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

A'KINBO J.S. HASHIM-TIGGS,

Petitioner,

v.

REPORT AND RECOMMENDATION

RICHARD SCHNEITER, Warden,
Wisconsin Secure Program Facility,

06-C-536-C

Respondent.

REPORT

Before the court for report and recommendation is the petition of A'Kinbo J.S. Hashim-Tiggs for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, a prisoner at the Wisconsin Secure Program Facility, challenges his October 3, 2003 conviction in the Circuit Court for Grant County for battery by a prisoner, in violation of Wis. Stat. § 940.20(1). For the reasons stated below, I am recommending that this court deny the petition.

Petitioner contends that his custody resulting from this particular conviction violates the Constitution of the United States because he did not enter his no contest plea knowingly and intelligently because his lawyer, Joanne Keane, incorrectly advised petitioner that a "no contest" plea was the same as an *Alford* plea.[1] Petitioner further contends that Keane erred by failing adequately to investigate the crime scene, failing to procure a videotape of the

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[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970), discussed below at 12-13.,

incident and failing to disclose to petitioner the victim's medical reports allegedly revealing that the victim sustained no injury. Petitioner also contends that the trial court coerced him into entering his plea and that the state committed prosecutorial misconduct by relying on the victim's injury testimony that the state knew to be false.

Petitioner is not entitled to a writ. As explained below, he has procedurally defaulted several of his claims by failing to present them or brief them adequately in the state court of appeals; the rest were properly adjudicated by the state court of appeals

From the record of the state court proceedings attached to the state's answer and documents supplied by petitioner, I find the following facts:

FACTS

On November 15, 2002, the Grant County District Attorney's office filed a criminal complaint charging petitioner with one count of battery by a prisoner and one count of disorderly conduct, as a repeater. According to the complaint, on March 26, 2002, petitioner had caused bodily harm to Officer Thomas Belz, an officer at the Wisconsin Secure Program Facility, during an altercation between petitioner and correctional officers while petitioner was being transferred to a different unit. According to Belz and other guards present during the incident, petitioner hurt Belz's right arm when he grabbed a tether strap that Belz was holding and pulled it down through the slot in the cell door behind which the guards had restrained petitioner. The case was assigned to the Hon. George Curry, circuit court judge.

The state public defender appointed Katherine Findley to represent petitioner. At a status conference on February 4, 2003, Findley reported that petitioner had asked her to withdraw from the case and that he wished to either hire his own lawyer or have the public defender's office appoint a new lawyer. Judge Curry allowed Findley to withdraw but noted that, per his customary ban on post-status conference pleas, no further plea bargaining would be allowed on the case. After a few more minutes of discussion with the parties concerning procedural matters, the court concluded the formal hearing. As the court was calling the next case petitioner made a comment to the court that prompted the court to order petitioner returned to the courtroom for a summary contempt proceeding. The court found petitioner in contempt for failing to follow the rules of decorum and for showing disrespect to the court. It sentenced petitioner to 30 days' incarceration consecutive to his current sentence.

Attorney Russell Hanson took over petitioner's battery case but he too withdrew. Eventually, the public defender's office appointed Attorney Joanne Keane to defend petitioner. At a hearing on July 9, 2003, Judge Curry noted that he previously had advised petitioner had lost his chance to plea bargain, but he retracted that statement and stated that he would allow petitioner "to plea bargain right up to the day of the status since he has now a new and his third attorney."[2]

[2] The transcript of this hearing is not in the record. However, the pertinent excerpt is set forth in the brief the state submitted in petitioner's direct appeal. Br. of Pl.-Resp., attached to respondent's answer, dkt. 8 , Exh. D, at 9.

Nine days later, at a July 18, 2003 status conference, the parties reported that they had reached a plea agreement: the state would dismiss the repeater allegation to the charge of battery to a prisoner and dismiss the disorderly conduct charge in exchange for petitioner's plea of guilty or no contest to the battery charge. The state also agreed that it would not file charges against petitioner for an incident in which he allegedly intimidated the victim, Belz. Finally, the state would recommend a sentence of two years' confinement followed by three years of extended supervision.

Responding to court inquiry, petitioner stated that he understood the terms of the plea agreement and understood that the court was not bound by it. Petitioner stated that he wished to enter a plea of no contest to the battery charge without the repeater allegation. The court informed petitioner that the court would find petitioner guilty on the basis of his plea and that such a plea could not be used as an admission of guilt if anyone filed a civil against petitioner based on his conduct.

The court then engaged petitioner in a plea colloquy, during which petitioner stated that: he understood the rights he was waiving; the plea had not been the product of threats, coercion or impaired judgment; he understood the elements of the charge that the state would have to prove if the case went to trial; and the facts contained in the information and adduced at the preliminary hearing could be used as a factual foundation to find petitioner guilty. On the basis of petitioner's statements during the plea colloquy, the court accepted petitioner's plea and adjudged him guilty. The court ordered a presentence report and scheduled a sentencing hearing.

The court sentenced petitioner on October 2, 2003. The prosecutor voiced concerns about the completeness of the record from the plea hearing because the court had not parroted the plea questionnaire and waiver of rights form when it reviewed with petitioner the constitutional rights he was waiving by pleading no contest. Petitioner's lawyer reported that petitioner had now signed a waiver of rights form, and petitioner confirmed to the court that at the time he entered his plea he understood all the rights he was waiving as set forth on that form.

But petitioner expressed confusion about the difference between an *Alford* plea and a no contest plea:

PETITIONER: I understand that I'm giving up the constitutional rights, but the part I'm confused on is the difference between the Alford plea and the no contest plea. My understanding is that we entered an Alford plea.

THE COURT: No. You entered a no contest plea. The Court doesn't accept Alford pleas.

PETITIONER: I don't understand. The Court does not accept Alford pleas?

THE COURT: I don't accept Alford pleas. You pled no contest.

PETITIONER: Right.

THE COURT: And I will accept your no contest plea. I went over the differences between a no contest plea and a guilty plea with you before, indicating to you that if you plead no contest and the Court accepts your plea, the probable result is a finding of guilt, which you were found guilty of.

I don't have the transcript, Mr. Everix, do you?

PROSECUTOR: Yes.

THE COURT: Let's see it. Nobody told me this was going to be an issue today. It says here on page 8 that you said, "I would like to plead no contest." That's clear as a bell. There's no mention of any Alford plea in there.

PETITIONER: That's my understanding, that the no contest plea was consistent with the Alford plea. At least that's what I was advised by my attorney.

THE COURT: Well, it's not. An Alford plea is totally different. It's indicating that there is some requisite proof that you are not admitting to. But I'm not accepting Alford pleas. The Court is not required to accept an Alford plea. So I told you your options were not guilty, guilty, or no contest.

PETITIONER: All right. Fine.

THE COURT: And you pled no contest. Alford plea wasn't even mentioned. This is the very first time it's even been raised.

PETITIONER: Well, this is the first time it's been raised in the court, yes, but no, not the first time it's been raised with counsel. But if that's what the Court is accepting, that's fine.

* * *

THE COURT: Counsel, did you tell him that the Alford plea was the same as a no contest plea?

DEFENSE COUNSEL: No, Your Honor, but from the choices of guilty, not guilty, or no contest, I did advise him to plead no contest.

The court asked petitioner if he needed any additional time to discuss anything with his lawyer. Petitioner responded that he did not.

The court then reaffirmed its findings that petitioner had entered his plea freely, voluntarily and intelligently and that there was a factual basis for the plea.

After the state presented its sentencing recommendation, the victim, Belz, made a statement. Belz stated that he had a lot of pain and constant numbness in his predominate hand that he attributed to petitioner's action of pulling Belz's arm down repeatedly through the trap. According to Belz, he had been told that although surgery was an option, it could cause further damage and pain in the hand that was currently asymptomatic.

During petitioner's allocution he claimed that he had acted in self defense.

The court adopted the state's recommendation and sentenced petitioner to serve five years, the first two in prison followed by three years of extended supervision, all consecutive to petitioner's current sentence.

