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

JAMES W. GOMEZ,

Petitioner,

v.

GERALD BERGE, Warden, Wisconsin Secure Program Facility,

Respondent.

REPORT AND RECOMMENDATION

04-C-17-C

REPORT

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner James Gomez, an inmate at the Wisconsin Secure Program Facility, challenges his reckless homicide conviction and the resulting maxed-out sentence of 40 years in prison. Gomez claims that: 1) The trial court violated his right to self-representation and violated the Double Jeopardy Clause when it declared a mistrial during the jury trial at which he was representing himself; 2) His subsequent no contest plea was involuntary; and 3) The trial court's sentence was excessive. For the reasons stated below, I am recommending that this court deny the petition.

On June 21, 2001 Gomez pled no contest in the Circuit Court for Marathon County for one count of first degree reckless homicide of his four month old son. Gomez entered

his plea the day his retrial was to have begun. The trial court subsequently sentenced Gomez to the maximum term of 40 years.

In revoking Gomez's right to self-representation, the trial court relied upon Wisconsin common law that requires a criminal defendant who wishes to proceed pro se to demonstrate a level of competence higher than mere competence to stand trial. *See State v. Klessig*, 211 Wis. 2d 194, 203-04, 564 N.W. 2d 716 (1997); *Pickens v. State*, 96 Wis. 2d 549, 292 N.W. 2d 601 (1980). On direct appeal from his conviction, Gomez contended that the trial court had violated his right to represent himself by basing its decision to terminate that right on the court's disagreement with Gomez's trial strategy. For this same reason, Gomez argued, the trial court's decision to grant a mistrial was not justified by manifest necessity, and therefore the state unconstitutionally had placed him in jeopardy twice when it brought him to trial a second time.

The Wisconsin Court of Appeals considered the merits of all of Gomez's claims. It rejected Gomez's self-representation and double jeopardy claims, concluding that the record supported the trial court's conclusion that Gomez's conduct during trial showed that he lacked the competence to present his own defense and therefore it was proper for the court to terminate the trial and force Gomez to start anew with counsel. The appellate court also found no merit to Gomez's contention that his plea was invalid merely because he had been counseled by an attorney who had been forced upon him over his objection where the plea was otherwise made knowingly and intelligently. Finally, the state appellate court found that

the trial court had not abused its discretion when it sentenced Gomez to the maximum allowable sentence.

In this federal habeas petition, Gomez raises the same claims he raised in the state courts on direct appeal, namely 1) The trial court violated his right to self-representation and placed him in jeopardy twice for the same crime when it terminated the trial; 2) His plea was involuntary; and 3) The trial court's sentence was excessive.[1] The state argues that the Wisconsin Court of Appeals' adjudication of these claims was neither contrary to nor involved an unreasonable application of established Supreme Court law.

Up until a few days ago, I was prepared to conclude that the Wisconsin courts had erred by applying to Gomez their elevated standard for determining competency to proceed *pro se* because this elevated standard flouts the Sixth Amendment right to self-representation clearly established by the United States Supreme Court in *Faretta v. California*, 422 U.S. 806 (1975) and *Godinez v. Moran*, 509 U.S. 389 (1993). (But then I would have found that Gomez had waived his right to pursue this claim on federal collateral review by pleading no contest. I have removed that lengthy analysis from this report because now it is moot). However, just last Thursday the Court of Appeals for the Seventh Circuit issued a decision in which it found that Wisconsin's elevated standard was not inconsistent with *Godinez*.

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[1] Although Gomez did not list his excessive sentence claim on his petition, this court has construed the petition as having raised the same claims that Gomez presented to the state courts on direct appeal.

Gomez also raises numerous claims of ineffective assistance of trial and appellate counsel, but as discussed below, Gomez has procedurally defaulted them.

Brooks v. McCaughtry, ___ F.3d ___, 2004 WL 1795084 (7th Cir. Aug. 12, 2004). I'm not sure I agree with the court's opinion in *Brooks*, but that's irrelevant in a hierarchical judiciary. Having carefully reviewed that opinion, I conclude that it forecloses Gomez's Sixth Amendment and double jeopardy claims.

As for Gomez's challenges to the voluntariness of his plea and the length of his sentence, I am recommending that this court deny those claims because the state court of appeals adjudicated the merits of those claims in a manner that was neither contrary to nor involved an unreasonable application of established federal law.

The following facts are drawn from the Wisconsin Court of Appeals' opinion in *State v. Gomez*, 2002 WL 31416307, 2002 WI App 292 (Ct. App. Oct. 29, 2002) (unpublished decision) and the record:

Facts

On February 4, 1999, Gomez arrived at the Wausau Hospital emergency department with his infant son who was pulseless and not breathing. Gomez had been watching the child while his girlfriend, the child's mother, was at work. Gomez explained to hospital personnel he had been watching television while the child slept on the couch. Gomez noticed the child looked "funny" and, when he picked the baby up, the baby was not breathing and was unresponsive.

Although resuscitation efforts restored a pulse, life support was discontinued on February 6 because the baby was declared brain dead. According to the coroner's report, the

baby was a four-month-old healthy male who suffered brain injury as a result of occluded blood flow to the brain depriving him of oxygen. The report attached the preliminary autopsy report, which noted head bruises and a fractured right ulna, consistent with previous abuse. It stated:

> The exact mechanism of occluding blood flow to the brain is unknown. HOWEVER, the mother of baby Gomez has disclosed the fact that on multiple occasions the father would subdue the crying baby by means of a "sleeper hold." A "sleeper hold" is consistent with, and an effective mechanism to occlude the flow of blood to the baby's brain, thus causing anoxic/ischemic brain injury and ultimately death.

The coroner listed the cause of death as "[a]noxic encephalopathy as a result of homicidal assault."

The baby's mother told investigating officers that Gomez had admitted to her that at various times he used a "sleeper hold" to quiet the baby. This was a wrestling hold that would result in the baby becoming unconscious for a few minutes and, on awaking, to have a dazed appearance. The mother told officers she witnessed Gomez using this hold on two occasions. She stated that she was so frightened that this hold would kill the baby, she surreptitiously tape recorded a conversation in which Gomez admitted using these holds on the baby. She turned the tape over to officers.

After Gomez was charged with first-degree reckless homicide, his attorney was allowed to withdraw from representation due to a conflict of interest. Later, Gomez discharged two other defense attorneys.

A competency evaluation determined that Gomez was competent to stand trial and assist in his own defense. Gomez was a twenty-five years old high school graduate who never had been treated for any mental illness. He was able to understand criminal proceedings, understood legal terminology and trial procedures, was not delusional and was of normal intelligence. The circuit court appointed a third attorney, Gene Linehan, to represent Gomez at county expense. Gomez, however, sought to proceed pro se. Following motion hearings, the court permitted Gomez to represent himself, but required Linehan to act as standby counsel.

Gomez proceeded to trial with Linehan acting as standby counsel. Gomez conducted his own voir dire and gave a long, rambling opening statement. During his opening statement, he opened the door to the admission of the tapes recorded by his girlfriend, which the court previously had suppressed. On the second day of trial, the state presented six witnesses, each of whom Gomez thoroughly cross-examined.

On the morning of the third day of trial, the circuit court held a conference outside the jury's presence to attempt to determine the number of witnesses that Gomez planned to call. The court expressed concern that Gomez's witness list kept growing and that many of the witnesses he sought to call would provide either irrelevant or cumulative testimony. The court urged Gomez to focus on the events that occurred on the night of the baby's death and the medical evidence.

The conference turned to the subject of expert witnesses. When the court asked Gomez to name a certain expert he wanted, Gomez replied that he was not positive of the expert's name. The court asked Gomez to name three experts whom he wanted to call. Gomez responded: "Well again, you know, I didn't know who you were going to grant and who you weren't going to grant, so I didn't really get that much established . . .". Gomez named one expert on sudden infant death syndrome from Minnesota, but advised: "I haven't talked to her directly yet. I wrote a letter way back when." He stated that he obtained her name from the Internet. He did not obtain a response directly from her, but thought it was from somebody else in her office. The letter did not say whether she would come to testify, because "I didn't know if I was going to be able to call her, so I didn't establish that." Gomez identified another witness from Indiana whose name he also obtained from the Internet. He said he had not spoken to this witness directly, but had written a letter.

At this point, the prosecutor questioned whether Gomez possessed the minimal competence to conduct his own defense. After additional discussion, the court concluded that Gomez did not understand the advantages of being represented by counsel and the disadvantages of self-representation. The court found that Gomez did not understand trial preparation and, due to expert medical testimony, his was a "very complicated" case. Based on the way Gomez was conducting his defense, the court found that Gomez had "no conception" of the difference between a fact and expert testimony. The court stated:

> You have no conception of what that is. I've tried to hammer that to you for an hour and a half this morning. I get nowhere.

> I get absolutely nowhere, because you just refuse to listen to me, and you've refused to accept what I'm telling you. That means you don't understand, that you have no idea what the hell is going on and how a system works.

The court determined that Gomez lacked minimal competence to conduct his own defense because he lacked a rudimentary understanding of how to secure expert testimony and what type of information to present. The court stated: "And I cannot in good conscience allow him to subpoena sixty witnesses that we have no idea what they're going to tell us or whether or not they're cumulative or whether or not they're in fact necessary to the case." The court found:

> [Y]ou are not capable of conducting your own defense because you are, in fact, incapable of understanding what a defense means, and how you are to conduct it, and how you are to handle witnesses, and how you are to subpoena witnesses, and how you are to handle experts, and what experts do. You don't understand opening statements.

Gomez objected to the court's findings. The court ruled that it would continue the trial with Linehan stepping in to represent Gomez. Linehan expressed concern about stepping in mid-trial. In Linehan's opinion, Gomez had irreparably damaged his defense in his opening statement and cross-examination. Gomez stated that he was ready, willing and able to proceed. The court on its own motion declared a mistrial.

A second trial was scheduled to begin on April 4, 2001. On that day, Gomez entered a no contest plea to one count of first-degree reckless homicide. In exchange for Gomez's plea, the state agreed that it would dismiss other charges that were pending against him and

that it would not file additional charges on the basis of a letter that Gomez had written to the mother of his deceased child. The judge asked Gomez if he understood that upon his plea of no contest, the court would make a finding of guilty and could sentence him up to the maximum term of 40 years. Gomez replied that he understood. Gomez also indicated that he understood the trial rights he was waiving by entering a plea and the elements of the charge that the state would have to prove if the case went to trial. When asked whether he had gone over and understood all of the rights enumerated on a plea questionnaire and waiver of rights form submitted by his attorney, Gomez replied in the affirmative.[2] Gomez also stated that he was entering his plea freely and voluntarily after discussions with his lawyer. Gomez's lawyer, Linehan, stated that he and Gomez had had discussions "at length" concerning the plea and that in his opinion, Gomez was making his plea voluntarily. In addition, Linehan stipulated that the complaint set forth a factual basis for the plea.

On the basis of the representations by Gomez and his lawyer, the court accepted the plea, finding that it had been made freely and voluntarily. The court found that the complaint and preliminary hearing established a factual basis for the plea. The court did not require Gomez to admit that he was guilty of the conduct alleged and Gomez made no such admissions.

Gomez later sought to withdraw his plea, claiming that he had not understood the rights enumerated on the plea questionnaire and that he had been coerced by the state's

[2] A copy of that form is not in the record.

threat to file new charges. He also indicated that he disagreed with several findings in the presentence report. The trial court denied the motion, finding Gomez's assertion that he had not understood what he was doing when he entered his plea to be incredible. The court subsequently sentenced Gomez to the maximum prison sentence of forty years, with credit for time served.

Gomez, with new counsel appointed by the public defender's office, filed a postconviction motion to set aside his conviction and sentence, arguing that his plea had been tainted by the trial court's earlier decision to force him to proceed with counsel over his objection. In addition, he argued that the charges should be dismissed on double jeopardy grounds because there had been no manifest necessity for a mistrial. The court denied the motion.

Gomez appealed his conviction and the denial of his postconviction motion to the Wisconsin Court of Appeals, raising these grounds: 1) The trial court erred when it found petitioner incompetent to represent himself, thereby violating his Sixth Amendment right to self-representation; 2) The continuation of proceedings after the trial court declared a mistrial violated his right against double jeopardy; 3) Gomez's no contest plea was invalid because it was induced in part by the trial court's deprivation of his right to self-representation; and 4) the trial court exercised its discretion erroneously when it sentenced

him to the maximum possible sentence. In an opinion issued October 29, 2002, the court of appeals rejected petitioner's arguments and affirmed the conviction.[3]

In concluding that the trial court had not erred in finding that Gomez was not competent to represent himself, the court reviewed the relevant Wisconsin law concerning the right to self-representation. It noted that when faced with a defendant seeking to proceed *pro se*, the court must allow a defendant to represent himself if 1) the defendant knowingly, intelligently and voluntarily waived the right to counsel; and 2) the defendant is competent to proceed *pro se*. *Id*. at ¶ 19 (citing *State v. Klessig*, 211 Wis. 2d 194, 203-04, 564 N.W. 2d 716 (1997)). The court found there was no dispute that Gomez had validly waived his right to counsel.

As for the second factor, the court noted that in Wisconsin, "there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." *Id*. at ¶ 21 (citing *Klessig*, 211 Wis. 2d at 212). Citing *Klessig*, the court noted that factors relevant to determining whether a defendant is competent to proceed *pro se* include the defendant's ability to read and write, his education, his informal study of the law, his verbal skills and intellectual ability and his actual handling of the case. *Id*. The court noted that a denial of a request for self-representation must be supported by one of the following findings:

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[3] Gomez also contended that the trial court had no authority to impose a no contact order with the victim's mother and family. The court of appeals agreed and vacated the no contact provision.

1) The defendant does not understandingly and knowingly waive his right to counsel;

2) The defendant does not understand the disadvantages of self-representation; or

3) The defendant suffers from a specific disability that would prevent him from presenting a valid defense.

Id. at ¶ 22 (citing WISCONSIN JI–CRIMINAL SM-30A).

The court of appeals found that the circuit court had supported its decision with appropriate findings that were supported by the record. In particular, the trial court had found that Gomez did not understand the disadvantages of self-representation, as demonstrated by his actual handling of the case. From its own review of the record, the court of appeals found it "apparent that Gomez did not simply lack technical legal knowledge or that the court merely disagreed with Gomez's trial strategy." *Id*. at ¶ 24. The court explained:

> Rather, Gomez's attempts at conducting his own defense demonstrated that his pervasive suspicion of everyone involved prevented him from making rational choices regarding the presentation of witnesses. For example, Gomez wanted to subpoena Attorney General James Doyle and medical experts whose names he obtained from the Internet but whom he had not contacted. Gomez did not have a witness list prepared and over the course of two days continued to add lay and expert witnesses despite having no knowledge of their testimony. At a later competency hearing, Gomez admitted that none of the experts he wanted as witnesses had seen the medical files in this case and would not give an opinion without having seen the records. The circuit court reasonably concluded that Gomez was unable to properly locate, secure, prepare and call medical

> experts or other witnesses, which was basic to presenting a defense.

Id. at ¶ 25. In sum, found the court of appeals, the trial court had reasonably concluded that "while Gomez possessed competence to assist in his own defense, his actual handling of the case demonstrated that he did not understand the disadvantages of self-representation and lacked the minimal competence to proceed pro se." *Id*. at ¶ 26.

The court also rejected Gomez's argument that the case should have been dismissed on double jeopardy grounds because there was no manifest necessity for a mistrial. Noting that a trial court's decision to grant a mistrial *sua sponte* is entitled to considerable deference on appeal, the court found that the record supported the trial court's determination that it was manifestly necessary to call a mistrial. The court of appeals found that ordering stand-by counsel to continue with trial before the same jury would have defeated the ends of justice, noting, for example, that Gomez had opened the door in his opening statement to the admission of tapes containing Gomez's incriminating statements. *Id*. at ¶¶ 29-30. Also, the court found that "the [trial] court reasonably concluded that Gomez's lack of preparedness and pervasive distrust had irretrievably compromised his ability to present witnesses and conduct a defense." *Id*.

Next, the court rejected Gomez's contention that his decision to enter a no contest plea was tainted by counsel being forced upon him against his will. The court noted that: "Gomez does not assert that his attorney erroneously advised him or was constitutionally ineffective. The mere fact that he entered a plea following consultation with an attorney

does not provide a fair and just reason for plea withdrawal." *Id*. at ¶ 34. The court observed that Gomez's challenge to his plea "essentially recasts his claim that the trial court erroneously ruled that he was incompetent to represent himself and ordered counsel to represent him," a challenge that failed in light of the court's earlier conclusion that the trial court had not erred in so ruling. *Id*. at ¶ 35. As for Gomez's assertion of innocence, the court noted that that assertion was not dispositive of his motion to withdraw his plea. *Id*.

Finally, the court found that the trial court had not abused its discretion in sentencing Gomez to the maximum permissible sentence. The court noted that the trial court had considered the gravity of the offense, Gomez's character, his lack of remorse, his low rehabilitative potential and his attempts at manipulating others, including the court, and that it was within the court's discretion to give more weight to these factors than to Gomez's minimal prior record. Noting that the trial court had considered the appropriate factors and explained why it was imposing the maximum sentence, the court of appeals declined to find that the court had abused its sentencing discretion. Also, the court found that Gomez had provided no evidence to support his contention that the sentence was disproportionate to those imposed in other jurisdictions for similar offenses. *Id*. at ¶¶ 39-40.

The Wisconsin Supreme Court denied Gomez's petition for review on April 22, 2003. On May 30, 2003, petitioner filed a petition for habeas relief under 28 U.S.C. § 2254 in this court. This court construed the petition as raising the same claims that petitioner had raised in the state court of appeals. In addition, the court found that petitioner was also raising

claims that he had not presented to the state courts, namely, that his appellate and trial lawyers were ineffective for various reasons. After concluding that petitioner had not exhausted his state court remedies with respect to these claims and that avenues of relief were available in the state courts by which petitioner could present them, the court dismissed the petition as a "mixed" petition under *Rose v. Lundy*, 455 U.S. 509 (1982). The court informed petitioner that he could either pursue exhaustion of his claims in state court or amend his petition by deleting the unexhausted claims and then proceed only on the exhausted claims.

Petitioner chose to exhaust his state court remedies. On October 31, 2003, petitioner filed a "Motion for Order on Ineffective Assistance of Appellate Counsel" in the Wisconsin Supreme Court. In the petition, petitioner sought to present additional information or argument on the four issues that had been raised on appeal by his appellate lawyer and to raise numerous other issues that his lawyer had not raised on appeal. More specifically, petitioner alleged that appellate counsel was ineffective for: 1) Failing in his brief to point to the prosecutor's statement that the record was a "mess" as support for the contention that the state sought the mistrial because it wanted to start over; 2) Failing to argue that petitioner's no-contest plea was invalid because his trial lawyer had lied to him and tricked him and failed to explain the plea questionnaire adequately; 3) Failing to stress petitioner's peaceful nature and minor criminal record when arguing that the sentence was excessive; 4) Failing to argue that petitioner was denied his right to compulsory process because he was

not allowed to call more than 100 witnesses at his aborted trial; 5) Failing to argue that petitioner had been denied his right to a speedy trial; 6) Failing to raise a claim of ineffective assistance of trial counsel on the basis of trial counsel's providing petitioner with false and misleading information; 7) Failing to challenge the preliminary examination; and 8) Failing to bring counterclaims alleging criminal activity by the police and the prosecutor.

The state supreme court certified the petition to the court of appeals for disposition. On November 7, 2003, the court of appeals issued an order denying the petition *ex parte*. Addressing petitioner's arguments one-by-one, it found that none of them had arguable merit and that therefore petitioner's appellate counsel was not deficient for failing to raise them.

Gomez did not petition the Wisconsin Supreme Court for review of the court of appeals' decision. On January 12, 2004, petitioner filed his habeas petition in this court. This court construed the petition as raising the eight newly-exhausted claims of ineffective assistance of appellate counsel as well as the four claims that Gomez had exhausted on direct appeal.

Analysis

I. Procedural Default

I begin with Gomez's claims of ineffective assistance of appellate counsel. I agree with the state that Gomez procedurally defaulted those claims by failing to file in the Wisconsin Supreme Court a petition for review of the court of appeals' denial of his habeas corpus

petition. Before a federal court may consider the merits of a petitioner's claims, the petitioner must give the state's highest court an opportunity to review each claim where such review is "a normal, simple, and established part of the State's appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 839 (1999). This means that in Wisconsin, state prisoners who wish to have their constitutional claims heard in federal court must first present the operative facts and controlling legal principles of those claims to the Wisconsin Court of Appeals and then to the Wisconsin Supreme Court. *Moore v. Casperson*, 345 F.3d 474, 486 (7th Cir. 2003) (finding that under *Boerckel*, Wisconsin prisoners must present claims to Wisconsin Supreme Court). This rule applies to claims raised on collateral review, like the ineffective assistance of counsel claims raised in Gomez's state court petition for a writ of habeas corpus, as well as to claims on direct review. *White v. Godinez*, 192 F.3d 607, 608 (7th Cir. 1999). Failure to present claims to the state's highest court constitutes a procedural default that bars the federal court from considering the claims unless the petitioner can show either cause for the default and prejudice arising from failure to review the claims or that failure to review the claims on procedural grounds would result in a fundamental miscarriage of justice. *Boerckel*, 526 U.S. at 848; *Howard v. O'Sullivan*, 185 F.3d 721, 726 (7th Cir. 1999).

Gomez argues that it would have been pointless for him to have filed a petition for review in the Wisconsin Supreme Court because that court would have rejected his claims anyway. Although Gomez is probably correct, the unlikelihood that a court will grant the

relief requested does not excuse failure to comply with the requirement that the state courts must be given the first opportunity to pass on any federal claims. "Federal-state comity demands that a habeas petitioner first give the state courts an opportunity to pass on his federal claims, even if those courts would be expected to view such claims unfavorably." *White v. Peters*, 990 F.2d 338, 342 (7th Cir. 1993) (citing *Engle v. Isaac*, 456 U.S. 107, 130 (1982) and 28 U.S.C. § 2254(c)). The relevant question for futility purposes is "not whether the state court would be inclined to rule in the petitioner's favor, but whether there is any available state procedure for determining the merits of petitioner's claim." *Id*. Here, a petition for review in the Wisconsin Supreme Court was a state procedure available to Gomez by which he could have presented the merits of his ineffective assistance of appellate counsel claim. Accordingly, he was required to avail himself of that procedure in order to avoid procedurally defaulting his claims.

Gomez argues that his default should be excused for cause because he has to write and copy his legal documents by hand. Gomez's lack of access to office equipment does not constitute "cause" as that term has been defined by the Supreme Court. "The Supreme Court has defined cause sufficient to excuse procedural default as 'some objective factor external to the defense' which precludes petitioner's ability to pursue his claim in state court." *Harris v. McAdory*, 334 F.3d 665, 668 (7th Cir. 2003) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Cause can be established "by showing interference by officials or that the factual or legal basis for a claim was not reasonably available." *Id*. Gomez has not identified

any sort of official interference that would excuse his failure to file a petition for review in the Supreme Court.

Finally, Gomez argues that his default should be excused under the fundamental-miscarriage-of-justice exception. However, that exception applies only in the "extremely rare" and "extraordinary case" where the petitioner is actually innocent of the crime for which he is imprisoned. *Schlup v. Delo*, 513 U.S. 298 (1995). To support a colorable claim of actual innocence the petitioner must come forward with "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Id*. at 324. The petitioner must also establish that "it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id*. at 327. Here, Gomez has not come forth with any new evidence beyond his insistence that he is innocent, a position he has maintained throughout his case. Without supporting evidence, his mere assertions of innocence are inadequate to satisfy the miscarriage of justice exception.

In sum, Gomez has failed to show that he satisfies either of the exceptions to the procedural default rule. Accordingly, this court is barred from considering the merits of his claims of ineffective assistance of appellate counsel.

II. Termination of Right to Self-Representation

Gomez's primary contention is that the state trial court deprived him of his Sixth Amendment right to self-representation and the Fifth Amendment prohibition on double jeopardy when, on the third day of trial, it reversed its initial determination that Gomez was capable of representing himself, ordered stand-by counsel to take over as Gomez's attorney, and then declared a mistrial.[4]

A. Standard of Review

Pursuant to 28 U.S.C. § 2254(d), this court must determine whether the state court's adjudication of Gomez's claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court case law or "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."

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[4] It's possible that Gomez procedurally defaulted his Sixth Amendment claim by failing to fairly alert the state court of appeals of the federal substance of his claim. *See Verdin v. O'Leary*, 972 F.2d 1467, 1472-73 (7th Cir. 1992) (§ 2254 requires that a petitioner "fairly present" his federal constitutional claim to the state courts.) Gomez did not argue that the trial court applied an unconstitutional standard in denying his right to self-representation, but rather that the court had erred in its application of Wisconsin's elevated standard. However, the state has not asserted the fair presentment issue, and has thereby waived it. *Henderson v. Thieret*, 859 F.2d 492, 496-98 (7th Cir. 1988) (district court may not raise procedural default defense *sua sponte* if state has explicitly or implicitly waived it, such as by asserting procedural default defense to some claims but not others).

Also, Gomez's ability to raise his Sixth Amendment/double jeopardy claim on collateral attack probably is barred by his no contest plea. *See United States v. Seybold*, 979 F.2d 582, 587 (7th Cir. 1992) and authorities discussed therein. Because Gomez's claims fail on their merits, it is unnecessary to decide the waiver issue.

To show that a decision was "contrary to" Supreme Court precedent, a petitioner can show that the state court reached a conclusion opposite to that of the Supreme Court on a question of law or that the state court decided a case differently than the Supreme Court "on materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). To show that a state court decision resulted in an "unreasonable application" of Supreme Court precedent, a petitioner must show that although the state court identified the correct rule of law, it unreasonably applied it to the facts of his case. *Id*. at 405-406. 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.

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 a 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).

B. Federal and Wisconsin Case Law Concerning the Right to Self-representation

In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that the right to self-representation, though not stated explicitly, is "necessarily implied" by the structure and historical context of the Sixth Amendment:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Faretta, 422 U.S. at 820-821 (internal citations and footnotes omitted; emphasis in original). The Court recognized that the right of a defendant to represent himself often may be exercised at the expense of the defendant's right to a fair trial:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only

> imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' *Illinois v. Allen*, 397 U.S. 337, 350--351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring).

Id. at 834. In the words of Justice Scalia:

> That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is no more remarkable--and no more a basis for withdrawing the right--than is the fact that proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage.

Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 165 (2000) (Scalia, J., concurring). *See also McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n. 8 (1984) (because right to self-representation is "a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant," denial of that right not amenable to harmless error analysis).

After *Faretta*, courts disagreed whether the right to represent oneself demanded a higher level of competence than merely the competence necessary to stand trial. *Compare, e.g., United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 133 (2d Cir. 1975) ("the standard

of competence for making the decision to represent oneself is vaguely higher than the standard for competence to stand trial") *with Curry v. Superior Court*, 75 Cal.App.3d 221, 226-227, 141 Cal.Rptr. 884, 887 (1977) ("Whether or not a defendant is competent to act as his own lawyer is irrelevant").

In *Pickens v. State*, 96 Wis. 2d 549, 292 N.W. 2d 601 (1980), Wisconsin joined those courts that concluded that

> Competency to stand trial is not the same as competency to proceed pro se and that, even though he has knowingly waived counsel and elected to do so, a defendant may be prevented from representing himself.

Id. at 567. The *Pickens* court reasoned that "[c]ertainly more is required where the defendant is to actually conduct his own defense and not merely assist in it." *Id*. at 567. The court instructed trial courts making this competency determination to consider the accused's "education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." *Id*.

> [A] defendant who, while mentally competent to be tried, is simply incapable of effective communication or, because of less than average intellectual powers, is unable to attain the minimum understanding necessary to present a defense, is not to be allowed 'to go to jail under his own banner.'

Id. at 568 (citation omitted). The trial court has an ongoing obligation, even after trial has begun, to ensure that the defendant is competent to present a defense:

> [E]ven after the request to proceed pro se has been granted and the defendant has begun his defense, the trial court has a continuing responsibility to watch over the defendant and

> insure that his incompetence is not allowed to substitute for the obligation of the state to prove its case. If, during the course of the trial, it becomes apparent that the defendant is simply incapable, because of an inability to communicate or because of a complete lack of understanding, to present a defense that is at least prima facie valid, the trial court should step in and assign counsel. But because the defendant is not to be granted a second chance simply because the first is going badly, counsel should be appointed after trial has begun, or a mistrial ordered, only where it appears the defendant should not have been allowed to proceed pro se in the first place.

Id. at 569.

Eight years before Gomez's conviction became final, the Supreme Court decided *Godinez v. Moran*, 509 U.S. 389 (1993). In that case, the defendant, Moran, was charged with three murders for which the state sought the death penalty. After Moran entered pleas of not guilty to the charges, the trial court ordered that he be evaluated by two psychiatrists, both of whom concluded that Moran was competent to stand trial. Two and a half months later, Moran appeared in court and told the court that he wanted to discharge his attorneys and change his pleas to guilty. After advising him of the dangers of self-representation, the nature of the proceedings and his right to counsel, the court accepted Moran's waiver of counsel. The court also conducted a plea colloquy with Moran, after which it concluded that he had entered his pleas knowingly and voluntarily. Moran later was sentenced to death.

On appeal, he argued that the trial court had erred in accepting his waiver of his right to counsel and the subsequent entry of his guilty plea because he had been "mentally incompetent to represent himself." On review of Moran's petition for a writ of habeas

corpus, the Ninth Circuit agreed, finding that a defendant's waiver of his right to counsel required a "higher level of mental functioning" than that required to stand trial and that the record did not support a finding that Moran had possessed this level of functioning.

The Supreme Court reversed the Ninth Circuit, holding that the competency required for self-representation is the same as the competency required to stand trial. Thus, to be competent to represent himself, a defendant simply must have a "rational understanding" of the proceedings. *See id*. at 397-98 (citing *Dusky v. United States*, 362 U.S. 402 (1960)). The Court rejected arguments in favor of a higher standard, explaining that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Id*. at 399 (emphasis in original). The Court explained:

> In *Faretta v. California*, we held that a defendant choosing self-representation must do so "competently and intelligently," but we made it clear that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel, and we emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored." Thus, while [i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts, a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.

509 U.S. at 399-400 (emphasis in original).

Godinez established a two-pronged inquiry as a predicate to waiving the right to counsel. First, if a court has reason to doubt the defendant's competence, the court must

make "a finding that the defendant is competent to stand trial." *Id*. at 400. Second, the court must "satisfy itself that the [defendant's] waiver of his constitutional rights is knowing and voluntary." *Id*.

What gives rise to the dispute in this case is the last paragraph of the Court's opinion, in which it stated:

> Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.

Id., 509 U.S. at 402.

In *State v. Klessig*, 211 Wis. 2d 194, 564 N.W. 2d 716 (1997), the Wisconsin Supreme Court considered whether the rule it had announced in *Pickens* was still good law after *Godinez*. Seizing on the last sentence from the Court's opinion, the Wisconsin Supreme Court concluded that even though *Pickens* had imposed "a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial," the United States Supreme Court had placed its imprimatur on this heightened standard by announcing that states were free to adopt competency standards more elaborate than the *Dusky* formulation. Thus, the court declined to abandon *Pickens's* heightened competency standard. *Klessig*, 211 Wis. 2d at 212.

C. The Seventh Circuit's Decision in *Brooks v. McCaughtry*

In *Brooks v. McCaughtry*, -- F.3d -- , 2004 WL 1795084 (7th Cir. Aug. 12, 2004), the Court of Appeals for the Seventh Circuit concluded that *Pickens* survived *Godinez*. The petitioner in *Brooks* was a Wisconsin inmate whose motion to represent himself had been denied by the state courts. The Seventh Circuit summarized the facts as follows:

> Before his trial began, Brooks was permitted to fire two lawyers who had been appointed in succession to represent him. A third was appointed. The judge warned Brooks that if he fired number three, he would have to represent himself. When the case was called for trial, Brooks moved to dismiss the lawyer (whose motion to withdraw at Brook's request had been denied) and when the judge denied the motion Brooks punched the lawyer in the face. Two days later, after jury selection, Brooks moved that he be allowed to represent himself. After quizzing him about his educational background and his knowledge of the law, the judge denied the motion.

Id. at *1.

In affirming the district court's decision to deny the writ, the court of appeals rejected Brooks' contention that because he was competent to stand trial, he was ipso facto competent to waive counsel. First, the court noted that although *Godinez* did reject the idea that a person wishing to waive counsel did not require "an appreciably higher level of mental functioning than the decision to waive other constitutional rights," the Court had nonetheless made clear that mental competence was not the only requirement; rather, the trial court also had to be sure that the defendant "knows enough about the consequences of his choice to make it 'intelligent and voluntary.'" *Id*. at *3. The court explained: "[T]here

is a difference between mental functioning, which is the ability to process information, and the information itself; more information may be required for an effective waiver of the right to counsel." *Id*. Thus, the existence of an effective waiver of counsel does not follow simply because the defendant has been found competent to stand trial. *Id*. Rather

> A judge who, having explained the consequences [of going to trial without a lawyer], finds that the defendant doesn't understand them is entitled to conclude that although competent to stand trial, the defendant has not made an effective waiver of his right to counsel and therefore may not represent himself.

Id.

The court suggested that in applying a "heightened" standard for waiver of the *Faretta* right than for competence to stand trial, Wisconsin simply was striving to ensure that the defendant possessed the requisite "information" necessary to satisfy the requirement in *Faretta* and *Godinez* that the waiver of counsel be "knowing and intelligent":

> Because being competent to stand trial and having waived the right to counsel do not require the same information, and because the former competence does not imply an effective waiver in all cases, we do not think that Wisconsin's approach violates the rule of *Godinez*.

Id. at *4.

However, the court also suggested that requiring a defendant to possess some functional ability to conduct his own defense in addition to the minimal *Dusky* formulation was not prohibited by *Godinez*. As the court explained, "in *Godinez,* the Ninth Circuit had imposed a *federal* minimum standard of competence for self-representation in state

prosecutions that was higher than the *Dusky* standard, and it was this that the Court was disapproving." *Id*. (emphasis in original). The Seventh Circuit conjectured that the Court took such a course because otherwise "it might [have] enforce[d] against the states a concept of ineffective self-representation." *Id*. In other words, grafting a functional competency requirement onto the *Faretta* standard would allow a defendant who was allowed to proceed *pro se* later to claim on appeal that the trial judge had erred in finding him competent to represent himself. *Id*. Though it would have been bad form for the federal courts to have set the states up for such manipulation, the Seventh Circuit found "[n]o federal policy, whether found in the due process clause of the Fourteenth Amendment or anywhere else, is offended by a state's adopting a rule that may allow some of its criminal defendants to whipsaw it." *Id*.

Finally, the court found that even if it was wrong about the broader implications of *Godinez*, Brooks would still not be entitled to relief because of the restrictive scope of 28 U.S.C. § 2254(d)(1). The court reasoned that "*Godinez* did not *clearly* establish a rule, which is the rule for which Brooks contends, that a defendant found competent to stand trial is automatically entitled to represent himself no matter how deficient his understanding of the consequences of going to trial without a lawyer." *Id*. at *4 (emphasis in original). Curiously, the court did not cite to any facts found by the state trial court that supported its conclusion that Brooks did not understand the dangers of self-representation. The only evidence mentioned was Brooks's "wild behavior and incomprehensible outbursts during the trial,"

which, in its view, indicated that Brooks lacked the competence to represent himself. *Id*. at *2. In language that is difficult to reconcile with *Faretta* and *Godinez*, the Seventh Circuit reasoned:

> And if he was incompetent to conduct his own defense, this is evidence that his decision to waive counsel was not "knowing and intelligent," as all waivers must be to be legally effective . . . A waiver of counsel would make no sense from the defendant's standpoint if he *knew* he was incompetent to defend himself . . . and so senseless a waiver could only with difficulty be regarded as knowing and intelligent.

Id. (emphasis in original).

D. Application of § 2254(d)

Brooks dooms Gomez's claim. The state court of appeals found that the trial court's decision to terminate Gomez's right to self-representation rested partly on its conclusion, based on its observations of Gomez's handling of his case, that he did not understand the dangers of self-representation.

Before *Brooks*, I would have rejected the state court's post-waiver assessment of Gomez's handling of his case as a basis for terminating his right to self-representation. I would have concluded that the record made during the pretrial colloquy between the court and the defendant regarding defendant's waiver of counsel controlled whether the defendant had waived his right to an attorney "knowingly and intelligently." Nothing in *Faretta* suggests that the determination whether the defendant "understands the disadvantages of

self-representation" is a moving target subject to *sua sponte* judicial reconsideration based on how poorly a defendant represents himself. If this were the case, then the right to self-representation would be chimeral. The court could revoke it at any time during the trial based solely on the judge's opinion of the defendant's performance. Courts *expect* pro se defendants to represent themselves poorly, that's why we advise them during the pretrial colloquy not to do it. But they have a Sixth Amendment right to do it, so we let them, regardless of the wisdom of the decision or the effectiveness of a defendant's performance. To say then that the court unilaterally may countermand its pretrial determination based on performance criteria creates a loophole you could drive a truck through.

But in *Brooks* the Seventh Circuit appears to suggest that the defendant's actual abilities and conduct during trial are factors that a trial judge may use to conclude, *nunc pro tunc*, that the defendant had *never actually* executed a "knowing and intelligent" waiver of counsel, notwithstanding the pretrial colloquy at which the court would have determined that the defendant had indeed waived counsel knowingly and intelligently. This is a dubious proposition, but there's no point in parsing it further because it is the law of this circuit.

Additionally, even if this court were to conclude that the state trial court's termination of Gomez's self-representation was based solely on Gomez's functional inability to present his defense as opposed to a retroactive invalidation of his waiver, Gomez has no claim. The Seventh Circuit in *Brooks* also concluded that the Court's opinion in *Godinez* does not forbid states from requiring a defendant seeking to proceed *pro se* to have sufficient

ability to conduct his own defense. In the Seventh Circuit's view, *Godinez* established a federal floor, not a ceiling. Therefore, in the instant case, because there have been no Supreme Court cases since *Godinez* establishing the ceiling's location, the state court of appeals could not have violated clearly established federal law by applying to Gomez the standards developed in *Pickens*.[5]

Gomez's case differs factually from *Brooks* in that the trial court in *Brooks* had denied the defendant's request to proceed *pro se* from the get-go, while in Gomez's case the trial court allowed him to try his case *pro se* to the jury for two days before pulling the plug. However, this distinction does not save Gomez's claim. If a state trial court is permitted to consider a defendant's competence to defend himself as a factor relevant to allowing him to exercise his *Faretta* right, then it only makes sense that the trial court may terminate–perhaps *must* terminate–that right where the defendant's actual conduct during the trial suggests that the court erred by allowing the defendant to proceed *pro se* in the first place.

Accordingly, in light of *Brooks*, I conclude that Gomez has not satisfied the criteria for granting the writ under 28 U.S.C. § 2254(d)(1) with respect to his self-representation claim. He also cannot show that the state appellate court's decision was "based on an unreasonable determination of the facts," as required by § 2254(d)(2). Although Gomez argued in the

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[5] In *Faretta*, the Court also recognized that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." 422 U.S. at 834 n. 46. However, neither the state nor the record suggests that the trial court's decision to terminate Gomez's *Faretta* right rested on a determination that Gomez had engaged in such misconduct.

state court of appeals that the trial court had based its decision to terminate his right to self-representation upon its disagreement with Gomez's trial strategy (a factor inappropriate even under Wisconsin's elevated standard), the court of appeals disagreed with that characterization. In the appellate court's view, the record demonstrated that the trial court was concerned instead about Gomez's inability to represent himself in light of his lack of preparedness, failure to understand the necessity and nature of expert testimony in what was a complex medical case, and his distrust of everyone involved in the case. Although the record arguably supports Gomez's contrary view that the trial court was being overly paternalistic, it also supports the appellate court's interpretation. Where, as here, the facts are capable of supporting two reasonable interpretations, this court must defer to the state court's findings. Accordingly, Gomez is not entitled to relief under § 2254(d)(2).

III. Double Jeopardy

The double jeopardy clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, safeguards a criminal defendant's "valued right to have his trial completed by a particular tribunal," as well as the public's interest in "fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). The double jeopardy clause bars retrial unless the trial court's mistrial declaration was occasioned by "manifest necessity," *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)), or consented to by the defendant, *Oregon v.*

Kennedy, 456 U.S. 667, 676 (1982). The doctrine of manifest necessity allows a court to declare a mistrial if a "scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn*, 400 U.S. 470, 485 (1971). The Supreme Court has cautioned that manifest necessity is a high degree of necessity, *see Arizona v. Washington*, 434 U.S. 506, and that the power to declare a mistrial over the defendant's objection should be exercised only "under urgent circumstances, and for very plain and obvious causes." *Perez*, 22 U.S. (9 Wheat.) at 580; *accord Washington*, 434 U.S. at 506 n. 18.

Whether the declaration of a mistrial is manifestly necessary turns on the facts before the trial court. *See Illinois v. Somerville*, 410 U.S. 458, 464 (1973); *see also Washington*, 434 U.S. at 506 (explaining that the "manifest necessity" standard cannot "be applied mechanically or without attention to the particular problem confronting the trial judge"). In balancing these significant interests, reviewing courts must afford considerable deference to the trial court's determination that manifest necessity warranted a mistrial. *See Washington*, 434 U.S. at 511.

Gomez's double jeopardy argument essentially is a retread of his claim that the trial court should have allowed him to continue to represent himself at trial. Gomez argues that because he was capable of presenting his own defense, no manifest necessity existed for the court's decision to declare a mistrial.

Gomez's double jeopardy claim fails with his Sixth Amendment claim. As noted previously, if the Constitution permits a state to condition a defendant's right to self-representation on his ability to present a competent defense, then it follows that it also permits the state court to terminate that right if the court concludes that its initial assessment was wrong. Indeed, as the state trial court and the Seventh Circuit in *Brooks* recognized, failing to do so risks creating a reversible error for appeal. Upon concluding that it had erred by permitting Gomez to represent himself, the trial court had little choice but to terminate mid-trial.

The trial court considered continuing the trial with Linehan stepping in to represent Gomez, but concluded that Gomez's conduct during the first two days of trial virtually had guaranteed a conviction. The state appellate court properly deferred to the trial court's firsthand knowledge of the facts and its ability to observe the first two days of trial in upholding the trial court's decision to declare a mistrial. As the court of appeals noted, Gomez gave a long, rambling opening statement during which, among other things, he opened the door to the admission of tapes containing his incriminating statements. The court of appeals saw no reason to second-guess the trial court's determination that the ends of justice would only be served by starting over with a new trial. Because the court of appeals analyzed Gomez's double jeopardy claim using the proper legal standard and reached a conclusion that was "at least minimally consistent with the facts and circumstances of the case," it was not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

IV. Voluntariness of Gomez's Plea

Next, Gomez contends that his conviction is unconstitutional because his no contest plea was invalid. The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). In *Alford*, the Court held that "an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." 400 U.S. at 38.

At the outset, I note that Gomez appears to contend that his plea was invalid because he never admitted his guilt. However, the Supreme Court in *Alford* held that the Constitution does not prohibit the court from accepting a plea from a defendant who professes his innocence so long as the plea is knowing and voluntary and there is a factual basis for the plea. *Id*. At the plea hearing, Gomez stipulated that the complaint established the requisite factual basis for the plea. Accordingly, the plea survives constitutional scrutiny so long as it was "voluntary and intelligent."

Gomez asserts that his plea is invalid because it was made "under threat, duress and coercion" and that his lawyer threatened him and tricked him. Gomez failed to raise any claim of lawyer coercion until he filed his state court petition for a writ of habeas corpus. As found previously, Gomez has procedurally defaulted all of the claims that he raised in that

petition by failing to file a petition for review in the Wisconsin Supreme Court. In any event, Gomez's claim would not succeed on the merits. Not only has Gomez failed to provide any details about these alleged threats or tricks, but his claim that his plea was induced by attorney overbearing is incredible in light of his testimony at the hearing on the motion to withdraw his plea, wherein he stated, "I wasn't coerced by my attorney." Tr. of Hearing, June 20, 2001, dkt. #11 at 11.

At the hearing on his motion to withdraw his plea, Gomez claimed that he did not understand all of the rights that were set out on the plea questionnaire form because his lawyer had not read them to him and he was under duress because the state had threatened to file additional charges against him. The trial court rejected Gomez's allegations, finding that they were not credible. This is a finding of fact to which this court must defer absent clear and convincing evidence to the contrary; Gomez has presented nothing. *See* 28 U.S.C. § 2254(e).

Finally, insofar as Gomez might be suggesting that his plea was invalid merely because it had been entered with the assistance of counsel who was forced upon him over his objection, that position is untenable. Whether to enter a plea is a decision that belongs to the defendant, not counsel. *See, e.g., Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000). The fact that Gomez had a lawyer representing him in plea negotiations did not mean that Gomez was required to accept his advice. Neither here nor in the state courts did Gomez provide any legal authority or facts to support his theory that a plea entered after the denial

of one's right to represent himself is inherently invalid or is to be judged by a standard different from the ordinary "voluntary and intelligent" standard. I agree with the court of appeals that the only issue surrounding the plea was whether it was made voluntarily and intelligently. Because the record of the plea hearing amply supports the court of appeals' conclusion that it was, Gomez's claim that he is entitled to habeas relief on the basis of an invalid plea fails under 28 U.S.C. § 2254(d).

V. Excessive Sentence

Gomez claims that the trial court imposed a constitutionally excessive sentence when it sentenced him to the maximum term of 40 years. "[A] federal court will not normally review a state sentencing determination which, as here, falls within the statutory limit." *Gleason v. Welborn*, 42 F.3d 1107, 1112 (7th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995). However, the court shall review a petitioner's showing "that the sentencing court lacked jurisdiction to impose this term or committed a constitutional error making the sentence fundamentally unfair." *Id*. (citation omitted). A sentence violates the Constitution if it is extreme and " 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). In *Solem,* the Supreme Court identified three factors relevant to the proportionality determination: "(1) the inherent gravity of the offense, (2) the sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same

crime in other jurisdictions." *Id*. at 986-87 (opinion of Scalia, J.) (citing *Solem*, 463 U.S. at 290-91).

It is questionable whether Gomez fairly presented the constitutional basis of his claim to the state courts. In the court of appeals, Gomez argued merely that the trial court had abused its discretion because he had ignored Gomez's minimal prior criminal record and appeared to be intent upon punishing Gomez for his disruptive courtroom behavior. In upholding the sentence, the court of appeals noted that the trial court had explained its reasons for imposing the maximum sentence, which included Gomez's character, his lack of remorse and low rehabilitative potential and his attempts to manipulate others, including the court, all of which were appropriate sentencing considerations.[6] The court noted that, under Wisconsin law, it was within the trial court's discretion to give more weight to some factors than others, and that the record demonstrated that the court had properly exercised its discretion. This court has no authority to consider whether a sentence within the statutory maximum was proper under state law.

In any event, even assuming Gomez properly exhausted a claim that his sentence was constitutionally unfair, it has no merit. As the court of appeals noted, Gomez was charged with causing the death of his own son under circumstances showing utter disregard for

[6] The sentencing hearing transcript reveals some remarks by the sentencing judge that perhaps in hindsight he wishes he had tempered, but Gomez's obstreperous behavior and paranoid cavils would have tested the patience of a saint, and they certainly confirmed most of the court's observations about Gomez and the appropriateness of a harsh sentence.

human life. Undoubtedly, causing the death of a helpless human being is a serious offense. As for Gomez's claim that the sentence was not proportionate to those imposed for the same offense in other jurisdictions, the court noted that Gomez had not presented any evidence to support that claim. Gomez still has not presented any evidence to support his claim that his sentence was grossly disproportionate to that imposed for similar offenses in the same or other jurisdictions. Absent such evidence, the appellate court did not unreasonably apply clearly established federal law when it rejected Gomez's claim that his sentence was excessive. *See Koo v. McBride*, 124 F.3d 869, 875 -876 (7th Cir. 1997) (upholding sentence within statutory limits where petitioner made no showing of disproportionality).

Conclusion

As noted above, the Seventh Circuit's opinion in *Brooks* materially affected the content of this report, but it did not change the outcome. From whatever direction a federal court approaches Gomez's petition, it is clear that he is not entitled to habeas relief on any of his claims.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that the petition of James Gomez for a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED.

Dated this 18th day of August, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge