual assault charge, arguing that no such charge existed in Wisconsin or, in the alternative, that it was duplicitous of the enticement charge. The court denied the motion. It granted

the state's motion to admit "other acts" evidence consisting of Evans's 1989 conviction for sexual assault of a five-year-old child.

At trial, the state presented the testimony of the victims, Jessica L. and Jennifer L., and a third girl, Sophie D., who was present at the house and saw Evans grabbing and kissing the twins. The evidence of Evans's prior conviction was admitted by way of a stipulation, followed immediately by a cautionary instruction to the jury warning that it could use the evidence only to find intent, motive, plan or absence of mistake.

After the state rested, the court asked whether Evans was going to testify; Evans's lawyer stated that Evans had decided not to. Evans moved to dismiss both counts; the court denied the motion. The jury returned guilty verdicts on both counts. The court sentenced Evans to 15 years (eight years of initial confinement followed by seven years of extended supervision) on the attempted second degree sexual assault and 15 years of consecutive probation on the child enticement count.

Evans filed a postconviction motion for a new trial, alleging that he had been denied his right to testify at trial as the result of the ineffective assistance of counsel. The trial court held an evidentiary hearing at which Evans's trial lawyer testified. Counsel testified that he had discussed Evans's right to testify with him on several occasions, including two times during conferences at the jail. He said that after the state rested, he asked Evans if he wanted to testify, to which Evans had replied by shrugging his shoulders and asking counsel what he thought. Counsel said he told Evans that he didn't think he should testify. Evans

testified at the postconviction hearing that he knew he had the right to testify at trial but that he took his lawyer's advice that he should not. The trial court denied Evans's motion, finding that Evans knew he had a right to testify but, on the basis of his lawyer's advice, opted not to for strategic reasons.

On appeal from the verdict and the denial of the post-conviction motion, Evans's lawyer filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), in which he identified the following potential issues for appeal: 1) the trial court's sentence was excessive; 2) Evans was denied a fair trial by the admission of other acts evidence and by the court's reading of a cautionary instruction to the jury; 3) the trial court erred in denying Evans's motion to dismiss the attempted sexual assault charge before trial; and 4) trial counsel was ineffective for not obtaining a gas station receipt showing that the victims' father had purchased vodka the weekend of the assault and for preventing Evans from testifying. Evans filed a response to the petition in which he raised three additional issues: 1) his custodial statement had been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); 2) he was denied a fair trial because of juror and judicial bias; 3) the evidence was insufficient to support the convictions; and 4) trial counsel was ineffective for various reasons.

In a decision issued April 13, 2005, the Wisconsin Court of Appeals affirmed Evans's conviction and permitted appointed counsel to withdraw, finding no arguable merit to any issue that could be raised. *State v. Evans*, Appeal No. 03-2288-CRNM (Ct. App. April 13,

2004) (unpublished opinion), attached to Answer, dkt. #11, at Exh. D. With respect to Evans's *Miranda* claim, the court found that even if a *Miranda* violation had occurred, Evans had not been prejudiced by it because the state had a sufficient factual basis for the charges even without Evans's statements. It found his cursory allegations of juror and judicial bias unsupported by anything in the record and that the testimony of the twin victims and Sophie D. defeated his claim that the evidence was insufficient to support the verdict.

As for any potential challenge to the charges, the court found that attempted second degree sexual assault of a child was a permissible attempt crime and that the charge was not duplicative of the enticement count because each offense involved different victims. The court also found that the trial court had properly admitted evidence of Evans's 1989 conviction and that its sentence was not excessive.

Finally, the court found no arguable merit to a claim that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court rejected Evans's contention that counsel had deprived him of his right to testify, noting that Evans had admitted at the postconviction motion hearing that he knew he had a right to testify but that he opted not to on the basis of his lawyer's advice. As for the claim that counsel should have obtained the vodka receipt, the court pointed out that whether the victims' father had consumed vodka was irrelevant to Evans's guilt; moreover, the father had acknowledged during his testimony that he had drunk beer and vodka around the time Evans allegedly assaulted the girls, so there was no prejudice. Finally, it rejected Evans's claim that his

lawyer should have pursued admission of his polygraph test results, noting that polygraph test results are inadmissible in Wisconsin.

Evans, proceeding *pro se*, filed a petition for review in the state supreme court. The petition consists of a three-page letter from defendant, a list of 10 questions, five vague statements labeled "facts" and two letters purportedly written by an individual named Travis Wilson. In the letters, Wilson suggested that Evans had been the victim of "set up" by the twin girls' father and his girlfriend, although Wilson did not claim to know any details about the alleged set-up. The supreme court denied the petition on August 2, 2004.

ANALYSIS

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 Evans has exhausted his state court remedies for purposes of federal habeas review because he has no more state court avenues through which to challenge his conviction.

Exhaustion entails more than merely shepherding one's claims through the appropriate paths of state court review; in addition, the petitioner must present his federal

claims fully and fairly to the state courts along the way. *Chambers v. McCaughtry*, 264 F.3d 732, 737 (7th Cir. 2001)*; 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."). That is, "[a] petitioner must provide the state courts with a fair opportunity to apply constitutional principles and correct any constitutional error committed by the trial court." *Bocian v. Godinez*, 101 F.3d 465, 469 (7th Cir. 1996) (quotation omitted). In order to meet the "fair presentment" precondition to exhaustion, "[t]he petitioner must have placed both the operative facts and the controlling legal principles before the state courts." *Chambers,* 264 F.3d at 737-38 (internal citations omitted). A petitioner has satisfied the fair presentment requirement if his argument to the state court (1) relied on pertinent federal cases employing constitutional analysis; (2) relied on state cases applying constitutional analysis to a similar factual situation; (3) asserted the claim in terms so particular as to call to mind a specific constitutional right; or (4) alleged a pattern of facts that is well within the mainstream of constitutional litigation. *Verdin v. O'Leary*, 972 F.2d 1467, 1473 -1474 (7th Cir. 1992).

In Wisconsin, a petitioner exhausts his claims by presenting them to the state court of appeals and in a petition for review to the state supreme court. *Moore v. Casperson*, 345 F.3d 474, 486 (7th Cir. 2003). A petitioner's failure fairly to present his federal claims to the state courts is a procedural default that bars this court from considering the merits of the claims. *Chambers*, 254 F.3d at 738.

The state contends that this court should dismiss all of Evans's claims because he did not properly present them to the state supreme court in his petition for review. I agree. As the state points out, Evans submitted a disjointed, incomprehensible petition in which he failed to present any operative facts or controlling legal principles. Although it is clear from the petition that Evans had complaints about his lawyer's performance, he failed to articulate the ways in which his lawyer was defective, failed to provide any supporting facts, and failed to cite any legal authority. His remaining claims are even more vague. For example, in the "facts" section of his petition, he asserts "I'm innocent – no evidence of guilt; 'Reasonable Doubt'" and "'Hearings'–I never knew about – 'Motions.'" The general thrust of his petition is that he was railroaded by the system and the witnesses lied. Nowhere does Evans identify a federal claim or allege a pattern of facts with enough clarity to call to mind a specific constitutional right. As a result, Evans has failed the fair presentment requirement.

This means that this court cannot consider the merits of his claims unless Evans can show either (1) cause for the default and actual prejudice from failing to raise the claim as required, or (2) that enforcing the default would lead to a "fundamental miscarriage of justice." *Steward v. Gilmore*, 80 F .3d 1205, 1211-12 (7th Cir. 1996) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). To show "cause," petitioner must show that "some objective factor external to the defense impeded counsel's [or petitioner's] efforts to comply the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show that a fundamental miscarriage of justice occurred, petitioner must show that "a constitutional

violation has probably resulted in the conviction of one who is actually innocent." *Id*. at 496. To satisfy this latter exception, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of newly discovered evidence of innocence. *Schlup v. Delo*, 513 U.S. 298, 325-327 (1995).

Evans has not attempted to show that he satisfies either of these exceptions, so the analysis technically ends here. For the sake of completeness, however, I note that Evans hinted at a "cause" argument when he asserted in his petition for review that he had been transferred to a new prison that had no law library. Yet Evans's alleged lack of access to legal materials fails to explain why he could not have outlined at least the *facts* underlying his claims with more clarity than he did in his petition for review. As noted previously, to present his claims fairly, Evans did not have to cite to any legal authority so long as he articulated his claims specifically enough to call to mind a specific constitutional right. His failure to make any comprehensible argument in his petition for review cannot be blamed on the institution's lack of a law library. The fact that he had to file the petition on his own does not constitute "cause" for petitioner's default. *See Harris v. McAdory*, 334 F.3d 665, 668 (7th Cir. 2003) (petitioner's *pro se* status not adequate cause for default).

Likewise, Evans cannot satisfy the fundamental-miscarriage-of-justice exception. With his petition for review, he submitted two unsworn, written statements from a man named Travis Wilson as "new evidence." The statements purportedly were written by Wilson in December 2002 and October 2003. In the statements, Wilson states that he was

at a party in Ladysmith (where Evans and the victims resided) in February 2002 where he heard a man named Roger and a woman named Wendy say they were going to "set up" someone named Rock. (The trial evidence showed that the twins' father was named Roger, he was dating a woman named Wendy at the time of the assaults and Evans was known as "Rock.") But as the state points out, Wilson does not claim to know what the alleged "set up" was about, makes inconsistent statements about how he learned about the set up and does not explain why he first memorialized the incident 10 months after it occurred and before he apparently had met Evans.

Apart from the inherent unreliability of Wilson's statements, they fail to establish that it was actually the twins' father and his girlfriend whom Wilson had encountered or that the alleged "set up" they were discussion related to framing Evans for sexual assault involving Roger's daughters. In light of the questionable credibility and borderline relevance of Wilsons's statements, Evans cannot show that it is more likely than not that no reasonable juror would have convicted him even if Wilson had testified.

Having failed to show that he satisfies either of the exceptions to the procedural default doctrine, Evans is not entitled to federal review of the merits of his claims. The petition should be denied on this basis. However, Evans would not be entitled to a writ even if this court considered his claims on their merits. Evans presented all of his claims to the state court of appeals, which found that none of them had arguable merit. Under the Antiterrorism and Effective Death Penalty Act of 1996, to be entitled to habeas relief Evans

must show that the court of appeals' resolution of his claim rested on an unreasonable application of Supreme Court precedent or on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d). Having considered all of Evans's claims and read his submissions, it is clear that Evans cannot make this showing. I agree with the court of appeals that none of his claims have any arguable merit.

RECOMMENDATION

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

Entered this 2nd day of December, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

December 5, 2005

David W. Evans
#90861
Oshkosh Correctional Institution
P.O. Box 3310
Oshkosh, Wi 54903-3310

Aaron R. O'Neil
Assistant Attorney General
Wisconsin Dept. Of Justice
P.O. Box 7857
Madison, WI 53707-7857

Re: Evans v. Smith;
Case No. 05-C-468-C

Dear Messrs. Evans and O'Neil:

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 December 19, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by December 19, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge