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

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GEORGE GLEASON,

Petitioner,

v.

LARRY JENKINS, Warden,
Kettle Moraine Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

05-C-123-C

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**REPORT**

George Gleason, an inmate at the Kettle Moraine Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He seeks relief from October 30, 2000 convictions in the Circuit Court for La Crosse County for two counts of making threats to circuit judges in violation of Wis. Stat. § 940.203(2). For the reasons stated below, I am recommending that the court deny relief and dismiss Gleason's petition.

Gleason contends he is in custody in violation of the laws or Constitution of the United States because:

> 1) The jury instruction defining a "threat" was inadequate and violated Gleason's First Amendment and due process rights;
>
> 2) The evidence adduced at trial was insufficient to support the convictions;
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> 3) The introduction of "other acts" evidence deprived Gleason of his constitutional rights to due process and a fair trial; and
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> 4) It was multiplicitous to convict Gleason of two separate counts of threatening a judge.

The state has filed a motion to dismiss the petition on the ground that Gleason procedurally defaulted his right to federal review of his claims by failing fairly to present them to the state courts. I agree that Gleason procedurally defaulted his insufficiency-of-the-evidence and multiplicity claims by failing to present them at all to the Wisconsin Supreme Court in his petition for review, and he defaulted his challenge to the admission of "other acts" evidence by failing to present that claim in constitutional terms. Because Gleason has not developed a cause-and-prejudice argument and has failed to introduce evidence to support his conclusory claim of actual innocence, I am recommending that the court dismiss claims 2, 3 and 4 of the petition.

I find that Gleason *did* fairly present to the state courts his challenge to the "true threat" jury instruction. It was not necessary for Gleason to present his challenge to the jury instruction as a "direct" constitutional challenge; it sufficed to present his constitutional arguments in the context of arguing for discretionary reversal in the interests of justice. Nonetheless, Gleason is not entitled to relief on this claim because he cannot show that the state appellate court's decision was an unreasonable application of clearly established federal law or an unreasonable determination of the facts.

## FACTS

I have drawn the following facts the record:

On December 1, 1999, the state filed a criminal complaint against petitioner George Gleason, charging one count of threatening a judge in violation of Wis. Stat. § 940.203(2)[1] and one count of disorderly conduct, both as a habitual criminal. The complaint was based in part on the report of Colleen Berent, an acquaintance of Gleason's who reported that recently he told her that he was mad at his probation officer, at judges and at a district attorney, and that he planned to kill them in his "war." Berent reported that she thought Gleason might have referred specifically to La Crosse County Circuit Judge Perlich. On the basis of Berent's report, police officers searched Gleason's van (in which he had been living) and found a machete, numerous boxes of ammunition and various writings in which Gleason characterized himself as a "combatant" in the war on drugs. In one writing, Gleason referred to La Crosse County Circuit Judge Ramona Gonzalez and listed various actions she had

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[1] Wisconsin Stat. § 940.203(2) provides:

> Whoever intentionally causes bodily harm or threatens to cause bodily harm to the person or family member of any judge under all of the following circumstances is guilty of a Class D felony:
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> > (a) At the time of the act or threat, the actor knows or should have known that the victim is a judge or member of his or her family.
> >
> > (b) The judge is acting in an official capacity at the time of the act or threat or the act or threat is in response to any action taken in an official capacity.
> >
> > (c) There is no consent by the person harmed or threatened.

taken that Gleason perceived as violations of his civil rights. Another document was addressed to La Crosse County Circuit Judge Dennis Montabon. None of the documents contained any explicit threats toward any judge.

At Gleason's preliminary hearing, Berent testified that she could not recall the specific name of the judge Gleason had made threats against, although she thought it began with a "P." The judge found probable cause to bind Gleason over for trial. After the preliminary hearing, the state filed an amended information, adding a second count of threatening a judge. The state's theory was that when Gleason made his statement to Berent, he actually was referring the Judge Gonzalez and/or Judge Montabon, not Judge Perlich.

At Gleason's jury trial on these charges, the state introduced evidence showing that Judge Montabon had presided over a case in which Gleason was charged with drug possession. According to the assistant district attorney who prosecuted that case, Gleason had insisted that the drugs had been planted by a jailer. While the possession case was pending, Gleason failed to appear for court, resulting in a bail jumping charge that was assigned to Judge Gonzalez. The assistant district attorney testified that Gleason went to trial and was convicted of bail jumping. After he was sentenced to probation, the state dismissed the underlying drug charge in front of Judge Montabon. The assistant district attorney testified that this dismissal disappointed Gleason because he had wished to establish at trial that he had been framed.

Berent was the state's main witness at Gleason's threat trial. Berent is deaf and was assisted by an interpreter at trial; however, she testified that she is a skilled lip-reader and can communicate with her voice. Berent testified that she had known Gleason for several years and had talked with him on many occasions about his anti-government views and his opposition to the war on drugs. On November 23, 1999 Gleason came to her house agitated and angry. Berent testified that Gleason was "very upset with people in his past, and he felt that a judge was wrong." Trial Transcript, attached to Exh. H. to State's Brief in Support of Motion to Dismiss, dkt. #14, doc. 139, at 242. Berent testified that although she did not know the name of the judge to whom Gleason was referring, it was a judge in a pending case of Gleason's. Gleason also expressed anger with district attorneys and probation officers with whom he had dealt in the past. Gleason told Berent that he was planning a war against the people in his past who had hurt him, and that he was going to "lop off some heads" with a machete that he had found and sharpened. Gleason described his plan as a "war,"that he would launch near Thanksgiving, two days hence.

Berent testified that Gleason planned "to kill or hurt judges and DA's and additional other groups of people." According to Berent, Gleason told Berent that afterwards, he was going to give himself up. Berent testified that although she was not sure whether Gleason would actually carry out his plan, she was frightened enough by his comments and his demeanor that she filed a police report the next day.

Sheena Murphy, a 15-year old girl who was living with Berent at the time, testified that she had heard part of the conversation between Gleason and Berent. According to Murphy, Gleason "was talking about guns and knives he had in the van, and he said he was going to kill judges and some lawyers and officers." *Id.*, at 274. Murphy testified that Gleason scared her when he said this. She said that although she had seen Gleason in the past, she had never seen him as angry as he was that night.

Brett Brobeck testified that he had been in jail with Gleason on two occasions while Gleason's case was pending. According to Brobeck, Gleason told him that "he had spoken with a deaf girl, and he had told her some threatening gestures toward judges or something like that." *Id.*, at 281. Brobeck said that Gleason told Brobeck that he had only been kidding when he was speaking with Berent. Gleason shared his anti-government views with Brobeck and told him that someday someone was going to "retaliate against the government or whatever through harm to a judge or a probation department, things like that." *Id.*, at 284. Brobeck indicated that Gleason was talking about "judges in general" in La Crosse County, although Gleason did express dislike for Judge Gonzalez.

Over the defense's objection, the court allowed the state to present nine items of "other acts" evidence. Some of this evidence was background information concerning Gleason's history of proceedings before Judges Gonzalez and Montabon. Other evidence was that Gleason had driven to and parked near the rural home of an assistant district attorney very early one morning, that he left a letter at the home of a probation agent and that he had obtained another probation agent's home phone number and called her.

The state also introduced evidence from a post office employee who testified that Gleason, while waiting to lodge a complaint, opined to a friend that the Oklahoma City bombing was justified and the parents of the children killed were responsible for having their children in the building. Gleason also said that "It's too bad Tim McVeigh isn't here."

The defense did not present any witnesses. However, it read stipulations into the record that it had reached with the state as to the testimony of Judges Gonzalez, Montabon and Perlich. The jury was informed that each of the judges had presided over a case involving Gleason in the past; during these proceedings, Gleason had been respectful and had addressed the court appropriately; and that Gleason had never uttered a threat to either judge. Judges Gonzalez and Montabon both reported that after concluding their cases with Gleason, they had had no contact with him.

Judge Perlich reported that he and Gleason had been high school classmates and had known each other for 40 years; that as part of the case over which Perlich had presided, Gleason served six months in jail, during which time his house had been foreclosed; that after that, the relationship between Perlich and Gleason deteriorated and the two no longer were cordial; and that Judge Perlich believed that Gleason blamed him for ruining his life.

During closing argument, the defense argued that Berent's testimony about what Gleason had said was not specific enough to show that he had made a "threat" towards anyone; alternatively, if Gleason had threatened any judge, it was Judge Perlich, not Gonzalez or Montabon.

Gleason asked the court to give a "theory of defense" instruction informing the jury that in order to convict Gleason, it had to find that he had made a "true threat." The court declined to read Gleason's proposed language as a separate theory of defense instruction, but included it in the instruction on the elements of the charge. The jury was instructed as follows:

> The first element requires [that] the defendant threatened to cause bodily harm to Ramona Gonzalez in Count I / Dennis G. Montabon in Count II.
>
> To determine whether George Gleason threatened to cause bodily harm to Ramona Gonzalez in Count I / Dennis G. Montabon in Count II, you must first look to what the defendant said and determine whether the statement is a true threat. Every person has a right to criticize any public official, including a judge. That right includes using language that is "vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact."
>
> A true threat is not such a criticism, is not idle or careless talk, is not exaggerated political opinion. You must not find the defendant guilty unless you're satisfied beyond a reasonable doubt that the defendant's statement was not merely vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact, but was a statement which a reasonable person would have understood to be a serious expression of intent, determination, or purpose to harm.

The jury found Gleason guilty of both threat counts and the disorderly conduct count. The court sentenced Gleason to consecutive 11-year terms on the two threat counts, plus 340 days in jail for disorderly conduct count.

Gleason filed a direct appeal, raising these arguments:

> 1) The jury instruction for the offense of threat to a judge did not adequately define the element of a "threat," and therefore a new trial was required in the interests of justice;
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> 2) The evidence adduced at trial was insufficient to show that Gleason had made a true threat;
>
> 3) The trial court improperly admitted the "other acts" evidence; and
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> 4) Gleason's convictions for two counts of threats to a judge were multiplicitous.

The court of appeals rejected all four and affirmed Gleason's conviction. *State v. Gleason*, 2004 WI App 1, 268 Wis. 2d 843, 673 N.W. 2d 410 (Table) (unpublished opinion).

In his petition for review by the Wisconsin Supreme Court, Gleason repeated his challenges to the jury instruction and to the admission of the "other acts" evidence, but dropped his sufficiency-of-the-evidence and multiplicity claims.

After the state filed its response to the petition for review but before the state supreme court issued its decision denying the petition, Gleason filed a *pro se* supplement in which he asked the court to allow him to supplement the petition for review. In his supplement, Gleason alleged that his appellate lawyer was ineffective for failing to raise several additional issues that Gleason believed were of merit. On February 24, 2004, the supreme court issued an order denying the petition for review without mentioning Gleason's *pro se* filing.

Gleason then filed the instant federal habeas petition

## ANALYSIS

### I. The Lack of Fair Presentment

#### A. The Fair Presentment Requirement

The state contends that Gleason has procedurally defaulted all four claims, either by failing to include them in his petition for review in the state supreme court or by failing to present them to the state courts in constitutional terms. I agree that Gleason procedurally defaulted Claims 2, 3 and 4 but I find that he fairly presented Claim 1.

Before seeking a writ of habeas corpus in federal court, a petitioner first must exhaust the remedies available to him in state court. 28 U.S.C. § 2254(b)(1)(A). "Exhaustion serves an interest in federal-state comity by giving state courts the first opportunity to address and correct potential violations of a prisoner's federal rights." *Perruquet v. Briley*, 390 F.3d 505, 513 (7th Cir. 2004) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)). To exhaust state court remedies, a prisoner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Moreover, for that opportunity to be meaningful, the petitioner must "fairly present" to each appropriate state court his constitutional claims before seeking relief in federal court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). To satisfy this requirement, a petitioner must alert the state court that he is relying on a provision of the federal constitution for relief. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Failure to satisfy the fair presentment requirement

constitutes procedural default that precludes a federal court from reaching the merits of a petitioner's claim. *Perruquet*, 390 F.3d at 514.

