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

EDWARD ANDERSON,

Plaintiff,

v.

DANIEL BENIK, Warden,
Stanley Correctional Institution,

Defendant.

REPORT AND
RECOMMENDATION

05-C-0306-C

REPORT

Edward Anderson, an inmate at the Stanley Correctional Institution, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his March 22, 2002 judgment of conviction in the Circuit Court for Milwaukee County for one count of robbery by use of force. Anderson contends that he is in custody in violation of the laws or Constitution of the United States because: 1) his trial lawyer committed 11 different errors that prejudiced Anderson's right to a fair trial; 2) the state denied Anderson's right to a speedy trial; and 3) the state committed prosecutorial misconduct by presenting testimony that it knew was false, and by intimidating a defense witness. Anderson exhausted his state court remedies and filed his petition within the statute of limitations.

For the reasons set forth below, I conclude that Anderson is not entitled to habeas relief. As for those claims decided on their merits, the state court of appeals did not unreasonably apply established Supreme Court precedent and did not unreasonably

determine the facts, as required to obtain habeas relief under 28 U.S.C. § 2254(d). As for the claims not decided on their merits, this court's *de novo* review establishes that they either lack factual support or are refuted conclusively by the record. Accordingly, I am recommending that this court deny relief and dismiss Anderson's petition.

FACTS

I. Pretrial Proceedings

In October 2000, the state charged Anderson with robbery by use of force for attacking William Coons (the boyfriend of Anderson's cousin) and taking his car. Anderson was arrested around November 4, 2000. At a hearing on November 10, 2000, Anderson waived his right to a preliminary hearing and requested a speedy trial.

On January 31, 2001, the parties appeared in court on the date scheduled for trial. The prosecutor and Anderson's defense lawyer, Richard Johnson, both told the court that they were prepared to proceed. The prosecutor stated that she had offered a plea agreement to Anderson in which he would plead guilty to the pending charge in exchange for the state's promise not to charge Anderson with intimidating a witness, charges that arose from letters Anderson had sent from jail. In response to court questioning, Anderson stated that he was aware of the plea offer but wanted to go to trial. The court recessed briefly so that Anderson could change into civilian clothes.

Upon reconvening, the court alerted the parties that they would have to wait to pick their jury because two other courts were picking first. The prosecutor announced that during

the recess, defense counsel had advised that Anderson was willing to take a lie detector test to establish his innocence and that he was willing to waive his speedy trial demand in order to take the test. The prosecutor committed to dismissing the pending charge and eschewing new intimidation charges if Anderson passed the test. The prosecutor favored a continuance because during the recess, Coons had told her for the first time that Anderson twice had telephoned him from the jail while the case was pending. The prosecutor stated that she wished to investigate the matter; in the event she filed new charges for intimidation, it would be more efficient to join to Anderson's robbery charge because Coons was the victim in both. The prosecutor reported that Coons also was willing to submit to a polygraph test.

The court asked Anderson if he agreed to give up his right to a speedy trial so that he could take a lie detector test. Anderson replied affirmatively. Anderson acknowledged his understanding that if he did not pass the test and if the state determined that new charges for intimidating a victim were appropriate, then new charges would be filed against him and tried with the robbery charge. After characterizing the motion as a joint motion for adjournment of the trial, the court granted it.

Anderson did not pass the lie detector test. The polygraph examiner reported "definite indications of lying" when Anderson answered "No" to each of the four pertinent questions. *See* State's Resp. to Def.'s Mot. for Post Conviction Relief, dkt. #7, exh. C, at 18.

At a subsequent status conference on March 1, 2001, Anderson told the court that he was not satisfied with his lawyer's representation. He accused his lawyer of "employ[ing]

numerous tactics" on January 31 to get him to waive his right to a speedy trial, including asking Anderson to do him a favor and postpone the trial so that he could go to New York and visit his girlfriend. Tr. of Hearing, March 1, 2001, dkt. #20, exh. U, at 3. Anderson's accusation led to the following exchange:

> THE COURT: Let me interrupt you there. I am aware of the fact that [defense counsel] had a matter that he was going out of town for, but he made it very clear– And, [Assistant District Attorney] Parthum, you can correct me if I'm in error in this. He made it very clear to the Court and to the district attorney that he was prepared to go to trial, and that he was going to cancel his trip.
>
> MS. PARTHUM: Absolutely.
>
> THE COURT: He had indicated that he was going to make inquiries of you as to whether or not you would waive your right to a speedy trial. If you were not, he was willing to and able to go to trial. I don't want you to place on the record facts that are erroneous.
>
> MR. JOHNSON: I advised Mr. Anderson of that fact. I said if you want to go to trial that day, then we're going to trial. I'll do the best I can. Correct?
>
> [ANDERSON]: Yes. That's what you said.

Id. at 3-4.

Despite his accusations that Johnson pressured him, Anderson indicated that he still wanted to go forward with Johnson as his lawyer. *Id*. at 5.

The parties appeared for trial on April 25, 2001. Defense counsel requested an adjournment, stating that he had received a report that morning indicating that a fingerprint lifted from Coons's car had been matched to a person named Roderick Turner. The prosecutor did not oppose the adjournment. She noted for the record that Coons had come to court for the first time with Kevin White, an individual who had witnessed some of the events on the night of the robbery. She indicated that a detective was interviewing White and would be submitting a supplemental report. The court granted the motion for adjournment so the parties could follow up on the fingerprint evidence. When the clerk asked whether the motion should be docketed as a joint motion, the prosecutor replied: "No. It is a defense motion. The State would have been ready to proceed today." *Id.*, exh. V, at 4.

The court rescheduled the trial for July 9, 2001, but had to adjourn because defense counsel was in trial in a different court. The parties returned on September 5, 2001 but the state requested a continuance because it was unable to locate White. The court reluctantly granted the state's motion and rescheduled trial for November 12, 2001. On that date, however, the court postponed trial again because it was required to try a different case in which a speedy trial demand had been made. The parties noted at that hearing that Anderson was in custody serving a sentence after parole revocation. The court rescheduled trial for February 6, 2002 but adjourned it because of court congestion. Anderson finally went to trial on February 18, 2002, sixteen months after originally being charged.

II. Trial

Jury selection began on February 18, 2002 with the attorneys introducing themselves and naming the witnesses they planned to call. The court asked the venire panelists if they knew any of the witnesses, parties or attorneys. Juror Kevin Carr responded that he knew Milwaukee Police Detective Percy Moore, who had interviewed Coons and was the state's chief investigator on the case. Carr stated that he was "well-acquainted with him and his sister," indicating that he worked with Moore's sister at the Milwaukee County Sheriff's Department. The court asked Carr whether he could be fair and impartial under those circumstances; Carr replied: "Absolutely." *See* dkt. 20, exh. DD, at 16-17. A bit later, the court elicited more detail from Carr about his work for the sheriff's department. Carr advised that he was a deputy inspector in charge of the Criminal Investigation Bureau and that he had been a deputy sheriff for 22 years. The court asked Carr again if he could be fair and impartial; Carr again replied that he "absolutely" could. *Id*. at 23. Defense counsel did not move to strike Carr for cause.

The attorneys then asked follow-up questions of the panel members. In response to questioning by the prosecutor, Carr stated that he had been a witness in approximately 500 to 1,000 criminal cases, but said that would not affect his ability to decide the case fairly and impartially. *See* dkt. #14, exh. N, at 15-16. Carr ultimately was seated as a juror.

In response to questioning by defense counsel, four potential jurors admitted that they would like to hear Anderson's side of the story before reaching their verdict. However,

they all indicated that they understood that Anderson had a right not to testify, and said that they could decide the case fairly and impartially if he exercised that right. *Id*., at 28-30. Two of these panelists Longhurst and Lapsley, were seated as jurors.

During the state's case in chief, Coons testified against Anderson. He explained that he knew Anderson as "Darrell" and that he was the cousin of Coons's girlfriend, Martha Jean King. Coons testified that he and Anderson were together at White's trailer and that Coons agreed to give Anderson a ride. Coons drove a1984 Oldsmobile. During the ride Anderson asked Coons to park in an alley so Anderson could meet someone for a minute. Coons testified that Anderson asked him to come along; Coons reluctantly agreed. As soon as Coons exited the car, Anderson jumped him punching and kicking him to the ground, breaking two of his ribs. Coons testified that Anderson took Coons's keys and drove off in Coons's car.

Coons admitted that during his first police interview immediately after the incident, he did not say that he and Anderson had met at White's trailer; his story then was that Anderson had flagged Coons down after Coons left a tavern. Coons explained that he told a different story because people were using drugs at White's trailer and he did not want to get them in trouble.

As the state's next witness, White testified that on the night in question, Coons had been at White's trailer. The prosecutor asked White if anyone else in the courtroom had been there that night. White responded, "Yeah . . Darrell." *Id*., at 100-101. This exchange followed:

PROSECUTOR: When you say "Darrell," can you tell me who that person is by, where the person seated, what color clothing the person is wearing?

WHITE: Fellow right here in the gray suit.

PROSECUTOR: Is he wearing suit jacket?

WHITE: Yeah.

PROSECUTOR: White male or black male?

WHITE: Black.

PROSECUTOR: Where is he sitting relative to where I am sitting?

WHITE: In front of you to -- it is to my left.

PROSECUTOR: May the record reflect the identification of the defendant, Edward Anderson.

THE COURT: I don't know if that's a gray suit or not. It looks like the detective is wearing a gray suit.

PROSECUTOR: I think he said at the table in front of me.

THE COURT: What kind of shirt is he wearing?

WHITE: Black.

THE COURT: Doesn't help.

THE COURT: Is he wearing a tie or not?

WHITE: No.

PROSECUTOR: Does he have my hand on his head?

WHITE: No.

THE COURT: The record will now reflect.

Id. at 101-102.

White testified that while Coons and Anderson were at White's trailer, White heard Anderson ask Coons for a ride. He testified that about 20 to 30 minutes after Coons and Anderson left, Anderson came back to the trailer alone in Coons's car and said that he had dropped Coons off at a friend's house. Anderson left about five minutes later.

Another prosecution witness was Martha Jean King, Anderson's cousin and Coons's girlfriend. King was in jail at the time of the incident. She testified that after Anderson was arrested he started mailing letters to her from jail. She testified that the letters were in Anderson's handwriting, bore his name on the return address, referred to her as "cuz" and were signed "D," which was Anderson's middle initial and the first letter of his nickname, Darrell. In one of the letters, which King read aloud to the jury, Anderson asked her to encourage Coons to "do the right thing" and offered to pay for Coons's broken glasses. In another letter, Anderson asked King to tell Coons not to show up at Anderson's parole revocation hearing. He also asked King if she would agree to be a witness on his behalf, and he provided her with a written script of what she should say in the event she testified: Anderson instructed King to testify that Coons told her that he had been jumped by two drug dealers while he was with Anderson and that Coons was blaming Anderson because he thought Anderson had set him up. King testified that Coons had never told her the version of events suggested by Anderson.

After the state rested, the court engaged Anderson in a colloquy regarding his right to testify. Anderson acknowledged that he knew that he had a right to testify, that the

choice was his to make and that he had talked about it with his lawyer. Anderson stated that he had had enough time to confer with his lawyers, that he had no questions about the matter and that he had determined that it was in his best interest not to testify. He denied being coerced in any way in reaching his decision. On the basis of Anderson's statements and those made by his lawyer, the court found that Anderson had voluntarily and intelligently waived his right to testify.

Anderson's theory at trial, developed through witness Sandra Beckman, was that Coons had been attacked not by Anderson, but by two men in the alley who had approached Coons's vehicle when it stopped. Beckman testified that she had been following Coons's vehicle to the alley because Coons was giving a ride to both Anderson and Beckman's friend, "Net." Beckman testified that she saw Coons stop his car, then Anderson and Net jumped out and ran away. Beckman testified that two men then approached Coons in his car and violently attacked him, trying to pull him out. Beckman said she left while Coons was still in the driver's seat and that she did not see what ultimately happened to him.

During his closing argument, defense counsel stated:

> Unluckily for Edward -- the man who this is all about, the man who's falsely accused, not a Boy Scout, drug user, thief -- they try to make him suffer for what happened when he didn't do it. He may have had a hand in it. He didn't do what he's here for.

Tr. of Jury Trial, Feb. 19, 2002, dkt. #14, exh. P, at 111.

In her rebuttal, the prosecutor argued:

> Now, if Ms. Beckman is the only person the defendant has willing to come forward for him here, I feel sorry for him. Because he was at the–the trailer that night according to the witness. According to Kevin, according to Mr. Coons, according to Ms. Beckman, he was at the trailer; and so if counsel says, well, if only Mr. Coons had let the police come back that night, there would have been witnesses. The fact is that the defendant was there, so he knows who was there.

Id., at 113.

The jury found Anderson guilty of robbery by use of force. Juror Carr was the foreperson. The court sentenced Anderson to six years in prison and seven years of extended supervision.

III. Post-conviction Proceedings

A. Trial Court Proceedings

After waiving his right to appellate counsel, Anderson filed a *pro se* motion for postconviction relief in the trial court in which he alleged that his trial lawyer had been ineffective because he: 1) coerced Anderson to waive a speedy trial under a fraudulent premise; 2) failed to subpoena witnesses who could have provided exculpatory testimony; 3) failed to seek removal of biased jurors during voir dire, namely, juror Kevin Carr and the four jurors who said they would like to hear testimony from Anderson; 4) failed to object to the state's use of "unauthenticated" letters that Anderson purportedly had written to his cousin; 5) failed to object to references to Anderson's parole revocation hearing; 6) failed to

object to the use of witness testimony not disclosed in discovery; 7) failed to object to White's in-court identification of Anderson; 8) coerced Anderson not to testify; 9) failed to investigate and to use photographic evidence to impeach the state's witnesses; 10) gave an improper closing argument in which he impeached Anderson's credibility; and 11) failed to move for a mistrial for prosecutorial misconduct. The state's alleged misconduct was presenting the testimony of White, whom Anderson claimed had presented perjured testimony, and for threatening Beckman before trial that she would face termination of her employment as a Milwaukee County corrections officer if she testified for the defense. Anderson requested an evidentiary hearing on his motion.

With respect to counsel's alleged failure to call witnesses, Anderson alleged that counsel had failed to investigate, interview and subpoena four civilian witnesses and four law enforcement witnesses. Anderson provided the name of each witness and a brief summary of their expected testimony. *See* dkt. #7, exh. B, at 12-15. With respect to the civilian witnesses, Anderson proffered:

> (1) Donjeanette Allen. She would have testified to being in the car with Defendant and Mr. Coons. She would testify that when Mr. Coons, the Defendant and herself went to purchase drugs, the Defendant took the drugs and attempted to get Mr. Coons to drive off. She would also testify that when the guys (sellers) began to open the drivers' side door to grab Mr. Coons, she and the Defendant exited the vehicle on the passengers' side and fled. She would further testify that Defendant was not the person(s) that beat Mr. Coons and took his car;
>
> (2) Berlenda Sanders. She would have testified that Kevin White, a witness for the State, was paid in drugs to testify for

> the State. She would testify that while at home with her boyfriend, Mr. Coons came by looking for Kevin W. indicating that Kevin W. was suppose to testify in court; that later, when Kevin W. showed up at the house, her boyfriend inquired into Kevin W.'s appearance in court. Kevin W. then informed them both that Mr. Coons had given him drugs to come and testify at court. She would testify that Kevin W. had decided that he wasn't going to testify after all and that her boyfriend then asked Kevin W. to show up at the next hearing. For doing so, the boyfriend would give Kevin W. drugs for each appearance he made. She would also testify that her and Donjeanette were good friends and that, in a conversation between them, Donjeanette informed her that she had been contacted by someone indicating they where [sic] connected to Defendant's case and was told she would be charged with party to a crime if she showed up to testify;
>
> (3) Susan King. She would testify that she seen Kevin W. drive Mr. Coons car and park it in front of her house. She would also testify that Kevin W. then attempted to give her the keys to the car but she refused to accept them;
>
> (4) Frederick Cocraft. He would testify to being a witness to Mr. Coons renting his car out for drugs on a number of occasions[.]

Id. As for the law enforcement witnesses, Anderson merely listed a number of questions he wanted his lawyer to ask each witness.

The state responded that the court should deny Anderson's motion without an evidentiary hearing because he had failed to set forth facts showing that he was entitled to relief or because the record conclusively refuted his claims. With respect to Anderson's claim of ineffective assistance of counsel based on his alleged failure to subpoena civilian witnesses, the state argued for denial because Anderson had failed to produce affidavits from any of the witnesses or from defense counsel.

In reply, Anderson provided notarized statements from Sanders and King. In Sanders's statement, she wrote: "Kevin? from 26th Nash was paid off in drugs to come testify and lie in court on behalf of Bill? and Martha Gean King against Edward D. Anderson." *See* dkt. #14, exh. M., at A202. King's statement essentially matched the synopsis that Anderson had provided in his motion. *Id*. at A203. Anderson also filed his own affidavit in which he asserted that he was unable to pay someone to do the legwork on his case and that he had been physically unable to locate witnesses and obtain affidavits. *Id*. at ¶¶ 22-23. Anderson pointed out that the trial court had denied his motion for the appointment of counsel or an investigator. *See* dkt. #14, exh. L, at 12-13.

On November 25, 2003, the trial court denied Anderson's motion without an evidentiary hearing. The court first noted that Anderson had "clearly waived his right to a speedy trial in open court." Dec. and Order Denying Mot. for Postconviction Relief, attached to dkt. 7, exh. D, at 3. With respect to Anderson's failure-to-call witnesses claim, the court found that Anderson had "not attached the affidavits of any of the witnesses he believes trial counsel should have called; consequently it is unknown if those witnesses would have actually testified in the manner in which the defendant contends they would have." *Id*. Although the court noted that it had received Anderson's affidavit, it found it "wholly insufficient" to establish grounds for a new trial. *Id*. The court rejected Anderson's remaining claims with little discussion, indicating that it was doing so for the reasons set forth by the state in its brief. *Id*.

B. Direct Appeal

On appeal, Anderson raised the same claims he raised in the trial court, arguing that the trial court had erred by denying his claims without an evidentiary hearing. He also argued that he had been denied his constitutional right to a speedy trial.

The appellate court first addressed Anderson's claim that the trial court erroneously had denied his request for an evidentiary hearing on his ineffective assistance of counsel claims. Citing to *Strickland v. Washington*, 466 U.S. 668 (1984), the court noted that Anderson would be entitled to an evidentiary hearing only if he alleged sufficient material facts that would allow a reviewing court to "meaningfully assess" his claims. *Id*. at ¶ 9. Applying the Wisconsin Supreme Court's test for evaluating postconviction motions (set forth in *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W. 2d 50 (1996) and clarified in *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W. 2d 433 (2004)), the court upheld the trial court's decision that Anderson was not entitled to an evidentiary hearing on his claims that his lawyer had been ineffective for allegedly coercing him to waive his right to a speedy trial, for failing to subpoena witnesses, and for failing to attempt to remove biased jurors from the venire panel.

As for Anderson's claim that he had been coerced into waiving his speedy trial demand, the court noted the trial court's finding that Anderson waived his right to a speedy trial in open court. Furthermore, it found that "[n]othing in Anderson's motion asserts facts which, if true, would establish that his counsel was ineffective. Vague claims about 'fraudulent' and 'misleading premise' are opinions, not facts." *Id*. at ¶10.

With respect to Anderson's failure-to-subpoena-witnesses claim, the appellate court did not fault Anderson for failing to attach affidavits from the witnesses, but found that this claim failed because Anderson "does not specify how the lack of that testimony prejudiced him." *Id.* at ¶ 11. The court continued:

> "Even after reviewing both of Anderson's briefs, this court still does not know Anderson's theory of how counsel's failure to call specific witnesses resulted in Anderson's conviction. Because Anderson has not met the standard articulated in *Allen*, this court concludes that the trial court correctly concluded that this aspect of Anderson's motion was insufficient to warrant a hearing or relief. "

Id.

Addressing Anderson's claim that his lawyer should have sought to remove certain venire people for bias, the court found that the record conclusively refuted Anderson's claim.

The court rejected Anderson's eight remaining claims of ineffective assistance of counsel on the ground that they had been inadequately briefed. *Id*. at ¶ 20.

As for Anderson's speedy trial claim, after weighing the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the court concluded that Anderson had suffered no constitutional deprivation. *Id*. at ¶¶ 21-31. Finally, the court rejected Anderson's allegations of prosecutorial misconduct, noting that he had produced no affidavits to support his claims that White's testimony had been perjured and that the state had threatened Beckman before she testified. *Id*. at ¶¶ 32-33.

The Wisconsin Supreme Court denied Anderson's petition for review on February 9, 2005.

ANALYSIS

I. Relevant Legal Standards

In his habeas petition, Anderson presents the same claims that he presented to the state court of appeals. This court's review of those claims decided on the merits by the state court is governed by 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

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.

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

II. Ineffective Assistance of Counsel

Anderson raises 11 alleged errors committed by trial counsel. To establish constitutionally ineffective assistance of counsel, Anderson must show that his lawyer's performance was deficient and that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. at 687. To be deficient, counsel's representation must fall below an objective standard of reasonableness. *Id*. at 688. Deficient performance prejudices the defense when the errors were serious enough to deprive the defendant of a fair trial. *Id*. at 687. To demonstrate prejudice, Anderson must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 695. The court need not determine the first, or "performance,"

prong of the *Strickland* test if it determines that counsel's alleged deficiency did not prejudice the petitioner. *Id*. at 697.

