UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 05-2929
(Case No. 03-C-885 (E.D. Wis.))

JOSEPH ECKSTEIN,

Petitioner-Appellant,

v.

GARY R. McCAUGHTRY, Warden,
Waupun Correctional Institution,

Respondent-Appellee.

Appeal From A Final Judgment
Denying Petition For Writ Of Habeas Corpus
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable William E. Callahan, Presiding

REPLY BRIEF
OF PETITIONER-APPELLANT

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ARGUMENT

TRIAL COUNSELS' UNREASONABLE ACTS AND OMISSIONS PREJUDICED ECKSTEIN'S DEFENSE, DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL, AND ENTITLE HIM TO HABEAS RELIEF

A. The Identified Failures of Counsel Were Unreasonable and Thus "Deficient Performance"

1. Failure to seek suppression or exclusion of Eckstein's tape

Although the actual basis for the Respondent's argument is less than clear, it fails to provide any legitimate basis to reject the state post-conviction court's holding that Eckstein's trial counsel acted unreasonably in not seeking suppression or exclusion of Eckstein's tape of the September 3, 1998 conversation with Crystal

Graham. *See* Respondent's Brief at 16-26. The Respondent apparently attempts to make three arguments: (1) that the failure to seek suppression or exclusion was a "strategic decision" based on Eckstein's alleged insistence that counsel use the tape, (2) that the warrantless seizure and search of the tape was proper pursuant to either the "automobile exception" to the warrant requirement or as the fruit of a permissible "inventory search," and (3) that the tape was not subject to exclusion based on the state's violation of Wis. Stat. §971.23(1).

The Respondent is wrong. His first "argument" is inadequately argued and, in any event, is based on a factual assertion necessarily rejected by the state post-conviction court. The Respondent's remaining claims are wrong as a matter of law and, in any event, were waived or abandoned in state court or the district court.

a. Trial counsels' failure to seek suppression or exclusion was based on ignorance or oversight, not a reasoned trial strategy

The Respondent's "statement of facts" regarding trial counsels' failure to seek suppression or exclusion of Eckstein's September 3, 1998 tape recording quotes allegations by Eckstein's trial counsel to the effect that Eckstein had insisted that he wanted the tape in evidence. Respondent's Brief at 18-19. Although not stating as much, the Respondent appears to suggest that Eckstein's supposed insistence necessarily rendered reasonable counsel's failure to seek suppression or exclusion of the tape.

Respondent has waived any such argument by not developing the point before

this Court. *E.g.*, *Palmquist v. Selvik*, 111 F.3d 1332, 1342 (7th Cir.1997) ("Even an issue expressly presented for resolution is waived if not developed"). The Respondent's implicit argument also is waived because he failed to raise it in the district court (*see* R8). *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005).

On a more fundamental level, however, Respondent's suggestion ignores the fact that trial counsel's assertion necessarily was rejected as a matter of fact by the post-conviction court. Contrary to the Respondent's repeated assertions,[1] the state post-conviction court in fact did find deficient performance on the part of trial counsel with regard to their failure to seek suppression or exclusion of Eckstein's tape (R6:Exh.D:App.10-13). Its findings could not have been more clear:

> I agree with the defendant's argument that defense counsel was deficient in failing to challenge the seizure of the Eckstein tape recorded September 3, 1998, from his truck and the search of it that occurred through listening to it.

(R6:Exh.D:App.10).

> Because of the foregoing reasoning, I conclude that counsel for the defendant was deficient in performance in not seeking suppression and exclusion of the Eckstein tape taken by Detective Darm from Eckstein's blue truck on September 3, 1998.

(R6:Exh.D:App.13).

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[1] According to the Respondent, "[t]he Wisconsin courts chose not to reach the issue of deficient performance because it was so obvious that Eckstein could not meet his burden of proving prejudice," Respondent's Brief at 16, that "the state courts reached only the prejudice prong of the *Strickland* analysis" regarding the suppression/exclusion issue because "they saw no need to discuss the issue of deficient performance . . .," *id.* at 19. *See also id.* at 20. As noted in the text, these assertions are simply untrue. Indeed, although repeatedly misstating the record in its brief to this Court, the Repondent readily admitted below that "[t]he trial court concluded that counsel's performance was deficient for not filing a suppression motion." (R8:11).

The state argued at the post-conviction hearings that trial counsel's attempted explanation rendered his failure to seek exclusion or suppression of the tape reasonable (R6:Exh.P:42), while Eckstein's post-conviction counsel explained why that *post hoc* rationalization made no sense in light of trial counsel's explanation at trial that he did not challenge admission of the tape because he knew no grounds on which to do so (R6:Exh.P:10-11). While Mr. Boyle at trial acknowledged the damaging effect of the admission of Eckstein's tape on his defense, and his desire to exclude it if he could, he believed that there was no legal basis for its exclusion:

> . . . That which would have been a problem that I would have brought to the Court's attention of not allowing into evidence has now dissipated because they're not putting their tape into evidence, they're putting Mr. Eckstein's tape into evidence.
>
> I told Mr. Eckstein that I have no idea how a defendant can keep out of evidence his work product, if it is otherwise properly taken by law enforcement. This was properly taken by law enforcement. I don't know of any challenge that I could muster up to support an argument that somehow or another his rights were violated by them taking a tape. It was evidence of, as far as the state is concerned, commission of a crime, and therefore, properly in the hands of law enforcement, and therefore, if they wish to play it and play that one as opposed to the one they did, I would not have a basis for objecting to it, and I explained all of that to Mr. Eckstein. I know of no way I can keep that out any more than I can keep out a written statement that he made or something that was a record that he kept in the ordinary and necessary course of business. This tape was made by him. He will have to explain why he made it when he takes the stand, but for whatever reason he made it, it certainly doesn't keep it out, it can be admissible into evidence.

(R6:Exh.M:5).

Although the post-conviction court did not expressly rule on whether it credited Mr. Boyle's post-trial claims or his contrary statements at trial, the issue was

fully joined. In finding trial counsels' performance to have been deficient, that court necessarily rejected the proffered rationalization cited by the Respondent here. *State v. Pallone*, 2000 WI 77, ¶ 44 n. 13, 236 Wis.2d 162, 613 N.W.2d 568 ("Even if the circuit court does not make an explicit factual finding, we assume that the court made the finding in a manner that supports its final decision"), *cert. denied*, 531 U.S. 1175 (2001). This Court is bound by that finding of fact. 28 U.S.C. §2254(e)(1).

b. The search of Eckstein's tape by listening to is was justified by neither the "automobile exception" nor the "inventory" exception to the warrant requirement

Although the state abandoned the issue in state court, and thus abandoned the claim, *see* Eckstein's Brief at 26-27, the Respondent seeks to overcome the deficient performance of Eckstein's trial counsel by asserting that the search of his tape was somehow justified either under the automobile exception to the warrant requirement or as the product of a routine inventory search. Respondent's Brief at 20-24. The state post-conviction court properly rejected those assertions, however (R6:Exh.D:App.10-13), and the state understandably abandoned them on the state appeal.

Contrary to the Respondent's suggestion, Response Brief at 20-23, the search of Eckstein's tape was not justified under the automobile exception. That exception permits police to search a car found in a public place when they have probable cause that it contains evidence of a crime. *E.g.*, *United States v. Ross*, 456 U.S. 798, 820-22 (1982). The question here, as in *State v. Weber*, 163 Wis. 2d 116, 471 N.W.2d 187

(1991), is whether the police had probable cause that the tape contained evidence of a crime so that they could search the tape by listening to it.[2]

The state post-conviction court properly held that the type of speculation relied upon by the state here is not enough (Exh.D:App. 11-12).

In *Weber*, the court held that the police did not have probable cause to believe the tape in the cassette player of Weber's car contained evidence of a crime. The court emphasized that "[u]nder the circumstances, the police had no idea, when they were searching the car, that the tape could have been evidence, subject to a search." 471 N.W.2d at 197. Similarly, as the post-conviction court found (Exh.D:App.11-12), the record here fails to establish that the police had probable cause to believe the tape contained evidence of a crime. The record is silent as to the reasons that prompted the police to seize the tape. Although Darm seized the tape and work gloves at Urban's direction, the state presented no evidence as to Urban's knowledge at the time he ordered Darm to seize the items. This Court cannot speculate as to what prompted Urban to issue his directive or about what information the police knew at the time. The only evidentiary support in the record for the police action is that

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[2] As the United States Supreme Court reiterated in *California v. Acevedo*, 500 U.S. 565, 579-580 (1991):

> "The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (citation omitted).

See also Pallone, 2000 WI 77, ¶6,("when law enforcement officers have probable cause to search a vehicle without a warrant, they also may conduct a warrantless search of all containers found inside the vehicle *capable of containing the object of the search*") (emphasis added).

Eckstein had been arrested and that among the many items in his truck was a micro-cassette recorder containing a tape. The police apparently had no information indicating that Eckstein was recording his meetings with Graham or that Eckstein was in the habit of recording surreptitiously his conversations with others. There is no evidence that the recorder was operating at the time that it was discovered, so as to provide a basis for concluding that Eckstein had been recording his conversation with Graham.[3]

The conclusion that the police were merely on a fishing expedition is supported by considering the other objects they seized from Eckstein's vehicles. Darm could not articulate any reasonable justification for seizing items like the white gloves, the surfer wig, and the "disability" folder. The police plainly had decided to seize any item they thought might possibly have evidentiary value in the future. For the automobile exception to apply, however, the officers need probable cause, not just a hunch, that the items seized might contain evidence of a crime.

In *State v. Merchant*, 713 So.2d 577 (La. App. 1998), the court rejected an argument similar to the Respondent's in this case. The police there had pulled over a truck in which Merchant was a passenger and arrested him for an armed robbery that occurred an hour and a half earlier. The two victims of the armed robbery identified

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[3] It also is significant that the police reports prepared on the day of arrest and admitted into evidence at the state post-conviction motion hearing do not reveal any opinions by the officers to the effect that Eckstein probably had recorded his conversations with Graham, although the district court denied Eckstein's motion to expand the record to include those documents (R22:5; App. 23; *see* R14).

Merchant as one of the culprits. The arresting officer saw a video camera in the bed of the pickup truck that was missing its battery. After discovering the battery in Merchant's pocket, the officer put it in the camera and viewed the videotape, which showed Merchant firing a gun while wearing the same clothes as at the time of his arrest.

The court rejected the state's claim that there was probable cause to search the camera under the automobile exception:

> In the present case, there is no testimony that anyone had reported the theft of a video camera by persons matching the descriptions of Merchant and his companions or that Merchant and his companions had used the video camera to film the attempted robbery of [the victims]. Under the circumstances, probable cause for the warrantless search was lacking.

Merchant, 713 So.2d at 579.

Similarly here the record discloses no reason for the officers to conclude that the micro-cassette recorder was in Eckstein's truck for the purpose of recording his conversation with Graham. Contrary to the patently absurd testimony of one of the detectives here to the effect that microcassettes are used *only* for the concealed recording of conversations (R6:Exh.N:56), these types of recorders have numerous purposes, including dictation. The Respondent's reliance on that testimony (which was implicitly and justifiably rejected by the state post-conviction court), is wholly unjustified.

The state failed to demonstrate that the police had any particularized reason for believing at the time of the seizure that Eckstein had been recording his conversation

with Graham. To the contrary, the police, believing that Eckstein was soliciting a murder, would have had reason to believe that he would not record evidence of the alleged crime.

Contrary to the state's suggestion, a hunch or speculation that an item might constitute evidence of a crime is not sufficient to establish probable cause. There was nothing to suggest that the microcassette recorder contained any evidence of the alleged crime. Because the record here thus fails to establish probable cause, the post-conviction court was correct that the search of Eckstein's tape cannot be justified under the automobile exception, and that Eckstein's trial counsel acted unreasonably in not seeking suppression on this ground (R6:Exh.D:App.10-13).

The Respondent's conclusory attempt to shoehorn the search of Eckstein's tape into the "inventory search" exception likewise must fail. Respondent's Brief at 23-24. Once again, Respondent simply makes an assertion without relevant supporting argument, and thus has waived the point. *E.g.*, *Palmquist*, 111 F.3d at 1342. Once again, the Respondent asserts an argument which he failed to raise in the district court and thus has waived for that reason as well. *Sanders*, 398 F.3d at 582.

Once again, Respondent also simply ignores binding factual findings by the state post-conviction court which doom his argument. As the Respondent notes, a search qualifies as a lawful inventory search *only* "'if conducted pursuant to standard police procedures aimed at protecting the owner's property – and protecting the police from the owner's charging them with having stolen, lost, or damaged his property.'"

Respondent's Brief at 23, quoting *United States v. Pittman*, 411 F.3d 813, 817 (7th Cir. 2005). The state post-conviction court, however, expressly held as a matter of fact that the tape was seized for evidentiary purposes and not pursuant to an inventory search (R6:Exh.D;App.11). These findings are controlling here. 28 U.S.C. §2254(e)(1).

Finally, although the Respondent's assertions fail in any event, he misstates the law in repeatedly suggesting that Eckstein must disprove any possible state rationalization for the warrantless search. Respondent's Brief at 20, 23, citing *United States v. Cieslowski*, 410 F.3d 353 (7th Cir. 2005). *Cieslowski* certainly does not stand for that outlandish proposition. It merely holds that one alleging ineffectiveness based on counsel's failure to seek suppression must show that the suppression motion would have been meritorious if timely raised. 410 F.3d at 360. Where, as here, the petitioner shows that the search was performed without a warrant, and the state fails to meet its burden of proving a valid exception to the warrant requirement, he has met that burden. *See, e.g.*, *United States v. Arch*, 7 F.3d 1300, 1302 (7th Cir. 1993) (because warrantless search is presumptively unreasonable, government must bear burden of showing search falls within exception to warrant requirement).

c. A proper and timely objection would have required exclusion of Eckstein's tape under Wis. Stat. §971.23(7m)

In an attempt to evade a finding of deficient performance regarding trial counsel's failure to seek exclusion of Eckstein's tape under Wis. Stat. §971.23(7m),

the Respondent once again raises a different argument than he raised in the district court. Respondent's Brief at 24-26. In the court below, Respondent conceded that the state had failed to meet its disclosure obligations with regard to the tape and that exclusion accordingly would have been required absent a showing of good cause (R8:12, citing *State v. DeLao*, 2002 WI 49, ¶51, 252 Wis.2d 289, 643 N.W.2d 480). As did the state in the state courts, Respondent made no effort to demonstrate "good cause" for its failure to disclose. Instead, it asserted that it should not have to meet its obligations under §971.23(7m) given trial counsel's failure to object. (R8:12-13).

The Respondent on appeal tries a new tactic, asserting for the first time that the state did not discover the tape until trial, that exclusion would not have been the appropriate remedy under state law, and that trial counsel in any event made some strategic decision not to seek exclusion because Eckstein's tape was more complete than the state's tape. Respondent's Brief at 24-26. Once again, the Respondent waived these allegations by not having raised them in the district court. *Sanders*, 398 F.3d at 582. They also have no merit.

The post-conviction hearing evidence demonstrated that the state had possession of Eckstein's tape from the time of his arrest on September 3, 1998 through the time of trial in late March, 1999, and thereafter. The state knew of the recording very early in that time period because Detective Darm listened to at least part of the tape at the time he seized it. (R6:Exh.N:49-50). This knowledge is attributable to the state even if the specific prosecutor was not informed of it until

sometime later. *E.g.*, *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

Eckstein's counsel sought disclosure of the tape prior to trial, but the copy presented to them as a complete copy had only a recording of the September 2, 1998 conversation (R6:Exh.M:3-4; R6:Exh.O:24-27).[4] The prosecution team apparently failed to listen to the Eckstein's actual microcassette until it was preparing for trial (R6:Exh.N:32-33, 53-54), but still did not inform defense counsel until mid-trial.

The assertion that Wisconsin law would not require exclusion given the state's failure to demonstrate "good cause," is meritless for the reasons stated in Eckstein's Brief at 29-31. Negligence of the type relied upon by the Respondent here, Respondent's Brief at 25, even if the delay in disclosure was in good faith, is not "good cause." *DeLao*, ¶¶53-58. While the court has discretion to deny exclusion upon a showing of good cause, exclusion is mandatory absent such a showing. *E.g.*, *DeLao*, ¶51.

Finally, the suggestion that trial counsel made a strategic decision not to seek exclusion under §971.23(7m) fails for the reasons already stated. As counsel explained at trial, he failed to challenge admission of Eckstein's tape solely because he could think of no grounds on which to do so (R6:Exh.M:5). Especially given counsel's intent to challenge the state's damaging tape on the grounds it was unintelligible to a great extent, it is absurd to suggest that he would make a reasonable

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[4] The Respondent's assertion that counsel "failed to ask police to flip [the tape] over so he could hear the September 3 conversation," Response Brief at 17, is at best misleading. Counsel testified that he did not ask the officer to flip over the tape because the police officers had told him there was nothing on it. (R6:Exh.O:27).

strategic decision to admit a more complete copy of such damaging evidence. As demonstrated by his statements at trial, counsel failed to seek exclusion due to oversight of the applicable legal grounds rather than any rational trial strategy (R6:Exh.M:5).

2. Failure to use Graham's admitted disabilities at trial

The Respondent's argument regarding the unreasonableness of trial counsel's failure to use Ms. Graham's known mental disabilities at trial merely parrots the state court's decision on this point. Response at 36-38. Because the Respondent ignores the patent irrationality of both trial counsel's purported "reasons" for this failure and the Wisconsin Court of Appeals' conclusory approval of that "rationale," no further response is necessary beyond that explained in Eckstein's Brief at 31-33.

B. Counsels' deficient conduct prejudiced Eckstein's right to a fair trial

Eckstein's Brief at 34-42 demonstrates that his defense was prejudiced within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), due to trial counsel's errors, and that the state court's holding to the contrary was unreasonable. Nothing in the Respondent's brief rebuts that showing.

Contrary to the Respondent's conclusory assertion, Response Brief at 38, the evidence against Eckstein was far from "overwhelming." *See* Eckstein's Brief at 34-42. The possibility that the state may have presented other evidence if suppression had been granted is irrelevant. Absence of prejudice must be based on the evidence

actually presented, not on evidence which might have been presented but for counsel's unreasonable mistakes.

> According to the Respondent, evidence of Eckstein's guilt
>
> > came from the police tape of the September 2 meeting with Graham. . . . It came from the police tape of his September 3 meeting with Graham that would have been put in evidence if Eckstein's tape had not.

Respondent's Brief at 38-39. *See also id.* at 32 (again relying on the police tapes as "undercut[ting] any claim that the result would have been different had Eckstein's September 3 tape been excluded"). He argues that there is "no serious dispute" about what Eckstein and Graham discussed as shown by the police tapes. *Id.* at 39.

In addition to being untrue, *see* Eckstein's Brief at 34-42, the Respondent bases his assertion on evidence which, at his own insistence, is not in the record here. When the Respondent failed to include the trial exhibits, the post-conviction hearing exhibits, and a number of other critical documents in his Answer to Eckstein's petition, Eckstein moved the district court to expand the record to include those portions of the state court record necessary for a fair assessment of his claims (R14). The Respondent opposed the motion regarding the exhibits, arguing that the actual evidence heard by the trial and post-conviction courts was irrelevant for purposes of habeas review of Eckstein's claims (R18). The district court agreed and therefore declined to order expansion of the record to include either the tapes or the post-conviction exhibits (R22; App. 19-24).

The Respondent having succeeded in excluding the exhibits from the record

of this habeas proceeding, he must be judicially estopped from using that evidence and assumptions or inferences from them to support the continued incarceration of Mr. Eckstein. As this Court recently explained:

> Judicial estoppel provides that when a party prevails on one legal or factual ground in a lawsuit, that party cannot later repudiate that ground in subsequent litigation based on the underlying facts. *Moriarty v. Svec*, 233 F.3d 955, 962 (7th Cir.2000). To apply, (1) the latter position must be clearly inconsistent with the earlier position; (2) the facts at issue must be the same in both cases; and (3) the party to be estopped must have prevailed upon the first court to adopt the position. *United States v. Hook*, 195 F.3d 299, 306 (7th Cir.1999).

Urbania v. Central States, 421 F.3d 580, 588 (7th Cir. 2005).

Respondent's assertions that the tapes demonstrate a lack of resulting prejudice is directly contrary to its assertion that they are wholly irrelevant to the issues on this habeas proceeding. The issues remain the same as when the Respondent sought to exclude those materials from the record, and he in fact succeeded in doing so. He therefore must be judicially estopped from using those tapes (or his interpretation of them) in responding to Eckstein's petition.

The Respondent having succeeded in excluding those parts of the state record from the record before this Court, he has forfeited any argument that those tapes support a finding that the police "transcripts" are accurate or that Eckstein was not prejudiced by counsel's errors. *Cf. Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 731 n.10 (7th Cir. 2003) (where Court could not evaluate claim because of party's failure to include transcript in appellate record, party held to have forfeited that claim; while court may order supplementation of the record, that action deemed

inappropriate where the party "'ha[s] had ample opportunity to correct the problem but ha[s] failed to do so.'"(citation omitted)).

Also, contrary to the Respondent's suggestion, Respondent's Brief at 33-35, the fact that a finder of fact might reject Eckstein's explanation for his actions and the contents of his conversations with Graham does not require that it do so. While Respondent may interpret those conversations one way, a reasonable fact-finder could view them as asserted by Eckstein.

The Respondent, for instance, bases much of its argument on the supposed inconsistency between Eckstein's reliance upon Graham as part of the attempt to plant drugs on his ex-wife, and his later view of Graham as too crazy to take seriously. Respondent's Brief at 33. The Respondent, however, simply ignores the fact that it was Graham's incompetent handling of the attempt to plant drugs and her irrational excuses for that failure which led Eckstein to his perception of her mental state. (R6:Exh.M:39-41, 57, 64-65). There is nothing inconsistent or unreasonable about modifying one's perceptions based on experience.

Respondent's suggestion that there was no resulting prejudice here because Eckstein received a full and fair suppression hearing as part of his post-conviction motion, Respondent's Brief at 27-29, is frivolous. It would be one thing if Eckstein had lost the suppression motion and that were upheld. Ineffectiveness cannot be based on the failure to make a meritless motion. *United States v. Stewart*, 388 F.3d 1079, 1085 (7th Cir.2004).

As the Respondent concedes, however, Respondent's Brief at 29, Eckstein *won* the suppression hearing. The tape was unlawfully searched and Eckstein thus was entitled to its suppression. Merely holding a meaningless suppression hearing does not, as the Respondent asserts, remedy the constitutional violation. Nor does it mitigate the prejudice resulting from admission of prejudicial evidence which should and would have been excluded or suppressed but for counsel's unreasonable failure to object. *See Owens v. United States*, 387 F.3d 607 (7th Cir. 2004) (counsel's unreasonable failure to seek suppression constitutes ineffective assistance of counsel where suppression would have been granted and, as a result, there exists a reasonable probability of different result at trial or plea).

Finally, the Respondent simply ignores, and thus concedes, the fact that the state court of appeals applied the wrong legal standard for assessing resulting prejudice, such that its decision denying Eckstein relief was contrary to the controlling standards in *Strickland*. Eckstein's Brief at 43-46. *See United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (government's failure properly to argue harmlessness constitutes waiver).

C. The District Court Abused its Discretion in Denying Eckstein Expansion of the Record to Include Trial Exhibits Critical to a Fair Determination of Eckstein's Habeas Claims

As previously discussed, the Respondent's successful attempts to exclude portions of the state appellate record from the habeas record forfeits any claim that the tapes support a finding that the police "transcripts" are accurate or that Eckstein was

not prejudiced by counsel's errors. *Cf. Learning Curve Toys, Inc.*, 342 F.3d at 731 n.10. Should the Court choose to relieve Respondent from the consequences of that forfeiture, however, the district court abused its discretion in denying Eckstein's request to expand the record to include those portions of the state court record.

While simultaneously using evidence which it succeeded in excluding from the record in this matter to argue lack of resulting prejudice, the Respondent continues to assert that such evidence is "irrelevant and immaterial." Respondent's Brief at 41-43. Respondent's own arguments on the merits of Eckstein's claims thus condemn its assertions regarding expanding the record. *See also* Eckstein's Brief at 47-50.

Respondent asserts that counsel for Eckstein could have unilaterally expanded the record to include the state court exhibits. Respondent's Brief at 41. That is untrue. Only the Court can grant expansion of the record, Rule 7 Governing 28 U.S.C. §2254 Cases, and, at the Respondent's insistence, the district court denied Eckstein's request to do so (R22:3-5; App. 21-22; *see* R18).

Respondent also is wrong in asserting that the inclusion of the purported "transcripts" of the state's tapes prepared by police officers in preparation for trial render irrelevant the actual tapes admitted into evidence at trial. Respondent's Brief at 41-42. Throughout his brief, the Respondent indiscriminately equates the police officers' interpretation of the conversation with the actual contents of the tape recordings he succeeded in withholding from this Court. As explained in Eckstein's Brief at 47-48, moreover, the "transcript" is inaccurate on at least one critical point

on which both the state courts and the district court, as well as the Respondent here, base their conclusions that Eckstein was not prejudiced by counsels' deficient performance.

While Respondent attempts to minimize the identified error in the "transcript," Respondent's Brief at 35-36, he does so by reading his own disputed interpretation of the overall conversation into it. According to the Respondent, Eckstein "meant the word 'murder'" even if he did not use it. *Id.* While both may have the same ultimate physical result, however, there is a substantial difference between the exercise of self-defense if necessary during a scheme to plant drugs and an attempt to murder someone. Also, while both may be illegal, Eckstein was charged and convicted only with regard to the latter. His ineffectiveness claim cannot legitimately be denied based on the possibility, or even the likelihood, that he would have been convicted of a crime for which he was not charged.

The only additional correction necessary once again concerns a false or misleading allegation relied upon by the Respondent. Respondent asserts that

> Counsel for Eckstein chose not to include this tape in the state appellate court record . . . . If he didn't feel it was important enough to present the tape to the state courts, it is too late for him to present it in the first instance on federal habeas review.

Respondent's Brief at 41.

Counsel is at a loss regarding how to respond to this patently false assertion. Whether counsel "chose" not to include this tape in the state appellate record is not reflected in this record. At most, the record suggests that, for whatever reason, the

circuit court clerk did not transmit the tapes with the original record to the state court of appeals (*see* R6:Exh.E:20 n.8). As counsel for the Respondent should well know, however, these tapes in fact were included in the state appellate record at undersigned counsel's request, the Wisconsin Court of Appeals having granted that request by Order dated March 13, 2003. Unfortunately, that Order is likewise not included in the record before this Court because the Respondent did not previously make this assertion at a time when counsel could expand the record to rebut it.[5]

Because the Respondent's allegation is both unsupported by the record and factually untrue, it should be disregarded by this Court.

CONCLUSION

For these reasons, as well as for those in his opening brief, Joseph Eckstein respectfully asks that the Court reverse the judgment below and either (1) grant the requested writ of habeas corpus or, if such relief is not granted, (2) remand with directions that the district court grant expansion of the record and reconsider Eckstein's petition in light of the expanded record.

Dated at Milwaukee, Wisconsin, October 3, 2005.

[5] Should the Court have any question in this regard, Eckstein respectfully moves the Court to expand the record to include both Eckstein's motion to expand the record before the state court of appeals and that court's Order of March 13, 2003 granting that request.

Respectfully submitted,

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Eckstein Consol. Reply.wpd

RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a reply brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 5,330 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

_____

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2005, I caused 15 hard copies of the Reply Brief of Petitioner-Appellant Joseph Eckstein to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG Daniel J. O'Brien, Wisconsin Department of Justice, P.O. Box 7857, Madison, WI 53707-7857.

Robert R. Henak
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