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

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ERIC GOMEZ,

Petitioner,

v.

RICHARD SCHNEITER, Warden,
Wisconsin Secure Program Facility,

Respondent.

REPORT AND
RECOMMENDATION

05-C-184-C

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REPORT

This case presents a petition for a writ of habeas corpus filed by state prisoner Eric Gomez pursuant to 28 U.S.C. § 2254. For the reasons stated below, I conclude that petitioner is not entitled to habeas relief from this court on any of his claims. Therefore, I am recommending that this court deny the petition and dismiss this case.

Petitioner, an inmate at the Wisconsin Secure Program Facility, challenges his 2003 conviction for battery to a corrections officer by a prisoner, with an enhancer for habitual criminality. The charge arose from a May 2002 cell extraction while petitioner was an inmate at WSPF. Petitioner went to trial on the charge and was convicted on or about May 9, 2003. Petitioner raises four claims in his petition:

> **I.** The state violated petitioner's Fourth Amendment rights by forcing him to appear in court to answer charges when the trial court lacked personal jurisdiction as a result of the state's failure properly to serve the criminal complaint on petitioner;

**II.** The evidence adduced at trial was insufficient to support the conviction;

**III.** Petitioner's trial lawyer was ineffective for failing to develop facts to support petitioner's selective prosecution claim, for failing to obtain an *in camera* review of the personnel files of extraction team members and for failing to obtain the victim's medical records "that may have shown that the victim might have had a preexisting lip injury that went untold." (dkt. 1 at 14).

**IV.** Petitioner was subjected to selective and discriminatory prosecution.

## BACKGROUND FACTS

Having considered all the submissions from both sides, including transcripts of the pretrial hearings and the trial, I find the following background facts:

In May, 2002, petitioner Eric Gomez, who is Hispanic, was incarcerated at the Wisconsin Secure Program Facility serving a life sentence. Believing that prison employees were harassing him, on May 24, 2002 petitioner obstructed the view of the security camera in his cell. This led to a cell extraction team of four heavily-padded correctional officers entering petitioner's cell and forcibly removing him. During extraction one of the officers, Thomas Taylor, received a bloody lip.

The state charged petitioner with battery by a prisoner as a habitual offender. Petitioner received notice of this criminal charge when a WSPF records custodian stuck the summons and complaint in the door of petitioner's cell. Thereafter, as the case proceeded, WSPF officers routinely transported petitioner from his cell to court for hearings and trial.

Petitioner's first court-appointed attorney withdrew from the case. His second attorney also withdrew after petitioner filed a battery of pro se motions and told counsel that he did not want to be represented by him. Petitioner's self-penned motions included a challenge to the court's jurisdiction, a claim of selective prosecution and a demand for in camera review of the extraction team personnel files in order for petitioner to raise a self-defense claim at trial. No proposed facts accompanied the selective prosecution motion.

The court appointed a third attorney for petitioner, Jeffrey Erickson from the public defender's office. Erickson did not adopt, pursue or argue petitioner's previously-filed pro se motions; nonetheless Erickson suggested at a February 19, 2003 motion hearing that the court rule on them. The court did so, denying them all. *See* Dkt. 6, vol. 2, Exh. 34. The court held that it had personal jurisdiction over petitioner.

The court denied the motion to dismiss based on selective prosecution, finding that there was no showing to support petitioner's claim. In fact, the thrust of petitioner's motion actually was a challenge to probable cause. The court directly asked petitioner in open court to reply to the state's opposition to his motion. Petitioner took the opportunity to report his version of his confrontation with the cell extraction team. Petitioner did not attempt to argue invidious selection for prosecution, nor did he indicate to the court that he–or Attorney Erickson– needed or would like an opportunity to develop evidence to support such a claim. *Id.* at 6-9.

The court denied petitioner's request for an in camera review of extraction team personnel records, concluding that petitioner did not know and could not have known at first which officers had entered his cell in their riot gear. Therefore, it was immaterial whether any of these officers had reputation for violence amongst the prisoners.

At petitioner's jury trial, the members of the extraction team testified that they entered petitioner's cell after he refused to obey an order to submit to restraints. Petitioner charged at the officers, swinging his closed fists. Officer Taylor testified that Gomez struck him in the face, resulting in cuts. *See* dkt. 6, vol. 2, Exh. 37 at 113-14. Petitioner testified that when the extraction team entered his cell he tried to go to the ground but they pushed him to the back of the cell and kneed him in the face. Petitioner testified that he never swung at the officers. The state played a videotape of the extraction.

The jury convicted petitioner and the court sentenced him to 18 months in prison plus 18 months of supervision.

Petitioner appealed his conviction. His appointed appellate attorney filed a 38 page "no merit" brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). *See* Dkt. 6,, vol. 1, Exh. B. Petitioner filed a response. *Id.* Exh. C. Among his issues, petitioner claimed that the trial court impermissibly subjected him to "hybrid representation" in violation of his Sixth Amendment right to counsel. Specifically, he complained that the court heard and ruled on his pro se motions at a time when his third attorney was representing him; it is not entirely clear, but apparently petitioner's point was that the trial court should *not* have

considered his pro se motions at all because this resulted in "forbidden" hybrid representation. Petitioner then argued that Attorney Erickson nonetheless had an obligation to gather facts and information to correct the errors and omissions in petitioner's motions.

As an example of this, petitioner claimed that "as a result of inept legal knowledge and hybrid representation, no demographic data was ever gathered" to support his selective prosecution motion. Petitioner submitted a handwritten chart that contained this information, which he identified merely as "statistics from 2001 and 2002":

| Admissions at WSPF | Major conduct reports | Batteries | Prosecutions |
|---|---|---|---|
| Afr. American 257 (57.11%) | 1510 (62.47%) | 21(50%) | 6 |
| Caucasians 140 (31.11%) | 579 (23.96%) | 15(35.71%) | 2 |
| Hispanic 40 (8.89%) | 227 (9.39%) | 03 (7.14%) | 1 |
| Other 13 (2.89%) | 101 (4.17%) | 03 (7.14%) | 0 |

Petitioner further asserted that "The prosecution for non-white state prison inmates in Grant County Circuit Court is 68.02% which is quite suspect." Exh. C. at 4-5.

Next, petitioner alleged that service of the criminal complaint was defective under state statute, which meant that he had been "abducted" from his prison cell to answer the battery charge in violation of his Fourth Amendment right to be free from unreasonable seizures.

After raising some other claims not at issue in the instant federal habeas petition, petitioner alleged that the evidence adduced at trial did not prove beyond a reasonable doubt that he had struck Officer Taylor, because another officer might have hit Taylor, or Taylor might have bitten his own lip.

Elsewhere in his response to the no merit brief, petitioner objected to the trial court's denial of his pro se motion for in camera review of the cell extract team's personnel files, but he did not allege that his trial attorneys were ineffective for failing to obtain these records. (Petitioner now alleges that this was ineffective assistance of counsel).

On October 20, 2004, the Wisconsin Court of Appeals entered an unpublished opinion upholding petitioner's conviction. First, the court cited to *United States v. Chavin*, 316 F.3d 666, 671 (7th Cir. 2002) to conclude although a criminal defendant had no right to hybrid representation, it was within a trial court's discretion to allow it; perforce, it was not unconstitutional to permit hybrid representation. Therefore, it was within the trial court's discretion to rule on petitioner's pro se motions despite petitioner's representation by counsel.

In response to petitioner's claim of selective prosecution and claim that his attorney was ineffective for having failed to pursue this claim, the court stated that

> Gomez appears to concede that, based on the record before it, the trial court properly denied his venue and selective prosecution motions. He contends, however, that trial counsel provided ineffective assistance by failing to research and present the trial court with documentation in support of those motions. Counsel is not required, however, to take futile actions. Gomez has not shown that there were actually any materials available which would have changed the outcome of those motions.

Dkt. 6, Exh. E at 2.

The court ruled that petitioner's challenge to the court's personal jurisdiction over him was based a 1976 legal proposition that had been overruled ten years later in *State v.*

*Smith*, 131 Wis. 2d 220, 239 (1986); *see also* Wis. Stat. 939.03 (establishing the bases for Wisconsin's criminal jurisdiction over defendants).

The court held that the trial court correctly denied to review in camera the personnel files of the extraction team because petitioner would have been unable to connect up this information to his claim of self defense.

The court held that the evidence was sufficient to support the verdict because viewed most favorably to the state and the conviction, it was not so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilty beyond a reasonable doubt. Dkt. 6, vol. 1, Exh. E at 4. The court noted that four correctional officers testified that petitioner had swung his fists at them while they attempted to subdue him, and that the videotape shown to the jury supported the officers' accounts.

Petitioner sought review by the Wisconsin Supreme Court. He alleged four grounds for relief: first, he claimed that the state never properly served him with the summons and complaint, which he framed as a statutory and jurisdictional issue, not a Fourth Amendment issue. *See* Dkt. 6, Exh. F. At 4-5. Second, he claimed that attorney Erickson had been ineffective because he refused petitioner's request to research the motions to determine their merits, which resulted in prejudice to petitioner on his selective prosecution claim. Petitioner added brand new complaints against Erickson, claiming that he should have sought to suppress the videotape of the extraction and should have impeached the victim and his fellow officers with the written conduct report and the medical reports. Third, petitioner

claimed that the evidence at trial was insufficient to sustain the battery conviction. Fourth, petitioner claimed selective prosecution, again stating that his data reflected disproportionate criminal prosecution of nonwhite prisoners, which at least merited remand for further exploration. On December 15, 2004, the Supreme Court denied review.

ANALYSIS

**I. Standard of Review**

This court may not grant petitioner's application for a writ of habeas corpus unless the state courts' adjudication of his claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). When the case falls under § 2254(d)(1)'s "contrary to" clause, the district court reviews the state court decision de novo to determine the legal question of what is

clearly established law as determined by the Supreme Court and whether the state court decision is "contrary to" that precedent. *Denny v. Gudmanson*, 252 F.3d 896, 900 (7th Cir. 2001) (citations omitted).

The "unreasonable application" clause of § 2254(d)(1) pertains to mixed questions of law and fact. *Lindh*, 96 F.3d at 870. A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407.

An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411. A state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh*, 96 F.2d at 871 ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

Finally, as for § 2254(d)(2), a federal court's disagreement with a state court's determination of the facts is not grounds for relief. Pursuant to § 2254(e)(1), the state court's findings of fact are presumed correct, and it is the petitioner's burden to show by clear and convincing evidence that the state court's factual determinations were incorrect *and* unreasonable. *Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002).

**II. Petitioner's Fourth Amendment Claim**

Petitioner claims that the state violated his Fourth Amendment right to be free from unreasonable seizures when it escorted him from his cell to attend state court proceedings without first having served the criminal complaint and summons on him in the fashion required by state statute. There are two reasons to deny this claim: First, notwithstanding petitioner's invocation of the Fourth Amendment, this is a paradigmatic state law claim, alleging nothing more than a technical failure to comply with a state service statute. Federal habeas relief is not available to correct errors of state law. *Estelle v. McGuire*, 502 U.S. 62 67-68 (1991); *Aperruquet v. Briley*, 390 F.3d 505, 511 (7th Cir. 2004). Second, the state court correctly concluded that service of the summons and complaint *was* proper, the court had jurisdiction over petitioner and that petitioner's claim was based on nothing more than petitioner's willful failure to acknowledge a change in state law.[1] Petitioner is not entitled to federal habeas relief on his Fourth Amendment claim.

[1] As a third ground to deny relief, the state invokes the doctrine of *Stone v. Powell*, 428 U.S. 465 (1976). *Stone* probably does not apply here because it is concerned with the exclusionary rule, not dismissal.

**III. Sufficiency of the Evidence**

Similarly, petitioner's sufficiency of the evidence claim is based on his struthious refusal to acknowledge the evidence actually adduced at trial. Pursuant to *Jackson v. Virginia*, 443 U.S. 307(1979), a court reviewing a factual challenge to a jury's guilty verdict is not required to ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt; "instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 319, emphasis in original. *See also McFowler v. Jaimet*, 349 F.3d 436, 446 (7th Cir. 2003). It took petitioner's appellate attorney thirteen pages in his no-merit brief just to *summarize* the testimony against petitioner proving his guilt. *See* dkt. 6, vol. 1, Exh. B at 15-27. As counsel notes in his reply to petitioner's response, "Mr. Gomez' assertion that there was no testimony that he had struck Officer Taylor and that the entire case was based on circumstantial evidence is entirely false." *Id.*, Exh. D. At 4. Counsel is correct. Petitioner continues in this court intentionally to mischaracterize the evidence supporting the jury's guilty verdict. Petitioner is not entitled to federal habeas relief on this claim.

**III. Ineffective Assistance of Counsel**

Pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), petitioner claims that his third trial attorney was ineffective for not pursuing the selective prosecution claim and for

punting on two evidentiary issues. The state responds that petitioner defaulted this claim by failing to present it in his petition for review to the Wisconsin Supreme Court. *See* Answer, dkt. 6 vol. 1, at 4. The state is incorrect: "Issue B" in petitioner's petition to the Wisconsin Supreme Court asks "Did Gomez receive effective assistance of trial counsel?" *See* dkt. 6, vol. 1, Exh. F at 1. In his argument seeking review, petitioner specifically criticized Attorney Erickson for failing to support petitioner's claims of lack of jurisdiction and selective prosecution. *Id*. at 6-7. Petitioner also complained generally that

> Although Gomez filed the pro se motions between Attorney Hanson's withdrawal and Attorney Erickson's appointment, Gomez was never absent of counsel and the [prudent] attorney would have sought to affirm or deny the merit of the motion(s) prior to allowing their client to even attempt representation.

*Id*. at 6.

It appears that petitioner defaulted his claims against Attorney Erickson regarding petitioner's request for an in camera inspection of the correctional officers' personnel records and Officer Taylor's medical record. Even so, there is no need for a time-consuming default analysis because as a substantive matter, petitioner could not obtain habeas relief on these evidentiary claims. Petitioner requested a review of the personnel records so that he could claim self-defense: he alleged that at least two of the officers who entered his cell had reputations for violence against inmates; therefore, petitioner was afraid he was about to receive an undeserved beating, which caused him to "defend" himself.[2] But the uncontested

[2] This claim of self-defense contradicted petitioner's assertion that he never struck Officer Taylor or offered other resistence, but a criminal defendant may present inconsistent defenses at trial if he wishes. *See, e.g., Stevenson v. United States*, 162 U.S. 313, 323 (1896).

evidence led the trial court to conclude at the pretrial motion hearing that petitioner did not know the identity of the members of the cell extraction team entering his cell. Therefore, petitioner's decision to resist them could not have been based on his knowledge of their purported reputations for violence. Accordingly, there was no reason for the court to review their personnel records. *See* dkt. 6, vol. 2, Exh. 34 at 21-29. Similarly, petitioner's post-trial theorizing that Officer Taylor already might have had a cut on his lip is immaterial: it is not an element of the offense that petitioner draw blood. Even if Officer Taylor had a pre-existing cut, Officer Taylor's lip was not bleeding when he entered petitioner's cell but it was bleeding afterwards.

This leaves petitioner's claim that his attorney should have developed facts to support the selective prosecution claim. First, petitioner does not appear to be pursuing his claim that the trial court erred by allowing petitioner even to present his motions pro se. In any event, this would not have been error because, as the Wisconsin Court of Appeals noted, "hybrid" representation is not prohibited. *See McKaskle v. Wiggins*, 468 U.S. 168, 183 (1984). It does, however, lead to messy records and opportunistic post-trial motions of the sort that petitioner has filed here. *See, e.g., United States v. Perez*, 43 F.3d 1131, 1136 (7th Cir. 1994) (because demarcation of responsibilities was unclear between a purportedly pro se defendant and his stand-by attorney, it was difficult on appeal to determine whether defendant had waived his right to object to jury instruction; appellate court decided record was "sufficiently opaque" to give defendant the benefit of the doubt).

Here, petitioner received a windfall from the trial court: although he claims that he was represented at all times, he filed a series of motions pro se, received–and used–the opportunity personally to argue their merits, then after losing the motions, attempted to blame his attorney–who wasn't even *on* the case when petitioner filed the motions–for not investigating and pursuing them more vigorously.

On direct appeal, the court did not hold–as it certainly could have–that on the issue of his pro se motions, petitioner had waived his right to blame his attorney, *see Faretta v. California*,422 U.S. 806, 834 n.46 (1975) and it did not remand the claim for a *Machner* hearing.[3] Instead, the court held, as quoted above (at p. 6), that counsel could not be ineffective for failing to take "futile actions" and that petitioner had not shown that "there were actually any materials available which would have changed the outcome of those motions." Dkt. 6, vol. 1, Exh. E at 2. This last observation fails to account for the chart of statistics and percentages that petitioner provided for the first time in his response to the no-merit brief. Although I surmise that an appellant in state court is not allowed to present new evidence, the court's failure even to acknowledge petitioner's chart prevents this court from deducing the appellate court's position on the data: was it a procedural nullity? Lacking foundation? Unpersuasive? Immaterial to the claim of ineffective assistance?

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[3] In *State v. Machner*, 92 Wis.2d 797 (1979), the Wisconsin Supreme Court established the post-trial procedure by which a trial court could develop the evidentiary record on an ineffective assistance claim. Petitioner has no federal right to request a *Machner* hearing at this time. *See Peoples v United States*, 403 F.3d 844, 848-49 (7th Cir. 2005).

Ordinarily a § 2254 petitioner alleging ineffective assistance of counsel faces the daunting burden of overcome two levels of presumptively correct discretionary decisions: "*Strickland* builds in an element of deference to counsel's choices in conducting the litigation; § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard." *Holman v. Gilmore*, 126 F.3d 876, 881 (7th Cir. 1997). But in this case, absent any meaningful application of *Strickland* by the appellate court, the prudent analytical course would be to eschew the deference normally mandated by § 2254, and instead to dispose of petitioner's claim against counsel "as law and justice require." *Myartt v. Frank*, 395 F.3d 782, 785 (7th Cir. 2005).

The first question is whether *Strickland* even is available to petitioner: should petitioner be heard to accuse Attorney Erickson of ineffectiveness regarding motions that petitioner chose to file on his own before Erickson represented petitioner, that petitioner chose to argue directly to the court at the motion hearing without Erickson's assistance or input, and for which petitioner did not request of the court more time to develop factual support. Pursuant to *Faretta v. California*, 422 U.S. at 834 n.46, petitioner is hoist on his own petard. Petitioner clearly chose to pursue his selective prosecution claim pro se in the trial court. He cannot now blame Erickson for inaction on a motion that petitioner unequivocally demarcated as his own.

Petitioner tries to wiggle past his choices with fuzzy criticism of "hybrid" representation, but the only reason petitioner experienced even this scintilla of hybrid

representation is because he chose to file and argue his own pretrial motions without seeking or obtaining input from his attorney. The state court record is pockmarked with references to petitioner being a difficult client; this particular contretemps is one example of petitioner attempting to have it both ways. It would have been prudent case management for the trial court to have stricken the pro se motions as a nullity; instead it gave petitioner free rein to pursue them on his own notwithstanding petitioner's full representation by counsel in all other aspects of this case. For petitioner now to characterize this self-inflicted hybrid representation as a violation of his constitutional rights demonstrates remarkable chutzpah.

But let's assume for argument's sake that because the state courts did not invoke *Faretta,* then this court cannot do so either. As a result, this court must consider the appellate court's observation that the trial court had before it no evidence to support petitioner's claim of selective prosecution; therefore, the motion was "futile" and Attorney Erickson was not obliged to pursue it.

Under the two-part performance-prejudice test of *Strickland*, petitioner's must establish that (1) Erickson's failure to investigate and advocate the selective prosecution claim fell below an objective standard of reasonableness, and (2) Erickson's deficient performance actually prejudiced petitioner. *See id*. at 680-82. Without actually citing *Strickland* (or a state equivalent), the court of appeals concluded that petitioner failed at step one, because it was not objectively unreasonable for Erickson to pursue a futile motion. Because the court did not account for petitioner's proffer of data in its futility

determination, the question for this court is whether adding this information to the equation changes the result. The most efficient way to answer this question in the absence of a *Machner* hearing is to skip to the second prong of *Strickland*, and ask whether counsel's failure to uncover the proffered information and present it to the trial court prejudiced petitioner. The answer is "No." I explore this in the following section. The upshot of this is that Attorney Erickson was not ineffective because the data proffered by petitioner was insufficient to move his selective prosecution claim to the discovery and analysis phases. Therefore, petitioner is not entitled to federal habeas relief on his claim of attorney ineffectiveness.

**IV. Selective Prosecution**

In *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court expressed discomfort allowing discovery into the "special province of the Executive" in deciding whom to prosecute. Although *Armstrong* involved federal prosecutors, the same presumption of regularity supports state prosecutorial decisions: in the absence of clear evidence to the contrary, courts assume that prosecutors have properly discharged their official duties. Ordinarily, so long as the prosecutor has probable cause that the accused committed an offense defined by statute, the decision whether to prosecute and what charge to file generally rests entirely within the prosecutor's discretion. *Id*.

This prosecutorial discretion is subject to the normal constitutional constraints, including the Equal Protection Clause. Accordingly, a prosecutor may not prosecute a defendant based on an unjustifiable standard such as race. *United States v. Armstrong*, 517 U.S. at 464. In order to prove an equal protection violation, a defendant must present clear evidence to dispel the presumption that a prosecutor has acted within the law and Constitution. *Id*. at 464-65. Therefore, to prove selective prosecution, a defendant must demonstrate that the prosecutorial policy or decision had a discriminatory effect and that it was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, a defendant must show that similarly situated individuals of a different race were not prosecuted. *Id*.

In the instant case, there is an intermediate question: how much of an evidentiary showing was petitioner required to make before receiving discovery from the state? Obviously, petitioner made no showing whatsoever the trial court, but because there is an intertwined *Strickland* claim, we must consider whether the proffer he made to the appellate court would have been sufficient to allow pretrial discovery on this claim.

In *Armstrong*, the Court noted that "the Courts of Appeals require some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent." *Id*. at 468. However, the Court then appeared to conflate the elements, indicating that it was enough for a defendant to make "a credible showing of different treatment of similarly situated persons." *Id*. at 470. The Court clarified its intent

in *United States v. Bass*, 536 U.S. 862 (2002): "In *United States v. Armstrong*, we held that a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent." *Id.* At 863. Because the Court explicitly separated effect and intent into two distinct showings, this is not a situation in which a court should infer discriminatory intent from evidence of discriminatory effect.

As a result, petitioner cannot prevail on his selective prosecution claim. Petitioner has made no showing that anyone was motivated by racial animus when deciding to prosecute him criminally. Normally the discriminatory intent must be that of the prosecutor, not the referring agency, although there could be situations in which an agency's animus could be imputed to the district attorney. *See United States v. Monsoor*, 77 F.3d 1031, 1034-35 (7th Cir. 1996). Here, petitioner has not made any showing that the district attorney's office had discriminatory intent of its own or was influenced by any discriminatory intent on the part of WSPF. This deficiency dooms his claim as well as his request for discovery.

Apart from this, petitioner has not sufficiently established the existence of a similarly situated class of white prisoners who committed assaults but were not prosecuted. "Defendants are similarly situation when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *McDonald v. Village of Winnetka*, 371 F.3d 992, 1006 (7th Cir. 2004). Simply breaking out by race two years' worth of assaults at WSPF resulting in major conduct

reports and a subset of state court prosecutions does not provide enough information to determine which other inmates actually were similarly situated to plaintiff. *Cf. United States v. Stephens*, __ F.3d __, __ WL __, Case No. 03-2968, slip op. at 18 (7th Cir. Aug. 29, 2005)(in context of proving discriminatory pattern of juror strikes pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), percentages derived from small numbers are not dispositive; court must consider "all relevant circumstances" to determine whether discrimination is present). The relevant circumstances here would include answers to these questions: How many of the assaults were between two prisoners and resulted in both getting conduct reports? How many were prisoner-against-prisoner in which the evidence against the ticketed inmate was not beyond a reasonable doubt? How many inmates assaulted institutional staff but were not referred for criminal prosecution? How many inmates punched a correctional officer in the face but were not referred for criminal prosecution? It seems the appropriate comparison here should be inmates from the final or the penultimate group, not from every inmate written up for assault. Therefore, petitioner's factual proffer is fatally vague and overinclusive.

Finally, although less critically, petitioner has not laid an adequate foundation for his proffered data. Their source and accuracy are unknown. These deficiencies would justify a court's decision not to consider the information. I surmise that petitioner could remedy these evidentiary shortcomings if given the opportunity, which is why I view these flaws as not fatal to his claim. But if these deficiencies were to have formed at least a partial basis

for the court of appeals' cryptic conclusion that petitioner "has not shown that there were actually any materials available which would have changed the outcome," then this court would not be free to substitute its evidentiary sensibilities for the state court's. That said, given the opacity of the court's statement, it would be best not to speculate as to the court's thought process.

In any event, even if this court were to provide petitioner with *de novo* review of his selective prosecution claim, he could not obtain federal habeas relief. He has not come close to making the required showing to obtain evidence, let alone to establish a violation of his equal protection rights.

## CONCLUSION

Having carefully considered the entire record and having given petitioner the benefit of more doubts that the federal statutory scheme envisions, I conclude that none of his claims have merit. Petitioner is not entitled to federal habeas relief in this case.

## RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny petitioner Eric Gomez's claims for relief and dismiss his petition for a writ of habeas corpus.

Entered this 15th day of September, 2005.

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

September 15, 2005

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Re: Gomez v. Schneiter
Case No. 05-C-184-C

Dear Messrs. Gomez 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 October 7, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 7, 2005, 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