Applying this requirement to petitioner's insufficiency-of-evidence claim and his multiplicity claims is straightforward: Gleason did not present either claim in his petition for review to the Wisconsin Supreme Court. Therefore, under *Boerckel*, Gleason has procedurally defaulted his second and fourth claims and this court must dismiss them.

To determine whether Gleason also has defaulted his first and third claims, this court must review Gleason's state court briefs in support of his appeal.

A petitioner "fairly presents" a federal claim to the state courts when he articulates both the operative facts and the controlling legal principles on which his claim is based. *Sweeney v. Carter*, 361 F.3d 327, 332 (7th Cir. 2004). Although he need not "cite book and verse on the federal constitution," *Picard*, 404 U.S. at 278, he must, in some manner, alert the state courts to the federal underpinnings of his claim. *Duncan*, 513 U.S. at 365-66. In deciding whether the state courts were so alerted, we consider a number of factors, including:

> (1) whether the petitioner relied on federal cases that engage in constitutional analysis;
>
> (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts;
>
> (3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and
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> (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation.

*Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001).

"[T]he presence of any one of these factors . . . does not automatically avoid a waiver; the court must consider the facts of each case." *Verdin v. O'Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992).

A review of Gleason's briefs state court submissions shows that he adequately presented his claim that the jury instruction on "threats" infringed his First Amendment right to free speech and his right to due process. Although Gleason did not draw extensively on federal cases, he relied heavily on a state case decided after his trial, *State v. Perkins*, 2001 WI 46, 243 Wis.2d 141, 626 N.W.2d 762, which overturned a threat conviction because the pattern jury instruction failed to shield the defendant from conviction based on constitutionally protected speech." *Id*. at ¶ 2, 234 Wis. 2d at 145-46, 626N.W. 2d at 764.

In *Perkins,* after observing that the First Amendment prohibits criminalizing speech unless it constitutes a"true threat," the court concluded from its gloss of the legal landscape that a "true threat" was a statement

> that a speaker would reasonably foresee that a listener would reasonably interpret the statement to be a serious expression of a purpose to inflict bodily harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech.

*Id*. at ¶¶ 17-29.

The court found that the instruction used at Perkins's trial (which was patterned after Wisconsin Jury Instructions–Criminal 1240) was deficient because it did not define the term "threat." Because a reasonable likelihood existed that the jury used the common definition

of the word as opposed to the much narrower legal definition, the court concluded that Perkins's conviction could not stand. *Id*. at ¶¶ 43-44.

In the instant case, Gleason acknowledged in his appeal that the trial court had not used the pattern instruction later found deficient in *Perkins* but had modified it to define a "true threat." Gleason nonetheless contended that the instruction remained deficient because it did not included a "reasonable person" standard or a "speaker-and-listener-based" reasonable person standard (which some courts call a "reasonable foreseeability" standard). The court of appeals rejected this argument. It held that the trial court's instruction to the jury–namely, that it could not find Gleason guilty unless it found that he had made "a statement which a reasonable person would have understood to be a serious expression of intent, determination, or purpose to harm"–was adequate to convey the speaker-and-listener-based reasonable person standard approved in *Perkins*. *See Gleason*, 2004 WI App at ¶ 7.

The state concedes that Gleason fairly apprised the state courts that he was claiming a violation of his federal rights. Nonetheless, it argues that Gleason has not met the fair presentment requirement because Gleason waived his right to raise a federal claim on appeal by failing to object to the instruction at trial; as a result of his waiver, Gleason was left only with the option of seeking relief from the state appellate courts pursuant to their statutory power of reversal, as opposed to seeking relief "directly" under the Constitution.

This argument is unpersuasive. The state cites no authority for its contention that a petitioner who fairly presents the substance of his constitutional claim to the state courts

nonetheless is precluded from obtaining federal review of that claim simply because he sought relief under the state court's discretionary power of reversal. The purpose of fair presentment is to give the state the first "opportunity to pass upon and correct" a constitutional violation. *Picard,* 404 U.S. at 275 (citation omitted). The fact that tactical choices by Gleason's trial attorney might have left appellate counsel no choice but to appeal to the state court's discretionary (but inherent) power to reverse his conviction did not deprive the state courts of the opportunity to consider and correct the alleged defect in the jury instruction. Nor did it somehow convert Gleason's constitutional claim into a state law claim. Because Gleason presented the "same claim" to the state courts that he raises in his federal habeas petition, he has satisfied the fair presentment requirement of the exhaustion doctrine with respect to Claim 1. *Id*. at 276. I will address the merits of this claim in Section II of this report.

Finally, Gleason failed fairly to present his claim that the trial court's admission of the "other acts" evidence deprived him of his right to a fair trial. In challenging the admissibility of this evidence, Gleason invoked nothing but state law. More specifically, Gleason argued that the trial court had not properly employed the three-step framework for evaluating the admissibility of other acts under Wis. Stat. § 904.04(2), as set forth in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W. 2d 30 (1998). None of his briefs contain any discussion of the Due Process Clause, nor do they cite to any federal cases employing a due process analysis to the admissibility of "other acts" evidence. Gleason's only constitutional reference appears in the heading to his arguments.

An evidentiary error like that of which Gleason complains does not amount to a constitutional violation unless it "produced a significant likelihood that an innocent person has been convicted." *Howard v. O'Sullivan*, 185 F.3d 721, 723-24 (7th Cir. 1999). Gleason made no such argument, focusing solely on state law. The Supreme Court has stated that a litigant wishing to present a federal claim must make his intent clear in his state court submissions:

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'

*Baldwin*, 541 U.S. at 31.

This is particularly true with respect to procedural due process claims. *See Wilson*, 243 F.3d at 328 ("[A]buse-of-discretion arguments are ubiquitous, and most often they have little or nothing to do with constitutional safeguards."); *Verdin*, 972 F.2d at 1475 (because due process claims are "particularly indistinct" and overlap with state claims, defendant must do more than refer vaguely to "due process" or "denial of fair trial" to fairly present constitutional due process claim to state court). It was insufficient for Gleason merely to assert in his point headings that he had been denied his constitutional right to a fair trial; he was required to provide the federal legal basis for that claim in the argument section of his brief. Therefore, Gleason has procedurally defaulted his challenge to the admission of the "other acts" evidence.

Gleason attempts to show that he fairly presented all of his federal claims by pointing to the *pro se* supplement that he filed in the Wisconsin Supreme Court. However, there is nothing in the record to suggest that the Wisconsin Supreme Court considered that document. Although the court apparently accepted the document for filing, it did not request the state to respond to it, did not refer to it in its order denying review, and gave no indication that it ever read or considered it. As the state points out, Gleason's supplement was an improper filing insofar as he was represented by counsel at the time. Absent some indication that the court in some fashion considered this supplement document when passing on Gleason's petition for review, or that court rules allowed the filing of such a document, Gleason's supplement fails to establish that he fairly presented his claims to the state courts.

**B. Cause and Prejudice**

This court still court consider Gleason's three defaulted claims on their merits if Gleason were to demonstrate good cause for his default and actual prejudice resulting therefrom, *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977), or if he were to convince the court that a miscarriage of justice would result if his claims were not entertained on the merits. *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986).

Gleason focuses on the fundamental miscarriage of justice exception, arguing that he actually is innocent of threatening Judge Gonzalez and Judge Montabon because the

evidence failed to establish that the "judge" or "judges" to whom he referred when speaking to Berent were Judge Gonzalez and/or Judge Montabon.

To establish that this is the "extremely rare" and "extraordinary case" in which the fundamental-miscarriage-of-justice exception applies, 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." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Gleason has not come forward with any such evidence, but merely attempts to "put[ ] a different spin on evidence that was presented to the jury." *Gomez v. Jaimet*, 350 F.3d 673, 680 (7th Cir. 2003). This does not satisfy the *Schlup* requirements. *Id*. A claim of "actual innocence" requires more than simply arguing that the jury could not have found guilt on the evidence presented at trial.

Gleason strenuously contended in his *pro se* submission to the state supreme court that his appellate lawyer was ineffective for failing to make various arguments in the state appellate courts; in this court, however, he has not raised an independent claim of ineffective assistance of appellate counsel, nor has he presented any meaningful argument that appellate counsel is to blame for the failure fairly to present his federal claims in the state courts. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (ineffective assistance of counsel can establish cause for a procedural default). In response to the state's motion to dismiss, Gleason offers no more than the vague assertion that his appellate attorney "failed/refused to submit an Appeal Brief which was true, accurate, correct, and complete" (dkt. 9, at 11), then backs up this declaration with a solitary, irrelevant example.

Gleason does not aver that he asked his appellate lawyer to present his claims in federal terms. Gleason does not attempt to show that the claims his appellate attorney chose to present to the state supreme court were weaker than the ones he chose to omit. So although Gleason's brief hints at good cause, it does not developed this claim enough to permit review. *See Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) (pro se litigant's filings are to be construed liberally, but court does not develop his arguments for him).

Because Gleason has failed to satisfy the miscarriage-of-justice exception and has failed to develop any meaningful argument that he qualifies for the cause-and-prejudice exception, I am recommending that this court dismiss Claims 2, 3 and 4 of the petition on the ground that Gleason failed to present them adequately to the state courts.

**C. Lack of Substantive Merit**

Even if Gleason had preserved any of these three claims for federal review, he would not be entitled to relief. His multiplicity claim is an instant loser: the Double Jeopardy Clause does not prohibit charging two separate offenses based upon a single course of conduct, so long as each count requires proof of a fact which the other does not. *United States v. Gonzalez*, 933 F.2d 417, 424 (7th Cir.1991). Count 1 of the amended information required proof that Gleason threatened Judge Gonzalez, a fact that was not an element of Count II; conversely, Count II required proof that Gleason threatened Judge Montabon, a fact that was not an element of Count I.

More meritorious (but still wanting) is Gleason's contention that the state failed to *prove* that he threatened both judges. Gleason insists that the jury could not convict him because no witness heard him identify either Judge Gonzalez or Montabon by name.[2] Gleason argues that the only judge to whom Berent could recall him referring was Judge Perlich.

When reviewing such a challenge, courts must determine whether the evidence, viewed in the light most favorable to the prosecution, permits *any* reasonable trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Although much of the state's evidence against Gleason was circumstantial and amenable to innocent interpretation, it still was enough to meet the forgiving standard of *Jackson*.

Berent and Murphy, the two witnesses to Gleason's frightening diatribe, could not recall Gleason mentioning any particular judge by name.[3] However, Wis. Stat. § 940.203(2) does not require the state to prove that Gleason made a personal threat to and in the presence of a particular judge, nor does it require the state to prove that Gleason specified his intended victims by name; it would appear a violation can be established so long as the

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[2] This is different from the insufficiency-of-the-evidence argument that Gleason presented to the state court of appeals, where he claimed insufficient evidence of a "true threat."

[3] In fact, it is unclear from Berent's testimony whether Gleason stated that he was angry with "judges" or with just one judge. However, in Berent's original statement to police, she stated that Gleason had threatened to kill "judges," plural, and Murphy testified that she also heard Gleason saying that he was going to kill "judges." This evidence is sufficient to support the jury's conclusion that Gleason threatened more than one judge.

state proves the victim's identity by other satisfactory evidence. Berent testified that the judge or judges with whom Gleason was angry had been involved in a pending case of his; the state presented evidence that Gleason was on probation in a bail-jumping prosecution presided over by Judge Gonzalez that arose from a drug prosecution presided over by Judge Montabon. The jury also received documents recovered from Gleason's van in which he expressed anger towards Judge Gonzalez and displeasure with the state's dismissal of the charge pending before Judge Montabon. From this evidence, the jury reasonably could infer that Gleason's threats were directed at Judges Gonzalez and at Judge Montabon. In short, the evidence presented was enough to support the jury's verdicts.

Finally, Gleason cannot prevail on his challenge to the admission of "other acts" evidence. Gleason has not specified which evidence he is challenging; I infer it is the evidence that he parked near the home of an assistant district attorney, phoned one of his probation officers at home, left a threatening letter at the door of another probation officer and made comments at the post office about the Oklahoma City bombing. Gleason also complains that the assistant district attorney who had prosecuted Gleason in another case was allowed to testify that he had been followed on one occasion by someone driving an older model, four-door car.

Some of this evidence appears to be thinly veiled propensity evidence, and if Gleason had been tried in this court, he likely would have succeeded in excluding it on that basis. However, the admission of this evidence was not egregious enough to trigger federal habeas

relief. First, this court's opinion as to how it would have handled the admission of the other acts evidence is irrelevant to a § 2254 analysis. *See Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000)(federal court may not substitute its independent judgment as to correct outcome).

More substantively, erroneous evidentiary rulings do not deprive a defendant of a fair trial unless they likely resulted in the conviction of someone who is innocent. *Anderson v. Sternes*, 243 F.3d 1049, 1054 (7th Cir. 2001); *Dressler v. McCaughtry*, 238 F.3d 908, 914 (7th Cir. 2001). A state court's alleged violation of the state law counterpart to Fed. R. Ev. 404(b) does not automatically establish a denial of due process. *Watkins v. Meloy*, 95 F.3d 4, 7 (7th Cir. 1996). Rather, "[s]omething worse than a garden-variety violation of the standard of 404(b) must be shown to cross the constitutional threshold." *Id*. As the court explained in *Watkins*:

> [W]hen the state merely fails to limit the prosecution's evidence, the only constitutional principle to which the defendant can appeal is a catch-all sense of due process, and the appeal almost always fails. If the evidence is probative, it will be very difficult to find a ground for requiring as a matter of constitutional law that it be excluded; and if it is not probative, it will be hard to show how the defendant was hurt by its admission.

95 F.3d at 7 (internal citations omitted). Notwithstanding the questionable admission of some of the evidence, it did not violate Gleason's due process rights.

Most questionable was the admission of Gleason's diatribe at the post office. Unlike the content of Gleason's various writings, the post office remarks had nothing to do with

judges or lawyers, they failed to add useful context to Gleason's comments to Berent, and they did not illuminate Gleaon's subjective intent. Admission of this chilling commentary accomplished nothing except to paint Gleason as hot-headed and hard-hearted.

To his credit, Gleason was able to minimize the damage: when cross-examined, the postal employee reported that when he asked Gleason to go outside if he was going to continue speaking like that, Gleason responded that he merely was exercising his right to free speech. This information allowed the jury to infer that Gleason might be offensive and blustery but he was all talk and no action, lacking the subjective intent to make "true threats." Therefore, the erroneous admission of this statement was a garden-variety violation of 404(b) that did not deprive Gleason of a fair trial.

The only other evidence that arguably might have been admitted erroneously was the prosecutor's testimony implying that Gleason had followed him in a four-door car. However, Gleason did not object to this testimony at trial, and he established through other witnesses that he owned a coupe, not a sedan. This allowed the inference that the state was stretching to find inculpatory evidence, an inference that could have weakened the state's other circumstantial evidence.

But even if the jury inferred that Gleason had been tailing the prosecutor, this evidence paled in comparison to the more harmful evidence that Gleason actually had driven to and parked near the same prosecutor's home. Accordingly, there is little likelihood that its admission affected the outcome of the trial.

The remaining other acts evidence was properly admitted. Some of the other acts were relevant to establish necessary background information regarding Gleason's history with Judges Gonzalez and Montabon. Other evidence, such as the content of Gleason's writings and the proof that Gleason had tracked down the phone numbers or addresses of probation officers and district attorneys, was relevant to show that Gleason had the required subjective intent to utter a true threat when he made his comments to Berent.

In sum, Gleason was not prejudiced by his failure to fairly present his federal claims to the state courts. Although Gleason did not get a perfect trial, he got a fair one. That is all the Constitution requires.

**II. The Merits of Gleason's Challenge to the Jury Instructions**

Due to the threshold nature of its motion to dismiss, the state has not addressed the merits of Gleason's challenge to the jury instruction. Even so, there is no point in requesting additional briefing from the parties because under the stringent standard of 28 U.S.C. § 2254(d), Gleason cannot prevail on his claim.

Pursuant to that statute, federal habeas relief may be granted to a state prisoner on his claim only if the state courts' adjudication of that claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1); *see Johnson v. Bett*, 349 F.3d 1030, 1034 (7th Cir. 2003). 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 materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

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.

In Gleason's case, the state courts's adjudication of the First Amendment issue did not run afoul of § 2254(d). The closest the United States Supreme Court has come to resolving the true threat/First Amendment dilemma is *Watts v. United States*, 394 U.S. 705 (1969), in which a young war protester was convicted of willfully threatening the President by stating:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is LBJ. They are not going to make me kill by black brothers.

394 U.S. at 706.

The Supreme Court overturned the conviction, finding that this statement, taken in context and regarded as expressly conditional, could only be interpreted as very crude and offensive political hyperbole as opposed to a "true threat." *Id.* at 708. In affirming the inarguable principle that the government cannot punish speech protected by the First Amendment, the Court declined to establish any bright-line test for distinguishing a "true threat" from protected speech. *Cf. Madsen v. Women's Health Center*, 512 U.S. 753, 773 (1994) (insulting and outrageous speech is protected but fighting words and threats of physical harm are not; Court grants partial relief from challenged injunction based on its specific facts but announces no generally applicable rule).

This dooms Gleason's habeas claim: the absence of a bright-line federal test enunciated by the Supreme Court means that the state court of appeals' decision could not be "contrary" to clearly-established federal law. Indeed, as noted by the Wisconsin Supreme Court in *State v. Perkins*, 243 Wis. 2nd at 152-58, the federal circuits court have failed to reach a consensus on what constitutes a "true threat." *See, e.g.,United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000)(court uses an objective definition focusing on reaction of a reasonable recipient); *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999)(court endorses objective definition of threat); *United States v. Francis*, 164 F.3d 120 (2nd Cir. 1999)(court leaves unclear whether subjective intent required); *United States v. Miller*, 115 F.3d 361, 363-64 (6th Cir. 1997)(must be "reasonable foreseeable" to defendant that victim would feel threatened); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997) (same as *Miller*); *United States v. Malik*, 16 F.3d

45 (2nd Cir. 1994) (even conditional threats can be unlawful; test of a threat is objective); *United States v. Aman*, 31 F.3d 550 (7th Cir. 1994) ("threat" is determined objectively).

This spectrum of definitions is possible because the United States Supreme Court has not defined the term except to state the obvious in *Watts* and *Madsen*: it does not include speech protected by the First Amendment. Therefore, the salient question in Gleason's case is whether it was reasonable for the Wisconsin court of appeals to conclude that the jury instruction given at Gleason's trial was adequate to prevent him from being convicted for having engaged in protected speech.

It was. The trial court adequately conveyed to the jury the requirements that it evaluate Gleason's alleged threat objectively, from the standpoint of a reasonable person, and that it could not convict Gleason for a statement that was merely critical, idle, careless, exaggerated, vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact. Although the instruction did not convey the notion of reasonable foreseeability that the Wisconsin Supreme Court deemed necessary in *Perkins,* as just noted, there is no clearly-established *federal* law holding that such language is required. Therefore the state court resolution of Gleason's claim was not unreasonable because the court of appeals "t[ook] the rule seriously and produce[d] an answer within the range of defensible positions," *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). Gleason cannot obtain federal habeas relief on his challenge to the jury instruction defining a true threat.

## RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the George Gleason's petition for a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED.

Entered this 27th day of October, 2005.

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

October 27, 2005

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Re: Gleason v. Jenkins
Case No. 05-C-123-C

Dear Messrs. Gleason and O'Brien:

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 November 14, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 14, 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