UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 06-3075
(Case No. 05-C-176 (E.D. Wis.))

JOSEPH M. MALINOWSKI,

Petitioner-Appellant,

v.

JUDY P. SMITH, Warden,
Oshkosh Correctional Institution,

Respondent-Appellee.

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

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BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellant, Joseph M. Malinowski, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) The party represented is Joseph M. Malinowski

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Dated: _____ _____

Robert R. Henak

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BRIEF OF PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

Joseph M. Malinowski appeals from the final judgement entered by the district court on June 30, 2006, denying his Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The district court had jurisdiction over this federal habeas action under 28 U.S.C. §§2241 & 2254. The case was heard and decided in that Court by a Magistrate Judge, the parties having consented to such jurisdiction pursuant to 28 U.S.C. §636(c) and General Local Rule 73.1 (E.D. Wis.). The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§1291 & 2253.

Malinowski filed his notice of appeal on July 24, 2006. By Order dated July 31, 2006, the District Court granted his motion for a certificate of appealability on the issues raised in this brief.

There are no pending motions which would toll the time within which to appeal.

There are no prior or related federal appellate proceedings in this case.

This is a collateral attack on Mr. Malinowski's criminal conviction in Wisconsin state court. Mr. Malinowski's current place of confinement is the Oshkosh Correctional Institution, 1730 W Snell Rd, Oshkosh, WI 54901. The warden at that institution is Judy P. Smith.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

As set forth in the District Court's Order granting Malinowski a Certificate of Appealability, the issue presented on this appeal is as follows:

> Whether exclusion of testimony from the complainant's school counselor regarding his bad opinion of her character for truthfulness and the fact that she had emotional difficulties that negatively impacted upon her ability to perceive and relate the truth violated Malinowski's right to present a defense rooted in the Sixth Amendment's confrontation and compulsory process clauses and the Fifth and Fourteenth Amendments' guarantee of due process.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Procedural History of the Case

By criminal complaint filed December 4, 2000, the State of Wisconsin charged Joseph Malinowski with two counts of sexual contact with his 14 year old step-daughter, S.L., on December 3, 2000 (one count hand to vagina and the other alleging

oral sex), one count of sexual intercourse with S.L. on November 30 or December 1, 2000, and one count of repeated sexual assault of the same child between June 1, 2000 and November 29, 2000. The state subsequently added a charge of bail jumping, based on the claim that Malinowski called S.L.'s mother, Tammy, on December 26, 2000, contrary to the court's order that he have no contact with his wife (R7:Exh.D:19-20).[1]

Prior to trial, Malinowski sought *in camera* review of S.L.'s school records. On April 3, 2001, the circuit court heard Malinowski's motion (R7:Exh.B). To demonstrate S.L. had significant emotional difficulties that affected her ability to perceive and relate the truth, Malinowski called S.L.'s elementary school counselor, Tom Bosman, to testify as to that general proposition, though not to any particulars in S.L.'s counseling records (R7:Exh.B:5-6). The state objected, arguing that any information in S.L.'s school counseling records was confidential and privileged and that any testimony by the counselor fell under the same cloak of protection (*id.*:4-9).

The court initially allowed Bosman to testify and he established that he worked for the D.C. Everest School District as an elementary school counselor, was licensed by the State of Wisconsin as a school counselor, and knew S.L. (*Id.*:9-10). Thereafter, however, the court disallowed any additional testimony from Bosman as it related to

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[1] Throughout this brief, several abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the District Court docket sheet number as "R___"; the following ":___" reference denotes the exhibit ("Exh.") or page number of the document.

When the document is reproduced in the attached or separate appendix, the applicable appendix page number is also identified as "App. ___."

S.L. (*id*.:17). Malinowski then established through an offer of proof that, if allowed, Bosman would testify that S.L. suffered from emotional difficulties which affected her ability to perceive and relate the truth (*id.*:18).

Although the circuit court initially denied Malinowski's request for *in camera* review of S.L.'s school records (R7:Exh.B:28-32), it subsequently granted Malinowski's motion for reconsideration. After conducting the *in camera* review of those documents, however, the court declined to release those materials to Malinowski. (*See* R7:Exh.D:3).

Malinowski then filed a motion on August 10, 2001, seeking, among other things, admission of testimony from Bosman to show S.L.'s history of emotional disturbance and inability to perceive and relate the truth and that she learned about sexual matters from sources other than the defendant (*see* R7:Exh.D:3-5). At a hearing on September 7, 2001, the circuit court held that anything Bosman learned through the course of counseling S.L. was privileged and therefore inadmissible (R7:Exh.D:14, 16).

Following a three-day trial beginning December 12, 2001 (R7:Exhs. T-V), the state moved to withdraw the charge of oral sex on December 3, 2000 (R7:Exh.V:2). The jury then convicted Malinowski of the charges of hand to vagina contact on December 3, 2000 and repeated sexual assault of S.L. between June 1, 2000 and November 29, 2000. However, it acquitted him on the count charging sexual intercourse as well as on the bail jumping charge. (R7:Exh.V:68-71).

On May 20, 2002, the court imposed consecutive sentences totaling six years initial custody and 16 years extended supervision (R7:Exh.W:90).

On his direct appeal, Malinowski argued, among other things, that the exclusion of Bosman's testimony denied him the right to present a defense (R7:Exh.J:25-32). The Wisconsin Court of Appeals, however, simply held that the evidence was inadmissible under state law and did not address Malinowski's constitutional claim:

> ¶6 The trial court correctly ruled that the school counselor would not be allowed to testify to opinions he formed during counseling sessions. Opinions, perceptions and impressions gained during confidential communications are privileged. *Cf. State v. Meeks*, 2003 WI 104, ¶40, ___ Wis.2d ___, ___ N.W.2d ___ (relating to confidential communications with an attorney). The counselor testified that all of his information relevant to the case was based on his contact with Samantha in his capacity as a counselor. Her counseling sessions are privileged under Wis. Stat. §905.04. *Id.* Malinowski also contends that the counselor could have testified to Samantha's reputation for honesty. Aspects of Malinowski's argument appear to suggest that he sought the counselor's opinion on whether Samantha was telling the truth. That testimony would not be permissible. *See State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). It also appears that he sought to disclose specific acts of conduct contrary to Wis. Stat. §906.08(2). To the extent he merely wanted to show Samantha's reputation for honesty, other witnesses should have sufficed.

(R7:Exh.M:3-4 (footnote omitted)).

On November 17, 2003, the Wisconsin Supreme Court denied Malinowski's petition for review challenging this and another aspect of the Court of Appeals' decision as violating his right to present a defense (R7:Exhs.N & P).

Malinowski filed his habeas petition pursuant to 28 U.S.C. §2254 with the

district court on February 14, 2005, again challenging the exclusion of Bosman's testimony as violating his right to present a defense (R1).

By Order dated February 15, 2005, the district court, Hon. William E. Callahan, Jr., Magistrate Judge, presiding, ordered the respondent to file an answer, and scheduled briefing on the petition (R2; App. 107-08). By consent of the parties, the case was heard by Magistrate Judge Callahan for decision pursuant to 28 U.S.C. §636(c) (R3, R6).

Following briefing (R9; R11; R14), the district court entered an Order on May 31, 2006, directing the respondent to file under seal copies of the complainant's school records that were reviewed *in camera* by the state trial court (R16; App. 104-06). The state court filed those materials on June 26, 2006 (R18).

On June 30, 2006, the District Court, Hon. William E. Callahan, Jr., Magistrate Judge, presiding, entered a Decision and Order and Judgment dismissing Malinowski's petition (R19; R20; App. 1, 24-45). That Court entered an Amended Decision and Order correcting certain typographical errors on July 6, 2006 (R22; App. 2-23).

Although the state Court of Appeals did not even address Malinowski's constitutional claim, resting its decision instead on state evidence rules, the District Court concluded that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), applies to Malinowski's claim, requiring deference to the state Court of Appeals' decision (R22:6-9; App. 7-10). The District

Court further held that, because the facts in Malinowski's case were not identical to those in the controlling Supreme Court authority, Malinowski failed to show that the state court decision was contrary to that authority (R22:9-16; App. 10-17). And finally, the District Court held that, although the Wisconsin Court of Appeals did not conduct the constitutional analysis required by controlling Supreme Court authority regarding the excluded evidence at issue here, the state trial court's analysis of a different legal issue regarding different evidence not at issue in Malinowski's petition necessarily meant that the state Court of Appeals' decision upholding exclusion of Bosman's testimony was a reasonable one (R22:16-21; App. 17-22).[2]

Although finding that relief was barred under the AEDPA, the District Court did not address whether exclusion of Bosman's testimony in fact violated Malinowski's constitutional rights or whether that violation was harmless.

Malinowski filed his notice of appeal on July 24, 2006 (R23). By Order dated July 31, 2006, the district court granted him a certificate of appealability on the issue raised on this appeal (R27; App. 101-03).

State Trial Evidence

Joe and Tammy Malinowski were married in June of 1993 following a lengthy

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[2] The different issue relied upon by the District Court concerned the state trial court's *in camera* review of the complainant's written school records. The District Court even went so far as to review those records itself and to hold that the state court's refusal to disclose those records to the defense was neither contrary to nor an unreasonable application of controlling Supreme Court authority. (R22:20-21; App. 21-22). Apparently overlooked by the court was the fact that Malinowski did not challenge the state court's refusal to disclose those records.

courtship that began around 1988 (R7:Exh.T:60-61, 164). When they met, Tammy already had a two-year-old daughter, S.L., from a previous relationship (*id.*:61, 164). In 1996, the couple had a son, Dakota (*id.*:61).

By February of 2000, after almost seven years of marriage, Tammy and Malinowski had moved into their "dream house" with both S.L., who was then 13 years old, and Dakota, who was three (R7:Exh.T:64). On the strength of Malinowski's carpentry and general contracting skills, they had built the house themselves and though it was not yet completed, they had obtained an occupancy permit to live there while they finished it (*id.*:65). When finished, the ranch home, located in Kronenwetter, would have two bedrooms upstairs and one in the basement (*id.*:66-68). The Malinowskis' plan was to use one of the upstairs bedrooms for themselves and the other for Dakota, while S.L. eventually would occupy the basement bedroom (*id.*).

However, despite the excitement of finally building their dream house, not all was well in the Malinowski household. During the summer of 2000, Tammy worked at the Holiday Inn in the Banquet Service (R7:Exh.T:127). At the hotel's restaurant/bar known as the Green Mill, Tammy had met and begun socializing after work with Dan Gironimi, a bartender there[3] (*id.*:92, 127; Exh.U:48-49). Although disputed, evidence was presented that, by August of 2000, Tammy was referring to Gironimi as her "boyfriend" (R7:Exh.U:105-113).

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[3] Eventually, Tammy also began working at the Green Mill (R7:Exh.T:127).

The Malinowski household was also beset with disciplinary problems involving S.L., who by that time was something of a rebellious teenager. Malinowski was frequently called upon to assume responsibility for disciplining S.L. (R7:Exh.T:70). Such measures were often needed because S.L. had a panoply of problems at school (*id.*:71). Indeed, by September of 2000, when S.L. was fourteen, S.L.'s problems increased, and her relationship with her mother had deteriorated (*id.*:72).

By December of 2000, the house, save the basement, was largely finished (R7:Exh.T:65). The basement was still being used to store trim for the rest of the house and many of S.L.'s belongings (*id.*:65-66). Thus, although S.L.'s bedroom would eventually be in the basement, in December of 2000, she was still sharing a bunk bed with Dakota upstairs (*id.*:66).

On December 3, 2000, the Malinowski family went to a Schofield tree lot to choose a Christmas tree (R7:Exh.T:76, 78). Upon their return, they put up the tree in their livingroom and went to Denny's for dinner (*id.*:78). During dinner, however, Tammy and S.L. argued vociferously (*id.*:81). Consequently, when they returned home, Tammy went to the living room with Dakota to trim the Christmas tree while S.L. retreated downstairs to the basement (*id.*:81).

At trial, Tammy alleged that within one-half hour, and while she was trimming the tree, she heard Malinowski downstairs talking to S.L., who was crying (R7:Exh.T:82, 124). Then there was silence and from where Tammy was standing

in the livingroom, she claimed she could see Malinowski's and S.L.'s feet close together[4] (*id.*:82). Tammy maintained she then crawled on her hands and knees behind the couch so she could look further into the basement where she saw S.L. sitting in a chair wearing her pants and a shirt (*id.*:82-83). Tammy further alleged she saw Malinowski, fully clothed, bent over in front of S.L. (*id.*:83). Finally, she alleged she could see S.L.'s pants were open, S.L.'s pubic hairs, and Malinowski's hand fondling her in that area (*id.*:84).

Instead of attempting to stop the alleged molestation of her daughter, Tammy testified that she crawled back to the Christmas tree and decided to simply leave and make the 10-minute drive to her brother Yancy's house (R7:Exh.T:84-85, 124). Before leaving, however, she first paused to let out the dog (*id.*). She then got into her car and left the premises, abandoning Malinowski and S.L. alone in the basement, and four-year-old Dakota roaming the house (*id.*:85; 113).[5]

When Tammy arrived at Yancy's house, only her sister-in-law, Jenny, was there (R7:Exh.T:86). Jenny offered to go and get S.L. and Dakota (*id.*:86). When Jenny arrived at the house, Malinowski was surprised and wondered what was going on (*id.*:144). Jenny did return with S.L., but left Dakota behind (*id.*:87, 144-45).

When Yancy eventually returned, he took Tammy back to the house to try to

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[4] Because the house was still unfinished, the stairway down to the basement was an open stairway. (R7:Exh.T:80).

[5] Although she tried to justify her bizarre flight from the scene by contending Malinowski had been drinking (R7:Exh.T:121), Tammy admitted there was no history of violence between the two (*id.*:122).

get Dakota (R7:Exh.T:88). Thereafter, they drove behind the house and called the police from Yancy's cell phone (*id.*:89). By this time, approximately two hours had elapsed since the alleged assault on S.L. (*id.*:124). Eventually, they returned to Yancy's house and a short time later, the police arrived (*id.*:89).

Detective Ruechel was assigned the task of interviewing S.L. and allowed Jenny to be present (R7:Exh.T:150; Exh.U:87). During the interview, S.L. repeated roughly the same story given by her mother (R7:Exh.U:87-88). However, she also lodged a whole slew of additional allegations against Malinowski. Indeed, S.L. claimed that sexual contact at the hands of Malinowski had been going on for six months, which would have been since early June of that year. (*Id.*:87). She also claimed that after Tammy left the house earlier in the evening, Malinowski later called her into his upstairs bedroom and engaged in oral sex with her (*id.*:88). Finally, S.L. claimed that just a couple of days earlier, Malinowski had intercourse with her in her parents' bedroom (*id.*:89-90). Because the reported event was recent, the police advised Tammy to take S.L. to a doctor, noting doctors have rape kits. (R7:Exh.T:102; R7:Exh.U:88-90).

Tammy did not, however, take S.L. to the doctor until the next day. (R7:Exh.T:93). Struggling at trial to explain why she had not requested a rape examination, Tammy rationalized that when police officers advised her to take S.L. to a doctor and referenced a rape kit, it was "just a suggestion" (*id.*:100-102). Tammy also waffled when asked whether she requested a pelvic exam of S.L. (*id.*:101-102),

and no such exam was performed (*id.*:103).

After interviewing Tammy and S.L., the police proceeded to the Malinowski house (R7:Exh.U:79). Malinowski let the officers in and upon being apprized of the allegations, immediately waived his Miranda rights, agreed to speak with the detectives, and consented to a search of his house (*id.*:79-81). Despite his cooperation, however, Malinowski was arrested and incarcerated on the basis of Tammy's and S.L.'s allegations (R7:Exh.T:103; R7:Exh.U:81). Thereafter, Tammy immediately took sole possession of the house on which, conveniently, the mortgage had just closed the month before (R7:Exh.T:130). Despite S.L.'s allegations, the police did not seize or request, nor did Tammy offer, the bed linens from the bedroom (or any of S.L.'s clothing) where just a couple of days earlier, Malinowski had supposedly had intercourse with S.L. (*id.*:104).

Following Malinowski's incarceration, Tammy wasted no time in continuing her relationship with Dan Gironimi. Although she claimed their relationship did not become intimate for another two months, she did admit she spent Christmas Eve with Gironimi just three weeks after the December 3, 2000, incident. (R7:Exh.T:92). By the time of the trial, Tammy and Dan were living together and S.L., then only 16, had moved out of the house (*id.*:126-27, 131).

At trial, S.L.'s version of events underwent material modifications. Having originally indicated the sexual assaults by Malinowski began in June of 2000, S.L. shifted gears and said they did not begin until after her birthday on August 7, 2000,

(R7:Exh.T:174-77), which further contradicted another statement where she said they began in September of 2000 (R7:Exh.U:30). Moreover, although she had previously told authorities Malinowski had engaged her in oral sex upstairs following the December 3, 2000, basement incident (R7:Exh.U:88), she testified at trial that this had not occurred (R7:Exh.T:184). Numerous other material inconsistencies in both S.L.'s and Tammy's statements and testimony will be examined and developed in the section of this brief devoted to a discussion of the harmless error doctrine.

SUMMARY OF ARGUMENT

Joseph M. Malinowski appeals from denial of his federal habeas petition under 28 U.S.C. §2254. That petition claimed violation of Malinowski's constitutional right to present a defense in violation of the Fourteenth Amendment to the United States Constitution.

The District Court erred in concluding that Malinowski is not entitled to habeas relief. The AEDPA does not apply where, as here, the state court did not decide the constitutional issue presented on its merits. Also, even if the Court reasonably could conclude that the state court adjudicated Malinowski's "right to present a defense" claim on the merits, he nonetheless is entitled to habeas relief because (1) he in fact was denied his due process right to present a defense, (2) the error was not harmless, and (3) any adjudication to the contrary by the state court was both contrary to and an unreasonable application of controlling Supreme Court authority.

ARGUMENT

BARRING CRITICAL TESTIMONY OF THE COMPLAINANT'S SCHOOL COUNSELOR DENIED MALINOWSKI THE RIGHT TO PRESENT A DEFENSE AND JUSTIFIES HABEAS RELIEF

The central issue at trial in this matter was S.L.'s credibility. The charge of repeated sexual assault rested entirely on her claims, while the single count of sexual contact on December 3, 2000, rested on the conflicting assertions of S.L. and her mother. To bolster his defense that S.L. was fabricating the allegations against him, petitioner sought to introduce evidence from her school counselor, Tom Bosman, regarding both his bad opinion of her character for truthfulness and the fact that S.L. had emotional difficulties that negatively impacted upon her ability to perceive and relate the truth.

Unbiased evidence to the effect that S.L. suffered from emotional difficulties that affected her so she had difficulty perceiving and relating the truth would squarely address that central issue in dispute. Despite the clearly exculpatory nature of the evidence, however, the trial court excluded it on grounds of privilege (R7:Exh.D:14, 16), and the Wisconsin Court of Appeals upheld the exclusion on that ground (R7:Exh.M:3-4).

Malinowski does not here dispute the state court's conclusion that Bosman's testimony was privileged as a matter of state law under Wis. Stat. §905.04. Rather, he is entitled to relief because, although overlooked by the state courts, application of that state exclusionary rule denied him the right to present a defense and was far

from harmless. Moreover, even if the restrictive provisions of the AEDPA apply here, the state court's exclusion of Bosman's exculpatory evidence was either contrary to or an unreasonable application of controlling Supreme Court authority.

A. Applicable Legal Standards

1. Right to present a defense

A defendant's right to testify, present witnesses in his own defense, and to cross-examine witnesses against him--often collectively referred to as the right to present a defense--is rooted in the Sixth Amendment's confrontation and compulsory process clauses and the Fifth and Fourteenth Amendments' guarantee of due process. *See Rock v. Arkansas*, 483 U.S. 44, 51-52 (1977).

While the admission of evidence generally rests within the sound exercise of trial court discretion and may be subject to reasonable restrictions, *United States v. Scheffer*, 523 U.S. 303, 308 (1998), such limitations may deny the defendant his rights to due process, compulsory process, and confrontation where, as in this case, they have the effect of concealing relevant, exculpatory evidence from the jury. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986). The jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [a witness'] testimony which provided 'a crucial link in the proof. . . of petitioner's act.'" *Davis v. Alaska*, 415 U.S. 308, 317 (1974) (citation omitted).

A defendant's right to present a defense includes the right to offer testimony

by witnesses and to compel their attendance. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14, 19 (1967). The Supreme Court has recognized that "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302.

At the same time, a defendant's right to present relevant testimony is not without limitation and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295; *Rock*, 483 U.S. at 55. Still, while "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Scheffer*, 523 U.S. at 308, the Supreme Court has expressed disapproval of rules "applied mechanistically to defeat the ends of justice," *Rock*, 483 U.S. at 55. Accordingly, such rules violate the right to present a defense if their application in a particular case is "arbitrary" or "disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 56.

Evidentiary privileges constitute one type of general rule which may contravene the right to present a defense in a particular case. *See, e.g.*, *United States v. Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994):

> Evidentiary privileges are not absolute, however. Even privileges recognized when the Constitution was written can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment and interpreted to include the right of cross-examination. [Citations omitted]. Even the attorney-client privilege, therefore, hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation, whether in its aspect as the right of cross-examination or in some other

aspect, would be violated by enforcing the privilege.

See also Davis v. Alaska, 415 U.S. 308 (1974) (state rule barring inquiry into fact prosecution witness was on juvenile probation violates right to confrontation).

Evidentiary privileges are not based on any concerns about the reliability of the excluded evidence and instead "are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974) (footnote omitted).

2. AEDPA

Demonstrating a prejudicial constitutional violation generally is not alone sufficient for habeas relief. As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), 28 U.S.C. §2254(d) provides that a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits

> 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; 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).

This Court has explained the applicable legal standards under the AEDPA as follows:

> "[A] state court decision is 'contrary to' federal law if the state court either incorrectly laid out governing Supreme Court precedent, or, having identified the correct rule of law, decided a case differently than a materially factually indistinguishable Supreme Court case." *Conner v. McBride,* 375 F.3d 643, 649 (7th Cir.2004), *cert. denied,* --- U.S. ----, 125 S.Ct. 1399, 161 L.Ed.2d 193 (2005). "An 'unreasonable application' of Supreme Court precedent occurs when 'the state court identifies the correct governing legal rule... but unreasonably applies it to the facts of the particular state prisoner's case' or 'if the state court either unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Dixon v. Snyder,* 266 F.3d 693, 700 (7th Cir.2001) (quoting *Williams v. Taylor,* 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "Clearly established" Supreme Court precedent is "the holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade,* 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Muth v. Frank, 412 F.3d 808, 813-14 (7th Cir. 2005) .

This Court has construed this provision as requiring *de novo* review only of purely legal questions to determine if the state court cited the correct Supreme Court precedents, and "reasonableness" review regarding application of that precedent to the particular facts of the case:

> Under these new standards, our review of state courts' legal determinations continues to be *de novo*. So, too, does our review of mixed questions of law and fact. [Citations omitted]. Under the AEDPA, however, we must answer the more subtle question of whether the state court "unreasonably" applied clearly established federal law as the Supreme Court has determined it. *Pitsonbarger v. Gramley*, 103 F.3d 1293, 1297-98 (7th Cir. 1996).

Hall v. Washington, 106 F.3d 742, 748 (7th Cir. 1997). The *Hall* Court went on to hold, however, that the reasonableness standard is not a toothless one:

> The statutory "unreasonableness" standard allows the state court's

> conclusion to stand if it is one of several equally plausible outcomes. On the other hand, Congress would not have used the word "unreasonable" if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue.

Id. at 748-49. "Unreasonableness is judged by an objective standard." *Morgan v. Krenke*, 232 F.3d 562, 565 (7th Cir. 2000), *cert. denied*, 532 U.S. 951 (2001).

Finally, however, this Court has made clear that the restrictive provisions of the AEDPA apply *only* to matters actually decided on the merits by the state court. Matters which the state court did not decide on the merits are reviewed *de novo*. *Dixon v. Snyder*, 266 F.3d 693, 701, 702 (7th Cir. 2001); *see Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir.), *reh'g denied*, 108 F.3d 144 (7th Cir. 1997). "If the state court did not reach the merits, §2254 does not apply and this court applies the general habeas standard set forth at 28 U.S.C. §2243." *Muth*, 412 F.3d at 814 (citation omitted).

3. Appellate review

On appeal from the district court's denial of a writ of habeas corpus, this Court reviews findings of fact for clear error and legal conclusions de novo. *Dunlap v. Hepp*, 436 F.3d 739, 741 (7th Cir. 2006); *Rittenhouse v. Battles*, 263 F.3d 689 (7th Cir.2001).

B. The Trial Court's Exclusion of Bosman's Exculpatory Testimony Denied Malinowski the Right to Present a Defense

Exclusion of the proffered evidence from S.L.'s school counselor regarding his bad opinion of her character for truthfulness and the fact that she had emotional difficulties which negatively impacted upon her ability to perceive and relate the truth denied Malinowski the right to present a defense. Rather than attempting to accommodate both the legitimate state interests protected by the statutory privilege and Malinowski's right to a fair trial, the state courts opted merely for an arbitrary and mechanical application of the state privilege.

When confronted with a similar situation in *Davis v. Alaska*, 415 U.S. 308 (1974), the Supreme Court rejected such a mechanistic approach. The Court there held that the refusal to allow the defendant to cross-examine the key prosecution witness to show his probation status following an adjudication of juvenile delinquency denied the defendant his constitutional right to confront witnesses, notwithstanding the valid state policy of protecting the anonymity of juvenile offenders. There, as here, "[t]he accuracy and truthfulness of [the witness'] testimony were key elements in the State's case against petitioner." *Id.* at 317. While recognizing the state's legitimate interest in protecting the confidentiality of a juvenile offender's record, the Court held that "the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest . . .." *Id.* at 320. Because "[t]he State could have protected [the witness] from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out

its case," elevating the state's interest over those of the defendant was found to be constitutionally unacceptable. *Id*. at 320-21.

The state courts here also overlooked the fact that the privilege under §905.04 may be waived. *See* Wis. Stat. §905.11. A voluntary waiver of the privilege would have provided Malinowski the evidence necessary for a fair determination of his guilt or innocence while allowing the holder of the privilege to retain control over the question of whether to release the confidential information. It does not appear, however, that the state courts even contemplated such a request, instead assuming lack of consent to release of the information and placing the full burden of vindicating the privacy interests upon the defendant.

Because both S.L.'s interest in her privilege and Malinowski's interest in presenting a complete defense could have been upheld by the state simply not using evidence from S.L. to make out its case, those interests were not in conflict. Instead, the conflict here is between (1) the state's desire to present certain evidence while concealing facts impeaching that evidence versus (2) the defendant's right to present a complete defense, including confrontation of the witnesses against him. While a defendant's right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," *Chambers*, 410 U.S. at 295; *Rock*, 483 U.S. at 55, the state's desire to conceal relevant impeachment evidence from the jury does not constitute such an interest. *Cf. Kyles v. Whitley*, 514 U.S. 419 (1995) (state's concealment of material, exculpatory evidence violates due

process).

If all that were at stake was S.L.'s "reputation" for dishonesty, then the state and the Wisconsin Court of Appeals (R7:Exh.M:4) might be correct that someone else could provide that information. "Reputation," after all, represents one's character as seen or judged by people in a particular community. Bosman was only one member of the relevant "community."

Reputation, however, is not and never has been what is at issue in this case. Rather, Bosman's testimony was offered to show both his bad opinion of her character for truthfulness and the fact that S.L. had emotional difficulties that negatively impacted upon her ability to perceive and relate the truth. Bosman, as S.L.'s school counselor, was in a unique position to collect the information necessary to make valid and legitimate conclusions on these matters and to provide this information to the jury. The family friend who testified at trial would have had contact with S.L. in other circumstances and could state her opinion of S.L.'s character for truthfulness in those contexts. However, only Bosman could provide the kind of reliable, unbiased information regarding S.L.'s character for dishonesty in a broader context involving her interactions with authority figures and S.L.'s emotional difficulties in perceiving and relating the truth.

Reliable, unbiased evidence of S.L.'s bad character for truthfulness and her emotional difficulties that negatively impacted upon her ability to perceive and relate

the truth were critical to Malinowski's defense in this case.[6] The state courts nonetheless approved exclusion of such evidence based on an arbitrary and mechanistic application of a state rule of privilege. The state courts' mechanistic application of the counselor-patient privilege in Wis. Stat. §905.04 failed to consider previously recognized methods of protecting *both* S.L.'s privacy interests and Malinowski's right to a fair trial.

Because the state was allowed to present S.L.'s evidence while concealing information necessary to a fair assessment of her credibility, Malinowski was denied the due process right to present a defense. *E.g.*, *Rock*, *supra*; *Davis*, *supra*.

C. The Constitutional Violation Was Not Harmless

Because it erroneously concluded that Bosman's evidence was not admissible on state evidentiary grounds, the Wisconsin Court of Appeals did not address whether exclusion of that evidence was harmless. This Court accordingly owes no deference to that court's decision on this issue. *Dixon*, 266 F.3d at 701, 702.

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*

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[6] Although no witness in Wisconsin may be permitted to comment on the truthfulness of another witness' specific testimony, *State v. Haseltine*, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984), a party is entitled to present evidence regarding a witnesses opinion of the general truthfulness of another witness. Wis. Stat. §906.08(1) ("the credibility of a witness may be attacked . . . by evidence in the form of reputation or opinion, but . . . [t]he evidence may refer only to character for truthfulness or untruthfulness"); *see* Wis. Stat. §904.05(1).

Because Malinowski sought to introduce Bosman's opinion solely on S.L.'s general truthfulness, and not on the specific allegations in this case, that testimony would not have violated *Haseltine*.

v. California, 386 U.S. 18, 24 (1967). In order to find an error harmless beyond a reasonable doubt, the Court must determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).[7]

While the standard for resulting prejudice is slightly more forgiving of state errors on habeas, *see Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (error is harmless if it had no "substantial and injurious effect or influence in determining the jury's verdict" (citations omitted)), the burden remains on the state to disprove prejudice, *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995).

The Supreme Court in *O'Neal* eschewed expressing its holding in terms of "burdens of proof," focusing on the court's perception of the effect of an error rather than on the state's presentation. *Id.* at 436-37. The fact remains, however, that it is the state, and not the petitioner, that must bear the "risk of doubt." *Id.* at 438. *See also Lainfiesta v. Artuz*, 253 F.3d 151, 158 (2d Cir. 2001) (burden of persuasion is on the government under *O'Neal*).

If the Court is convinced that "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *O'Neal*, 513 U.S. at 437. If, however, the Court is not fairly assured that there was no effect on the

[7]The Supreme Court disapproved other language in *Yates* on other grounds in *Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991).

verdict, it must reverse. *Id.* In the "narrow circumstance" in which the Court is in "grave doubt" as to the effect of the constitutional error, it must assume that there was such an effect and grant the petition. *Id.* at 436, 438.

Thus, while the term "burden of proof" may be more appropriate to the determination of facts rather than the purely legal issue of assessing prejudice, *id.* at 436-37, the concept remains the same. If the state fails to persuade the Court that there was no substantial or injurious effect on the verdict, the error is not harmless. Placing the "risk of doubt" on the state in such circumstances is fully consistent with prior Supreme Court authority that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error. *Id.* at 437-44; *e.g.*, *United States v. Olano*, 507 U.S. 725, 741 (1993) (government bears the "burden of showing the absence of prejudice"). *See also Brecht v. Abrahamson*, 507 U.S. 619, 640-41 (1993) (Stevens, J., concurring) (noting that *Kotteakos v. United States*, 328 U.S. 750 (1946), the decision on which *Brecht* was based, "places the burden on prosecutors to explain why those errors were harmless").[8]

Whether based on application of the *Brecht*/*O'Neal* harmlessness standard or upon assessment of the "reasonableness" of the state court's application of the *Chapman* standard, exclusion of unbiased evidence of the complainant's bad character for truthfulness and her difficulties in terms of perceiving and relating the

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[8] The federal courts remain divided on whether the *Brecht/O'Neal*, "substantial and injurious effect" standard even applies where, as here, the state court did not address harmlessness. *See Hassine v. Zimmerman*, 160 F.3d 941, 950 (3rd Cir. 1998), and cases cited therein. This Court, however, sided with application of *Brecht* in *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995).

truth cannot rationally be excused as "harmless" in any event. "A person's story is not much use to a jury if the jurors are denied the information they need to evaluate how likely it is that the story is true." *Williams v. Borg*, 139 F.3d 737, 741 (9th Cir. 1998). As the Wisconsin Supreme Court has recognized,

> "[t]he administration of justice is and should be a search for the truth," and that the jury cannot search for truth if it cannot consider relevant and admissible evidence on a critical issue in the case.

State v. Cuyler, 110 Wis.2d 133, 327 N.W.2d 662, 664 (1983) (citation omitted).

The exclusion of Bosman's evidence went to the heart of the issue central to both the state's case and Malinowski's defense: the credibility of S.L. Had Malinowski been able to introduce evidence from the most reliable and unbiased of sources (i.e., Bosman) regarding S.L.'s problems with reality, such evidence easily could have affected the outcome of this case, greatly enhancing the inherent contradictions in her testimony. The evidence likewise would have provided the jury an additional reason to doubt both S.L.'s allegations and the trial prosecutor's repeated attempts to soft-peddle the many contradictions in her testimony as merely the natural byproduct of a fading memory (*See, e.g.*, R7:Exh.V:11-13, 44-45, 47).

The evidence also would have rebutted Tammy's testimony that S.L. was a "truthful" kid, no more prone to lying than "the typical teenager" (R7:Exh.T:130, 138-39), thereby both nullifying the bolstering effect of Tammy's appraisal of S.L. and demonstrating that Tammy's own biases would lead her to shade her testimony to support S.L.'s claims.

Given the multiple significant inconsistencies in the state's case, the evidence against Malinowski was far from overwhelming, as demonstrated by the state's dismissal of one of the counts against Malinowski and the jury's acquittal of Malinowski on two of the remaining four charges. Where, as here, the state's case already is of marginal sufficiency, even otherwise minor errors can have a great impact on the jury. *Cf. United States v. Agurs*, 427 U.S. 97, 113 (1976).

One such contradiction at trial revolved around Malinowski's discipline of S.L., an important issue because it vividly impacted on S.L.'s motive to fabricate. Virtually all witnesses who had been in a position to observe the interaction between Malinowski and S.L. agreed that Malinowski had been responsible, to varying degrees, for disciplining S.L. For example, Bonnie Breunig, S.L.'s *maternal* grandmother, admitted Malinowski often disciplined S.L. (R7:Exh.U:59-60). Indeed, Breunig indicated S.L. complained about being yelled at all the time by Malinowski (*id.*:60). Joseph Malinowski, Sr., S.L.'s paternal step-grandfather, also indicated Malinowski regularly disciplined S.L. (*id.*:148). He recalled an occasion when S.L. had been hogging the phone for over an hour and Malinowski disciplined her, causing Tammy to get upset with Malinowski (*id.*:148-49). Jennifer LaBarge also testified Malinowski shared fully in disciplining S.L. (R7:Exh.T:153). Even Tammy, albeit somewhat more reluctantly, admitted Malinowski sometimes disciplined S.L. (*id.*:69-70). Within this context it was therefore remarkable that at trial, S.L. baldly asserted that Malinowski "never" disciplined her (R7:Exh.U:14).

The most startling contradiction at trial, however, was S.L.'s about-face on the question of oral sex, the allegations that formed the basis for Count Two of the criminal complaint. In the hours following the December 3, 2000, episode, S.L. told Detective Rueschel and Officer Pitt that after the incident in the basement, Malinowski had re-engaged her in oral sex upstairs in the house (R7:Exh.U:30, 88). Thus, it was extremely conspicuous by its absence when, at trial, S.L. omitted any reference to oral sex occurring after the basement incident (*See* R7:Exh.T:184).

Yet another conflict emerged around what time of day the alleged act of intercourse occurred. S.L. reported to Detective Ruechel and later testified that the incident of sexual intercourse happened "after school" (R7:Exh.T:210-13). She also claimed, however, that Dakota was not present because Tammy had put him to bed before going to work (*id.*:221-22). Thus, because Tammy had gone to work at 4:00 p.m. every day during that time frame (*id.*:98), this created the untenable idea that Dakota, who was described as very active throughout the proceedings, had been tucked in bed at 4:00 p.m. in the afternoon. This may explain why, at the preliminary examination, S.L. testified the sexual intercourse had actually happened closer to 8:00 p.m. in the evening (*id.*:213).

S.L. was not the only individual, however, whose testimony rang false. From the moment of Tammy's first report of the incident up through the trial, she offered several versions of how, and from what vantage point, she had witnessed the events unfolding in the basement. According to Jennifer LaBarge, Tammy initially told her

she saw the incident while "standing upstairs." (R7:Exh.T:143-44). In Officer Pitt's January 10, 2001 report, Tammy was quoted as saying, "she [had] crept downstairs" and discovered Malinowski fondling S.L. (R7:Exh.U:29). In her statement to Detective Ruechel, however, Tammy claimed she had "crept very quietly down stairs" and peeked underneath the wall on the open stairwell and observed Malinowski molesting S.L. (R7:Exh.U:78, 86-87).

Adding further confusion and injecting additional doubt into Tammy's story, S.L. stated that a person "standing" in the living room would not really be able to see more than one foot into the basement and that from the other side of the couch (which is where Tammy first claimed to have seen their feet together), one would not be able to see into the basement at all. (R7:Exh.T:196).

Tammy and S.L. were further conflicted on how and when the basement incident putatively occurred. Tammy claimed that S.L.'s pants were merely unbuttoned (R7:Exh.T:83-84). S.L., however, asserted that Malinowski had pulled her pants and underwear down "below [her] knees" (*id.*:183-84, 200). Moreover, according to S.L., the incident occurred shortly after 9:00 or 9:30 p.m., which was when they got home from Denny's (*id.*:183). According to Tammy, they got back from Denny's around 6:00 or 6:30 p.m. and it happened shortly thereafter (*id.*:96-97).

Given the significance of S.L.'s and Tammy's testimony in this case and the substantial impact unbiased evidence of both her bad character for truthfulness and the emotional problems which interfered with her ability to perceive and relate the

truth, exclusion of Bosman's testimony necessarily had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

D. The AEDPA Does Not Bar Relief

Contrary to the District Court's decision (R22; App. 2-23), although the AEDPA generally makes it more difficult to obtain relief from the types of unconstitutional deprivation of liberty to which Malinowski is subject here, it does not bar him from obtaining relief. Because the Wisconsin Court of Appeals did not decide the merits of his constitutional claim, the restrictions on federal review under the AEDPA do not apply here. Moreover, even if Malinowski's claims can somehow be deemed subject to the more restrictive standards, he still is entitled to relief because the state court decision was either contrary to or an unreasonable application of controlling Supreme Court authority.

1. The AEDPA Does Not Apply Here

As discussed in Section A,2, *supra*, demonstrating a prejudicial constitutional violation generally is not alone sufficient for habeas relief. As amended by the AEDPA, 28 U.S.C. §2254(d) provides that a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits

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 . . ..

28 U.S.C. §2254(d)(1).

This Court has made clear, however, that the restrictive provisions of the AEDPA apply *only* to matters actually decided on the merits by the state court. *E.g.*, *Dixon,* 266 F.3d at 701, 702; *Liegakos*, 106 F.3d at 1385. Thus, "before applying the 'clearly established' standard of review, the reviewing court must first determine whether the claim 'was *adjudicated on the merits* in State court proceedings.'" *Muth*, 412 F.3d at 814 (emphasis added by court), quoting 28 U.S.C. §2254(d). "If the state court did not reach the merits, §2254 does not apply and this court applies the general habeas standard set forth at 28 U.S.C. §2243." *Id.* (citation omitted).

Although Malinowski squarely argued that the exclusion of Bosman's testimony deprived him of his right to present a defense (R7:Exh.J:25-32), the Wisconsin Court of Appeals did not address that claim. Rather, it focused solely on state-law issues, holding (1) that any opinions formed by Bosman based on counseling sessions were privileged under Wis. Stat. §905.04, (2) that, to the extent Malinowski sought to elicit Bosman's opinion regarding whether S.L. was telling the truth, such testimony likewise was barred under state law, *see State v. Haseltine*, 120 Wis.2d 92, 352 N.W.2d 673 (App. 1984), and (3) that others could have testified to S.L.'s reputation for honesty. (R7:Exh.M:3-4).

Because the Wisconsin Court of Appeals did not decide Malinowski's constitutional claim, that Court is owed no deference under the AEDPA. *Dixon*, 266 F.3d at 701, 702; *Liegakos*, 106 F.3d at 1385.

The District Court nonetheless held that the state court of appeals implicitly decided Malinowski's constitutional claim on the merits, even though it did not purport to do so expressly. According to the District Court, the state court did so by (1) noting the constitutional nature of Malinowski's claim when initially listing his issues on appeal, and (2) by thereafter affirming his conviction. (R22:7-9; App. 8-10). The District Court is wrong.

It is true that a claim may be "adjudicated on the merits" even if the state court's decision was not "well-articulated or even a correct decision." *Muth*, 412 F.3d at 815. The *Muth* Court noted that "several circuits have held that a state court need not offer *any* reasons and summarily dispose of a petitioner's claim and that summary disposition would be an adjudication on the merits." *Id.* (citations omitted; emphasis in original).

Contrary to the decision below, however, the fact that even a summary or inadequately-explained decision on the merits of a claim remains a decision on the merits does not apply here. The *Muth* Court went on to note that "[i]f a state court specifically identifies a claim it must identify and review the correct claim." 412 F.3d at 815 n.5. Thus, where the defendant raises one claim, but the state court misconstrues it as a different claim, its resolution of the wrong claim is not an "adjudication on the merits" of the claim actually raised by the defendant. *Id.*; *see Appel v. Horn*, 250 F.3d 203, 210-11 (3d Cir. 2001).

> It stands to reason that a petition is subject to AEDPA's standards of review only when a petitioner has had *his* claim reviewed by a state

> court. If a court considers another claim, it has not considered *his* claim.

Id. (emphasis in original).

Although the state Court of Appeals identified Malinowski's federal due process claim early in its decision while listing the issues raised (R7:Exh.M:2; App. 111), it subsequently reviewed and decided a *different* claim – whether exclusion of Mr. Bosman's testimony was an error of *state* law. At no time during its brief discussion of the exclusion of Bosman's testimony did the Court of Appeals cite to any constitutional authority, refer to any constitutional standards, employ any constitutional reasoning, or even mention the constitutional right to present a defense. Rather, the discussion on that point was entirely limited to different issues of *state evidence law*. (R7:Exh.M:3-4; App. 112-13).

Because the state court reviewed the wrong issue and not the constitutional issue Malinowski raised there (and here), Malinowski's due process claim was not "adjudicated on the merits" within the meaning of §2254(d). *Muth*, 412 F.3d at 815 n.5; *Appel*, 250 F.3d at 210-11.

The restrictive provisions of §2254(d) accordingly do not apply to Malinowski's claim. Rather, the Court must apply the general habeas standards under 28 U.S.C. §2243. *Muth*, 412 F.3d at 814; *Braun v. Powell*, 227 F.3d 908, 916-17 (7th Cir. 2000), *cert. denied*, 531 U.S. 1182 (2001). That is, the Court must "dispose of the matter as law and justice require," 28 U.S.C. §2243, without deference to the state court decision.

2. The state court decision was contrary to controlling Supreme Court authority

If it is deemed to have adjudicated Malinowski's due process claim on the merits, then the state Court of Appeals decision was contrary to controlling federal authority as determined by the Supreme Court. The state court cited no constitutional authority and failed to identify any constitutional standard for the assessment of whether the exclusion of evidence violates one's due process right to present a defense. Because its decision is based entirely on the assertion that exclusion of Bosman's testimony was consistent with *state evidentiary law*, the implicit constitutional standard, if any, applied in the case appears to be that the right to present a defense never is violated by the exclusion of evidence consistent with state rules of evidence.

While the Supreme Court has held that qualification for AEDPA deference "does not require citation of our cases--indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state court decision contradicts them," *Early v. Packer*, 537 U.S. 3, 8 (2002) (emphasis in original), the proviso is critical. That is, AEDPA deference applies *only* "so long as neither the reasoning nor the result of the state court decision contradicts" controlling Supreme Court authority. *See, e.g.*, *Harrison v. McBride*, 428 F.3d 652, 666-67 (7th Cir. 2005).

The standard applied by the state appellate court here, of course, does exactly that. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1977) (defendant's right to testify

cannot be barred by rote application of per se rule against admission of hypnotically refreshed testimony); *Davis v. Alaska*, 415 U.S. 308 (1974) (application of state rule barring inquiry into fact prosecution witness was on juvenile probation violates right to confrontation); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (enforcement of voucher rule and hearsay rule to prevent cross-examination of defendant's own witness as to prior statements denied due process); *Washington v. Texas*, 388 U.S. 14 (1967) (states cannot make co-indictees incompetent as witnesses for defendant).

By focusing on *factual* dissimilarities between Malinowski's case and those of the controlling Supreme Court authorities in *Rock*, *Davis*, *Chambers*, and *Washington* (R22:11-16; App. 12-17), the District Court overlooked the fact that it was the *legal* standard applied by the state Court of Appeals that was contrary to that mandated by these authorities.

Rather than leaving state evidentiary rules as the conclusive standard for assessing the claimed denial of the constitutional right to present a defense, which is the approach used by the Wisconsin Court of Appeals here, the Supreme Court requires a case-by-case evaluation of whether the particular application of a state rule contravenes constitutional principles. *E.g.*, *Rock*, *supra*; *Davis*, *supra*; *Chambers*, *supra*.[9] In *Dunlap*, *supra*, for instance, this Court found that the Wisconsin Supreme Court's acknowledgment that a defendant's constitutional rights might require admission of evidence otherwise excluded by the rape shield law indicated that it was

[9] Although overlooked by the state court, Wisconsin law is the same. *E.g.*, *State v. St. George*, 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777.

"looking at the right question." 436 F.3d at 742. *Dunlap* found a "highly significant factor" to be "that the Wisconsin court recognized that its rape shield law must yield if it would deprive a defendant of his constitutional rights." *Id.* at 745.

No such recognition is expressed, or even hinted at, in the Wisconsin Court of Appeals decision here. To the contrary, the state court deemed the state evidentiary rules to be controlling, without even suggesting that constitutional protections could mandate a different result.

A state court decision is "contrary to" federal law if the state court relied upon the wrong legal standard. *E.g.*, *Muth*, 412 F.3d at 813 (citation omitted). If the state court is deemed to have adjudicated Malinowski's due process claim, therefore, the standard it applied was directly contrary to controlling Supreme Court authority. The AEDPA accordingly does not bar Malinowski from obtaining federal habeas relief from his unconstitutional custody.

3. The state court decision was an unreasonable application of controlling Supreme Court authority

Even if the Wisconsin Court of Appeals reasonably could be deemed to have applied the correct legal standards *sub silento*, it did not apply those standards in an objectively reasonable manner. That court failed to cite or apply the appropriate federal constitutional standard for assessing alleged violations of one's right to present a defense, and indeed failed to cite *any* standard for assessing such claims. Rather, the only discernable standard, if any, applied by that court appears to be that the right to present a defense is never violated by the exclusion of evidence consistent

with state rules of evidence.

The state court did not assess whether application of the state evidentiary rules it found controlling deprived Malinowski of the right to present a defense on the facts of this case. It did not apply the standards for such an assessment dictated by cases such as *Rock*, *Davis*, and *Chambers*. It did not assess whether the state's reliance on S.L.'s testimony while using her privilege to conceal evidence undermining that testimony violated the principles in *Davis*. It did not assess whether the privilege rule here was being "applied mechanistically to defeat the ends of justice." *See Rock*, 483 U.S. at 55. Nor did it assess whether application of the rule in this particular case was "arbitrary" or "disproportionate to the purposes [it was] designed to serve." *Id.* at 56.

This case thus bears no resemblance to that in *Dunlap*, *supra*, and the District Court's reliance on *Dunlap* accordingly is misplaced. In assessing a Confrontation Clause challenge based on the "unreasonable application" standard of the AEDPA, the *Dunlap* Court found "highly significant" the fact that "the Wisconsin court recognized that its rape shield law must yield if it would deprive a defendant of his constitutional rights." 436 F.3d at 745. *Dunlap* also relied on the fact that the Wisconsin court there, unlike that here, had sought to balance the relevant interests and reached a conclusion that this Court stated it "simply can't judge to be unreasonable." *Id.* Again, the Wisconsin Court of Appeals here neither acknowledged that the right to present a defense could trump state evidence rules nor made any attempt to balance the constitutional interests at stake, instead merely

deferring to the state evidentiary privilege.

Even if the state court had applied the proper legal standards, moreover, denial of Malinowski's claim would have been patently irrational for the reasons stated in *Davis*. *See* Section B, *supra*. The state court decision was not "one of several equally plausible outcomes." *Hall*, 106 F.3d at 748-49. Rather, that decision was, at best, seriously at tension with governing Supreme Court precedents, inadequately supported by the record, and arbitrary, thus mandating issuance of the writ despite the AEDPA amendments. *Id.* at 749.

The District Court's extensive reliance upon what the state trial court may or may not have done regarding a different issue not raised in Malinowski's habeas petition (R22:17-22; App. 18-23) is misplaced. First, as the District Court notes but then overlooks, "the relevant decision for purposes of this court's assessment is the decision of the last state court to rule on the merits of the petitioner's claim." (R22:16; App. 17), citing *Charlton v. Davis*, 439 F.3d 369, 374 (7th Cir. 2006). Thus if, as would have to be the case if the "unreasonable application" standard were to apply, the state Court of Appeals ruled on the merits of Malinowski's claim, then it is that Court's resolution of the claim that is at issue here, not the state trial court's. If, on the other hand, the Court of Appeals did not rule on the merits of the claim, then §2254(d)'s restrictions on habeas relief simply do not apply. *See* Section D,1, *supra*. If the Court of Appeals decision was not a ruling on the merits of his claim, then the AEDPA would not apply at all. On the other hand, if that decision was a ruling on the

merits, then its total failure to identify or apply the controlling constitutional standards necessarily would render it either contrary to or an unreasonable application of controlling Supreme Court precedent.

Second, the District Court's analysis simply does not make sense. The possibility that the trial court *might* have applied the proper standard applicable to a *different* legal issue at about the same time it denied Malinowski the right to call Bosman as a witness has no relevance to whether the state Court of Appeals reasonably applied a different legal standard to the issue raised here. Any minimal nexus between the trial court's analyses of the two issues is further diminished by the fact that the trial court's finding after *in camera* review of certain documents that they were not relevant to the defense was not even raised on the state appeal.[10]

CONCLUSION

For these reasons, Joseph M. Malinowski respectfully asks that the Court reverse the judgment below and grant the requested writ of habeas corpus.

Dated at Milwaukee, Wisconsin, November 13, 2006.

[10] Nor, contrary to the District Court's apparent belief (*see* R22:20-21; App. 21-22), is that finding at issue in Malinowski's habeas petition.

Respectfully submitted,

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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 principal 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 10,021 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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Robert R. Henak

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Items bound with brief:

Items bound in separate appendix:

CIRCUIT RULE 30(c) STATEMENT

The items required by Circuit Rule 30(a) have been bound with appellant's brief. Those items required by Circuit Rule 30(b) are contained in the separate appendix.

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Robert R. Henak

CIRCUIT RULE 31 STATEMENT

The materials contained in Mr. Malinowski's required short appendix and the separate appendix are not available in non-scanned PDF format that he has the technical capability to include in the digital copy of his appendices.

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Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2006, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant Joseph M. Malinowski and 10 hard copies of the Separate Appendix of Petitioner-Appellant Joseph M. Malinowski 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 the brief, one hard copy of the separate appendix, one copy of the brief on digital media, and one copy of the available portions of the separate appendix on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG Katherine Lloyd Tripp, P.O. Box 7857, Madison, WI 53707-7857.

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Robert R. Henak
State Bar No. 1016803