After sentencing, petitioner filed a *pro se* motion to vacate his plea or in the alternative, for modification of his sentence. Petitioner submitted his affidavit in which he averred, among other things, that he had not entered his plea intelligently because Keane had told him that a no contest plea was the same as an *Alford* plea. Petitioner declared that he never intended to enter a no contest plea and that he believed he was entering an *Alford* plea "which allowed the affiant to maintain the affiant's innocence which [sic] yet pleading to the charges--a process that still isn't clear to the affiant." He also claimed Keane was ineffective because she failed to develop his self-defense claim, failed to investigate the crime scene, and failed to obtain medical testimony about Belz's alleged injuries.

On October 1, 2004, the trial court held an evidentiary hearing on petitioner's motion. Petitioner called Keane, who admitted that she did not investigate the crime scene

or interview the medical personnel who had examined Belz. Keane explained that she made a tactical decision to forego these lines of investigation after she and petitioner decided that they would seek a plea bargain in order to minimize petitioner's penalty exposure. As for the *Alford* plea issue, Keane testified that although she might have had a conversation with petitioner at some point concerning what an *Alford* plea entailed, she and petitioner had never entertained the possibility that petitioner would attempt to enter an *Alford* plea instead of a no contest plea. The trial court denied petitioner's motion.

Thereafter, petitioner appealed the judgment of conviction and the denial of his postconviction motion. On appeal, petitioner raised these arguments:

> 1) The circuit court had no jurisdiction over petitioner because he had not properly been served with the criminal complaint;
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> 2) The trial judge coerced petitioner to change his plea by declaring that it would not accept a negotiated plea after the February 4, 2003 status conference;
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> 3) Petitioner did not enter his no contest plea intelligently because it was based upon counsel's misrepresentation that a no contest plea and an *Alford* plea were the same;
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> 4) The record failed to establish an adequate factual basis for petitioner's plea because there was no evidence that the victim was injured or that petitioner had intended to injure him;
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> 5) Petitioner's plea was unknowing and involuntary because none of his lawyers viewed the crime scene, reviewed medical reports showing that Belz suffered no injuries, or questioned petitioner's competence to stand trial;
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> 6) Petitioner was the victim of selective prosecution; and
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> 7) The trial court committed various errors at sentencing, including requiring petitioner to pay restitution.

The state court of appeals rejected all of petitioner's claims and affirmed the conviction. The court quickly dispensed with petitioner's claim that the trial court had impermissibly involved itself in plea negotiations, noting that the trial court ultimately retracted its moratorium on post-status conference plea negotiations and allowed petitioner to enter a plea bargain. The court also rejected petitioner's claim that his plea was not entered knowingly and intelligently because he did not understand the difference between a no contest plea and an *Alford* plea:

> Tiggs asserts in his brief that if he had understood that he was not entering an *Alford* plea, but only a regular one, he would not have taken the plea agreement and would have taken the case to trial. Regardless of what information was given to Tiggs, there is no evidence in the record that this distinction would have caused him to reject the plea offer. A postconviction evidentiary hearing was held, at which Tiggs represented himself, but did not testify. He cites nothing in the record that would support a finding that he would have rejected the plea. In fact, the sentencing transcript appears to show that when this distinction was brought up and discussed, Tiggs agreed to proceed even with the understanding that his plea was not an *Alford* plea.

State v. Tiggs, 2006 WI App 101, ¶ 5, 715 N.W. 2d 240 (Table) (unpublished decision), attached to Answer, dkt. #8, exh. F.

As for petitioner's claim that his plea lacked a factual basis, the court noted that petitioner's argument rested upon evidence concerning Belz's injuries (or alleged lack thereof) that was not in the record at the time of the plea. The court noted that such evidence did not undermine the propriety of the court's finding, at the time petitioner entered his plea, that an adequate factual basis for the plea existed. Insofar as petitioner

appeared to be contending that there was insufficient evidence to support a finding of guilt, the court pointed out that petitioner had waived his right to contest his guilt when he entered his no contest plea. *Id*., at ¶ 7.

The court noted that petitioner also argued that his plea should be vacated "because he received ineffective assistance of counsel in several ways." *Id*., at ¶ 8. Citing *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W. 2d 633 (Ct. App. 1992), the court declined to address the issues on the ground that they were inadequately briefed. According to the court, petitioner's brief "does not address these [allegations of ineffective assistance] in sufficient detail to allow us to obtain a meaningful understanding of what occurred in the trial court on these issues or why Tiggs believes the decision was legally in error." *Id*.

Petitioner filed a motion for reconsideration in the court of appeals. The court denied the motion on the ground that "the motion does not cause us to amend the opinion."

On June 14, 2006, the Wisconsin Supreme Court denied petitioner's petition for review and on June 28, 2006, it dismissed his motion for reconsideration.

ANALYSIS

I. Standard of Review

When a state prisoner seeks federal habeas relief on a claim that the state courts adjudicated on its merits, the federal court may grant relief only when the state courts' adjudication:

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

28 U.S.C. § 2254(d).

When applying this statute, the federal court reviews the decision of the last state court that ruled on the merits of petitioner's claims, *Simelton v. Frank*, 446 F.3d 666, 669 (7th Cir. 2006), which in this case is the Wisconsin Court of Appeals. A decision is "contrary to" federal law when the state court applies a rule that "contradicts the governing law set forth by the Supreme Court," or when an issue before the state court "involves a set of facts materially indistinguishable from a Supreme Court case," but the state court rules in a different way. *Boss v. Pierce*, 263 F.3d 734, 739 (7th Cir. 2001) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). "'A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular petitioner's case'

qualifies as a decision involving an unreasonable application of clearly established federal law." *Id*. (quoting *Williams*, 529 U.S. at 407-08).

A federal court may not issue a writ of habeas corpus simply because the court concludes in its independent judgment that a state court applied the law incorrectly. Relief is available under 28 U.S.C. § 2254(d)(1) only if the state court's decision is objectively unreasonable. *Yarborough v. Alvarado*, 541 U.S. 652, 665, 666 (2004). An "unreasonable" state court decision is one that is "well outside the boundaries of permissible differences of opinion." *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002).

Section 2254(d)'s standard of review applies only to those claims that were actually "adjudicated on the merits" in state court. When a state court is silent with respect to a habeas petitioner's *federal* claim, then the federal court must apply the more lenient standard of 28 U.S.C. § 2243 and "dispose of the matter as law and justice require." *Canaan v. McBride*, 395 F.3d 376, 382-83 (7th Cir. 2005).

II. Petitioner's Plea: *Alford* versus No Contest

In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Court considered whether a trial court committed constitutional error when it accepted the defendant's guilty plea and adjudged him guilty when the defendant proclaimed his innocence and indicated that he was entering his plea in order to avoid the death penalty. In concluding that such a plea was constitutionally sound so long as it was entered freely and knowingly and had an adequate

factual basis, the Court explained that a plea entered by a defendant who continues to assert his innocence was not materially different from that entered by a defendant who pleads *nolo contendre* or "no contest" insofar as an express admission of guilt is "not a constitutional requisite to the imposition of criminal penalty." *Alford*, 400 U.S. at 37. "An individual accused of a crime may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id*.

In other words, there is no constitutionally significant difference between a plea accompanied by a proclamation of innocence (now labeled an *Alford* plea) and a plea in which the defendant simply declines to admit guilt (a no contest plea). *Id*. A plea entered knowingly and voluntarily under either scenario is a valid waiver of the right to a trial and it authorizes the court to treat the defendant as if he were guilty for the purposes of the case. *Id*. That said, a trial court may refuse to accept a plea from a defendant who proclaims his innocence. *Id*. at n. 11. In Wisconsin, trial courts have discretion to accept *Alford* pleas, but only if the court determines that there is "strong proof of guilt" to negate the defendant's claim of innocence. *State v. Smith*, 202 Wis. 2d 21, 26, 549 N.W. 2d 232 (1996).

This is the legal backdrop for petitioner's request that he be allowed to withdraw his plea because it was based upon his lawyer's erroneous advice that a no contest plea was the same as an *Alford* plea. A defendant challenging the validity of his plea on the ground of ineffective assistance of counsel must satisfy the two-part performance/prejudice test of

Strickland v. Washington, 466 U.S. 668 (1984). *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). Therefore, when a defendant who was represented by counsel during his plea hearing later seeks to withdraw his plea on the ground that it is the result of his lawyer's bad advice, the defendant must prove two points: the attorney's advice was not within the range of competence demanded of attorneys in criminal cases; and "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 58-59.

The state court of appeals did not dwell on the distinctions between a no contest plea and an *Alford* plea, and it did not decide whether petitioner's lawyer would have rendered deficient performance had she advised petitioner that they were the same. Instead, it started with the prejudice prong of the test and determined that even if petitioner had not understood the difference between the two types of pleas, his claim failed because he had not demonstrated that he would have gone to trial but for his lawyer's allegedly erroneous advice.

In reaching this conclusion, the court of appeals made a reasonable determination of the facts and it reasonably applied the law set out in *Strickland* and *Hill*. Initially, I note that although the court did not cite either of these federal cases in its decision, it did not have to: "[a] state court's decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite [the Supreme Court's] opinions." *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (*per curiam*). Indeed, a state court need not even be aware of Supreme Court precedent "so long as neither the reasoning nor the result of the state-court decision

contradicts them." *Id*. (*quoting Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*)). Here, the appellate court's reasoning demonstrates its understanding that even if petitioner's lawyer provided petitioner with inadequate advice about *Alford* and no contest pleas, petitioner cannot prevail on his claim, unless he also establishes prejudice. Thus, the state court's opinion was not "contrary to" *Hill* or *Strickland*.

The court did not apply these precedents unreasonably or make unreasonable determinations of fact when it concluded that petitioner had not shown that he would have gone to trial if had he understood that he was not entering an *Alford* plea. As the court observed, petitioner did not testify at the postconviction hearing regarding what effect his lawyer's alleged error had on his decision to waive his right to a jury trial, and he made only a conclusory assertion in his brief that he would have rejected the plea agreement and gone to trial had he known that "no contest" ≠ *Alford* plea. What's more, noted the court, when petitioner expressed confusion about the two types of pleas at the sentencing hearing and was told by the court that he had *not* entered an *Alford* plea, petitioner nonetheless reaffirmed no contest plea and affirmed his willingness to proceed with the sentencing hearing. Petitioner even declined the court's offer to consult further with his lawyer. This evidence supports the court's conclusion that petitioner had failed to show that he was prejudiced by his lawyer's allegedly defective performance in connection with the plea.

Petitioner has not cited any evidence in the record that would undermine the appellate court's factual determination. Petitioner has not argued that the court of appeals

applied Supreme Court law unreasonably when it rejected his claim. Having independently reviewed the record, the only evidence I have found that bears on the prejudice inquiry is petitioner's affidavit in support of his postconviction motion. In it, petitioner asserts that he never intended to enter a no contest plea and that he believed he was entering an *Alford* plea "which allowed the affiant to maintain the affiant's innocence which [sic] yet pleading to the charges–a process that still isn't clear to the affiant." But nothing in petitioner's affidavit explains *why* the subtle distinction between an *Alford* plea and a no contest plea would have caused him to forego early resolution of the charges and proceed to trial instead. *See United States v. Winston*, 34 F.3d 574, 579 (7th Cir. 1994) ("mere conclusions" insufficient to demonstrate that but for lawyer's error, defendant would not have pleaded guilty). It is plain from the initial plea colloquy and the follow up at the sentencing hearing that petitioner understood that no matter what type of plea he was entering, he was giving up his right to call witnesses, confront the state's evidence and have his guilt proven beyond a reasonable doubt. It also is clear that petitioner wanted to enter a plea that did not require him to *admit* his guilt; but he accomplished that goal by pleading no contest.

In sum, petitioner has failed to show that the state appellate court unreasonably applied *Strickland* or *Hill*, or that it made an unreasonable factual determination when it rejected petitioner's claim that his plea was the product of his lawyer's faulty advice concerning the nature of his no contest plea. Accordingly, this court should deny habeas relief to petitioner on this claim.

III. Invalid Plea: Alleged Coercion by Trial Court

Petitioner contends that his plea was involuntary because it was coerced by Judge Curry, who employed "psychological tactics" to pressure petitioner into resolving his case by entering into a plea agreement. As in the state court, petitioner bases his claim upon Judge Curry's statements at the February 4, 2003 status hearing that he would not allow any plea bargaining on the case after that date.

This claim is meritless. As the court of appeals noted, Judge Curry later retracted his ban on plea bargaining and told petitioner that, notwithstanding the court's comments at the February 4 hearing, he would entertain a plea agreement if petitioner and his new attorney decided that petitioner should enter into one. Petitioner points to no other evidence suggesting that Judge Curry participated in the plea bargaining process in any way. Petitioner might have decided to enter a plea in part because he thought Judge Curry would sentence him less harshly than if he went to trial, but this is conjecture, and in any event, it would not amount to coercion or improper judicial participation in the plea process of the sort that would establish that petitioner's plea is not "a voluntary and intelligent choice among the alternative course of action open to the defendant." *Alford*, 400 U.S. at 31; *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (fear of possibility of greater penalty upon conviction after trial does not render plea involuntary). In light of the record, the court of appeals' determination that Judge Curry did not exert any pressure on petitioner to enter into a plea bargain is reasonable. Petitioner is not entitled to habeas relief on this claim.

IV. Remaining Claims of Ineffective Assistance of Counsel

Petitioner contends that lawyer failed to investigate the crime scene, procure a videotape of the incident or investigate the extent of Belz's injuries, leaving petitioner with no choice but to enter a plea.[3] In addition, he asserts that counsel was ineffective at sentencing for failing to object to the victim's testimony concerning his injuries. The state contends that petitioner procedurally defaulted these claims of ineffective assistance of counsel by failing to fairly present them to the state court in his appellate brief.

The state's procedural default defense is based upon the "fair presentment" corollary to the federal exhaustion doctrine. The exhaustion doctrine is designed to further federal-state comity by giving the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). For the state courts to have a "full and fair" opportunity to resolve a federal claim, the petitioner must "fairly present" it, which means that he must "place[] both the operative facts and the controlling legal principles before the state courts." *Chambers v. McCaughtry*, 264 F.3d 732, 737 (7th Cir. 2001). To determine whether a petitioner has accomplished this, courts consider whether petitioner's argument to the state court: 1) relied on pertinent federal cases employing constitutional analysis; 2) relied on

[3] In his submissions petitioner suggests that his lawyer failed to disclose to him medical records documenting Belz's alleged injury, and that petitioner did not become aware of such records until after sentencing. However, petitioner's statements during his allocution at the sentencing hearing indicate that he was aware of the content of these reports. *See* Tr. of Sentencing, Oct. 2, 2003, dkt. 8, exh. K, at 41.

state cases applying constitutional analysis to a similar factual situation; 3) asserted the claim in terms so particular as to call to mind a specific constitutional right; or 4) alleged a pattern of facts that is well within the mainstream of constitutional litigation. *Verdin v. O'Leary*, 972 F.2d 1467, 1473-74 (7th Cir. 1992). This is not a rigid formulation but an approach designed to determine whether the petitioner identified the substance of the federal claim clearly enough for the state court to have adjudicated it. *Id*. at 1474.

As support for its claim that petitioner did not fairly present his claims of ineffective assistance of counsel for failure to investigate to the state courts, the state relies on the Wisconsin Court of Appeals' refusal to consider the claims on the ground that petitioner had not adequately briefed them. Although it is easy to see why the state views plaintiff's state court default as a "fair presentment" violation, it is debatable whether this is the type of default petitioner committed. After all, petitioner cited in his brief to *Strickland v. Washington*, 466 U.S. 668 (1984), the state addressed petitioner's claims of ineffective assistance of counsel in its responsive brief and the court of appeals recognized that petitioner was claiming that his plea should be vacated because "he received ineffective assistance of counsel in several ways." In light of this, it is difficult to find that petitioner did not "alert[ ] [the state court] to the alleged federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

However, a petitioner can also procedurally default a federal claim by failing to meet a *state* procedural requirement. *Moore v. Bryant*, 295 F.3d 771, 774 (7th Cir. 2002). In

petitioner's case, the state appellate court declined to consider petitioner's claims of ineffective assistance of counsel because petitioner's brief did not address counsel's alleged errors "in sufficient detail to allow us to obtain a meaningful understanding of what occurred in the trial court on these issues or why Tiggs believes the decision was legally in error." A federal court will not review a question of federal law decided by a state court if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. *Id.*, 295 F.3d at 774 (citations omitted).

A state ground is "independent" of the federal claim if the state court "actually relied on a state rule sufficient to justify its decision." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1382 (7th Cir. 1990). It is plain from the court of appeals' decision in this case that it did not adjudicate the federal claim but relied on an independent state procedural rule to deny petitioner's undeveloped claims of ineffective assistance of counsel.

"A state ground is 'adequate' only if the state court acts in a consistent or principled way." *Id*. at 1383. The Wisconsin Rules of Appellate Procedure provide that an appellant's brief must contain an argument on each issue raised that contains the appellant's contention, the reasons therefore and citations to the parts of the record relied upon. Wis. Stat. Rule 809.19(1)(e); *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2006 WI App 109, ¶ 36, 721 N.W. 2d 127 ("Launching an argument unsupported by appropriate citations to the record violates Wis. Stat. Rule 809.19(1)(d) and (e)."). Wisconsin appellate courts routinely refuse to consider inadequately briefed arguments, even in cases involving *pro se* litigants. *See, e.g.,*

State v. Esser, 2006 WL 3590799, ¶ 20 (Ct. App. Dec. 12, 2006) (final publication pending); *State v. Deering*, 2006 WL 3490357, ¶ 6 (Ct. App. Dec. 5, 2006) (final publication pending); *State v. Adams*, 2005 WI App 88, ¶ 34, 281 Wis. 2d 270, 695 N.W. 2d 903 (Table) (unpublished opinion).

Although it is true that the courts sometimes overlook such deficiencies and consider the merits of an issue that was inadequately briefed, the willingness of the state courts to excuse compliance with state procedural rules on some occasions but not others does not alone render the state rule inadequate. *Prihoda*, 910 F.2d at 1384. Even if not strictly followed, a state ground will be respected if it is "solidly established," in other words, if it is not regularly *dis*regarded or manufactured seemingly for the occasion. *Id*. As explained in *Prihoda*, "[a]ny other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others." *Id*. Where, as in this case, "the *only* ground given is procedural the federal court must respect it, even though in some other cases the state court ignores the potential procedural basis and addresses the merits." *Id*. at 1384 (emphasis in original). Because there is no evidence that the court manufactured its "arguments-must-be-adequately-briefed" rule solely for the purpose of denying petitioner's claims, this court must respect the state appellate court's finding of default.

As evidence that he fairly presented these claims of ineffective assistance, petitioner points to a motion for reconsideration that he filed in the court of appeals. However, that

motion reveals that petitioner argued only that Attorney Keane was ineffective for failing to investigate whether Belz actually had been injured during the altercation with petitioner. It and did not mention her alleged failure to investigate the crime scene. More critically, petitioner still did not refer to any testimony developed in the trial court with respect to Keane's pretrial decisions or direct the appellate court to any trial court findings on the issue. The appellate court denied the motion for reconsideration without making any changes to its opinion, stating only that "the motion does not cause us to amend the opinion." Nothing in this statement suggests that the court of appeals considered petitioner's ineffective assistance of counsel claims on their merits or altered its conclusion that petitioner had inadequately briefed those claims. Accordingly, petitioner's motion for reconsideration fails to establish that he did not procedurally default these claims.

This state court of appeals' determination is an independent and adequate state ground that operates to bar this court from considering the merits of the claims unless petitioner can establish 1) cause for his default and prejudice resulting therefrom or 2) that a manifest injustice will result if this court does not consider the merits of the claims. *Steward v. Gilmore*, 80 F .3d 1205, 1211-12 (7th Cir. 1996). Petitioner has not attempted to show cause and prejudice but suggests that he qualifies for the fundamental miscarriage of justice exception. To properly invoke this narrow exception, allegations of constitutional error must be supported by new, reliable evidence that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A petitioner must then show "that it is more likely than

not that no reasonable juror would have convicted him in the light of the new evidence." *Id*. at 327; *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003).

The "new" evidence upon which petitioner relies to support his claim of actual innocence are medical reports indicating that following the altercation, Belz did not have any abrasions, swelling, bruising or other observable injury to his right forearm. However, these records do not show that it is more likely than not that no reasonable juror would have convicted petitioner of battering Belz. To establish that petitioner was guilty of battering Belz, the state had to show merely that petitioner intentionally caused "bodily harm" to Belz without Belz's consent. "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Wis. Stat. § 939.22(4). Belz testified at the preliminary hearing that petitioner's conduct caused him pain, swelling and numbness in his right forearm. Even if this court was to assume that Belz suffered no *permanent* injury, his testimony that petitioner's actions caused him pain is sufficient to show that he suffered "bodily harm."

Moreover, the medical records upon which petitioner places so much importance do not refute Belz's claim of injury. Although the physician's assistant who examined Belz on the day after the incident detected no obvious swelling, she noted that Belz complained of throbbing pain, one side of his wrist was slightly tender and Belz had decreased sensation and poor two-point discrimination in his pinky finger. Reasonable jurors reviewing these records could easily conclude that Belz suffered "bodily harm" at the hands of petitioner.

Because petitioner has not shown that the alleged failings by his trial lawyer "probably resulted in the conviction of one who is actually innocent," this court may not review the merits of his defaulted claims of ineffective assistance of counsel.

IV. Prosecutorial Misconduct

Last, petitioner claims that the state committed prosecutorial misconduct when it filed and pursued a battery charge against petitioner when it knew that Belz had not been injured by petitioner. The state contends that petitioner procedurally defaulted this claim by failing to fairly present it to the court of appeals. I agree. In the court of appeals, petitioner harped on Belz's alleged lack of injury to the forearm, but only to argue that an adequate basis for petitioner's entry of a no contest plea was lacking. He did not attach the "prosecutorial misconduct" label to his claim or cite any cases that would have alerted the appellate court that he was making such a claim. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir.2004) (finding that "[p]resenting the 'same claim' in state court that he later seeks to make in federal court means that the petitioner must alert the state courts that he is relying on a provision of the federal constitution for relief."). Again, petitioner points to his motion for reconsideration as proof that he fairly presented his claim. However, "under Wisconsin law, a litigant may not set forth new legal theories for the first time in a motion for reconsideration." *Kurzawa v. Jordan*, 146 F.3d 435, 443 n.7 (7th Cir. 1998) (citations

omitted). Thus, it cannot be said that petitioner fairly presented his prosecutorial misconduct claim to the state appellate court.

In any event, even if this court were to excuse petitioner's default, it would reject the claim on the merits. First, by entering a valid plea of no contest, petitioner waived his opportunity to challenge any alleged constitutional violations that occurred before he entered his plea. *Gomez v. Berge*, 434 f.3d 940, 942 (7th Cir. 2006). Second, as explained in my discussion of petitioner's claim of actual innocence, petitioner's insistence that Belz was not battered during the prison melée is unfounded.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of A'Kinbo J.S. Hashim-Tiggs for a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED.

Entered this 17th day of January, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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January 18, 2007

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Re: Hashim-Tiggs v. Schneiter
Case No. 06-C-536-C

Dear Mr. Hashim-Tiggs 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 newly-updated 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 9, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 9, 2007, 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