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

RICHARD NEWBY,

Petitioner,

v.

RANDALL HEPP, Warden,
Jackson Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

06-C-470-C

REPORT

Richard Newby, an inmate at the Jackson Correctional Institution, has petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner raises three claims:

> 1) He was deprived of his constitutional right to a fair trial when a witness at trial inadvertently mentioned a prior incident of child sexual assault by petitioner that the court had excluded;
>
> 2) His lawyer provided ineffective assistance because he failed to call Jessica Liddel to establish petitioner's alibi; and
>
> 3) Counsel's failure to call Liddel violated petitioner's right to a fair trial and his right of compulsory process.

In response, the state contends that this court should deny all of petitioner's claims on the merits or alternatively because he defaulted some of them.[1] Because petitioner's claims do not establish any constitutional deprivations for which habeas relief is warranted, I am recommending that this court deny the petition.

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[1]Petitioner has not filed a reply to the state's response.

FACTS

In October 2002, the state charged petitioner with repeated sexual assault of a child under the age of 16/14 (Anne S.), and with sexual intercourse with a different child under the age of 18 but above the age of 16 (Kristen T.). Anne was the younger sister of petitioner's girlfriend, Laura; Kristen was a friend of Anne's. Petitioner, Laura and their two children lived in a apartment above the apartment in which Anne lived with her sister and mother. The assaults and intercourse allegedly occurred between May 2002 and September 30, 2002.

At trial, there was no dispute that the alleged victims often were present in petitioner's apartment to care for his young children. The trial essentially was a credibility contest between the victims and petitioner over the dispute whether sexual contact occurred during these frequent interactions.

Before trial, the state moved to present other acts evidence of petitioner's prior sexual assault of a child (for which he was not convicted). The court denied the motion, finding that the prejudicial effect of the evidence outweighed its probative value. At trial, the state called Laura, petitioner's former girlfriend and sister of the alleged victim Anne. Laura testified that she had lived with petitioner in Marshfield prior to the charged assaults; as part of the time line, she acknowledged that she and petitioner got kicked out of their living arrangements. During cross-examination petitioner's attorney followed up on this:

Q: First you lived in Marshfield and then you ran out of money and you moved back to your parents' house?

A: I didn't run out of money. I got kicked out because he [petitioner] apparently molested a child there. I couldn't live there, so I had to move because they were going to trash my car and they did.

Dkt. 4, Exh. J at 98.

Defense counsel immediately moved to strike this answer. The court ordered the testimony stricken and immediately instructed the jury that it should disregard the testimony and not consider it during deliberations. Counsel later moved for a mistrial, but the court concluded that the testimony was not sufficiently prejudicial to warrant a new trial. At the close of the evidence, the court read an instruction to the jury that directed them to disregard all testimony that was stricken during the trial.

After about 2½ hours of deliberation the jury found petitioner guilty of both charges. The court sentenced him to 12 years in prison followed by eight years of extended supervision on the sexual assault charge, and to a nine-month concurrent jail term on the sexual intercourse charge.

The state public defender's office appointed a new lawyer to represent petitioner on appeal. Counsel submitted a no-merit report that raised the following potential issues for appeal: 1) whether the evidence was sufficient to sustain the conviction; 2) whether the trial court erred in denying petitioner's motion for a mistrial based on Laura's inadvertent reference to petitioner's alleged prior sexual assault of a child in Marshfield; 3) whether petitioner received effective assistance of counsel; and 4) whether the trial court properly

exercised its sentencing discretion. Petitioner filed a response to the no-merit report in which he alleged that his lawyer had been ineffective for not calling Jessica Liddel to testify. According to petitioner, Liddel would testify that petitioner was living with her and her family in July, August and September 2002.

On February 15, 2006, the court of appeals issued its opinion denying petitioner's appeal. It determined after reviewing the record that there were no issues of arguable merit that petitioner could raise in postconviction proceedings. *State v. Newby*, 2005 AP624-CRNM (Ct. App. Feb. 15, 2006), attached to dkt. 4 , exh. D. The court found that no meritorious claim could be made that the trial court had erred in denying the motion for a mistrial. The court noted that Laura's reference to a possible prior sexual assault by petitioner had involved no details and no basis on which to judge its validity, and the trial court had immediately instructed the jury to disregard the testimony. The court noted that the trial court had reasonably exercised its discretion when it determined, after considering the testimony in the context of the evidence as a whole and the prompt instruction, that the testimony was not so seriously prejudicial to warrant a new trial.

The court also rejected petitioner's contention that his trial lawyer had been ineffective for failing to call Liddel, pointing out that petitioner had admitted that he had lived in an apartment above Anne's for almost half of the period during which the assaults allegedly occurred.

Petitioner, proceeding *pro se*, filed a petition for review in the Wisconsin Supreme Court. He raised two claims: 1) Laura's reference to petitioner's alleged prior sexual assault was so prejudicial as to deny his right to a fair trial and 2) Counsel was ineffective for failing to call Liddel. The state supreme court denied the petition for review.

ANALYSIS

First, petitioner claims that his right to a fair trial was denied when Laura testified that she and petitioner had moved from Marshfield because petitioner was accused of molesting a child. The state responds that the court of appeals' decision denying relief on this claim was neither contrary to, nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). But § 2254(d)'s standard of review applies only to those claims that were "adjudicated on the merits" in state court. When a state court is silent with respect to a habeas petitioner's *federal* claim, then the federal court must apply the more lenient standard of 28 U.S.C. § 2243 and "dispose of the matter as law and justice require." *Canaan v. McBride*, 395 F.3d 376, 382-83 (7th Cir. 2005).

Of course, § 2243 review is available only if the state courts failed to address a claim that the petitioner clearly presented to them in federal constitutional terms. *Id.*; *see also Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999):

> When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the

> merits, however, our review of questions of law and mixed questions of law and fact is de novo.

Id. at 258.

If a state court fails to adjudicate a petitioner's federal claim on the merits because the petitioner failed to alert the court that he was presenting such a claim, then the petitioner cannot obtain federal review of his claim at all because he has not properly exhausted it. *Harrison v. McBride*, 428 F.3d 652, 660-661 (7th Cir. 2005).

In this case, it appears that the state court of appeals might not have adjudicated the merits of petitioner's due process claim because the court was not aware that he was raising one: petitioner's appointed lawyer argued in her no-merit brief only that the potential issue was whether the trial court had abused its discretion; in his response petitioner did not re-frame his claim in constitutional due process terms. *See Harrison*, 428 F.3d at 661 (setting forth four-part tests used to determine whether petitioner has fairly presented claim to state judiciary); *Wilson v. Briley*, 243 F.3d 325, 328 (7th Cir. 2001) ("Abuse-of-discretion arguments are ubiquitous, and most often they have little or nothing to do with constitutional safeguards.")

That said, the state has not asserted a procedural default defense to petitioner's first claim. Accordingly, even if such a defense were available, the state has waived it. *Perruquet v. Briley*, 390 F.3d 505, 516 (7th Cir. 2004) ("where the State has responded to one habeas claim on its merits while asserting that another is procedurally barred, it has implicitly waived any contention that the first claim is also procedurally defaulted."). Because it is

unclear that the state court adjudicated petitioner's due process claim on the merits, I will review the claim under § 2243's general standard without deferring to the state appellate court's decision.[2]

But even under this more forgiving standard of review, petitioner loses. Evidentiary errors committed during state criminal trials of the sort petitioner claims generally are not a ground for collateral relief. *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1989); *Dudley v. Duckworth*, 854 F.2d 967, 970 (7th Cir. 1988). Errors must be "of such a magnitude that the result is a denial of fundamental fairness." *Dudley*, 854 F.2d at 970. The erroneous admission of evidence deprives a petitioner of a fundamentally fair trial only if the admission "produced a significant likelihood that an innocent person has been convicted." *Anderson v. Sternes*, 243 F.3d 1049, 1054 (7th Cir. 2001).

Petitioner has not shown that Laura's inadvertent comment rendered his conviction fundamentally unfair. True, it was inflammatory, but defense counsel immediately objected, the court ordered the testimony stricken and instructed the jury to disregard it. As the state court of appeals correctly noted, jurors are presumed to follow trial court instructions.

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[2] It's possible that this approach catches the state off guard: had it anticipated that this court would find that the state appellate court did not address the constitutional aspect of petitioner's first claim, then the state probably would have argued default. To the extent that the state believes that petitioner *did* fairly present this claim to the state appellate court, the state certainly had reason to believe that the appropriate level of review at this juncture is § 2254(d)'s more deferential standard. It is not my intention to whipsaw the state by denying it the benefit of both arguments. If it is important to the state, it could file objections with the district judge clarifying its positions on these matters, and I would recommend that the court not deem these arguments waived by failure to offer them in the first round of briefing.

Federal courts also indulge this presumption. *United States v. Dumeisi*, 424 F.3d 566, 579 (7th Cir. 2005).

Perhaps in a particular case an isolated comment stricken from the record could be so toxic and so irremediable as to mandate a mistrial, but that is not the case here. Laura's comment obviously was second-hand and conditional and it provided no details about the alleged assault. Therefore the jury had no basis to judge its validity. Indeed, as the trial court noted, Laura's vague, quickly-stricken comment might have led the jury to conclude that Laura was hostile towards petitioner and that her testimony could not be trusted at all. Add to this the explicit, detailed testimony of petitioner's two victims, and it is clear that Laura's remark did not create a probability that the jury convicted an innocent man. *See Williams v. Chrans*, 894 F.2d 928, 932 (7th Cir.1990) (concluding that any error resulting from officer's hearsay testimony about another individuals' identification of defendants as perpetrators of robbery was harmless in light of defense counsel's objection, a limiting instruction, and other evidence supporting conviction). Petitioner is not entitled to habeas relief on this claim.

Petitioner's second claim is that his trial lawyer was ineffective for failing to call Jessica Liddel as a defense witness. Because the state court of appeals adjudicated this claim on its merits, this court reviews that decision under § 2254(d)'s more deferential standard. In reviewing ineffective assistance of counsel claims, the ultimate question is "whether, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding

would have been different." *Strickland v. Washington*, 466 U.S. 668 (1984). Defense counsel established through petitioner and other witnesses that petitioner moved out of the duplex in which he had been living with Laura and her family in July, and counsel emphasized this fact during closing argument. Therefore, Liddel's testimony that petitioner moved into her residence in July would have been cumulative.

Moreover, Liddel would not have provided petitioner with an "alibi," as he claims, because the assaults were alleged to have occurred between May and September 2002. In short, the state court of appeals properly applied *Strickland* when it concluded that petitioner had no viable claim of ineffective assistance of counsel arising out of the decision not to call Liddel. *See Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (to be "unreasonable" under § 2254(d), state court's application of Supreme Court law must lie "well outside the boundaries of permissible differences of opinion").

Finally, petitioner claims that counsel's failure to call Liddel deprived him of his right to present witnesses for his defense. Although petitioner invokes the Confrontation Clause, I infer that he means the Sixth Amendment's Compulsory Process Clause, which preserves a defendant's right to present witnesses for his defense; the Confrontation Clause preserves the right to confront witnesses presented by the government.

The state contends that petitioner procedurally defaulted this claim by failing to present it in these terms in his petition for review. It is unnecessary to delve into the procedural quagmire because petitioner's claim fails on the merits. To establish a violation

of his Sixth Amendment right to compulsory process, a defendant must show more than the mere absence of a witness at trial, he also "must at least make some plausible showing of how [the absent witness's] testimony would have been both material and favorable to his defense." *Newell v. Hanks*, 335 F.3d 629, 633 (7th Cir. 2003) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). As noted in the previous section, petitioner has failed to show–in fact, cannot show–that Liddel's testimony would have made a difference in his trial. Her testimony was cumulative and it did not provide an alibi.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons set forth in this report, I recommend that the petition of Richard Newby for a writ of habeas corpus be DENIED.

Entered this 29th day of November, 2006.

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

Telephone
608-264-5153

November 29, 2006

Richard G. Newby
#402042
Jackson Correctional Institution
P.O. Box 233
Black River Fall, WI 54615

Warren D. Weinstein
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Re: Newby v. Hepp
Case No. 06-C-470-C

Dear Messrs. Newby and 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 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 20, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by December 20, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge