UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Appeal No. 04-4247
(Case No. 00-C-1062 (E.D. Wis.))

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RUSSELL MARTIN,

Petitioner-Appellant,

v.

WILLIAM GROSSHANS, Administrator,
Division of Probation and Parole,

Respondent-Appellee.

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**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 Charles N. Clevert, 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, Russell Martin furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) Russell Martin

(2) Henak Law Office, S.C.
Shellow, Shellow & Glynn, S.C.(State Proceedings)
Eugene Pigatti (State Proceedings)

(3)(i) N/A

(3)(ii) N/A

Dated: _____

_____
Robert R. Henak

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# BRIEF OF PETITIONER-APPELLANT

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## JURISDICTIONAL STATEMENT

Russell Martin appeals from the final judgement entered by the district court on September 30, 2003, denying Martin's 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 Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§1291 & 2253.

On October, 14, 2003, Martin filed a timely motion for relief from the judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b). By Order entered June 14, 2004, the District Court denied relief from the judgment but ordered correction of a typographical error in its September 30, 2003 decision. The Court entered its Amended Decision and Order Denying Petitioner's Motion to Set Briefing Schedule,

Denying Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254, and Dismissing Case on June 14, 2004.

Martin filed his notice of appeal with the district court on July 14, 2004. By Order dated December 16, 2004, that court granted Martin a certificate of appealability on the issues raised in this brief.

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

This is a collateral attack on Mr. Martin's criminal conviction in Wisconsin state court. Mr. Martin has completed his prison and parole term, and is now serving a consecutive term of probation. His place of custody is 2735 Riverside Avenue, #1A, Jacksonville, FL 32202. His custodian is William Grosshans, Administrator, Wisconsin Division of Probation & Parole.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Martin was denied the effective assistance of counsel due to trial counsel's failure to:

a. object on proper grounds to the inflammatory and irrelevant testimony of Denise Watson Gilbreath regarding the "inappropriateness" of Martin's attempts to protect clergy members from false accusations of sexual misconduct;

b. object on proper grounds to the inflammatory and irrelevant testimony of Officer Charles Moranchek regarding Martin's exercise of his constitutional rights to counsel and to remain silent; and

c. request a mistrial based upon the prosecutor's inflammatory closing argument comparing Martin to Jeffrey Dahmer, Theodore Oswald, and convicted child molester, Eugene Maxey.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

In August, 1985, Russell Martin entered the Episcopalian Seminary known as Nashotah House for the purpose of obtaining his Master of Divinity Degree. Because Martin was married, he resided with his wife off campus in a small cottage. (R4:Exh.J:99).[1] After completing the three-year program at the Nashotah House Seminary, Martin underwent the ordination process and became an ordained priest in September, 1988 (*id.:*114). Martin then devoted the majority of his ministry to working with the youth of the parishes to which he was assigned in Texas, California and Florida (*id.*: 120-26).

In February, 1994, while Martin was working as the Canon for Youth at St. John's Cathedral in Jacksonville, Florida, he was informed by his Bishop that an accusation had been made against him claiming that he had sexually molested a youth while he had attended the Nashotah House Seminary. Specifically, Martin learned that Carl Strickland had claimed that, on one evening in either the fall of 1987 or the spring of 1988, Martin had performed three separate acts of oral sex on him. (R4:Exh.J:133-34). Two of these acts purportedly occurred inside Martin's home. Strickland claimed the third incident occurred shortly thereafter inside a car which

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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. ___."

was stopped in the Refectory parking lot. Strickland was 13 years old at the time of the alleged assaults. (R4:Exh.I:213-18).

Strickland first raised his claim of sexual molestation against Martin to Strickland's therapist, Gail Kaeman, around May, 1993 (R4:Exh.I:236; R4:Exh.J:26).[2] On June 14, 1994, the state filed a criminal complaint charging Martin with three counts of second degree sexual assault in violation of Wis. Stat. §940.225(2)(E) (1987-88).

Martin's case proceeded to trial before the Hon. J. Mac Davis in the Circuit Court for Waukesha County, Wisconsin on June 20, 1995 (R4:Exh.I). Strickland testified that the assaults took place (R4:Exh.I:212-20), and his mother testified that he began having behavioral problems at about the time of the alleged assaults (R4:Exh.I:117). Both Strickland and his mother disclaimed any financial motive in testifying against Martin. (R4:Exh.I:155, 156; R4:Exh.J:44-45).

Also testifying for the state were Denise Watson Gilbreath, a Florida attorney, and Officer Charles Moranchek. Gilbreath testified regarding what she labeled Martin's "inappropriate" emphasis, while developing a parish policy in 1993 for dealing with allegations of sexual abuse, on protecting clergy members from false allegations. (R4:Exh.I:157-67). Officer Moranchek's testimony primarily was limited to describing his meeting with Martin and his attorney in March, 1994, and Martin's

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[2] Ms. Kaeman was the last of several counselors Strickland saw in 1992 and 1993. In fact, Strickland initially sought out counseling only after becoming involved in legal difficulties of his own. Those legal matters were resolved contingent upon his completing these alcohol programs and counseling sessions. (R4:Exh.J:18-24).

refusal, on advice of counsel, to discuss the allegations against him (R4:Exh.J:50-66). Although she had never met Strickland, therapist Ramona Powers testified in general as to why a sexual assault victim might delay reporting (R4:Exh.J:68-91).

Martin testified on his own behalf that the alleged assaults never occurred (R4:Exh.J:98,115), and a number of witnesses testified to his excellent character (R4:Exh.J:203-89, 297-320). In rebuttal, the state called Rev. Herbert Hermann and Eugene Maxey to testify that at least one child molester had passed through Nashotah House screening procedures intended to weed out potential child molesters (R4:Exh.J:355-63, 365-70). Maxey previously had pled guilty to molesting Strickland, although the jury was told only that he had sexual contact with minors on many occasions, both while attending Nashotah House and afterwards.

During her closing argument, the prosecutor sought to discount the testimony of Martin's character witnesses, arguing that even notorious criminals Jeffrey Dahmer and Theodore Oswald had character witnesses (R4:Exh.J:409-10). She also argued that "you don't need to compare Eugene Maxey with this person," meaning the defendant (*id.*:442).

After lengthy deliberations, during which the jury twice asked about the consequences of being unable to agree on a verdict (R4:Exh.K:2-8), the jury returned a verdict of guilty on all three counts on June 22, 1995 (*id.*:8-9).

On August 7, 1995, the Circuit Court, Hon. J. Mac Davis, presiding, sentenced Martin to a term of four years imprisonment on count one. On the two remaining

counts, the Court placed Martin on 10 years probation in lieu of stayed, consecutive terms of eight years on each count. The Court entered judgment on August 8, 1995. (R4:Exh.A).

The Court of Appeals affirmed on direct appeal by decision dated May 7, 1997, *State v. Russell Martin*, 211 Wis.2d 889, 568 N.W.2d 651, 1997 WL 225489 (unpublished) (R1:Attach.; App. 115-21), and, on September 2, 1997, the Wisconsin Supreme Court denied review, 212 Wis.2d 688, 569 N.W.2d 589 (1997).

Martin was represented at trial and on direct appeal by the same attorney, Eugene Pigatti (R4:Exh.M:4). Mr. Pigatti subsequently was disbarred for reasons unrelated to this case. *See Disciplinary Proceedings Against Pigatti*, 207 Wis.2d 41, 558 N.W.2d 626 (1997).

On or about November 18, 1998, Martin filed a motion for post-conviction relief pursuant to Wis. Stat. §974.06 on the grounds that Mr. Pigatti had provided ineffective assistance of counsel at trial and in post-conviction proceedings. That motion cited five specific acts or omissions constituting ineffective assistance:

1. Attorney Pigatti's failure to object on proper grounds to Ms. Gilbreath's testimony to the effect that Mr. Martin's concern that clergy members not be wrongly accused of sexual misconduct was "inappropriate" and that he presented his position in that regard in a manner which she deemed "inappropriately aggressive."

2. Attorney Pigatti's failure to object on proper grounds to Officer Moranchek's testimony that Mr. Martin asserted his right to counsel and to remain silent soon after he was informed of the allegations against him.

3. Attorney Pigatti's failure to object on proper grounds to the testimony

of Eugene Maxey. (Mr. Martin withdrew this claim at the hearing on January 4, 1999 (R4:Exh.L:54-55)).

4. Attorney Pigatti's failure to request a mistrial based on the prosecutor's inflammatory and improper argument comparing Mr. Martin to Jeffrey Dahmer, Theodore Oswald, and Eugene Maxey.

5. Attorney Pigatti's failure, as post-conviction counsel, to request a new trial on the grounds of newly-discovered evidence that, despite the complainant's disavowal of any financial motive in making his claims against Mr. Martin, he subsequently sought approximately $300,000 in restitution at the time of sentencing.

(R5:Exh.1). In the affidavit attached to that motion, Mr. Pigatti admitted that the identified failures were not intentional on his part, and that he had no strategic or tactical reason for not identifying the errors and preserving the objections to them on behalf of his client (R5:Exh.1:20-22).

The Circuit Court, Hon. Donald J. Hassin, Jr., presiding, held an evidentiary hearing on Martin's post-conviction motions on January 4, 1999 (R4:Exh.L). Mr. Pigatti reaffirmed his affidavit submitted with the motion (R4:Exh.L:7-9; *see* R5:Exh.1:20-22). Pigatti agreed that the testimony of Gilbreath and Moranchek was irrelevant and should have been excluded, and that he thought so at trial. He had no strategic or tactical reason for not properly objecting to that evidence. (R5:Exh.1:21; R4:Exh.L:12-14, 16).

Regarding the state's improper closing argument, Pigatti did not object at the time nor request a curative instruction because he believed then that such actions would merely emphasize the unfair prejudice from the state's inflammatory statements (R4:Exh.L:20-21; R5:Exh.1:21). He did not think to request a mistrial afterwards

outside of the jury's presence, and had no strategic or tactical reason for not requesting a mistrial at that point. (R5:Exh.1:21).

Regarding the complainant's post-trial request for over $300,000 in restitution, despite his trial testimony and the state's argument disclaiming any financial motive for him to lie, Mr. Pigatti simply did not recognize that such information would constitute newly discovered evidence supporting the grant of a new trial in this case. He had no strategic or tactical reason for not making a newly discovered evidence claim either on a post-conviction motion or on appeal. (R5:Exh.1:21-22).

Following additional briefing (R5:Exh.2; R5:Exh.3; R5:Exh.4), the Circuit Court orally denied the motion on February 5, 1999 (R4:Exh.M:2-18), and entered a written order denying the motion (R5:Exh.5).

By decision dated March 1, 2000, the Wisconsin Court of Appeals affirmed. That court held that Gilbreath's testimony was admissible to show "consciousness of guilt," that the testimony of Officer Moranchek and argument by the prosecutor were improper, but that Martin was not prejudiced by these errors, and that the newly-discovered evidence did not create a reasonable probability of a different result. (R4:Exh.E; App. 106-14).

Martin timely petitioned the Wisconsin Supreme Court for review (R4:Exh.F), but that Court denied review by Order dated July 27, 2000 (R4:Exh.H; App. 105).

On August 1, 2000, Martin filed his petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the District Court for the Eastern District of Wisconsin, raising

the three issues raised on this appeal (R1).

By Order dated October 2, 2000, the district court, Hon. Charles N. Clevert, directed the respondent to file an answer (R2). The state filed its answer and limited portions of the state court record on October 26, 2000 (R4).

On November 5, 2001, Martin filed his memorandum in support of his habeas petition (R6), and moved to supplement the record to include additional portions of the record necessary to a fair determination of the issues raised (R5). The district court granted that motion on November 15, 2001 (R8).

On August 13, 2002, counsel for Martin asked that the district court schedule further briefing on the petition (R9). The district court did not respond and, on June 5, 2003, Martin filed a motion to set a briefing schedule (R10).

By Order dated September 30, 2003, the district court denied Martin's request for a briefing schedule and denied Martin's habeas petition (R12; App. 3-22). The district court entered that order and a judgment dismissing the case on October 1, 2003 (R13; App. 1-2).

On October 14, 2003, Martin filed his motion for relief from the judgment (R14). Martin there objected that, in holding that Gilbreath's testimony regarding Martin could be construed as showing his "consciousness of guilt," the court erroneously believed Martin knew of Strickland's allegations against him at the time he argued for what Gilbreath deemed "inappropriate" protections for falsely-accused clergy. (R14).

While acknowledging that the record reflected that Martin did not learn of the charges until long after his efforts on the part of those falsely accused, the district court nonetheless denied Martin's motion on June 14, 2004 (entered June 15, 2004) (R19; App. 23-25). That court did, however, enter an Amended Decision & Order Denying Petitioner's Motion to Set Briefing Schedule, Denying Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. 2254, and Dismissing Case, correcting what it stated was the "word-processing mistake" identified in Martin's motion (R20; App. 26-46; *see* R19:1; App. 23).

Martin filed his notice of appeal to this Court and his docketing statement on July 14, 2004 (R21; R22). By Order dated December 16, 2004, the district court granted Martin a certificate of appealability on the three issues raised in this brief. (R25; App. 101-04).

## SUMMARY OF ARGUMENT

The District Court erred in concluding that Martin is not entitled to habeas relief due to the trial counsel's failure properly to object to irrelevant and highly prejudicial evidence and arguments to the jury. The state court decisions on these points were not merely wrong, but unreasonably so. Indeed, the state court's conclusions that trial counsel's errors did not prejudice Martin's defense are directly contrary to controlling Supreme Court authority, requiring Martin to show not just a reasonable probability of a different result but for counsel's errors but that there in fact would have been a different result.

Regarding trial counsel's failure properly to object to Ms. Gilbreath's irrelevant and inflammatory that Martin demonstrated "inappropriate" concern for protecting falsely accused priests, the state court of appeals held that such concern could be viewed as showing Martin's "consciousness of guilt," and the district court agreed. With all due respect to those courts, that conclusion is wholly baseless and irrational.

Regarding counsel's failure to object to the state's tactics of calling an officer to testify regarding Martin's exercise of his right to counsel and her comparing Martin to infamous killers in summation, the state court of appeals agreed that these tactics were objectionable but concluded that Martin was not prejudiced as a result. That court, however, applied the wrong standard for assessing prejudice and its conclusion was unreasonable in any event given the highly prejudicial nature of the errors and the weakness of the state's case. That court also failed to assess the cumulative prejudice of all three errors.

Because many of the sub-issues on this appeal either were not decided by the state court of appeals (i.e., resulting prejudice regarding Gilbreath), were decided in Martin's favor (i.e., deficient performance on the Moranchek and summation claims), or were decided based on a legal standard contrary to that required by controlling Supreme Court authority (i.e., resulting prejudice), most of the state court's decision is not entitled to deference even under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The one portion which that court did decide against Martin

on the merits without directly contravening Supreme Court authority (i.e., that Martin's concerns for falsely accused priests shows "consciousness of guilt") is so irrational as to justify habeas relief even under the AEDPA.

## STANDARD OF REVIEW

Whether trial counsel's omissions denied the defendant the right to the effective assistance of counsel is an issue of law reviewed *de novo*. *E.g.*, *Hall v. United States*, 371 F.3d 969, 973 (7th Cir.2004).

The question of whether a constitutional violation mandates or permits habeas relief is controlled by 28 U.S.C. §2254(d). As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), §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).

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).

The district court's application of those standards is reviewed *de novo*. *Washington v. Smith*, 219 F.3d 620, 626 (7th Cir. 2000) (citation omitted).

## ARGUMENT

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

Russell Martin is being held in violation of the Constitution of the United States because his conviction in Wisconsin state court resulted from the ineffective assistance of trial counsel.[3] Specifically, Martin was denied the effective assistance of trial counsel due to counsel's failure to:

a. object on proper grounds to the inflammatory and irrelevant testimony of Denise Watson Gilbreath regarding the "inappropriateness" of Martin's attempts to protect clergy members from false accusations of sexual misconduct;

b. object on proper grounds to the inflammatory and irrelevant testimony of Officer Charles Moranchek regarding Martin's exercise of his constitutional rights to counsel and to remain silent; and

c. request a mistrial based upon the prosecutor's inflammatory closing argument comparing Martin to Jeffrey Dahmer, Theodore Oswald, and convicted child molester, Eugene Maxey.

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[3] Although Martin has been released from prison, he remains on probation as a result of the convictions in this matter. *See Jones v. Cunningham*, 371 U.S. 236 (1963) (parole status constitutes "custody" for purposes of federal habeas statute); *Hahn v. Burke*, 430 F.2d 100, 102 (7th Cir. 1970) (same; probation).

Even under the restrictive requirements of the Antiterrorism and Effective Death Penalty Act of 1996, habeas relief is appropriate where, as here the defendant was denied the effective assistance of counsel at trial and the state court decisions to the contrary are both contrary to controlling federal law and palpably unreasonable. *E.g.*, *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997).

**A. Standard of Review**

The substantive legal standards are settled. A defendant alleging ineffective assistance first must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). A defendant thus must rebut the presumption of attorney competence "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), *citing Strickland*, 466 U.S. at 688-89. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*., *citing Strickland*, 466 U.S. at 689. Moreover, in analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see Kimmelman*, 477 U.S. at 384.

It is not necessary, of course, to demonstrate total incompetence of counsel. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see*

*United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel. . . may in a particular case be violated by even an isolated error. . . if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight or inattention rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001).

Second, a defendant must show that counsel's deficient performance prejudiced his or her defense. A counsel's performance prejudices the defense when the "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The defendant is not required, however, to show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693; *see Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, the question on review is "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Reasonable probability," under this standard, is defined as "probability sufficient to undermine confidence in the outcome." *Id.* If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000).

In assessing resulting prejudice, the Court must consider the totality of the

circumstances. *Strickland*, 466 U.S. at 695. The Court thus must assess the cumulative effect of *all* errors, and may not merely review the effect of each in isolation. *E.g.*, *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000). Prejudice does not depend on whether the particular fact-finder at the original trial would have decided the matter differently but for counsel's errors, but whether the errors could have affected the decision of a reasonable trier of fact. *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985); *see Strickland*, 466 U.S. at 695.

Both prongs under *Strickland* are reviewed *de novo*. *E.g.*, *Hall v. United States*, 371 F.3d 969, 973 (7th Cir.2004).

Demonstrating a prejudicial constitutional violation is not alone sufficient for habeas relief, however. 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 . . ..

28 U.S.C. §2254(d)(1).

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

> A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that reached by the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) [footnote omitted]. 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." Id. at 407; see also *Jackson v. Miller*, No. 98-3736 2001 WL 884814 (7th Cir. Aug. 8, 2001). We review a state court decision de novo to determine whether it was "contrary to" Supreme Court precedent; however, we defer to reasonable state court decisions. *See Ouska v. Cahill-Masching*, 246 F.3d 1036, 1044 (7th Cir.2001).

*Dixon v. Snyder*, 266 F.3d 693, 700 (7th Cir. 2001).

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, *see Thompson v. Keohane*, ___ U.S. ___, ___-___, 116 S.Ct. 457, 464-65, 133 L.Ed.2d 383 (1995); cf. *Ornelas v. United States*, ___ U.S. ___, ___-___, 116 S.Ct. 1657, 1661-62, 134 L.Ed.2d 911 (1996) (requiring *de novo* review of determinations of reasonable suspicion and probable cause for search warrants in federal cases). 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.

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. The state court is entitled to no deference regarding matters it has not decided on the merits. *Dixon*, 266 F.3d at 701, 702; *Liegakos*, 106 F.3d at 1385.

Because different standards of review apply to different aspects of this appeal under the AEDPA, Martin provides the following table to assist the Court in keeping track of which standard applies to which aspect:

| **Claim** | **Prong** | **State Court Action** | **Standard of Review** |
|---|---|---|---|
| Ineffectiveness re Gilbreath | Deficient Performance | Decided on merits against Martin | AEDPA applies - Unreasonable application standard |
| | Resulting Prejudice | Not decided | AEDPA does not apply - *de novo* |

| | | | |
|---|---|---|---|
| Ineffectiveness re Moranchek | Deficient Performance | Not decided | AEDPA does not apply - *de novo* |
| | Resulting Prejudice | Decided on merits against Martin | AEDPA applies - contrary to or unreasonable application standard |
| Ineffectiveness re state's closing | Deficient Performance | Not decided | AEDPA does not apply - *de novo* |
| | Resulting Prejudice | Decided on merits against Martin | AEDPA applies - contrary to or unreasonable application standard |

Applying these standards, the state courts' finding that Martin's counsel provided effective assistance of counsel was both contrary to established federal law and "involved an unreasonable application of clearly established Federal law" as determined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The state court decision on Martin's ineffectiveness claims 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.

### B. The State Court Assessment of Resulting Prejudice Is Contrary to Clearly Established Federal Law as Determined by the Supreme Court

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams v. Taylor*, 529 U.S. 362, 391 (2000). While purporting to apply the Supreme Court's *Strickland* standard for ineffectiveness, the Wisconsin Court of Appeals in fact did not. Specifically, in assessing whether Martin was prejudiced by the claimed errors, the Wisconsin Court of Appeals placed the burden on Martin to prove that he would have been acquitted absent the alleged errors of counsel. According to that court, "the defendant must show that, but for defense counsel's unprofessional errors, the result of the proceedings would have been different." (R4:Exh.E:3; App. 108).[4]

The state court's decision thus was directly contrary to controlling Supreme Court precedent. The Supreme Court in *Strickland*, and more recently in *Williams*, defined the proper question when assessing resulting prejudice as whether there would have been a "reasonable probability of a different result" but for counsel's errors. *Williams*, 529 U.S. at 391; *Strickland*, 466 U.S. at 694. Contrary to the state court's decision, therefore, the defendant is not required under *Strickland* to show "that counsel's deficient conduct more likely than not altered the outcome of the

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[4] The district court notes that, although the standard for resulting prejudice stated by the state court here is contrary to controlling Supreme Court authority, the case cited for that improper standard actually applied the correct standard (R20:11-12; App. 36-37). It is not apparent, however, how the state court's misinterpretation of prior authority in this case alters the fact that the standard it stated and applied is directly contrary to clearly established Federal law as determined by the Supreme Court.

case." *Strickland*, 466 U.S. at 693.

In light of *Williams*, the Seventh Circuit has explained the "contrary to" provision of §2254(d)(1) as follows:

> In order for the state court's decision to be considered "contrary to . . . clearly established Federal law as established by the United States Supreme Court," that state court's decision must be "substantially different from relevant [Supreme Court] precedent." Id. at 1519. Thus, under the "contrary to" clause of sec. 2254(d)(1), we could grant a writ of habeas corpus in what would seem to be a narrow range of cases where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result. Such decisions would be "contrary to" clearly established federal law within the meaning of sec. 2254(d)(1).

*Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000).

Because the state Court's decision on the Moranchek and closing argument issues in this case applied a standard for prejudice which contradicts the Supreme Court's holdings in *Strickland* and *Williams*, that decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court . . .." Because application of the proper standard establishes violation of Martin's right to the effective assistance of counsel, *see infra*, habeas relief is appropriate. *See, e.g.*, *Williams*, 529 U.S. at 391-95 (state court decision requiring more than "reasonable probability of a different result" to establish prejudice was "contrary to" *Strickland*); *Washington*, 219 F.3d at 632-33 (Wisconsin court's application of improper prejudice standard was contrary to *Strickland*; application of proper standard mandated habeas relief).

### C. The State Court's Decision Is An Unreasonable Application of Controlling Supreme Court Precedent

Russell Martin was denied the effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. The specific instances of ineffectiveness concern Mr. Pigatti's (1) failure to seek exclusion, by *in limine* motion or proper objection, of the inflammatory and irrelevant testimony of Ms. Gilbreath; (2) failure to seek exclusion, by *in limine* motion or proper objection, of the inflammatory and irrelevant testimony of Officer Moranchek, and (3) failure to request a mistrial based on the prosecutor's inflammatory and improper argument comparing Martin to Jeffrey Dahmer, Theodore Oswald, and Eugene Maxey.

As already noted, the *Strickland* standards qualify as "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams,* 529 U.S. at 391. For the reasons which follow, the state court's determination to the contrary was an unreasonable application of those standards.

#### 1. Trial counsel's performance was deficient

##### a. Denise Watson Gilbreath

Denise Watson Gilbreath testified on behalf of the state that she was an attorney handling, among other things, "child sexual abuse type issues" and that she previously had been a prosecutor specializing in child sexual abuse cases (R4:Exh.I:157-58). She was a vestry person in the parish in Jacksonville, Florida

where Martin was Canon (*id.*:159-60). She stated that Martin approached her in 1993 to set up a policy dealing with allegations of sexual misconduct in the parish (*id.*:160-61). She testified that Martin strongly disagreed with the proposed policy she developed, asserting that they had to be careful that clergy members are not wrongly accused (*id.*:163-64). She was permitted to testify that this was an inappropriate reaction and that Martin became very agitated (*id.*:164-66), and that she told the investigating officer, Off. Charles Moranchek, that Martin was "inappropriately aggressive" about his position on the policy (*id.*:167).

This testimony was highly inflammatory and had no possible relevance to the allegations against Martin. The only possible use of such evidence in this case was to insinuate that Martin's reaction that something should be done to protect clergy members from false allegations of sexual misconduct, a response deemed "inappropriate" by an attorney experienced in the prosecution of child sex crimes, somehow reflects a guilty conscience or bad character on his part. Based upon the state's response to Martin's post-conviction motion (R5:Exh.2:4-6) and the prosecutor's statements at the hearing on that motion (R4:Exh.L:50), that was indeed the purpose for the evidence.

Contrary to the apparent belief of the state, however, there is no legitimate or rational correlation between an individual's belief that people should be protected from false accusations and his commission of a sex offense on a teenager some 6 years previously, even when that belief is forcefully asserted and disagreed with by

an ex-prosecutor. Belief in due process does not evidence a guilty conscience, so the evidence was irrelevant and inadmissible. Wis. Stat. (Rules) 904.01 & 904.02. To the extent the evidence was introduced to suggest a bad character of the type who would commit a sex offense against a child, moreover, it plainly was inadmissible under Wis. Stat. (Rule) 904.04(1)(a). Finally, even if there was some possible relevance to the evidence, the minuscule probative value of the evidence was far outweighed by the unfair prejudice resulting from its admission. Wis. Stat. (Rule) 904.03.

Mr. Pigatti attempted to exclude the evidence. His objections based on hearsay and lack of foundation grounds were denied (R4:Exh.I:164-65). However, Pigatti never challenged Gilbreath's testimony, at trial or by *in limine* motion, for undue prejudice under Rule 904.03 or for lack of relevance, or under Rule 904.04(1)(a), despite his possession before trial of a police report reflecting similarly irrelevant and inflammatory statements by Ms. Gilbreath.

At the evidentiary hearing on Martin's post-conviction motion, Mr. Pigatti reaffirmed the sworn statements in his affidavit attached to Martin's motion to the effect that these failures on his part were not intentional and that he had no tactical or strategic reason for not making proper objections or motions on these matters (R4:Exh.L:7-9; R5:Exh.1:21). Specifically regarding Ms. Gilbreath, Pigatti also testified that his objective was to keep her from testifying at all in the case because he believed her testimony was neither proper nor relevant, and that it likely would

have a prejudicial effect on the jury (R4:Exh.L:12-13).

As conceded by Mr. Pigatti, therefore, his failure to object on proper grounds was due to his oversight, not any tactical or strategic reason. His failure to object on these grounds thus was deficient performance. *E.g.*, *Wiggins*, 539 U.S. at 534; *Dixon*, 266 F.3d at 703 (failure to take proper actions due to oversight or ignorance was deficient performance).

It simply is not reasonable to suggest, as did the Wisconsin Court of Appeals and the district court below, that this evidence was relevant to showing "consciousness of guilt" (R4:Exh.E:4-5; R20:12; App. 37, 109-10). Evidence is relevant only if it tends to make some fact of consequence to the action more probable or less probable than it would be without the evidence. Wis. Stat. §904.01. Nothing about Ms. Gilbreath's testimony rationally or legitimately makes Martin's guilt or innocence any more or less probable.

The Wisconsin Supreme Court has recognized that there are two facets of relevance:

> The first consideration in assessing relevance is whether the . . . evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the . . . evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

*State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30, 32-33 (1998).

As a general matter, evidence which in fact shows a consciousness of guilt

would satisfy the first prong of this analysis. However, in the absence of some demonstrable nexus between the charged offense and the act claimed to evidence consciousness of guilt, the second prong is not met. *See also Leary v. United States*, 395 U.S. 6, 36 (1969) (inference is "irrational" unless presumed fact more likely than not given proven fact). Relevance of such evidence thus "depends upon its nearness in time, place, and circumstances to the alleged crime." *Sonnenberg v. State*, 117 Wis.2d 159, 344 N.W.2d 95, 101 (1984); *see State v. Amos*, 153 Wis.2d 257, 450 N.W.2d 503, 508-09 (Ct. App. 1989).

No such nexus exists in this case. Martin's actions, as testified to by Ms. Gilbreath, were neither near in time nor near in place to the offenses alleged here. Those acts took place 6 years and half a continent away from the supposed sexual assault.

Nor is there any nearness of circumstance. Unlike the acts which have been found sufficient to support an inference of consciousness of guilt, Martin's advocacy for due process protections at a particular parish in Florida could have had no possible effect on the ability of Wisconsin to discover or prosecute these charges. Acts which are admissible to prove consciousness of guilt, however, are those which are intended to obstruct justice or avoid punishment in a given case. *State v. Neuser*, 191 Wis.2d 131, 528 N.W.2d 49, 54-55 (Ct. App. 1995) ("'It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal

charge'" (citation omitted)). *See, e.g.*, *State v. Bettinger*, 100 Wis.2d 691, 303 N.W.2d 585, 588-89 (bribery of witness), *amended* 100 Wis.2d 691, 305 N.W.2d 57 (1981); *Bowie v. State*, 85 Wis.2d 549, 271 N.W.2d 110, 112 (1978) (threats against witness); *Peters v. State*, 70 Wis.2d 22, 233 N.W.2d 420, 425 (1975) (providing false alibi to police);[5] *State v. Bauer*, 2000 WI App 206, ¶¶6-7, 238 Wis.2d 687, 617 N.W.2d 902 (solicitation to kill witness); *State v. Miller*, 231 Wis.2d 447, 605 N.W.2d 567 (Ct. App. 1999) (flight); *State v. Mallick*, 210 Wis.2d 427, 565 N.W.2d 245 (Ct. App. 1997) (refusal to perform field sobriety tests); *State v. Hubanks*, 173 Wis.2d 1, 496 N.W.2d 96, 102-03 (Ct. App. 1992) (refusal to give court-ordered voice sample); *Amos*, 450 N.W.2d at 508-09 (suborning perjury). Other examples include escape, suppression of evidence, and failure to respond to accusatory statements when not in police custody. *Mallick*, 565 N.W.2d at 246-47, *quoting People v. Ellis*, 421 P.2d 393, 397-98 (Cal. 1966).

The evidence here thus simply was not relevant on a "consciousness of guilt" theory. *See also* 2 *Weinstein's Federal Evidence* §401.08[4] at 401-61 (2d ed. 2004) ("Where there is no showing in the record that the behavior in question occurred out of bad faith, no negative inference may be drawn"), citing *S.C. Johnson & Son v. Louisville & Nashville R.R. Co.*, 695 F.2d 253, 258-259 (7th Cir. 1982) (nothing in record to support negative inferences from destruction by plaintiff's specialist of his handwritten notes, specialist testified that everything in handwritten notes was typed

[5] *Peters* was disapproved on other grounds in *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752, 757 (1990).

in memorandum which was produced and no one but he could read his handwriting). Counsel can find no decision of the Wisconsin appellate courts, other than that in Martin's case, which has so distorted the concept of "consciousness of guilt."

This Court's decision in *United States v. Jackson*, 572 F.2d 636 (7th Cir. 1978), is instructive here. The Court there held that, given the combination of a substantial lapse of time since the alleged offense (3½ months) and the defendant's lack of knowledge he was being sought for the offense, the resulting lack of probative value renders admission of evidence of his flight from police plain error. The time lapse here was more than 18 times that in *Jackson*, and Martin similarly was without knowledge he was being sought for any offense at the time he sought legal protections for falsely-accused priests. Martin's argument is even stronger than Jackson's, however, because, while flight could have permitted Jackson to avoid punishment, nothing about Martin's promotion of a policy to protect priests from false accusations in a parish in Florida could have interfered with Wisconsin's prosecution of him in this case.

The Wisconsin Court of Appeals' determination that the evidence was admissible on this ground, and that Mr. Pigatti's failure to object on proper grounds accordingly was not deficient, thus fails any rational test of reasonableness.

**b. Officer Charles Moranchek**

Officer Moranchek testified that he traveled to Florida to meet with Martin and his attorney in March, 1994. He testified that Martin's attorney told him beforehand

that the meeting would be limited to biographical questions, with no questions about the specific allegations. He also testified to Martin's compliance with this limitation and his failure to respond when Moranchek described the allegations. (R4:Exh.J:50-66).

Once again, there was no legitimate relevance to this evidence, and neither the state nor the Wisconsin Court of Appeals claimed there was (R4:Exh.C:9-11; R4:Exh.E:5-6; App. 110-11). The fact that a police officer traveled to Florida to inform Martin of the charges can have no tendency to make Martin's guilt of the charged offense any more probable than it would be without the evidence. *See* Wis. Stat. (Rule) 904.01 (defining relevant evidence). Nor can the facts that Martin was represented by counsel at the time or that he declined, on advice of counsel, to discuss the allegations with the officer have any legitimate relevance. *See, e.g.*, Wis. Stat. §905.13 (comment or inference from claim of privilege barred).

The exercise of one's constitutional rights is not legitimate evidence of guilt. *See, e.g.*, *Doyle v. Ohio*, 426 U.S. 610 (1976) (post-*Miranda* silence may not be used as evidence of guilt or for impeachment); *Griffin v. California*, 380 U.S. 609 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"); *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (invocation of right to attorney and to silence cannot be used to impeach the defendant or to suggest consciousness of guilt; reversible despite "curative" instruction); *Sizemore v. Fletcher*, 921 F.2d 667

(6th Cir. 1990) (defendant's meeting with attorney, even shortly after incident giving rise to criminal charge, not proper evidence of guilt; habeas relief granted). To the contrary, the only possible purpose of this evidence was to prejudice the jury by insinuating that Martin likely was guilty because he chose to exercise his rights to an attorney and to remain silent.

Mr. Pigatti, however, made no objection on the grounds that such evidence was irrelevant or unduly prejudicial, or that it violated Martin's right to counsel or right to remain silent by placing a burden on his exercise of those rights. Nor did he make any *in limine* motion or request for an offer of proof on these grounds, despite Mr. Pigatti's possession of a police report describing Off. Moranchek's conversation with Martin and his attorney. No curative instruction was requested or given.

Once again, Pigatti at the post-conviction motion hearing reaffirmed his sworn statement that his failure to act was not intentional and that he had no tactical or strategic reason for not making proper objections or motions to exclude Moranchek's improper testimony (R4:Exh.L:7-9; R5:Exh.1:21). He testified that his intent in cross-examination was to either discredit the inferences the state wished to draw from the officer's testimony or to minimize the importance of that testimony. (R4:Exh.L:13-14, 16).

Because the Wisconsin Court of Appeals did not rule against Martin on this point, no deference is owed that court. *E.g.*, *Dixon*, 266 F.3d at 701, 702. Because the evidence was neither relevant nor constitutionally permissible, Pigatti's failure to

recognize that fact and properly object was deficient performance. *See Wiggins*, 539 U.S. at 534; *Dixon*, 266 F.3d at 703.

**c. State's closing**

During her closing argument, the prosecutor sought to discount the evidence of Martin's good character, arguing that even Jeffrey Dahmer and Theodore Oswald had character witnesses:

> Sexual abusers come in all shapes and sizes. Like I said, you can't pick them out and sometimes people don't know the other side of a person. I mean, even Jeffrey Dahmer had character witnesses, you know. They talked to people about his case and there were a lot of people that said I don't know, pretty quiet guy, seems to be a nice guy. You know, people living in the apartment building with him where he's boiling heads, they thought he was okay. Theodore Oswald had character witnesses. He executed a police officer. . . .

(R4:Exh.J:409-10). She also argued, in a "don't think about the pink elephant in the corner" manner, that "you don't need to compare Eugene Maxey with this person," meaning the defendant (*id.*:442).

The Court of Appeals correctly concluded that this argument was improper (R4:Exh.E:7; App. 112). Prosecutors may, of course, "make arguments reasonably inferred from the evidence presented." *United States v. Vargas*, 583 F.2d 380, 385 (7th Cir. 1978) (citations omitted); *see*, *e.g.*, *Embry v. State*, 46 Wis.2d 151, 174 N.W.2d 521, 526 (1970). Yet, "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). She has an obligation to do justice.

It is thus improper for a prosecutor to engage in the type of name-calling

evidenced in this case, name-calling designed to evoke an emotional response and thus encourage the jury to come to a verdict on some basis other than the facts before it. *See, e.g.*, *Stell v. State*, 711 S.W.2d 746, 748 (Tex. App. 1986) (argument that Lee Harvey Oswald also had neighbors willing to testify he was just a "good old boy" held to be "highly improper and error"); *Lee v. State*, 97 S.W.2d 697 (Tex. Crim. App. 1936) (prosecutor's comparison of defendant to Clyde Barrows held error; Barrow's "criminal career should not be used as a vehicle upon which to convey the appellant to the penitentiary"); *Rehm v. State*, 78 S.W.2d 983 (Tex. Crim. App. 1935) (prosecutor compared murder defendant to Barrows and Dillinger; reversible error).

The prosecutor's attempts to immunize her inflammatory statements from review are of no avail. *See*, *e.g.*, *Jacobs v. State*, 101 Nev. 356, 705 P.2d 130, 132 (1985) (reversing a murder conviction in part because of the prosecutor's statement in summation that he "'will not tell you to put yourselves in Mrs. Jacobs' position looking down the barrels of the shotgun, because that would be improper,'" despite "the prosecutor's resourceful disavowal after the fact of any intention to make an improper argument").

Mr. Pigatti did not object to these inflammatory statements, however, nor did he move for a mistrial on these grounds as required by *State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679, 692 (Ct. App. 1985) (failure to object to improper prosecutorial argument and move for mistrial on those grounds waives issue on appeal).

Martin does not challenge counsel's decision not to object to the improper

argument. Pigatti testified that he noted the improper argument but intentionally chose not to object before the jury so as not to emphasize the resulting prejudice (R5:Exh.1:21 (Affidavit of Eugene Pigatti); R4:Exh.L:20-21). Where, as here, the prosecutor's misconduct has placed defense counsel in the Catch-22 of objecting, and thereby emphasizing exactly the inference sought by the state, or not objecting, and hoping the jury will be able to ignore the state's argument, counsel's decision not to object cannot be deemed unreasonable.

This concession does not resolve the prosecutorial misconduct issue, however. Ineffective assistance of counsel is not limited to cases of unreasonable attorney conduct. The Sixth Amendment right to counsel also protects against state-imposed burdens upon the ability of otherwise competent counsel effectively to represent the defendant. *E.g.*, *United States v. Cronic,* 466 U.S. 648 (1984).

While trial counsel's decision not to object to the prosecutor's misconduct before the jury was reasonable, it was the *state* which improperly placed him in that dilemma in the first place. Martin was entitled to a fair trial, free from inflammatory comments from the prosecutor calculated to prejudice the defense. Moreover, the state, as a matter of fundamental fairness and due process, should not benefit from its own misconduct.

While trial counsel's failure to object before the jury to the state's prejudicial comments thus cannot be used to deny him relief, the fact remains that he did not move for a mistrial outside the presence of the jury, as required by *Holt, supra*.

Martin submits that there was no possible reasonable basis for such failure, and Pigatti admitted that he simply did not think to request a mistrial afterwards outside of the jury's presence, and that he had no strategic or tactical reason for not requesting a mistrial at that point. (R5:Exh.1:21). Deficient performance is demonstrated where, as here, counsel's errors resulted from oversight or inattention rather than a reasoned defense strategy. *Wiggins*, 539 U.S. at 534; *Dixon*, 266 F.3d at 703.

**2. Martin's defense was prejudiced by counsel's deficient performance**

Given the serious damage caused by each of the identified errors to the jury's ability to make a fair determination of the relative credibility of the complainant and Mr. Martin, any one of those errors in isolation would be sufficient to require a new trial in this case even if the state court had not applied a standard contrary to controlling Supreme Court authority. *See* Argument, Section B, *supra*. It is well-established, however, that the Court must consider the cumulative effect of all errors in assessing prejudice, not merely the effect of each error in isolation. *See Washington*, 219 F.3d at 634-35:

> Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence under *Strickland* rather than the individual errors. *See Williams*, 120 S.Ct. at 1515. Considering the "totality of the evidence before the . . . jury," *Strickland*, 466 U.S. at 695 . . ., [trial counsel's] unprofessional errors were prejudicial to Washington.

Because it refused to acknowledge the deficient performance regarding Ms. Gilbreath's testimony here, the Wisconsin Court of Appeals failed to address whether

the combined effect of the error and trial counsel's other deficient performance prejudiced Martin's right to a fair trial. This Court's assessment of the combined prejudicial effects of the two errors thus owes no deference to the state court under the AEDPA. *E.g.*, *Dixon*, 266 F.3d at 701, 702. Even if some deference were owed the state court decision here, however, that court's conclusion that the errors did not prejudice Martin's defense is patently unreasonable.

As the Wisconsin circuit court noted (R4:Exh.M:16-17), this case properly came down to a one-on-one swearing contest between the complainant and Mr. Martin. The identified errors, however, had the cumulative effect of both bolstering the complainant's credibility in the eyes of the jury and simultaneously undermining Martin's. Gilbreath's and Moranchek's testimony, for instance, undermined Martin's credibility by improperly suggesting consciousness of guilt and bad character on the part of Mr. Martin.

The Ninth Circuit Court of Appeals found not simply error, but plain error under similar circumstances when the government witness, as did Moranchek here, testified regarding the defendant's exercise of his rights to counsel and silence and provided no substantive information for the jury. *Guam v. Veloria*, 136 F.3d 648 (9th Cir. 1997). The Court found that such error is not only clear and obvious, but also seriously affected the fairness and integrity of the proceedings. *Id.* at 652-53. There, as here, "the officer's testimony consisted of little else, and the jury was never cautioned or instructed to disregard his testimony regarding the defendant's silence."

*Id.* at 652. Here, as there, therefore, even this error alone "was prejudicial enough to affect the outcome of the proceedings." *Id.* at 653.

Mr. Pigatti's *post hoc* attempts, through cross-examination, to limit the damage caused by Gilbreath's and Moranchek's improper testimony do not, as the state circuit court suggested, erase the resulting prejudice (R4:Exh.M:5-8). The prejudicial testimony that Martin took an "inappropriately aggressive" stand in favor of protecting clergy members from false accusations and asserted his rights to counsel and to remain silent soon after being informed of the allegations against him remained, undisputed before the jury. Given the lack of an objection and curative instruction, the jury was left to draw exactly the inference which the constitution prohibits and the state no doubt sought in calling the witnesses: that Martin's exercise of his rights suggests consciousness of guilt.

Equally likely, the evidence fed into a perception, often faced by criminal defense attorneys and judges up for re-election, that those who advocate due process are somehow aligned with criminals and therefore of bad character. After all, why would anyone advocate protections for "guilty" people unless he himself felt guilty of some past indiscretion?

The likely prejudice to Martin thus is twofold. The first is that the jury adopted the state's "consciousness of guilt" theory, despite the legal invalidity of such an inference. The second is that the jury used the allegations as evidence of Martin's "bad character." Either would have tainted the jury's evaluation of Martin's credibility

and improperly skewed the evidence against Martin in this very close case.

Even if the relative credibility of the complainant and Mr. Martin had not already been fatally skewed in favor of conviction, the prosecutor's misconduct in closing argument, likening Mr. Martin to such repulsive and notorious criminals as Jeffrey Dahmer, had the likely effect of making Martin a pariah in the eyes of the jury.

This one-on-one swearing contest was far from an overwhelming case from the state's point of view. Its sole eye-witness failed to report the supposed offense for more than 6 years after it allegedly occurred and was otherwise subject to impeachment, as is demonstrated by the fact that two other juries disbelieved his claims against two others from the Nashotah Seminary.[6] Mr. Martin, on the other hand, forcefully denied the allegations, and was supported by numerous character witnesses and the fact that, although he had been working closely with children over a period of several years, not a single additional claim of sexual misconduct has ever arisen against him.

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).

The factual questions in this case were extremely close, turning as they did almost entirely on the relative credibility of the complainant and Mr. Martin. If the jury either believed Martin or disbelieved the complainant, it would have had to

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[6] (R5:Exh.1:19 n.2; R4:Exh.L:33). *See State v. Jason W. Samuel*, Waukesha County Case No. 94-CF-538; *State v. Anthony Miller*, Waukesha County Case No. 95-CF-86.

acquit. The identified errors, however, both improperly bolstered the complainant's credibility and equally improperly undermined Martin's. There can be no doubt that such errors distorted the jury's determination of the factual issues and consequently its finding of guilt. *Cf.*, *United States v. Wolf*, 787 F.2d 1094, 1098-99 (7th Cir. 1986) (although evidence overwhelming if prosecution witness believed, improprieties which negatively affected defendant's credibility were prejudicial where jury had reason to doubt prosecution witness).

The state court's assertion that counsel's errors did not prejudice Martin's defense thus is wholly unreasonable. *See, e.g.*, *Williams*, 529 U.S. at 397-98 (state court finding of lack of prejudice unreasonable where it failed to consider totality of applicable circumstances). The state obviously believed that it risked an acquittal without this inflammatory evidence and argument or it would not have presented them. If the prosecutor believed the evidence could affect the jury's verdict, the jury reasonably could believe so as well. *See Kyles*, 514 U.S. at 448 ("If a police officer thought so, a juror would have, too").

The possibilities cited by the court of appeals that the jury may have overlooked references to Martin's assertion of the right to counsel and to silence, and might have overlooked the inflammatory effect of the prosecutor's closing, do not alter the fact that these errors may very well have had a substantial impact on the jury's evaluation of the relative credibility of Strickland and Mr. Martin. Having wrongly decided that Gilbreath's testimony was admissible, that court failed to

consider the totality of the circumstances and the additional prejudice resulting from that error. As previously noted, however, it is the *cumulative* effect of all errors which must be considered. *E.g.*, *Washington*, 219 F.3d at 634-35.

As previously shown, the Wisconsin Court of Appeals applied a standard for assessing resulting prejudice directly contrary to that required by the Supreme Court. The issue is not whether Martin can demonstrate that he necessarily would have been acquitted but for counsel's unreasonable mistakes, but whether there is a reasonable probability of a different result. Even if that court could be viewed as having applied the proper standard, however, its finding of no prejudice is not merely wrong, but unreasonable as well. The requested habeas relief accordingly is appropriate even under the restrictive provisions of the AEDPA.

## CONCLUSION

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

Dated at Milwaukee, Wisconsin, March 4, 2005.

Respectfully submitted,

RUSSELL MARTIN, Petitioner-Appellant

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Martin Consol. Brief.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 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 9777 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

## TABLE OF CONTENTS TO APPELLANTS' APPENDIX

**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. Martin's required short appendix and the separate appendix are not available in non-scanned PDF format.

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Robert R. Henak

## CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2005, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant Russell Martin 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 Gregory M. Weber, P.O. Box 7857, Madison, WI 53707-7857.

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