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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REPLY BRIEF OF PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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ARGUMENT

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

In her response, the Warden asserts that (1) the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to Malinowski's claim, requiring deference to the state Court of Appeals' decision, (2) Malinowski has failed to show that the state court decision was either contrary to or an unreasonable application of controlling Supreme Court authority, (3) there was no constitutional violation, and (4) any such violation was harmless.

The Warden is wrong. AEDPA does not apply where, as here, the state court

did not decide the federal constitutional issue presented on its merits. Malinowski's Brief at 30-33. 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, *see id.* at 20-23; (2) the error was not harmless, *id.* at 23-30, and (3) any adjudication to the contrary by the state court was both contrary to and an unreasonable application of controlling Supreme Court authority. *id.* at 34-39.

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

Malinowski's Brief at 20-23 demonstrated why the state courts' arbitrary and mechanistic application of a state rule of privilege to exclude reliable, unbiased and uncumulative 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 violated his due process right to present a defense. Malinowski there explained that, applying the same analysis used in *Davis v. Alaska*, 415 U.S. 308 (1974), the state's use of a witness while invoking that witness' exercise of a statutory privilege to conceal from the jury important evidence impeaching the witness' credibility violates the defendant's right to present a defense.

Here, as in *Davis*, "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. Here, as in *Davis*, the state could have protected the witness' interests in the privilege by not calling her as a witness. Here, as in *Davis*, therefore, elevating the state's interest over those of the defendant was constitutionally unacceptable. *Id*. at 320-21.

The Warden's attempt to distinguish *Davis* is superficial at best, focusing on minor, irrelevant differences between that case and this one, as well as inaccurate representations about Malinowski's case. Warden's Brief at 17-18. The Court in *Davis* rejected exactly the type of mechanistic application of state evidentiary rules at issue here. It did not matter to the Court's rationale that it was the defendant's right to present a defense through cross-examination rather than some other aspect of that right that was hindered by application of the state privilege. Rather, what mattered to the Court was that application of the state privilege excluded relevant, exculpatory evidence affecting the accuracy and truthfulness of the testimony of the state's star witness, and that any legitimate state interest in confidentiality could have been protected by other means instead of by undermining the defendant's right to present a defense. 415 U.S. at 317-21.

The Warden's conclusory assertion that "Malinowski, unlike the defendant in *Davis*, had other avenues open to him to pursue the ends he sought," Warden's Brief at 18, is simply untrue. Bosman's proposed testimony would have shown both his bad opinion of S.L.'s character for truthfulness and the fact that she 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 make those observations. Only he could provide the kind of reliable, unbiased information regarding S.L.'s character for dishonesty involving her interactions with authority figures and S.L.'s emotional difficulties in perceiving and relating the truth necessary to give the jury an accurate view of those matters. In other words, because S.L.'s dishonesty and emotional difficulties with the truth were neither undisputed nor fully established, Bosman's testimony was not cumulative. *See Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (evidence is not "cumulative" unless it "supports a fact established by existing evidence"), citing Black's Law Dictionary 577 (7th ed. 1999).

Rather than focus on *Davis* and admit that its principles undermine her argument, the Warden wastes much of her response arguing the importance of the counselor/patient or social worker/patient privilege, Warden's Brief at 21-23, a point that Malinowski concedes. *See* Malinowski Brief at 14. As demonstrated by *Davis*, however, the importance of the state's interest in protecting the privilege is irrelevant because that interest could have been protected by means other than concealing important impeachment evidence from the jury. 415 U.S. at 320-21.

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 v. Arkansas*, 483 U.S. 44 (1977); *Davis*, *supra*.

B. The Constitutional Violation Was Not Harmless

While the Warden chafes at the burden placed upon her to demonstrate that the constitutional error here was harmless, Warden's Brief at 24-25, the law is settled that it is the state (represented by the Warden here), and not the petitioner, who must bear the "risk of doubt" in a case such as this. *O'Heal v. McAninch*, 513 U.S. 432, 438 (1995); *see* Malinowski's Brief at 24-25.[1]

As demonstrated in Malinowski's Brief at 25-30, the violation of his right to present a defense was far from harmless. The Warden cannot evade that fact by spinning her view of the evidence and ignoring the conflicts in the state witnesses' stories. *See* Warden's Brief at 25-28. Resulting prejudice must be assessed in light of all the evidence, and not just that viewed most favorably to the state. It also must be assessed in light of the fact that, even without the benefit of Bosman's exculpatory evidence, the jury discredited enough of the complainant's allegations to acquit Malinowski on the sexual intercourse and bail-jumping charges (R7:Exh.V:68-71), and the state itself withdrew the charge of oral sex (R7:Exh.V:2). Contrary to the Warden's assumption, Warden's Brief at 25, 28, allegations by a witness whom the jury already has found to be incredible on other matters can hardly be described as "overwhelming evidence of guilt."

The Warden's harmless error argument, moreover, fails to account for the

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[1] The Warden does not dispute, and thus concedes, that the state Court of Appeals' failure to address the issue of resulting prejudice means that this Court owes the state court no deference under the AEDPA on this issue. *See, e.g.*, *Dixon v. Snyder*, 266 F.3d 693, 701, 702 (7th Cir. 2001).

constitutional violation here. But for that violation, S.L. either would have insisted on her privilege, such that any testimony or out-of-court statements by her would have been excluded, or she would have waived her privilege and testified, with her evidence subject to impeachment and possibly being discredited in the eyes of the jury. The Warden, however, simply assumes there would have been no effect at all.

The Warden also ignores the fact that there were two counts of conviction, and not just one. The Warden focuses solely on the charge of sexual contact on December 3, 2000, while ignoring the separate charge of repeated sexual assault of the same child. *See* Warden's Brief at 25-26. Even if the allegations of S.L.'s mother somehow provided either sufficient corroboration of S.L.'s claims regarding the incident on December 3 to overcome any possible impeachment effect of Bosman's testimony or a sufficient alternative basis for conviction to justify a finding of harmlessness on that count, no such corroboration exists on the "repeated sexual assault" count. Rather, that charge rests entirely on the allegations of S.L., the witness whose credibility would have been directly impeached or excluded but for the violation of Malinowski's right to present a defense, and the witness whose allegations on a different charge already were discredited by the jury even without Bosman's evidence.

Even if the denial of Malinowski's right to present a defense somehow could be deemed harmless with regard to the December 3, 2000, sexual contact charge, therefore, it cannot rationally be deemed harmless on the remaining charge. The

Warden effectively concedes as much, having failed even to argue the point. *United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (government's failure properly to argue harmlessness constitutes waiver).

C. The AEDPA Does Not Bar Relief

For the reasons stated in Malinowski's Brief at 30-39, the AEDPA does not bar him from obtaining relief here. Because the state Court of Appeals addressed and decided an issue of state evidentiary law and not Malinowski's constitutional claim, it did not decide his claim on the merits as required for application of the AEDPA restrictive review provisions. Moreover, even if the state court's decision could be read as holding that the exclusion of Bosman's testimony did not violate Malinowski's right to present a defense, he still is entitled to habeas relief because the state court's decision was both contrary to and an unreasonable application of controlling Supreme Court precedent. Nothing in the Warden's argument supports a different conclusion. Warden's Brief at 7-19.

1. The AEDPA Does Not Apply Here

Malinowski explained in his opening brief why the state Court of Appeals' discussion and decision on various issues of state evidence law did not constitute a decision on the merits of his constitutional claim. Malinowski's Brief at 30-33. Rather than seriously address that showing, the Warden merely cites to the same facts and then asserts in conclusory form that "rejection of Malinowski's constitutional claim" was "[a]rguably implicit" in the state court's decision. Warden's Brief at 9.

However, baldly asserting that an implication is "arguable" is different than proving that it exists in fact. The Warden's failure to make any effort to accomplish the latter is fatal to its assertion that the AEDPA applies here. *E.g.*, *Giovannetti*, *supra*.

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

The Warden's brief also fails to rebut Malinowski's showing that any decision on the merits of his constitutional claim was contrary to controlling Supreme Court authority. *See* Malinowski's Brief at 34-36. Like the District Court below, the Warden focuses on *factual* dissimilarities between the controlling authority and Malinowski's case, ignoring the fact that it was the *legal* standard applied by the state court that was contrary to that mandated by these authorities. Warden's Brief at 15-19.

The Supreme Court has held that one's right to present a defense cannot be denied based on rote application of state evidentiary rules. *E.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1977); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Yet, that is exactly what the Wisconsin Court of Appeals did here. Whether based on no constitutional standard at all or on a standard holding that the right to present a defense never is violated by the exclusion of evidence consistent with state evidentiary rules, the Wisconsin Court of Appeals' decision was directly contrary to controlling Supreme Court precedent. *See* Malinowski's Brief at 34-36.

Because the state Court of Appeals applied the wrong legal standard for

assessing Malinowski's constitutional claim, that Court's decision was contrary to controlling Supreme Court authority. *E.g.*, *Muth v. Frank*, 412 F.3d 808, 813 (7th Cir. 2005) (state court decision is "contrary to" federal law if the state court relied upon the wrong legal standard (citation omitted)).

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

It is difficult to comprehend how the state Court of Appeals' application of the controlling Supreme Court authority could be deemed reasonable, as argued by the Warden, Warden's Brief at 15-19, when that Court failed to acknowledge the existence of such authority, let alone the constitutional standards mandated by it. Merely applying state evidentiary standards as controlling without reference to or regard for contrary federal constitutional requirements cannot rationally be deemed a reasonable application of those constitutional standards. *Compare Dunlap v. Hepp*, 436 F.3d 739, 745 (7th Cir. 2006) (deeming "highly significant" Wisconsin court's recognition that rape shield law must yield if it would deprive defendant of constitutional rights). *See generally* Malinowski's Brief at 36-39.

CONCLUSION

For these reasons, as well as for those in his opening brief, Joseph M. Malinowski respectfully asks that the Court reverse the judgment below and grant the requested writ of habeas corpus.

Dated at Milwaukee, Wisconsin, December 21, 2006.

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 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 2,099 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 21st day of December, 2006, I caused 15 hard copies of the Reply Brief 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 and one copy of the brief 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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