A. Waiver of Speedy Trial

Anderson claims that his lawyer "coerced Anderson to waive his right to a speedy trial under a fraudulent and misleading premise and . . . failed to enforce an agreement made between Anderson and the state that resulted in the waiver of his speedy trial." Petition, dkt. 2, at p. 2, ¶ 1. Anderson's claim relates to his agreement on January 31, 2001 to withdraw his speedy trial demand so that he could take a polygraph examination.

Anderson's claim has two unrelated parts. First, he contends that the state's agreement that it would dismiss the charges if Anderson took and passed the lie detector test was "fraudulent" because one of the four pertinent test questions was based upon Coons's false statement to police that he had picked Anderson up after Anderson flagged him down while Coons was leaving a tavern. Thus, Anderson contends, the results of the test indicating that Anderson was lying in response when he answered "no" to that one particular question "could not possibly be accurate." He contends that his lawyer would have known this if he would have insisted that Coons submit to a lie detector test; according to Anderson, this was part of the original agreement that led to his waiver of his speedy trial demand. Second, Anderson alleges that his lawyer coerced him into taking the polygraph instead of proceeding to trial because the lawyer wanted to go out of town with a girlfriend.

As noted above, the state court of appeals found that the trial court properly denied this claim without an evidentiary hearing. *State v. Anderson*, *supra*, at ¶ 10. It noted that the trial court had asked Anderson three times on January 31, 2001 whether he was waiving his right to a speedy trial and that Anderson had assured the court each time that he was doing so. Also, it found that Anderson had failed in his postconviction motion to allege facts that, if true, would have established that his lawyer had been ineffective. Without elaborating, the court noted that Anderson's allegation that his waiver had been the product of a "fraudulent" or "misleading" premise was an opinion, not fact. *Id*.

Having reviewed Anderson's postconviction motion, I agree with the state courts that an evidentiary hearing was not warranted on this claim. Preliminarily, I note that simply because Anderson stated on the record three times that he was willing to waive his right to a speedy trial in order to take a polygraph test does not necessarily refute his claim: Anderson contends that his waivers were induced by false promises and that he did not receive the benefit of his bargain.

But the record does not support Anderson's contention that he waived a speedy trial in reliance on Coons also taking a polygraph test. The prosecutor merely reported that Coons, upon hearing that Anderson was willing to take a polygraph in exchange for the state's agreement to dismiss the charges if he passed, expressed his *own* willingness to take a polygraph to show that *he* wasn't lying. *See* dkt. 20, exh. T at 8-9. Neither side ever indicated that Coons was required to make good on his offer, or that his submission to a

polygraph was a material factor upon which Anderson was relying when he agreed to withdraw his speedy trial demand. Therefore, this facet of Anderson's claim of ineffective assistance fails because it rests on an inaccurate premise. Moreover, Anderson has failed to show that he would have passed the lie detector test but for the one question that he apparently answered accurately, or that the state meddled with the test or its results. The court of appeals properly concluded that there was no factual basis for Anderson's claim that the state somehow tricked him into withdrawing his speedy trial demand.

Anderson also has alleged that his lawyer pressured him into waiving his speedy trial demand at the January 31, 2001 hearing because the lawyer wanted to go to New York with his girlfriend. Neither state court addressed this allegation head-on; both courts, however, noted that Anderson stated three times on the record that he wanted to waive his speedy trial demand. It is logical to presume that if Anderson was waiving only to placate his lawyer, he would have voiced his reluctance when asked by the court if he really wanted to postpone the trial. More tellingly, Anderson admitted during a later hearing that his lawyer had said he was ready and willing to go to trial on January 31 if Anderson wanted to. Based on this, it was reasonable for the state courts to conclude that Anderson was not entitled to relief on this aspect of his ineffective assistance claim.

B. Failure to Call Witnesses

Anderson claims that counsel was ineffective for failing to investigate and to present the testimony of several witnesses who were essential to Anderson's defense. The state trial

court rejected this claim without a hearing because Anderson had not attached affidavits from the witnesses. Apparently unconvinced that the absence of affidavits was fatal, the court of appeals nonetheless found that no hearing was warranted because Anderson had not specified how the lack of the proffered testimony had prejudiced his defense. The court stated: "Even after reviewing both of Anderson's briefs, this court still does not know Anderson's theory of how counsel's failure to call specific witnesses resulted in Anderson's conviction." Put another way, the court found that Anderson's motion failed sufficiently to allege a viable claim of ineffective assistance of counsel. The upshot of the state courts' approach is a record devoid of any state court factual findings on this claim.

Anderson insists that he alleged facts sufficient to entitle him to an evidentiary hearing and argues that the state courts unreasonably applied *Strickland* when it denied his failure-to-investigate claim without allowing him to develop the record. He asserts that he provided the trial court with the names of the witnesses he had asked his lawyer to call and a summary of what each witness's testimony would have been had he or she been called to testify. He also points out that he provided his own affidavit as well as affidavits from two of the witnesses. Anderson contends that he is entitled to an evidentiary hearing in this court in order to flesh out the record concerning his claim.

A state prisoner who in a federal habeas petition requests an evidentiary hearing on claims he was unable to develop in state court must surmount the statutory barrier erected in 28 U.S.C. § 2254(e)(2). *Williams*, 529 U.S. at 424. That provision, as amended by the

AEDPA, provides that "[i]f the [petitioner] has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim" unless his claim relies either on new but retroactively-applied Supreme Court law, or on previously-undiscoverable facts that show clearly and convincingly that no reasonable factfinder would have found the applicant guilty but for constitutional error. § 2254(e)(2)(A) and (B).

Because nothing in Anderson's petition or in the record suggests that the exceptions of (e)(2)(A) or (B) apply to him, then Anderson is not entitled to an evidentiary in federal court if this court concludes that he failed to develop the factual basis of his claim in his state court proceedings. *Id*.[1]

In *Williams*, the Supreme Court explained that when the factual basis of a claim is not developed in state court, the federal habeas court must then consider whether the lack of development was the result of a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 431-32. Diligence requires a prisoner to make a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; at a minimum, the prisoner must seek an evidentiary hearing in state court in the manner prescribed by state law. A finding of

[1] Even if Anderson made sufficient efforts to develop the record but was foiled by his lawyer or by the state court, he *still* would not automatically get an evidentiary hearing. At that point, this court would determine the need for a hearing using the pre-AEDPA test. *Davis v. Lambert*, 388 F.3d 1052, 1061-62 (7th Cir. 2004).

diligence does not depend on whether those efforts could have been successful. *Id.* at 435, 437. Although state law guides the inquiry, it is a federal question whether a prisoner has "failed" adequately to develop the factual basis of a claim in state court and therefore is subject to § 2254(e)(2)'s limitations. *Burris v. Parke,* 116 F.3d 256, 258 (7th Cir. 1997) ("Section 2254(e)(2) is a rule of federal law, liberated from the independent-and-adequate-state-grounds doctrine . . .".)

To be entitled to an evidentiary hearing in Wisconsin on a claim of ineffective assistance of counsel, a defendant must allege facts that if true, would entitle the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W. 2d 50 (1996). Conclusory allegations without factual support are insufficient; a defendant must provide "facts that allow the reviewing court to meaningfully assess his or her claim," including facts that allow the court meaningfully to assess the claim of prejudice. *Id*. at 314, 318.

In *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W. 2d 433 (2004), the Wisconsin Supreme Court clarified the *Bentley* standard in order to reduce the frequency with which defendants filed insufficient postconviction motions. The court explained that to meet the *Bentley* standard, a postconviction motion must "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Id*. at ¶ 23, 274 Wis. 2d at 585, 682 N.W. 2d at 441. With respect to a claim that trial counsel was ineffective for failing to call a witness, the court explained that the motion must set forth "the name of the witness (who), the reason the witness is important (why, how), and facts that can be proven (what, where, when) . . .". *Id*. at ¶ 24, 274 Wis. 2d at 586, 682 N.W. 2d at 442.

Applying these principles, I conclude that petitioner is at fault for failing to develop the facts surrounding his failure-to-investigate claim. Having carefully reviewed petitioner's postconviction motion, affidavit and supporting briefs, I agree with the state court of appeals that petitioner's submissions lack the necessary explanations as to how the testimony of any of the missing witnesses would have made a difference in the outcome at trial. With respect to the law enforcement officers, petitioner did not even set forth any putative testimony, but merely set out a list of questions he wanted his lawyer to ask each witness. Merely listing questions without making a showing of what the answers would be or how they would have affected the outcome of trial fails to provide the specificity required to allege a colorable failure-to-investigate claim.

Petitioner made more of a showing with his civilian witnesses, but he still fell short of the *Bentley/Allen* requirements.[2] Petitioner merely set forth each witnesses's putative testimony (the "who" and the "what") but never alleged "how" and "why" the outcome of trial might have been different had each witness testified. Under state law, it was imperative for Anderson to make such allegations in order to obtain an evidentiary hearing. The requirement that a defendant seeking a postconviction evidentiary hearing must allege with specificity facts showing not only that counsel was deficient but also that the errors were prejudicial was in place in Wisconsin long before Anderson filed his motion. *See, e.g., State*

[2] *Allen* was decided after Anderson filed his motion, however the state supreme court explicitly observed that it was not announcing any new standard, it merely was clarifying the old standard so that defendants could write better motions. *Allen*, 2004 WI at ¶ 13.

v. Flynn, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-350 (Ct. App. 1994) (defendant alleging failure to investigate by counsel must specify what the investigation would have revealed and how it would have altered the outcome)(citation omitted). This is the rule in federal court as well. *See*, *e.g.*, *United States v. Rodriguez*, 53 F.3d 1439, 1449 (7th Cir. 1995) (defendant must provide sufficiently establish what evidence would have been obtained had counsel undertaken the desired investigation and must show how such evidence would have produced a different result.)

After the state pointed out in its state court appellate brief that Anderson had insufficiently alleged prejudice, Anderson did present in his reply a cogent theory of prejudice with respect to Allen, who I infer is the woman identified by Beckman at trial as "Net." *See* dkt. 7, exh. H, at 7-8. Anderson asserted that Allen's testimony would have been important because it would have been more compelling than that offered by Beckman, who was not actually in the car with Coons and Anderson. Anderson pointed out that during closing argument the prosecutor flagged Allen's failure to testify as a reason for the jury to question Anderson's version of events.

If Anderson had included these assertions in his postconviction motion or briefs to the *trial* court, then he most likely would have been entitled to an evidentiary hearing in state court, or alternatively, would not be subject in federal court to the stringent requirements of § 2254(e)(2). But he didn't. The operative question for the state court of appeals (and for this court in determining whether Anderson exercised the diligence

necessary to avoid § 2254(e)(2)) was not whether Anderson *could* have stated how the absence of certain testimony prejudiced him, but whether he *did* so state in the trial court. *See Allen,* at ¶ 27 (when reviewing claim that trial court should have held evidentiary hearing, appellate court "review[s] only the allegations contained in the four corners of [the] postconviction motion, and not any additional allegations that are contained in [the appellate] brief.").[3]

Like the state court of appeals, I have not found any specific allegations of prejudice in Anderson's trial court submissions. Because such allegations were necessary in order to obtain an evidentiary hearing, Anderson is at fault for failing to develop the record. Therefore § 2254(e)(2) applies and Anderson is not entitled to an evidentiary hearing.

Furthermore, in concluding that Anderson had failed to allege facts that, if true, established that he was entitled to relief on his claim of ineffective assistance of counsel, the Wisconsin Court of Appeals reasonably applied *Strickland*. Accordingly, § 2254(d) precludes this court from granting habeas relief to Anderson on this claim.

C. Failure to Remove Allegedly Biased Jurors

Anderson contends that trial counsel was ineffective for failing to move to strike for cause several potential jurors, or alternatively, failing to exercise peremptory strikes against them. Specifically, Anderson attacks his lawyer's decision not to seek removal of juror Carr

[3] Because the court of appeals' review was limited to the information the trial court had before it, the appellate court only could have been referring to Anderson's trial court briefs when it indicated that it had reviewed "both of Anderson's briefs."

(the Milwaukee County sheriff's detective) and the four venire people who admitted they "would like" to hear testimony from Anderson.

Starting with Detective Carr, the state appellate court noted that law enforcement officers are not *per se* objectively biased or ineligible to serve as jurors. *State v. Anderson*, *supra*, at ¶¶ 15, 17 (citing *State v. Louis*, 156 Wis. 2d 470, 479, 457 NW. 2d 484 (1990). The court reviewed Carr's answers during voir dire and found no evidence that he was subjectively biased. It noted that the trial court had asked Carr about his acquaintance with detective Moore and twice asked Carr whether he could be fair and impartial, to which Carr had replied, "Absolutely." *Id*. at ¶¶ 16-18.

Regarding the other venire people, the court noted that after questioning by defense counsel, each of them indicated that they could decide Anderson's case fairly and impartially even if he chose not to testify. Crediting these sworn assertions, the court found no evidence of bias; therefore, Anderson's lawyer was not ineffective for failing to seek and obtain their removal. *Id*. at ¶¶ 18-19.

This adjudication is not inconsistent with clearly established federal law and it does not rest upon an unreasonable determination of the facts. The court recognized implicitly that Anderson had a constitutional right to be tried by an impartial jury. *Ross v. Oklahoma*, 487 U.S. 81 (1968); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The Supreme Court has defined an impartial juror as a person who "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. The *voir*

dire process is recognized as an important tool for determining whether a juror can do this; however, the Constitution lays down no particular test or procedure for evaluating juror impartiality. *Id*. at 724. Prospective jurors are presumed impartial; the challenger to that presumption bears the burden of proving bias. *Id*. at 723 (quoting *Reynold v. United States*, 98 U.S. 145, 157 (1878)).

With respect to juror Carr, Anderson continues to allege bias resulting from Carr's employment as a detective for the sheriff's department and his acquaintance with detective Moore and his sister. However, Anderson cites no clearly established federal law precluding law enforcement officers or persons acquainted with a witness from sitting as jurors in a criminal case. To the contrary, the United States Supreme Court has been loathe to exclude groups of persons from serving as petit jurors on the ground of implied, as opposed to actual, bias. *See Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (bias should be inferred only in "extreme situations," such as upon learning "that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.").[4]

Although the Supreme Court has not considered the question whether law enforcement officers as a group should be presumed to be biased against the defendant in

[4] The Wisconsin Supreme Court cited *Smith* for this principle in *State v. Louis*,156 Wis. 2d 470, 479, 457 N.W. 2d 484 (1990), a case upon which the court of appeals relied in rejecting Anderson's claim.

criminal cases, it has declined to find that a juror may be disqualified simply because he or she is employed with the government. *Dennis v. United States*, 339 U.S. 162, 169-171 (1950) (rejecting defendant's claim that juror's job with federal government was basis to find implied bias against defendant charged with failing to appear before congressional committee on un-American activities). *See also United States v. Wood*, 299 U.S. 123 (1936) (declining to impute bias against defendant by government employees); *Frazier v. United States*, 335 U.S. 497 (1948) (reaffirming *Wood*).

In *State v. Louis*, 156 Wis. 2d 470 , the Wisconsin Supreme Court concluded that the Supreme Court's rationale in *Dennis*, *Frazier* and *Wood* defeated the defendant's analogous claim that law enforcement officials harbor an implicit bias against criminal defendants. 156 Wis. 2d at 481-82. This conclusion is not unreasonable; indeed, it is shared by the overwhelming majority of jurisdictions that have addressed the issue. *See*, *e.g.*, *United States v. McCullah*, 76 F.3d 1087, 1100 (10th Cir. 1996); *United States v. Nururdin*, 8 F.3d 1187, 1191 (7th Cir. 1993); *United States v. Maldonado-Rivera*, 922 F.2d 934, 970-71 (2d Cir. 1990); *United States v. McCord*, 695 F.2d 823, 828 (5th Cir. 1983); and cases cited in *Louis*, 156 Wis. 2d at 483. In rejecting Anderson's contention that juror Carr was presumptively biased by virtue of his employment, the state court of appeals adjudicated the claim consistent with these cases and with Supreme Court precedent. Likewise, Anderson has cited no clearly established federal law to support his claim that Carr should be deemed biased because of his job and his social relationships.

Having failed to show implied or objective bias, Anderson must show that the jurors he challenges were actually biased. Whether a juror can lay aside any preconceived opinions and render a verdict on the basis of the evidence presented in court is a fact to be determined in the first instance by the state courts, and to which this court must defer absent clear and convincing evidence to the contrary. *See Smith*, 455 U.S. at 218; 28 U.S.C. § 2254(e). Here, both the state trial and appellate courts concluded from the responses during *voir dire* that none of the jurors challenged by Anderson were biased. The state courts were entitled–indeed, may have been *obligated*–to credit fully each juror's sworn statement that he or she could be impartial. *Dennis*, 339 U.S. at 171 ("surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter").

Anderson has adduced no evidence suggesting that any of the jurors breached his or her oath in deciding his case, or otherwise to cast doubt on the state courts' determinations. Accordingly, this court cannot overturn the state courts' determination that the jurors whom Anderson alleged his counsel should have attempted to have removed from the panel were not biased. Having failed to show juror bias, Anderson cannot show that his lawyer was constitutionally ineffective for failing to move to strike or to strike peremptorily these jurors. The state court of appeals' adjudication of this claim falls within § 2254(d)'s bounds of reasonableness.

D. Remaining Claims

The Wisconsin Court of Appeals considered all of Anderson's eight remaining claims of ineffective assistance of counsel together, finding that Anderson had inadequately briefed them:

> On appeal, Anderson's arguments on each of these issues vary from a single sentence to three paragraphs. Often, there are no references to case law or an explanation of how he may have been prejudiced by each alleged error. Because these issues are not adequately briefed, this court declines to address them.

State v. Anderson, *supra*, at ¶ 20 (citation omitted).

In spite of the court's having declined to address the merits of these claims, the state has not argued procedural default. Instead, it contends that the appellate court's determination constitutes an adjudication of the claims on the merits to which this court must defer under § 2254(d).

The state's position is illogical and therefore puzzling: the state court of appeals expressly *declined* to adjudicate the claims on the merits, disposing of them instead on the procedural ground that Anderson had inadequately briefed them. The state has not argued in the alternative that Anderson's failure to adequately brief his claims constitutes a procedural default. Although this court arguably could overlook the state's failure to assert procedural default and address the issue *sua sponte*, *see Perruquet v. Briley*, 390 F.3d 505, 518 (7th Cir. 2004), I do not recommend doing so in this case. The state's failure to raise a blindingly obvious default defense suggests either that the state intentionally waived it or the

state's lawyers are asleep at the wheel. Whichever, procedural default is off the table. This doesn't change the outcome in the instant case, it just creates more work. There may be a case in the future, however, where the state will rue such an oversight.[5]

Because of the state's waiver, Anderson is entitled to *de novo* review of his claims. As noted previously, there is no adjudication on the merits by the state appellate court of these aspects of petitioner's ineffective assistance claim. Under the AEDPA's statutory scheme, this court might be able to look past the appellate court's procedural ruling and apply § 2254(d) to the *trial* court's adjudication of the claims. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (reviewing prejudice prong of petitioner's ineffective assistance claim *de novo* where "*neither* of the state courts below reached this prong of the *Strickland* analysis") (emphasis added). *But see Myartt v. Frank*, 395 F.3d 782, 785 (7th Cir. 2005) (applying pre-AEDPA standard of review where state court of appeals did not adjudicate petitioner's ineffective assistance claim in any "meaningful sense"); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997) (declining to defer to state trial court's adjudication of claims on merits where state court of appeals relied entirely on procedural bar). However, it is not necessary to determine the scope of § 2254's reach in this case for two reasons: 1) the state has not asked this court to defer to the trial court's rulings; and 2) petitioner's claims fail even if they are reviewed under the general standard as set forth in 28 U.S.C. § 2243, which

[5] This is not a gauntlet being thrown at the AG's office. Considering the tight deadlines imposed by this court and the heavy caseloads borne by the AAGs, they do a decent job of briefing the § 2254 petitions. But they cannot rely on this court to spot issues for them.

requires the court to "dispose of the matter as law and justice require." *Braun v. Powell*, 227 F.3d 908, 917 (7th Cir. 2000); *Moore v. Parke*, 148 F.3d 705, 708 (7th Cir. 1998). Having independently reviewed Anderson's allegations of ineffective assistance of counsel, I conclude that Anderson either has not shown or cannot show that counsel's alleged errors had any reasonable likelihood of changing the outcome of his trial.

1. Failure to Challenge Foundation of Letters

Anderson contends his lawyer was ineffective for failing to challenge the foundation of the letters that he allegedly wrote in jail which were introduced at trial by witness Martha Jean King. Anderson argues that the letters were inadmissible because the handwriting had not been "authenticated." I surmise that Anderson is suggesting that only a handwriting expert could have laid an adequate foundation for his letters. This is not the law. In Wisconsin, a layperson may authenticate the handwriting of a correspondent with whom he or she is familiar. Wis. Stat. § 909.015(2); *Daniels v. Foster*, 26 Wis. 686, 693 (1870). At trial, King testified that she recognized the handwriting in the letters as that of her cousin, Anderson. *See* dkt. 14, exh. N, at 124. Further, the return addresses bore Anderson's name. *Id*. at 125. In light these facts, counsel had no reasonable basis for objecting to their admission and his failure to do so could not have been prejudicial to Anderson.

2. Failure to Object to References to Anderson's Parole Status

Anderson contends that his lawyer should have objected to the state's reference to Anderson being on parole. The references to Anderson's parole status occurred in his letters to King in which he referred to his upcoming revocation hearing. But Anderson has no valid quarrel with his lawyer: at a pretrial hearing counsel moved to delete from the letters the references to parole revocation. The trial court expressly ruled that the references could be left in to give context to Anderson's motive for writing the letters. *See* dkt. #20, exh. Y, at 8, 11. It would have been pointless for counsel to renew his rejected objections during trial.

Anderson suggests that counsel somehow was deficient because when the existence of the letters first surfaced on the date that Anderson was scheduled originally for trial, the parties had agreed to refer to the revocation proceeding merely as a "hearing." But this hearing occurred before a different judge about six months before Anderson's trial actually took place. It is not defense counsel's fault that the prosecutor changed her mind in the interim. Defense counsel made his objection and lost. This is not ineffective assistance.

In any event, the potentially prejudicial effect of this fact pales in comparison to the evidence Anderson offered during his defense case: the actual carjackers were two drug dealers from whom Anderson had stolen drugs. Evidence that Anderson was on parole at the time of the offense certainly had less impact on the jury than his admissions that he was a drug user and a thief.

3. Failure to Object to Witness Testimony Not Disclosed in Discovery

Anderson asserts that his attorney was ineffective because he did not object to the prosecutor introducing evidence that she had failed to disclose during pretrial discovery, namely a second statement by Coons to Detective Moore on March 27, 2001. Anderson alleges that during this interview, Coons made a statement "contradicting the statement he initially made to police." According to Anderson, the state's alleged withholding of the second statement "denied Anderson an opportunity to effectively investigate the issues as dictated in the criminal complaint and adequately consider alternative defenses." See dkt. 2, at 4, ¶ 6.

Anderson does not identify the nature of Coons's second statement, explain how it contradicts his first statement or explain how the outcome at trial would have been different had the defense known about it earlier. If Anderson is referring to Coons's admission at trial that he had not told Detective Moore the truth about how and where he first encountered Anderson that night, the only prejudice Anderson alleges is his speculation that he would have passed the polygraph test had he known earlier that Coons had lied. But as noted above, Anderson has failed to support this theory with anything beyond his own conjecture that the polygraph exam was a fraud.

Anderson also complains that the state never provided the defense with a copy of White's statement to police. This unsupported complaint is incredible in light of the record, which strongly suggests that the defense did receive a copy or at least was aware of the

substance of White's statement. *See* Tr. of Sept. 5, 2001 Adjournment, dkt. 20, exh. Z, at 2-3, 10-11. Moreover, Anderson has failed to allege how he was prejudiced by counsel's failure to object to the alleged lack of disclosure. Absent specific allegations showing both deficient performance and prejudice, Anderson is not entitled to habeas relief on this claim.

4. Failure to Object to White's In-Court Identification of Anderson

Anderson contends that his trial attorney was ineffective because he did not object to White's in-court identification of Anderson, which was unreliable because the state prompted White. Having reviewed the record, I find no merit to this claim. The record reflects that the descriptors used by White to identify Anderson for the record were shared by the state's investigating officer, Detective Moore, who also was an African American man wearing a gray suit and a black shirt. Because those identifiers were inadequate to make a record distinguishing Anderson from the detective (keep in mind that it may have been obvious in the courtroom which person White was identifying) , the prosecutor put her hand on Moore's head and asked White if the person he had identified as Anderson had her hand on his head. White answered "No." There was nothing unduly suggestive about White's identification. Accordingly, Anderson was not prejudiced by counsel's failure to object.

5. Alleged Coercion of Anderson Not to Testify

The state trial court found on the record at trial that Anderson voluntarily and intelligently waived his right to testify after having had the opportunity to consult with his

lawyer. Anderson has not provided any clear and convincing evidence to rebut that finding; in fact, he has not even explained what his attorney allegedly did to coerce him not to testify. Anderson stated on the record that his decision not to testify was not the product of any promises or coercion. The trial court's finding that Anderson voluntarily and willing waived his right to testify is unrefuted.

6. Failure to Investigate

Anderson contends that his lawyer failed to visit White's trailer or the tavern at which Coons said he had been before coming to the trailer. Anderson alleges that had counsel done so, he would have determined that Coons gave false information to the police. However, Anderson does not identify what "false information" counsel would have discovered. Assuming Anderson is referring to Coons's admittedly-false statement that Anderson flagged Coons down after Coons left the tavern, counsel knew this before trial; in fact, he made it one of the focuses of his cross-examination of Coons. *See* dkt. #14, exh. N., at 86, 95. Having failed to establish how counsel's alleged failure to investigate prejudiced his defense, Anderson is not entitled to habeas relief on this claim.

7. Counsel's Reference to Anderson's Parole Status and Prejudicial Closing Argument

Anderson contends that his lawyer prejudiced his right to a fair trial when he referred to Anderson's parole status and "attack[ed] Anderson's credibility." From the citations Anderson has provided, it appears that Anderson's objection regarding his parole status

refers to counsel's having mentioned during opening statements that Anderson had had a probation agent. With respect to his claim that his lawyer attacked his credibility, I presume that Anderson is referring to the same passage from closing argument to which he objected in the state courts, namely, his lawyer's statement that:

> Unluckily for Edward – the man who this is all about, the man who's falsely accused, not a Boy Scout, drug user, thief – they try to make him suffer for what happened when he didn't do it. He may have had a hand in it. He didn't do what he's here for.

Anderson is not entitled to habeas relief under *Strickland* because neither of these comments prejudiced his right to a fair trial. At the outset of Anderson's trial, the court instructed the jury that opening statements and closing argument are not evidence and that it should base its decision solely on the evidence. Jurors are presumed to follow instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Moreover, as noted above, the court already had ruled that references to Anderson's parole status were admissible to provide context for the letters he wrote to King. Counsel did not harm Anderson's defense by referring to something the jury was going to hear anyway.

Similarly, counsel's decision during closing argument to admit that Anderson was guilty of some wrongdoing but not the robbery was a valid tactical decision, particularly in light of the jury's knowledge that Anderson had written letters scripting out his tale of a drug deal gone bad. Counsel's statement during closing was consistent with how Anderson had portrayed events to King. It was reasonable strategy under the circumstances. Even if hadn't been, it wasn't prejudicial. In light of the overwhelming evidence of guilt presented

by the state, including Coons's unequivocal testimony and the damning letters written by Anderson, counsel's remarks would not have had a measurable impact on the jury's verdict.

8. Failure to Seek Mistrial on Basis of Prosecutorial Misconduct

As explained in the following section, Anderson's claim of prosecutorial misconduct is without merit. Accordingly, his related and dependent claim of ineffective assistance of counsel fails as well.

III. Prosecutorial Misconduct

Anderson accuses the state of two instances of misconduct. First, he alleges that the prosecutor knew or should have known that White's testimony was perjured. Second, he alleges that someone from the prosecutor's office called Beckman and threatened to have her investigated and possibly terminated from her job at the Milwaukee County House of Correction should she testify for the defense.

The state courts found that Anderson's allegations had no merit. In rejecting them, the court of appeals noted that the trial court had found implicitly that "there was no evidence that White perjured himself, that the State knew he perjured himself or that the State contacted the defense witness." *State v. Anderson*, *supra*, at ¶ 33. The appellate court noted that Anderson had not supported his claim with any affidavits or facts in the record with respect to either White or Beckman.

Having carefully reviewed the record and Anderson's submissions, I agree that Anderson's allegations regarding the state's conduct with respect to White and Beckman are unsupported conjecture. In support of his claim that White committed perjury, Anderson submitted a document that purports to be a notarized statement signed by Berlinda Sanders. In the document, Sanders states only that "Kevin? from 26th Nash was paid off in drugs to come testify and lie in court on behalf of Bill? and Martha Gean King against Edward D. Anderson." Sanders does not indicate the source of her knowledge, who allegedly paid Kevin off or provide any other details sufficient to establish that she had personal knowledge that White actually lied in court. More significant to Anderson's prosecutorial misconduct claim, Sanders's affidavit does not establish that the state knew that White's testimony was false.

Anderson's belief that White lied and the state knew it hinges on the fact that White did not come forward as a witness to the events until several months after the incident and on what Anderson believes was White's inaccurate in-court identification of Anderson. As discussed previously, however, Anderson's mistaken-identity theory does not hold water. And the fact that White did not surface until Coons came clean and admitted that he had first encountered the defendant at White's trailer (where people were using drugs) does not alone indicate that White's testimony was false. Anderson must do more than point to suspicious timing to support his charge of perjury.

As for Beckman, all Anderson has adduced is evidence that Beckman was investigated by her employer shortly after testifying at Anderson's trial. He has not presented any evidence showing that the investigation was initiated at the prosecutor's request or, more

importantly, that the prosecutor or anyone else from the state contacted Beckman *before* trial and threatened her with such an investigation should she testify.

More significantly, even if Anderson could show prosecutorial misconduct with respect to Beckman, he still would not be entitled to habeas relief. "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Even when the misconduct is "egregious," such as the knowing use of perjury, it is only the "misconduct's effect on the trial, not the blameworthiness of the prosecutor" that will give rise to a due process violation. *Id*. at 220 n. 10. Thus, to be entitled to habeas relief, Anderson would have to show not only that the prosecutor threatened Beckman, but that these threats affected the outcome of his trial.

Anderson cannot make this showing because Beckman appeared at trial and testified on Anderson's behalf. Anderson alleges that she was nervous on the stand. Even if this is true, however, it does not establish that her nervousness was the result of the state's threats or that it was the reason the jury discounted her testimony. Many witnesses are palpably nervous on the stand, most for obvious, benign reasons: they are speaking in public under oath as the center of attention in an adversarial proceeding in which a trained attorney likely will try to make them look foolish and untrustworthy. It is not surprising that a correctional facility employee would be nervous about admitting publicly that she ran with drug users.

Even if Beckman had been poised and glib, the jury had ample reason to reject her testimony. Having learned of Anderson's letters to his cousin, the jury logically could have

concluded that Anderson was a vulpine puppeteer who pulled Beckman's strings after his cousin said no. Anderson has failed to make any showing that the prosecutor actually engaged in misconduct or that the purported misconduct affected his trial. The state court of appeals's conclusion that Anderson had not supported his prosecutorial misconduct claim with any evidence was a reasonable determination in light of the facts presented to it.

IV. Speedy Trial

Last, Anderson contends that the sixteen-month delay from the time he was charged until he was tried was a violation of his Sixth Amendment right to a speedy trial. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .". Examining the contours of that right in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the United States Supreme Court stated:

> [T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.

Id. at 521 (footnote omitted.) Thus, courts must perform a functional analysis of the right in the particular context of the case. *Id*. at 522. The Court in *Barker* adopted a four-part balancing test that weighed the conduct of both the prosecution and the defendant: 1) the length of the delay; 2) the reasons for the delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant. *Id.* None of the factors is dispositive. *Id*. at 533.

The state appellate court applied *Barker*'s four-part balancing test to Anderson's claim. It found that the 16-month delay was presumptively prejudicial. Examining the reasons for the delay, the court reviewed the record and found that the case was delayed once at the request of both parties, twice at the request of Anderson or his lawyer, once at the state's request and twice because of court congestion. It noted that Anderson was solely or jointly responsible for seven months of delay and that nothing in the record indicated that the state's delays were designed to gain an unfair advantage. Turning to the third factor, the court noted that Anderson had expressly waived his right to a speedy trial at the January 31 hearing and had not reasserted it. Finally, the court noted that the only prejudice that Anderson had identified was his inability to participate fully in prison programming. It noted that he was in custody on other charges while awaiting trial and that he had not alleged that his ability to present his defense was hampered by the delay. Weighing the four factors, the court found no deprivation of Anderson's Sixth Amendment right to a speedy trial. *State v. Anderson*, *supra*, at ¶¶ 21-31.

The record amply supports the state court of appeals' findings with respect to the predicate facts relevant to Anderson's speedy trial claim. Anderson has not attempted to rebut these findings with any clear and convincing evidence. Absent a valid attack on the court's factual findings, Anderson's speedy trial claim stands no chance of success. Assuming that the state court got its facts right, then the court's subsequent weighing of those facts pursuant to a balancing test like that set forth in *Barker* is virtually unassailable on habeas

review. As the Supreme Court explained in *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140 (2004):

> The term "unreasonable" [as used in § 2254(d)(1)] is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

541 U.S. at ___, 124 S. Ct. at 2149. *See also Lindh*, 96 F.3d at 871 (citing speedy trial claim as example of a "question of degree," for which "a responsible, thoughtful answer reached afer a full opportunity to litigate is adequate to support the judgment").

Here, after identifying the correct legal standard and reviewing all the relevant evidence, the state court of appeals determined that no speedy trial violation had occurred. Given the broad leeway afforded to courts under *Barker*'s balancing test, this court has no basis to second-guess that conclusion. *Danks v. Davis*, 355 F.3d 1005, 1009 (7th Cir. 2004) ("[T]his court reviews whether the state court applied the correct law, not whether in applying the law it reached the correct decision.") (citations omitted). Even if this court had authority to determine whether the state court of appeals properly balanced the *Barker* factors, Anderson would lose. It was not unreasonable for the state court of appeals to find

that Anderson's complicity in the delay and the absence of any unfair tactics by the state outweighed Anderson's poorly-articulated claim of prejudice. My use of a litotes is intentional because I would be hard-pressed to call a 16 month delay "reasonable." However, in this case, it was "not unreasonable" for the state courts to find that there was no speedy trial violation in Anderson's case.

V. Conclusion

To summarize, Anderson is not entitled to an evidentiary hearing on his claims because he is at fault for failing to develop the record in the state court proceedings and he cannot meet the stringent criteria of § 2254(e)(2). The state courts properly concluded that Anderson's allegations of ineffective assistance of counsel and prosecutorial misconduct were either conclusory or failed to establish the requisite factual predicate for his claims. It follows that the ineffective assistance and prosecutorial misconduct claims that the state appellate court adjudicated on the merits did not result from an unreasonable determination of the facts or from an unreasonable application of Supreme Court precedent. Anderson's remaining claims of ineffective assistance of counsel fail upon *de novo* review for a lack of prejudice. Finally, the state appellate court's adjudication of Anderson's speedy trial claim was reasonable under § 2254(d). This court should reject Anderson's claims and deny his petition for a writ of habeas corpus.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of Edward Anderson for the issuance of a writ of habeas corpus be DENIED.

Entered this 26th day of January, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

January 26, 2006

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Assistant Attorney General
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Re: Anderson v. Benik
Case No. 05-C-306-C

Dear Mr. Anderson and Attorney Lloyd Tripp:

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 February 16, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 16, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge