A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 17, 2023
Decided February 28, 2023

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 22-2526

KIMEO DELMAR CONLEY,
Petitioner-Appellant,

v.

JASON WELLS,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 21-CV-01237-SCD

Stephen C. Dries,
Magistrate Judge.

ORDER

Kimeo Delmar Conley applies for a certificate of appealability to challenge the denial of his petition under 28 U.S.C. § 2254. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Conley's requests for a certificate of appealability, appointment of counsel, and for "judicial notice" are **DENIED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KIMEO DELMAR CONLEY,

Petitioner,

v. **Case No. 21-CV-1237-SCD**

JASON WELLS,

Respondent.

ORDER GRANTING THE RESPONDENT'S MOTION TO DISMISS

Petitioner Kimeo Delmar Conley was convicted by a jury of trafficking a child for the purposes of commercial sex acts. He appealed but found no relief in the state court system. Conley filed this action for habeas corpus relief under 28 U.S.C. § 2254. After screening his petition under Rule 4, I permitted Conley to proceed on two claims for relief. The Department of Justice for the State of Wisconsin accepted service on behalf of the Respondent, Jason Wells. Wells is the warden of Racine Correctional Institution, where Conley is presently incarcerated. The State has now moved to dismiss Conley's action, arguing that he did not fairly present either of his two claims for relief in the state court system.

Conley is a prolific writer. After his conviction by a jury and on direct appeal, he made several arguments to the Wisconsin Court of Appeals. The operative question for the instant motion to dismiss is this: whether in any of Conley's filings during his direct appeal—of which there are many—did he fairly present, and therefore exhaust, the following legal arguments: (1) that the trial court provided constitutionally infirm jury instructions by failing to instruct the jury on all elements of the crime of conviction, or (2) that the State should be sanctioned

for destroying evidence after Conley's trial. For the following reasons, I find that Conley did not fairly present either issue in Wisconsin's state court system. His claims are thus procedurally defaulted. Moreover, he cannot overcome the immense hurdles associated with excusing procedural default by showing either a miscarriage of justice or cause and prejudice excusing procedural default. Accordingly, I will grant the Respondent's motion and dismiss Conley's habeas petition.

BACKGROUND

A. Factual Background

On January 3, 2019, the State filed a criminal complaint in Milwaukee County Circuit Court charging Conley with one count of trafficking a child, contrary to Wisconsin Statutes §§ 948.051(1) and 939.50(3)(c), for knowingly recruiting, harboring, and providing a child, identified as SAB, for the purpose of commercial sex acts. ECF No. 17-1 at 3. The complaint generally alleges a scheme where Conley recruited the 17-year-old SAB by plying her with liquor, furnishing her for a trial run where she had sex with 20 men in one night, and then asking her if she wanted to "join the money team" and become a prostitute for him. *Id.* at 3–4. The complaint further alleges that SAB told Conley that she was 17. *Id.* After a successful trial run, according to the complaint, SAB began working for Conley and charged up to $300 per date. *Id.*

Conley made his initial appearance for this charge on January 4, 2019. ECF No. 17-5 ¶ 3. At that proceeding, the trial judge discovered that Conley had another pending case for human trafficking, strangulation and suffocation, false imprisonment, and misdemeanor battery against another alleged victim, identified as MJH. *Id.* Eventually the two cases were joined, and Conley went to trial. *Id.* ¶ 4. On February 28, 2019, after a three-day trial, the jury

returned a guilty verdict on the charge related to SAB, and a not-guilty verdict on the charges related to MJH. *Id.* ¶ 5. The trial court sentenced Conley to fifteen years of initial confinement, ten years of extended supervision, and ordered Conley to pay $20,400 in restitution to SAB. *Id.* ¶¶ 6–9. Conley appealed. He had conflicting goals with the public defender appointed for his postconviction relief process, so Conley terminated the relationship and proceeded *pro se*. *Id.* ¶ 9.

B. Conley's Appeal in the State Court System

The procedural requirements for postconviction relief in Wisconsin are set forth in Wis. Stat. § 974.02 and, by reference, in Wis. Stat. § 809.30. In brief, a defendant-appellant must first file a postconviction motion with the trial judge. The purpose of this is twofold: to allow the initial court to efficiently resolve glaring issues and to clarify and preserve issues for a tidy appeal. Once the trial court rules on the postconviction motion, the defendant-appellant may proceed to the Wisconsin Court of Appeals to litigate the preserved issues. The defendant-appellant must file an opening brief, called the "Brief of the Appellant." Strict formatting and content guidelines govern, which are set forth in Chapter 809 of the Wisconsin Statutes. Following the Brief of the Appellant, the State will file the "Brief of the Respondent," and the defendant-appellant may respond with a "Reply Brief."

According to the Wisconsin Supreme Court's *pro se* guide to appellate procedure, the Brief of the Appellant is the most important document in an appellant's case.[1] The same guide cautions appellants that "[n]o new issues can be raised in the Reply Brief that were not presented in the Brief of the Appellant or the Brief of the Respondent. Therefore, it is

[1] *Guide to Wisconsin Appellate Procedure for the Self-Represented Litigant*, Clerk of the Wisconsin Supreme Court and Court of Appeals, https://www.wicourts.gov/publications/guides/docs/proseappealsguide.pdf. (last visited July 27, 2022).

important to make sure the Brief of the Appellant covers everything you want presented to the Court." *Id.* That cautionary advice is sound. The Wisconsin Court of Appeals does "not address issues raised for the first time in a reply brief." *State v. Mata*, 230 Wis. 2d 567, n.4 (Wis. Ct. App. 1999). This procedural rule in Wisconsin is clear and straightforward: if an appellant wants the Court of Appeals to consider a legal argument, the appellant must unequivocally state the legal argument in the Brief of the Appellant.

On October 5, 2019, Conley filed his opening brief. ECF No. 17-2 at 1–2. Conley certified that he sent his brief to the State on October 18, 2019. *Id.* In that brief, Conley raised eight legal arguments: (1) that an Assistant District Attorney failed to appear at a pretrial hearing and subsequently failed to prosecute Conley's alleged victim for her underlying prostitution; (2) that two witnesses against him were not credible and he had new evidence to prove it; (3) that Conley's newly discovered evidence entitled him to a new trial; (4) that the 17-year-old child Conley allegedly trafficked could be treated as an adult in the criminal system as a perpetrator, so she should also be treated as an adult victim; (5) that Conley's two human trafficking cases were improperly joined; (6) that the judge improperly applied a restitution statute; (7) that the evidence introduced at Conley's trial was insufficient to sustain a guilty verdict; and (8) that the jury was tainted when an alternate juror spoke to a judge in private, before returning to the jury room. ECF No. 17-2 at 9–15. Conley's brief did not raise any developed legal arguments about either (1) jury instructions or (2) spoliation of evidence. *See generally* ECF No. 17-2. Conley's brief was 21 pages long. At the very end—after his conclusion and signature block—Conley added the following postscript to his brief: "In addition the state did not prove every (element of the charge reguarding (sic) to (Conley) being guilty, beyond a reasonable doubt. That's why this case should be dismissed + the lower

court's decision overruled." ECF No. 17-2 at 30. This issue was not listed in the section of Conley's brief titled "Statement of the Issues." *See id.* at 9–15. This issue was not mentioned, developed, or argued in the section of the brief titled "Argument." *See id.* at 19– 29.

On June 2, 2020, Judge Brash of the Wisconsin Court of Appeals issued an order addressing two pending motions in advance of the Court of Appeals' decision on Conley's case, one from each side. ECF No. 17-6 at 49–51. To begin, Judge Brash granted the State's motion for an extension of time to file its Brief of the Respondent. *Id.* at 49. Next, Judge Brash denied four claims for relief made by Conley, who sought: (1) summary reversal if the State was tardy in filing its extension motion; (2) leave to file a supplemental brief to argue that the State's destruction of his Toyota Avalon may be grounds for reversal; (3) a legal explanation about a court's powers under Wis. Stat. § 19.35(4) and Wis. Stat. § 971.01.(2); and (4) sanctions against the State for destroying evidence under *Arizona v. Youngblood*, 488 U.S. 51 (1988) and to "let a jury determine, if one can dismiss a judgement of conviction for (spoilation)." *See id.* at 50.

Judge Brash's explanations for denying relief on Conley's second and fourth issues are relevant to this motion to dismiss. In denying Conley's request to supplement his brief and argue the issue of his destroyed Toyota Avalon, Judge Brash wrote: "This request is denied. To the extent that the issue has been properly preserved for appeal, no valid explanation has been provided for why the appellant's brief should be supplemented." *Id.* In denying Conley's request to sanction the State and offer a jury the chance to dismiss his conviction, Judge Brash wrote: "This request is also denied. Whether to impose sanctions for spoilation of evidence is generally a decision within the circuit court's discretion *See American Family Mut. Ins. Co v. Golke*, 2009 WI 81 ¶39, 319 Wis. 2d 397, 768 N.W.2d 729. To the extent that this request

relates to an issue properly preserved for appeal, the appropriate place to argue its merits is in the briefs, not in a motion." *Id.* at 50–51.

Judge Brash's order has become a source of great confusion for Conley. For example, in his reply brief for this case, ECF No. 20, Conley highlighted Judge Brash's order as evidence that he had fairly presented his arguments to the Wisconsin Court of Appeals. Again, Judge Brash wrote "[t]o the extent that the issue has been preserved for appeal, no valid explanation has been provided for why the appellant's brief should be supplemented." Judge Brash also wrote "[t]o the extent that this request relates to an issue properly preserved for appeal, the appropriate place to argue its merits is in the briefs, not in a motion." Conley now insists that this statement is a clear indication that "the court-of-Appeal's (preserved) the spoilation claim in its order of date (6/2/2020) and [the State] is well aware that the petitioner was instructed to raise this issue in the reply brief by the court of appeal's." ECF No. 26 at 9. Conley made this argument to the Wisconsin Supreme Court as well; in his petition for review he wrote, "On June 2, 2020 = The appeal's court in it's order let me know that my argument + issue, presented under provision (805.14) was (properly preserved)." ECF No. 17-6 at 4 (parentheses in original).

Conley's reading of Judge Brash's order is plainly wrong. Judge Brash was outlining two things that Conley would need to show to support his argument for destruction of evidence: (1) preservation with the trial court, and (2) a valid explanation for why this argument did not appear in Conley's Brief of the Appellant. Judge Brash then went on to reason that *even if* (1) were satisfied, (2) was definitely not. Therefore, he denied Conley's motion. And Judge Brash's comment that legal arguments need to appear in a brief and not in a motion was not an invitation to include additional argument in the reply brief. It was an

admonition for plainly failing to include this argument in the first place. This is further underscored by the Court of Appeals' decision, in which the court wrote:

> In his reply, Conley introduces several new arguments including that the State had to prove eight elements to secure a conviction for trafficking a child. We have consistently held that arguments raised for the first time in a reply brief will not be considered. Conley "unfairly raises this argument for the first time in his reply brief, thereby denying the State an opportunity to respond, and denying this court a full analysis of the issue by both parties with relevant case and record citations. As such we will not address the issue." *State v. Lock*, 2013 WI App 80, ¶38 n.6, 348 Wis. 2d 334, 833 N.W.2d 189.

ECF No. 17-5 ¶ 43.

On June 30, 2020, the State filed its Brief of the Respondent. ECF No. 17-3. The State briefed and argued the following issues:

1. Did Conley properly raise before trial and preserve his objection sto pretrial events, including the appearance of a difference Assistant District Attorney, joinder of the cases against him, his arrest, and the timing of discovery?
2. Given Conley's failure to file a postconviction motion or otherwise raise the argument to the circuit court, are his argument relating [to] the allegedly tainted jury, the alleged bias of the trial court, restitution, newly discovered evidence, and the interpretation of the definition of a child as excluding 17-year-olds properly before this Court?
3. Given the victim's testimony and other evidence introduced at trial, could the jury have reasonably found Conley guilty beyond a reasonable doubt?

Id. at 9–10. The State did not respond to Conley's destruction-of-evidence argument. Similarly, the State did not respond directly to Conley's postscript argument about proving every element, but it did offer the following:

> As given in the jury instructions at trial, the elements of trafficking of a child require (1) that the defendant "knowingly recruited, harbored or provided for [the child]"; (2) that the victim "had not attained the age of eighteen years"; and (3) that the victim was "recruited, harbored, or provided . . . for the purpose of commercial sex acts." (R. 96:128–29); *see* Wis. Stat. § 948.051; Wis. JI–Criminal 2124 (2017). The State introduced sufficient evidence to allow for a finding of guilt beyond a reasonable doubt on each of these elements.
>
> For the first element, the victim, SAB, testified that Conley recruited her and provided her with a place to stay, thereby harboring and providing for her. (R.

> 95:48, 52–54). Another victim, MJH, testified that Conley paid for the residence where SAB lived. (R. 94:134–35.) For the second element, SAB testified that she told Conley that she was 17. (R. 95:48–49.) For the third element, SAB testified that Conley oversaw her performing sex acts for money and that she turned the money she earned over to him. (R. 95:55–57.) MJH also testified that SAB went on "dates" for Conley, and that Conley received money from these dates, (R. 94:130, 135). The jury could therefore infer that Conley harbored SAB for the purpose of receiving this money, and for the purpose of commercial sex acts. The testimony by these two victims, on its own, could be deemed credible by the jury and support a finding of guilt beyond a reasonable doubt.

Id. at 34.

On July 14, 2020, Conley filed his reply brief. ECF No. 17-4. In it, Conley raised his destruction-of-evidence argument, *id.* at 13–17, and his jury instruction argument, *id.* at 17–23. On April 13, 2021, The Wisconsin Court of Appeals issued its decision affirming Conley's conviction. ECF No. 17-5. The court grouped all of Conley's challenges into three broad categories: *pretrial issues, postconviction relief issues,* and *sufficiency of the evidence.*

Pretrial Issues. The Court of Appeals recognized, considered, and rejected five legal arguments from Conley from his pretrial proceedings that he contended entitled him to relief: (1) the trial prosecutor failed to appear at a pretrial hearing—a violation of the trial court's calendar practice under Wis. Stat. § 802.10(7); (2) the State failed to prosecute the alleged victim of Conley's trafficking for her underlying prostitution crimes; (3) the State failed to divulge discovery to the defense in a timely manner; (4) the trial court improperly joined his two cases; and (5) he was arrested without probable cause and was not read his *Miranda* rights. ECF No. 17-5 ¶¶ 11–16.

Postconviction. After his conviction, Conley argued that (1) he was convicted under the wrong statute; (2) the trial court improperly applied the restitution statute; (3) the trial judge tainted the jury panel by speaking to an alternate juror who then had access to the other jury

members; and (4) he had newly discovered evidence that his victim accused another man of trafficking her after she testified at Conley's trial that she was no longer engaged in prostitution. *Id.* ¶¶ 17–36. Unlike Conley's pretrial issues, which the Court of Appeals rejected on the merits, the Court of Appeals rejected each of these arguments because Conley had not followed Wis. Stat. § 974.02(2), Wisconsin's statutory procedure for postconviction relief. Then, applying both belt and suspenders to its decision, the Wisconsin Court of Appeals discussed and rejected the merits of each postconviction argument notwithstanding procedural default. *See id.*

Sufficiency of the Evidence. The Wisconsin Court of Appeals considered the evidence of Conley's case and concluded that the jury reasonably inferred that Conley was guilty beyond a reasonable doubt of the crime with which he was charged. ECF No. 17-5 ¶¶ 37–43. The Court of Appeals also noted that Conley's arguments in this area were not developed and did not reflect "any legal reasoning." *Id.* ¶ 43.

On April 13, 2021, the Wisconsin Court of Appeals summarily rejected Conley's request for postconviction relief, explaining that it failed "both procedurally and on the merits." *See id.* ¶ 44. On September 14, 2021, the Wisconsin Supreme Court denied Conley's petition for review. ECF No. 17-7 at 1.

C. The Parties' Arguments in the Present Case

On October 22, 2021, Conley filed this habeas petition under 28 U.S.C. § 2254. ECF No. 1. After dropping an unexhausted claim, *see* ECF No. 8, Conley pressed two grounds for federal habeas relief. First, Conley argued that his jury conviction violated his 6th Amendment rights because "the trial judge failed to instruct the jury to find guilt of all (8) elements of the offense [] of Wis. Stat. (948.051), [because the judge] only instructed them to

find guilt of (3) elements."[2] ECF No. 1 at 6. Second, Conley argued that he should receive a new trial because the State destroyed his Toyota Avalon—which was used as evidence against him at trial—instead of preserving it. *Id.* at 7.

Saying nothing of the merits of either argument, the Respondent moved to dismiss the case for procedural default. ECF No. 16. The Respondent's primary argument is that "Conley did not fairly present his two claims for relief in state court." ECF No. 17 at 4–10. To support this argument, the Respondent points to Wis. Stat. §§ 974.02 and (Rule) 809.30(2)(h), as well as *State v. Evans*, 273 Wis. 2d 192 (2004). Together, these sources of legal authority set forth the procedural requirements for how defendant-appellants must present their arguments on appeal. In general and as detailed above, "a postconviction motion is needed prior to an appeal for issues not previously raised." *Evans*, 273 Wis. at 212–13, *overruled on other grounds by State ex rel. Coleman v. McCaughtry*, 290 Wis. 2d 352 (2006). Once preserved, a defendant-appellant must also include his arguments on appeal in his brief-in-chief. *See State v. Lock*, 348 Wis. 2d 334 (Wis. Ct. App. 2013). The Respondent argues that Conley (1) failed to raise either issue in a postconviction motion, and (2) did not advance either argument in his brief-in-chief to the Wisconsin Court of Appeals. ECF No. 17 at 6–7. The Respondent concedes that

[2] Conley's argument is baseless. It is founded upon a fundamental misunderstanding of the statute under which he was convicted. Conley is correct that a jury must find him guilty of every element of the offense charged. *See In re Winship*, 397 U.S. 358 (1970). But Wis. Stat. 948.051—Conley's statute of conviction—does not have 8 elements. It has 3. Instead, it has 8 potential actions that a criminal defendant can commit to satisfy one of the 3 elements. The criminal statute reads: "Whoever knowingly recruits, entices, provides, obtains, harbors, transports, patronizes, **or** solicits . . . any child for the purpose of commercial sex acts, as defined in s. 940.302 (1) (a), is guilty of a Class C Felony." The first element is knowledge—the criminal defendant must have an intentional state of mind. The second element is *any one* of the 8 listed actions. The third element is that the action is taken for the purpose commercial sex acts. Conley believes this statute required the jury to find him guilty beyond a reasonable doubt of committing all 8 listed actions. But that reading is plainly wrong. The disjunctive "**or**" means that any one action, proven beyond a reasonable doubt, can sustain a conviction, so long as the other two elements are satisfied. In Conley's case, the jury found him guilty beyond a reasonable doubt of engaging in 3 of the 8 listed actions(recruiting, harboring, and providing for), in addition to the first element (knowing state of mind) and the third element (for an illicit purpose).

Conley *tried* to raise both issues—the jury instruction claim in a reply brief and the destruction-of-evidence claim in a motion he filed after submitting his brief-in-chief—but asserts that neither issue was raised pursuant to proper appellate procedure. This position is bolstered by the final decision of the Wisconsin Court of Appeals, which does not mention the destruction-of-evidence claim and explicitly refused to consider the jury-instruction claim—citing *State v. Lock*—because it was improperly raised for the first time in reply. *See* ECF No. 17-5.

Conley's response is manifold. He argues that the Respondent mischaracterized the facts, that he did present his issues for review in state court, that he did follow proper appellate procedure, that the state court's decision does not rest on independent and adequate state grounds, that Wisconsin's appellate procedure in constitutionally suspect because it was applied "infrequently, unexpectedly, or freakishly," and that resolving Wisconsin's procedural law question depends on a federal constitutional ruling. ECF No. 20 at 7–11. Conley also argues that the "state high court did not expressly or explicitly state the petitioner was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis.2d 168 (1994) on the face of any of its orders." *Id.* at 12. For all these reasons, Conley contends that his case is not procedurally defaulted. Conley then goes on to argue that, even if his case is procedurally defaulted, actual innocence excuses procedural default and he is, in fact, actually innocent of the crime of which he was convicted. *Id.* at 13–17.

Additionally, Conley created a table to succinctly explain how he exhausted both claims. *Id.* at 18–21. In this table, Conley explains how he raised each issue at every stage of his appeal. For the inadequate jury instruction claim, Conley claims he objected to the jury instructions by mail in late February; they were filed stamped as received on March 6, 2019 and entered March 11, 2019—nearly two weeks after the jury reached its verdict. ECF No.

20-1 at 14; ECF No. 24 at 2. Conley claims he objected to the jury instructions again on December 10, 2020, by filing a habeas corpus petition in state court challenging them. ECF No. 20 at 14. His trial judge issued an Order on December 14, 2020, titled "Decision and Order Denying Petition for Writ of Habeas Corpus." ECF No. 20-1 at 15. In this Order, the trial judge explained that Conley's habeas corpus petition "is not a substitute for appeal, and therefore, a writ will not be issued where the petitioner has an otherwise adequate remedy that he or she may exercise to obtain relief." *Id.* (internal citations and quotation marks omitted). Next, Conley claims he raised his inadequate jury instruction claim on page 21 of his brief-in-chief to the Court of Appeals, where he wrote the following after his conclusion and signature: "In addition the state did not prove every (element) of the charge reguarding (sic) to (Conley) being guilty, beyond a reasonable doubt. That's why the case should be dismissed and the lower court's decision overruled." ECF No. 20 at 13. He argues that his argument was "finally noticed in [his] reply brief by Court of Appeals." *Id.* at 19. Finally, Conley claims he raised this issue to the Wisconsin Supreme Court, which declined review. *Id.* at 20.

For the destruction-of-evidence claim, Conley claims that he raised this issue to his trial judge by letter on October 13, 2021. *Id.* at 21. He next claims that the Wisconsin Court of Appeals "ordered the issue was preserved [and was] to be filed in the reply brief." *Id.* Conley claims that he briefed the issue in his reply brief, but the Court of Appeals never addressed it. *Id.* And finally, Conley asserts that he raised this issue to the Wisconsin Supreme Court, which declined review. *Id.*

The Respondent replied to Conley's arguments by saying that "[n]one of Conley's circuit court filings was a valid means to preserve a constitutional claim based on jury

instructions." ECF No. 24 at 2. Beginning with the jury instructions claim, the Respondent argues that "in Wisconsin, challenges to jury instruction are waived unless the defendant preserves them with contemporaneous objections to the trial court." *Id.* (citing *State v. McKellips*, 369 Wis. 2d 437 (2016)). Moreover, the Respondent argues that Conley's subsequent state habeas petition was an improper mechanism to raise a jury instruction claim. *Id.* at 3. Furthermore, even if this argument were preserved for appeal at the trial level, Conley's postscript on page 21 of his brief-in-chief to the Court of Appeals was only two sentences and it did not adequately alert the Court of Appeals to any jury instruction claim—it was not in the argument section of his brief, offered no facts about the instructions or arguments about why they were inadequate, and did not mention jury instructions at all. *Id.* at 4. Although Conley "mentions the alleged error in his initial motion to that court, which the court construed as a nonconforming petition for review [ECF No. 17-6], he did not clearly set forth the claim or operative facts as an issue presented for review in that document." *Id.* at 5–6. As for the destruction-of-evidence claim, the Respondent focuses on Conley's failure to properly raise this issue to the Wisconsin Court of Appeals because he raised this issue only in his reply brief. *Id.* at 6. And finally, the Respondent argues that Conley cannot establish actual innocence to overcome his procedural default. *Id.* at 7–10.

LEGAL STANDARDS

"Before seeking federal habeas relief, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal citations and quotation marks omitted). "To provide the State with the necessary opportunity, the prisoner must fairly present his claim in each appropriate state

court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Id.* "It is not sufficient that the federal habeas applicant has been through the state courts. The [exhaustion] rule would serve no purpose if it could be satisfied by raising one claim in the state courts and then another in the federal courts." *Picard v. Connor*, 404 U.S. 270. 275–76 (1971). Thus, when a habeas petitioner attempts to raise a novel claim for relief in federal court, his petition may be subject to dismissal under the doctrine of procedural default. *See id.*

"The procedural default doctrine, which like the exhaustion doctrine is grounded in principles of comity, federalism, and judicial efficiency, normally will preclude a federal court from reaching the merits of a habeas claim when either (1) that claim was presented to the state courts and the state-court ruling against the petitioner rests on adequate and independent state-law grounds, or (2) the claim was not presented to the state courts and it is clear that those courts would now hold the claim procedurally barred." *Perruqeut v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) (citations omitted). "Thus, when the habeas petitioner has failed to fairly present to the state courts the claim on which he seeks relief in federal court and the opportunity to raise the claim in state court has passed, the petitioner has procedurally defaulted that claim." *Id.* And if a habeas petitioner fails to meet a state's procedural requirements for presenting his federal claims, then he has deprived the state courts of an opportunity to address those claims, and his claims are defaulted. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

"A procedural default will bar a federal court from granting relief on a habeas claim *unless* the petitioner demonstrate cause for the default and prejudice resulting therefrom, *Wainwright v. Sykes*, 433 U.S. 72, 87–88 [] (1977), or, alternatively, he convinces the court that

a miscarriage of justice would result if his claim were not entertained on the merits." *Perruquet*, 390 F.3d at 514–15 (citing *Murray v. Carrier*, 477 U.S. 578, 195–96 (1986)) (emphasis in original). "To establish cause for his default, a petitioner ordinarily must show that some external impediment blocked him from asserting his federal claim in state court." *Id.* "[T]o overcome his procedural default by establishing the prospect of a miscarriage of justice, then he must demonstrate that he is actually innocent of the crime for which he was convicted—that is, he must convince the court that no reasonable juror would have found him guilty but for the error(s) allegedly committed by the state court." *Id.*

ANALYSIS

While the procedural background of this case is complex, the central issue the case presents is quite simple. In short, Conley did not follow Wisconsin's appellate procedure, particularly in his filings with the Wisconsin Court of Appeals. Accordingly, Conley cannot raise his two arguments here. Moreover, it is clear that the state court system would hold Conley's claims procedurally barred—in fact, the Court of Appeals has already held so.

"As a general rule, federal district courts may not reach the merits of a habeas petition challenging a state conviction if the 'state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds.'" *Barksdale v. Lane*, 957 F.2d 379, 382 (7th Cir. 1992) (quoting *Coleman v. Thompson,* 501 U.S. 722, 730 (1991)). Failure to comply with state procedural rules . . . provides an adequate basis for barring federal habeas relief 'only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the

lack of notice and consistency may show that the state is discriminating against the federal rights asserted.'" *Id.* (quoting *Prihoda v. McCaughtry,* 910 F.2d 1379, 1383 (7th Cir.1990)).

In Conley's case, he did not raise his destruction-of-evidence claim to the Court of Appeals in the appropriate manner. Not surprisingly, the Court of Appeals did not address it. The Court of Appeals did address each of Conley's claims that he made according to proper appellate procedure. As for the jury instruction claim, Conley's postscript on page 21 of his opening brief was insufficient for the Court of Appeals to address the issue. And when he tried to raise that issue in a reply brief, the Court of Appeals explained how it was procedurally defaulted. The Court of Appeals also, on pages 18 and 19 of its decision, explained why Conley's argument was frivolous. *See* ECF No. 17-5 ¶¶ 37–42. Hence, its conclusion that "Conley's request for postconviction relief fails both procedurally and on the merits." *Id.* ¶ 44. Accordingly, Conley's federal habeas case is procedurally defaulted.

A habeas petitioner claiming actual innocence can avoid procedural default in certain rare and narrow circumstances. *Gladney v. Pollard,* 799 F.3d 889, 895 (7th Cir. 2015). A petitioner's procedural default can be excused only if he "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* (quoting *Schlup v. Delo,* 513 U.S. 298, 316 (1995)). The petitioner must also show that "in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* (internal citations and quotation marks omitted). And the "new evidence" must be strong. It must "take the form of 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical

evidence—that was not presented at trial.'" *McDowell v. Lemke*, 737 F.3d 476, 483–84 (7th Cir. 2013) (quoting *Schlup*, 513 U.S. at 3215).

Here, to support his claim of actual innocence, Conley cites to portions of the trial transcript that seem to illustrate that a testifying witness also admitted to trafficking the child. ECF No. 20 at 14. Not only is this not "new evidence," but it lacks any probative value. Two people, of course, can both be guilty of the same crime. The only "new evidence" that Conley hints at is a letter from this same witness against him in which she says she is sorry for putting Conley in this situation and that she now realizes money isn't everything. *Id.* Conley does not include a copy of this letter but confusingly insists that it was docketed as a trial exhibit. *Id.* Therefore, it is not new. In any event, as Conley explains this letter, it offers little probative value of his innocence. A reasonable juror could have access to the contents of this letter, as explained by Conley, and nonetheless conclude that Conley trafficked a child.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Where a petition is denied on procedural grounds, as it is here, the Petitioner must show both that reasonable jurists would "find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *v. McDaniel*, 529 U.S. 473, 484

(2000). Here, I do not believe a reasonable jurist would find my procedural rulings debatable. Accordingly, I will deny a certificate of appealability.

CONCLUSION

In sum, both of Conley's claims are procedurally defaulted. He did not fairly present them in the state court system because he did not follow the rules for appellate procedure. Moreover, Conley cannot demonstrate actual innocence to overcome his procedural default. Accordingly, the motion to dismiss, ECF No. 16, is **GRANTED** and Conley's petition is dismissed. The clerk is directed to enter judgment dismissing this case. A certificate of appealability is **DENIED**. Finally, ECF No. 27 is **DENIED as moot**.

SO ORDERED this 4th day of August, 2022.

Stephen C. Dries

STEPHEN C. DRIES
United States Magistrate Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 27, 2023

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 22-2526

KIMEO DELMAR CONLEY,
Petitioner-Appellant,

v.

JASON WELLS,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:21-cv-01237-SCD

Stephen C. Dries,
Magistrate Judge.

ORDER

On consideration of petitioner Kimeo Delmar Conley's motion for a new trial, construed as a petition for rehearing, filed on April 12, 2023, both judges on the original panel have voted to deny the petition.

Accordingly, the motion for a new trial, construed as a petition for rehearing, filed by petitioner Kimeo Delmar Conley is **DENIED**.

To the extent that petitioner Conley wishes to pursue a successive collateral attack based on new evidence, he must first file a complete application that complies with 28 U.S.C. § 2244(b)(3) and Circuit Rule 22.2. Together with this order, the Clerk of this Court shall mail to petitioner Conley a copy of Circuit Rule 22.2.