IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ERIC GOMEZ,

ORDER

Petitioner,

05-C-0184-C

v.

RICHARD SCHNEITER, Warden,
Wisconsin Secure Program Facility,

Respondent.

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On September 15, 2005, the United States Magistrate Judge filed a report and recommendation in which he recommended denial of petitioner Eric Gomez's petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. The only objection filed to the report came from respondent, who was the prevailing party. He objected to the magistrate judge's determination that petitioner had made a fair presentation to the Supreme Court of Wisconsin of his claim that his attorney had been constitutionally ineffective for failing to develop the facts to support petitioner's claim of selective prosecution. In respondent's view, the magistrate judge's determination was inaccurate because petitioner had not identified the claim, its operative facts and legal principles clearly

enough to alert the state supreme court to the existence and nature of the claim. Respondent recognizes that the magistrate judge's proposed resolution of the claim on its merits would dispose of the matter but wants to preserve his objection.

BACKGROUND

Petitioner argued the issue of selective prosecution himself before the state trial court, which the court allowed him to do even though he was represented by counsel. He raised the issue again on appeal to the state appellate court in opposition to his court-appointed counsel's filing of a no merit brief and added the argument that his counsel had not gathered demographic data to support the claim. Petitioner submitted a handwritten chart purporting to show that non-Caucasian inmates were prosecuted for major conduct reports and batteries in particular at a higher rate than Caucasians. The court of appeals denied the claim. It acknowledged that petitioner had raised an issue of ineffective assistance when he alleged that his trial counsel had not researched and presented documentation in support of his claim of selective prosecution, but found that petitioner had failed to show that any materials existed that would have changed the outcome of his motion. State v. Gomez, No. 04-0518-CRNM (Ct. App. Oct. 20, 2004), Dkt. #6, Exh. E at 2.

Petitioner sought review by the Wisconsin Supreme Court on his own. He alleged four grounds for relief; two involved his claim of selective prosecution. He argued that his

trial counsel had refused petitioner's request to research his selective prosecution motion (and other motions) and that he had been subject to selective prosecution, citing his data that purported to show disproportionate prosecution of non-white inmates for battery.

DISCUSSION

A petitioner seeking a writ of habeas corpus is not considered to have fairly presented a claim to the state courts for exhaustion purposes unless he has raised the claim in the courts in a way that gives the state courts sufficient notice of the federal constitutional nature of the issue to allow them to resolve the claims on a federal basis. A petitioner may satisfy this requirement in one of several ways: (1) relying on federal cases that engage in a constitutional analysis; (2) relying on state cases that apply a constitutional analysis to similar facts; (3) framing the claim in terms so particular as to call to mind a specific constitutional right; or alleging a pattern of facts well within the mainstream of constitutional litigation. Ellsworth v. Levenhagen, 248 F.3d 634, 639 (7th Cir. 2001); Wilson v. Briley, 243 F.3d 325, 327 (7th Cir. 2001).

In raising his claim that he had been denied the effective assistance of counsel by his attorney's failure to research the facts underlying his selective prosecution claim, petitioner did not cite any cases, either state or federal, but he stated the claims in a manner particular enough to "call to mind a specific constitutional right." Ellsworth, 343 F.3d at 639. In his

petition, he explained that he had discussed the claim and others with his court-appointed counsel, that the research and investigation were beyond his capacity to perform as an inmate and that his attorney had permitted petitioner to argue the motions in a hybrid fashion "in the absence of any research on any of the motions (i.e. demographic data) that would prove or disprove the contentions alleged by [petitioner] in his pro se motions." Pet.'s App. for Review, Dkt. #6, Exh. F at 6.

In support of his claim that he had been subjected to selective discrimination, petitioner cited State v. Kramer, 2001 WI 132, 248 Wis. 2d 1009, 637 N.W.2d 35, a case in which the Supreme Court of Wisconsin addressed a claim of selective prosecution under the Fourteenth Amendment brought by a tavern owner charged with offering gaming. The court noted that a violation of this amendment occurs "when a defendant can show 'persistent selective and intentional discrimination in the enforcement of the statute in the absence of valid exercise of prosecutorial discretion.'" Id. at ¶ 14, 248 Wis. 2d at 1022, 637 N.W.2d at 41 (quoting State v. Johnson, 74 Wis. 2d 169, 172, 246 N.W.2d 503 (1976)). Petitioner advised the supreme court in his petition for review that he was attaching documents showing that non-whites are prosecuted 67% to 72% more than whites.

Petitioner's discussion of his two claims was brief, but it was sufficient to alert the state supreme court to the nature of his claims and their federal constitutional bases. I conclude that it was proper for the magistrate judge to address the two claims on their merits

after finding that petitioner had exhausted his state court remedies with respect to the claims of attorney ineffectiveness with respect to the issue of selective prosecution and his independent claim of selective prosecution. I conclude also that the magistrate judge's disposition of the two claims was proper. Petitioner has not shown that he could have produced any evidence of discriminatory intent on the part of the district attorney's office or on the part of the Wisconsin Secure Program Facility that influenced the district attorney in making its decision to charge and prosecute petitioner for battery of a correctional officer.

ORDER

IT IS ORDERED that respondent Richard Schneiter's objection to the report and recommendation entered by the United States Magistrate Judge on September 15, 2005, is DENIED. FURTHER, IT IS ORDERED that the magistrate judge's report and recommendation is ADOPTED and petitioner Eric Gomez's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 is DISMISSED.

Entered this 25th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge