

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

CHILDERIC MAXY,

Petitioner,

ORDER

v.

WILLIAM POLLARD, Warden,
Green Bay Correctional Institution,

05-C-0479-C

Respondent.

This case presents a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner Childeric Maxy, an inmate at the Green Bay Correctional Institution, challenges an August 17, 2000 judgment of conviction entered by the Circuit Court for La Crosse County finding petitioner guilty of attempted first degree intentional homicide, burglary and bail jumping. He has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Also before the court is petitioner's motion, pursuant to the Supreme Court's recent decision in *Rhines v. Weber*, 125 S. Ct. 1528 (2005), for an order "staying and abeying" his petition so that he can pursue unexhausted claims in the state court.

Petitioner's presentation is so vague and conclusory that it does not adequately allege that he is in custody in violation of the laws or Constitution of the United States. Before taking further action, I will provide petitioner an opportunity to supplement his petition with facts that show that his custody is unlawful.

DISCUSSION

Petitioner makes six claims:

- 1) Petitioner's appellate lawyer was ineffective for failing to pursue a claim of ineffective assistance of trial counsel based on numerous error by trial counsel;
- 2) The prosecutor committed misconduct by failing to notify defense counsel of new findings by the state crime lab that showed the presence of chemicals in petitioner's blood;
- 3) The prosecutor violated *Brady*¹ by failing to notify defense counsel of new findings by the state crime lab that showed the presence of chemicals in petitioner's blood;
- 4) The prosecutor's misconduct led the court to deny defense counsel's motion for a continuance;
- 5) Trial counsel was ineffective for failing to object to the prosecutor's misconduct or renew his request for a continuance; and
- 6) The prosecutor "surprised" the defense by not revealing the new findings until trial.

According to the petition, petitioner has exhausted only an unspecified "part" of claim one; his other claims are unexhausted.

Section 2254(a) provides that a district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The rules governing habeas petitions provide that the petition must specify all the grounds for relief available to the petitioner *and* state the facts supporting each

¹ I infer that petitioner is referring to *Brady v. Maryland*, 373 U.S. 83 (1963).

ground. Rule 2(c) of the Rules Governing Section 2254 Cases. The conclusory "notice pleading" permitted in civil suits is inadequate in habeas cases, since "the petition is expected to state facts that point to a 'real possibility of constitutional error.'" ' Advisory Committee Note to Habeas Rule 4 (quoting *Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir.1970)). The petition must cross "some threshold of plausibility" before the state will be required to answer. *Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir.1996).

Maxy's petition fails to cross that threshold. None of his claims provide enough facts from which to allow this court to conclude that his detention is illegal. With respect to his ineffective assistance of counsel claim, petitioner lists the alleged errors committed by trial counsel in conclusory fashion without asserting any facts to support his claim. As supporting "facts," petitioner merely states: "failure to ask for lesser included offense and instruction on intoxication; failure to present perfect and imperfect self defense; failure to present evidence (expert witness); element of state of mind to steal negated by intoxication; duplicity; polling of jurors; Miranda rights violated; failure to produce witness statement; defense counsel stating defendant looking for marijuana; deprivation of sleep as prescribed by medical professional." Pet.. dkt. #1, at ¶ 12, Ground One.

In order to establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). With regard to the performance prong, the petitioner must direct the court to the "specific

acts or omissions” that allegedly form the basis of his claim. *United States v. Farr*, 297 F.3d 651, 657 (7th Cir. 2002). Prejudice is defined as a reasonable probability that, without the errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 689. With respect to appellate counsel, petitioner must show that his lawyer ignored significant issues that were “clearly stronger” than those presented on appeal. *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985)).

The curt phrases employed by petitioner set out his claims, but they are not facts. Terms like “duplicity” and “polling of jurors” by themselves do not permit me to conclude that petitioner has made a showing of ineffective assistance of trial counsel sufficient to warrant attention from appellate counsel. Indeed, often it is impossible to discern what petitioner is complaining about. Accordingly, the state will not be ordered to respond to this claim unless petitioner can supplement it with more specific facts that establish a plausible claim of ineffective assistance of counsel.

Claims 2 through 6 of the petition likewise are deficient. As an initial matter, these five claims are redundant. They actually can be condensed into two: 1) prosecutorial misconduct based on an alleged *Brady* violation; and 2) ineffective assistance of counsel for failing to object to the misconduct. Petitioner contends that the prosecutor engaged in misconduct and committed a *Brady* violation when he failed to disclose until trial that crime lab testing of petitioner’s blood sample showed the presence of caffeine and ibuprofen. Petitioner appears to be contending that this prejudiced him because if petitioner had known

of the findings earlier, he would have requested and the court would have granted a continuance to allow him to have the blood sample tested by a private laboratory. According to petitioner, this additional testing would have revealed the presence of “more chemicals.” In addition to claiming that the prosecutor’s failure to disclose the blood test findings violated his right to due process, petitioner claims that his trial lawyer was ineffective for not objecting to the prosecutor’s actions or requesting a continuance.

Although petitioner provided more facts to support claims 2 through 6 than he did for claim 1, he still has not crossed the threshold of plausibility with respect to these claims. To establish a *Brady* violation, petitioner must show that the prosecution failed to disclose evidence that tended to exculpate him. 373 U.S. at 87. Petitioner has not provided a scintilla of evidence to support his suggestion that the presence of ibuprofen and caffeine in his blood was favorable, much less material, to his defense. Petitioner’s claim that this evidence was exculpatory rests on two unsupported conjectures: 1) Upon learning of the ibuprofen and caffeine, petitioner would have requested and received a continuance to allow him to have a private laboratory test the blood sample; and 2) This additional testing would have revealed the presence of “more chemicals.”

These allegations are nothing but speculation. Petitioner does not explain why the presence of ibuprofen and caffeine in his blood would have supported a motion for a continuance or provided any basis to conclude that the trial court would have granted such a motion. Moreover, petitioner has not explained why he thinks “additional chemicals” were

likely to be found in his blood, what those chemicals might be or why they might be relevant to his defense. Petitioner has not explained why such unnamed chemicals would not have been detected by the state crime lab when it tested petitioner's blood. *Brady* requires disclosure only of exculpatory material known to the government *but not known to the defendant*. *United States v. Dawson*, ___ F.3d ___, ___ WL ___, Case No. 04-2557, slip op. at 4 (7th Cir. Sept. 28, 2005), emphasis added. Unless someone slipped petitioner a Mickey or shot him with a dart gun, he would be in a better position than anyone else to know what other chemicals he would expect to be floating through his bloodstream. Thus, even if the state were aware of other chemicals in petitioner's blood—of which there is absolutely no proof—its failure to share this information with petitioner would not violate *Brady*. See *Dawson*, slip op. at 4.

Absent a plausible showing that petitioner is in custody in violation of the laws or Constitution of the United States, this court has no basis for ordering the state to respond to the petition or for considering petitioner's request for an order staying the petition. Understanding that petitioner will have statute of limitations problems if the petition is dismissed without prejudice, I will instead allow petitioner the opportunity to supplement his petition with all the facts and supporting materials he can muster to show that he being detained illegally. If petitioner makes this showing, then the court will decide whether the state should respond and whether it is appropriate to stay the petition to allow petitioner to exhaust his unexhausted claims. If petitioner cannot adduce additional facts sufficient to

show that his detention is violates the laws or Constitution of the United States, then this court will dismiss his petition. *See* Rule 4, Rules Governing Section 2254 Cases.

ORDER

IT IS ORDERED that:

1. Petitioner has until October 27, 2005, within which to supplement his petition with a detailed set of facts to support his various claims of ineffective assistance of trial counsel and his claim of prosecutorial misconduct, including facts showing that the errors of which he claims affected the outcome of his trial.

2. Petitioner's motion to stay the petition is STAYED pending receipt of petitioner's supplement.

Entered this 6th day of October, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge