UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

RUSSELL MARTIN,

Petitioner-Appellant,

v.

WILLIAM GROSSHANS, Administrator,
Division of Probation and Parole,

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 Charles N. Clevert, Jr., Presiding

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REPLY BRIEF OF PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Rules and Statutes

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ARGUMENT

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

This case is complicated, not because of the facts or the controlling legal authority, but because of the interplay between the Antiterrorism amendments to the federal habeas statute and the Wisconsin Court of Appeals' choice to address certain aspects of Martin's claims and not others. As a result, different standards of review apply to different aspects of Martin's claims.

Martin attempted to assist the Court in his opening brief by outlining which standard applies to which aspects, Martin's Brief at 18-19, and Grosshans does not

dispute that summary.

Because Martin claims ineffective assistance of counsel, the central issues are deficient performance and resulting prejudice. *E.g.*, *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Although Grosshans attempts to analyze the prejudice resulting from each error in isolation, Grosshans' Brief at 15-16, 18-20, 22-25, the law is clear that the Court must consider the totality of the circumstances in assessing prejudice. *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).

Martin accordingly addresses the deficient performance prong first and then the issue of resulting prejudice.

A. Martin Has Established Deficient Performance Sufficient To Support Habeas Relief

Martin asserts three errors by trial counsel which denied him the effective assistance of counsel. Trial counsel conceded that the asserted 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). Because the failure to take proper actions due to oversight or ignorance is deficient performance, *see Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001), the controlling question, therefore, is whether the challenged evidence and argument were, in fact, impermissible.

1. The State Court's Decision Regarding The Inflammatory And Irrelevant Testimony Of Ms. Gilbreath Is An Unreasonable Application of Controlling Supreme Court Precedent

Grosshans attempts to argue that Martin's concern "that a clergyperson is not wrongly accused" in a Florida parish in 1993 (R4:Exh.1:164) somehow demonstrates his consciousness of guilt regarding alleged misconduct 6 years previously and half a continent away. Grosshans Brief at 9-15. According to Grosshans, "[t]he prosecutor was entitled to present the evidence to support the inference that Martin reacted as he did to the policy proposal because he was acutely aware of his own sexual misconduct against a young man in his earlier faith community – Nashotah House." Grosshans Brief at 13. Yet, beyond the mere assertion that "[t]he jury was entitled to draw that conclusion from the evidence," Grosshans makes no effort to suggest *why* Gilbreath's testimony made it any more likely that Martin was guilty of the offenses at issue here. Nor could it. *See* Martin's Brief at 25-28.

The state court of appeals at least tried to give some basis for its conclusion, asserting that one reasonable inference from Gilbreath's testimony was that Martin "was conscious of his guilt and seeking to protect himself." (R4:Exh.E:4-5; App. 109-10). As already demonstrated in Martin's opening brief, however, the court's assertion is wholly irrational. Martin's actions in seeking protections for accused priests in a Florida parish in 1993 would have no possible effect in protecting him from charges concerning actions in Wisconsin in 1987. Martin's Brief at 26-28.

Acts which are admissible to prove consciousness of guilt are those which are

intended to obstruct justice or avoid punishment in a given case. *See* authorities cited in Martin's Brief at 26-28. Even the authorities cited by Grosshans so hold. While Grosshans is correct that the Court in *People v. Bennett*, 593 N.E.2d 279, 283 (N.Y. 1992), noted that "[e]ven equivocal consciousness-of-guilt evidence may be admissible," that court added the proviso which is fatal to Grosshans' claim here: "so long as it is relevant, meaning that it has a tendency to establish the fact sought to be proved – that [the] defendant was aware of [his] guilt." *Id.* Indeed, *Bennett* upheld *reversal* of a conviction based on the improper admission of evidence which, like that here, required speculative inferences to show "consciousness of guilt." *See also Edmunds v. Deppisch*, 313 F.3d 997 (7th Cir. 2002), *cert. denied*, 538 U.S. 1066 (2003) (upholding *exclusion* of evidence allegedly giving rise to a consciousness of guilt).

The state simply ignores the aberrant nature of the court of appeals' decision here. In fact, none of the authorities relied upon by Grosshans comes close to supporting admission of consciousness-of-guilt evidence supported only by the type of extremely speculative inferences used to rationalize admission of the evidence in this case.

No rational argument can be made that Martin's actions in Florida had any possible effect on the ability of Wisconsin authorities to discover or prosecute the charges at issue here. At best (and this still requires a high degree of speculation), Martin's actions to protect accused priests in Florida may suggest consciousness of

particular conduct *in Florida*, although none has ever been suggested or proven. One might also speculate that his actions suggest consciousness of a particular character trait which could lead him to commit such offenses (or to be viewed as being the "type" to commit such offenses) and thus be subject to accusation in Florida. But even if not purely speculative here, such character evidence is not admissible. With limited exceptions not applicable here:

> [e]vidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion. . ..

Wis. Stat. §904.04(1).

The only possible effect of Gilbreath's testimony thus was to encourage speculation and to improperly inflame the jury against Martin. The Wisconsin court's assertion to the contrary was not merely wrong, but unreasonably so. *See also United States v. Johnson*, 572 F.2d 636 (7th Cir. 1978).

2. Trial Counsel's Failure Regarding Officer Moranchek Constituted Deficient Performance

In the state court appeal, the state did not dispute that trial counsel acted unreasonably in failing to object to Officer Moranchek's testimony regarding Martin's exercise of his rights to silence and the assistance of counsel upon hearing of the allegations against him. (R4:ExhC:9-11).

Here, however, Grosshans briefly asserts that Moranchek's testimony may have been admissible. Grosshans Brief at 17-18. The state court of appeals did not decide this prong of Martin's claim, so review is *de novo*. *Dixon*, 266 F.3d at 701,

702.

Grosshans' argument is based on a misinterpretation of Martin's argument. Grosshans asserts that, because the prosecutor did not expressly argue that Martin's silence prior to trial calls his trial testimony into doubt, there is no violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) (post-*Miranda* silence may not be used as evidence of guilt or for impeachment). Grosshans Brief at 17-18. According to Grosshans, "[i]f there was no *Doyle* violation, then trial counsel can't reasonably be faulted for failing to make such an objection." *Id.* at 18.

Grosshans' argument, however, overlooks a number of points, not the least of which is that Martin does not claim a *Doyle* violation. The question is not whether post-*Miranda* silence may be used as evidence of guilt. Martin was not in custody and was not Mirandized. The specific holding in *Doyle* thus does not apply.

Martin's claim is based, not on the strict holding of *Doyle*, but on the broader principle that the exercise of one's constitutional rights is not legitimate 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).

Martin did exercise his rights to counsel and, upon advice of that counsel, to

remain silent. The exercise of those rights can have no legitimate 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). Grosshans, however, overlooks that fact, as well as the fact that Wisconsin law bars any comment or inference from such a claim of privilege. Wis. Stat. §905.13.

It matters not that the trial prosecutor made no specific argument based on Moranchek's testimony; she did not need to. Unlike in *Splunge v. Parke*, 160 F.3d 369 (7th Cir. 1998), and *Bieghler v. McBride*, 389 F.3d 701 (7th Cir. 2004), there was no legitimate relevancy to *any* of Moranchek's testimony, and the state has failed to suggest any. 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. *See, e.g.*, *Guam v. Veloria*, 136 F.3d 648 (9th Cir. 1997) (witness testified re defendant's exercise of his rights to counsel and silence and provided no substantive information for the jury; admission plain error).

3. Trial Counsel's Failure Regarding The State's Inflammatory Closing Argument Constituted Deficient Performance

Grosshans does not appear to contest that the prosecutor's inflammatory name-calling in closing, comparing Martin to such notorious criminals as Jeffrey Dahmer, Theodore Oswald, and Eugene Maxey, was improper. Indeed, the state court expressly condemned the argument as improper (R4:Exh.E:7; App. 112). Nor does Grosshans suggest that trial counsel's failure to request a mistrial on these grounds was in any way reasonable. He thus concedes deficient performance.

B. Martin's defense was prejudiced by counsel's deficient performance

Because the Wisconsin Court of Appeals did not address whether trial counsel's failures regarding Gilbreath's prejudiced Martin's defense, that issue is reviewed *de novo*. *Dixon*, 266 F.3d at 701, 702. Although that court did address Martin's claims of resulting prejudice concerning the admission of Officer Moranchek's testimony and the prosecutor's inflammatory closing argument, it applied a standard for prejudice contrary to that required by controlling Supreme Court authority. Specifically, that court assessed the prejudice resulting from each error in isolation and required that Martin establish that the results of the proceedings would have been different but for counsel's errors. Martin's Brief at 20-21, 34-35. Review accordingly is *de novo* on those claims as well.

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

Grosshans claims that the Wisconsin Court of Appeals did not mean what it said in holding that, to establish resulting prejudice on an ineffective assistance of counsel claim, "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). Grosshans Brief at 6-9. Grosshans concedes that this statement is contrary to the standard required by Supreme Court authority. However, he apparently wants to believe that the court of appeals was merely sloppy in Martin's case, and speculates that the state court's assertion of the wrong legal standard is

nothing but "a simple typographical error or omission" or "drafting error." *Id.* at 7, 8.

It is well-settled that, to establish resulting prejudice, a defendant is not required to show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. Rather, the Supreme Court has 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 v. Taylor*, 529 U.S. 362, 391 (2000); *Strickland*, 466 U.S. at 694.

The only basis for Grosshans' speculation appears to be the belief that the state court could not possibly have believed what it said. Grosshans concedes that the state court did believe at one time that the defendant must show more than a reasonable probability of a different result, but that "this court disabused the state court of that notion in *Washington v. Smith*, 219 F.3d 620, 632-33 (7th Cir. 2000)." Grosshans Brief at 7-8. However, he apparently overlooks the fact that *Washington* was decided on July 6, 2000, more than four months *after* the Wisconsin Court of Appeals' decision in Martin's case on March 1, 2000. The state court here thus did not have the benefit of this Court's holding in *Washington*.

The likelihood that the Wisconsin Court of Appeals was just sloppy in the statement of the applicable standard is lessened further by the fact that the applicable standard was directly in issue before that court. The circuit court had required Martin to prove "that the outcome of this trial would have been different but for" the alleged

errors (R4:Exh.B:App.19). Martin expressly argued that this was the wrong legal standard (R4:Exh.B:29-30), while the state argued for the standard which this Court rejected as contrary to *Strickland* in *Washington*, 219 F.3d at 632-33 (R4:Exh.C:3, 7).

While the state court's prejudice analysis thus is contrary to controlling Supreme Court precedent, Grosshans is correct that the state court's application of an erroneous standard does not alone mandate habeas relief. Grosshans Brief at 8-9. Rather, as Grosshans states, the Court "should review the issue of prejudice *de novo* and apply the correct standard under *Strickland*." *Id.* at 9. *See Washington*, 219 F.3d at 632-33.

2. There exists a reasonable probability of a different result but for trial counsel's unreasonable acts and omissions

Grosshans, like the state court, ignores the requirement that resulting prejudice from counsel's errors must be assessed cumulatively, *Strickland*, 466 U.S. at 695; *Alvarez*, 225 F.3d at 824, instead merely repeating the state court's error by evaluating the prejudicial effect of each error in isolation. Grosshans Brief at 15-16, 18-20, 22-25. For the reasons stated in Martin's Brief at 34-39, there exists a reasonable probability of a different result but for trial counsel's errors, regardless whether those errors are considered cumulatively or in isolation.

While Gilbreath's testimony was not properly relevant, it plainly had the effect of tainting the jury's perception of Martin and his credibility. The jury was left to believe that Martin's actions were somehow aggressive and inappropriate. While not properly considered as showing consciousness of guilt, that testimony easily could

have been misused for that purpose, or by inferring consciousness of bad character.

While it is possible that the jury might have discounted Gilbreath's improper testimony based on trial counsel's cross-examination, Grosshans Brief at 15-16, just as it is possible that a blind chicken occasionally will find a kernel of corn, nothing required the jury to do so. The evidence was presented with the intent and the expectation that it would affect the jury's assessment of the relative credibility of Strickland and Martin, and there certainly is nothing in the record to suggest that it did not have that effect.

Indeed, Grosshans' own arguments contradict his harmlessness claim. While asserting at one point that "Martin does not point to any objective proof in the record that the jury actually inferred consciousness of guilt" from Gilbreath's testimony, Grosshans Brief at 16, it elsewhere acknowledges that "[i]t is unlikely that the jury considered the evidence for any other purpose than to establish his consciousness of guilt," *id.* at 15.

Grosshans' harmlessness argument regarding Moranchek's testimony suffers from his refusal to acknowledge why that evidence is inadmissible in the first place. It is one thing to assert harmlessness if all that is in issue is testimony to the effect that, when Moranchek described Strickland's allegations to him, "Martin did not make 'any verbal responses' but 'raised an eyebrow, pursued his lips, but that was it.'" Grosshans Brief at 17; *see id*. at 19-20. It is quite another when the impermissible testimony concerns the defendant's exercise of the right to counsel and to remain

silent on the advice of counsel at a time when a layman might expect him to dispute the charges if untrue.

An uninformed juror easily could misconstrue such evidence as suggesting consciousness of guilt; that Martin immediately contacted an attorney and refused to talk because he had something to hide. Because there was no purpose to Moranchek's testimony other than to expose to the jury Martin's exercise of his constitutional rights, and the jury was never instructed to disregard that testimony, it is unlikely that the jury would have used it for any other purpose. *E.g.*, *Veloria*, *supra*.

Grosshans' harmlessness argument regarding the prosecutor's inflammatory closing argument, Grosshans Brief at 22-25, applies the wrong legal standard. Relying upon standards for assessing whether prosecutorial misconduct in summation independently violates due process or constitutes plain error, he argues that the trial prosecutor's impermissible argument cannot be prejudicial unless it "'undermine[s] the fundamental fairness of the trial.'" Grosshans Brief at 22-23 (citations omitted).

As already discussed, the issue of prejudice on an ineffective assistance of counsel claim turns on whether the defendant can show a reasonable probability of a different result but for counsel's errors. *Strickland*, 466 U.S. at 694. 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).

Grosshans' confusion on this point appears to arise from his failure to acknowledge why the prosecutor's argument was objectionable in the first place.

While prosecutorial misconduct of the type at issue here can rise (or fall) to the level of a due process violation, it need not do so to be error. Admission of hearsay statements may violate state rules of evidence without violating the constitution. Similarly, inflammatory comments such as those by the prosecutor here, unless harmless, constitute reversible error regardless whether they also violate due process. *See, e.g.*, *Berger v. United States*, 295 U.S. 78 (1935).

The issue thus is whether, but for the inflammatory argument (and the other errors of counsel), there exists a reasonable probability of a different result. It is irrelevant whether the prosecutor may have had a valid point regarding the strength of good character evidence. *But see State v. Cuyler*, 110 Wis.2d 133, 327 N.W.2d 662 (1983) (holding that character evidence can be critical to a fair trial when jury must assess relative credibility of witnesses in a one-on-one swearing contest). The error concerns not the point she was trying to make, but the inflammatory way she attempted to make it. As the Wisconsin Court of Appeals held, "[h]er point could have been made without reference to [Dahmer and Oswald]." (R4:Exh.E:7; App. 112).

Even applying the standards from *United States v. Durham*, 211 F.3d 437, 442 (7th Cir. 2000), cited by Grosshans, Grosshans Brief at 23, the inflammatory closing was prejudicial. First, despite Grosshans' attempt to minimize it here, the prosecutorial misconduct was quite serious. It is indeed rare that the Wisconsin courts admonish a prosecutor in a decision. Second, the misconduct was not invited by

improper defense conduct; rather, it was an attempt to nullify legitimate defense evidence. Third, the trial court did not admonish the prosecutor or direct the jury to disregard her inflammatory comments. Fourth, although defense counsel had an opportunity to respond to the comments, he was forced to decide whether doing so would merely enhance the resulting prejudice.

And fifth, this was far from an overwhelming case for the state. It was saddled with surreal, uncorroborated allegations by a young man who did not even raise them until he found himself in his own legal troubles some 5 or 6 years after the alleged offenses. It also was saddled with Martin's own credible testimony denying the allegations, a denial corroborated by numerous witnesses to his good character and the absence of any suggestion that he had been involved in similar misconduct, either before the alleged incident or in the 6 years following it. This was, in short, the prototypical one-on-one swearing contest.

Each of the factors noted in *Durham* thus supports a finding that the prosecutor's improper argument indeed prejudiced Martin's defense.

While the memory of Dahmer's actions now may be fading from the collective memory, they were still fresh in the minds of those in Southeastern Wisconsin when this case was tried in 1995. As Judge Evans explained the situation just three years earlier:

> When the call was made, on May 27, 1991, the name Jeffrey Dahmer was largely unknown. Today, everyone knows the story of the 31-year-old chocolate factory worker, a killing machine who committed the most appalling string of homicides in this city's history.

> Dahmer's misdeeds have been widely chronicled. Dahmer, who is white, has confessed to killing 17 young men between the ages of 14 and 28. Eleven of the victims were black, and most were lured into Dahmer's web with promises of, among other things, a sexual experience. The case is incredibly gruesome and bizarre; the dismembered bodies of many of the victims--hearts in the freezer, heads in the fridge--were preserved in Dahmer's small near west-side apartment. The leftovers were deposited in a barrel of acid, conveniently stationed in the kitchen.

Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343, 1345 (E.D. Wis. 1992).

The Court should keep in mind, moreover, that Jeffrey Dahmer had been convicted of second degree sexual assault of a 13-year old boy and released on probation prior to his most heinous offenses, and a common perception at the time was that those offenses might have been avoided had the judge erred on the side of incarcerating him or had Dahmer been more closely supervised. *See generally Weinberger v. State of Wisconsin,* 906 F.Supp. 485 (W.D. Wis. 1995) (addressing lawsuit by victim's father against Dahmer's probation agent, among others), *aff'd*, 105 F.3d 1182 (7th Cir. 1997). The prosecutor's implicit suggestion that the jury not make the same mistake with Martin likely was not lost on it. *See also United States v. Duran*, 884 F.Supp. 534, 536-37 (D.C.D.C. 1995) (excluding evidence of a letter as unfairly prejudicial under Fed. R. Evid. 403 because it associated the author with Jeffrey Dahmer, "a figure who would likely arouse very strong feelings among jurors because of his horrendous, senseless crimes").

CONCLUSION

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

Dated at Milwaukee, Wisconsin, April 19, 2005.

Respectfully submitted,

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Martin Consol. Reply.wpd

RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a reply brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 3,762 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 19th day of April, 2005, I caused 15 hard copies of the Reply Brief 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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