UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 07-1243
(Case No. 03-C-1279 (E.D. Wis.))

STANLEY A. SAMUEL,

Petitioner-Appellant,

v.

MATTHEW J. FRANK,

Respondent-Appellee.

Appeal From A Final Judgment Dismissing Petition For Writ Of Habeas Corpus and the Order Entered In The United States District Court For The Eastern District of Wisconsin, Hon. Lynn Adelman, 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, Stanley Samuel, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) The party represented is Stanley Samuel

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Dated: __________________ ______________________________
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STANLEY A. SAMUEL,

Petitioner-Appellant,

v.

MATTHEW J. FRANK,

Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

Stanley A. Samuel appeals from the final judgement entered by the district court on January 3, 2007, dismissing Samuel'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.

Samuel filed his notice of appeal on January 25, 2007. By Order entered February 1, 2007, the District Court granted him leave to proceed *in forma pauperis* on appeal and granted him a certificate of appealability on the issues raised in this brief.

Other than the denial of Samuel's certiorari petition from the Wisconsin

Supreme Court's decision on his direct appeal, *see Samuel v. Wisconsin*, 537 U.S. 1018 (2002), there are no prior or related federal appellate proceedings in this case.

This is a collateral attack on Mr. Samuel's criminal conviction in Wisconsin state court. Mr. Samuel's current place of confinement is the New Lisbon Correctional Institution, 2000 Progress Road, New Lisbon, WI 53950. The warden at that institution is Timothy Lundquist.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Samuel moved the district court for a certificate of appealability on the following issue:

> Whether Samuel's conviction was obtained by the use of coerced witness statements in violation of his right to due process.

(R37). In granting the certificate, the district court chose to break this one issue into its two component parts:

1. Whether the Wisconsin Supreme Court unreasonably declined to extend Supreme Court jurisprudence on the admissibility of coerced confessions to coerced witness statements, entitling petitioner to relief.

2. Whether the Wisconsin Supreme Court unreasonably determined that state actors did not threaten to take the witness's child unless she incriminated petitioner, entitling petition to relief.

(R40:2-4; App. 102-04).[1]

[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. ___."

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Stanley Samuel stands convicted of one count each of second degree sexual assault of a child, Wis. Stat. §948.02(2), interference with child custody, Wis. Stat. §948.31(2), and abduction, Wis. Stat. §948.30(1)(a) (R9:Exh.A; R13:Exh.1). The charges arose from Samuel's involvement in 1995 and 1996 with then 15 year old Tisha L, culminating in an incident on January 29, 1996, when Tisha left the home of her mother, either because she ran away from home (the state's view) or because she was thrown out (Tisha's view), and then left Wisconsin with Samuel.

On March 8, 1997, Samuel and Tisha were stopped at a roadblock in Phelps County, Missouri. The two were returned to Wisconsin where, on March 10, 1997, Tisha gave birth to a daughter. On March 12, 1997, after Tisha declined to provide any information against Samuel, government agents placed her newborn daughter in a foster home pending Tisha's "cooperation" in the prosecution of Samuel. When Tisha subsequently provided the agents with a statement against Samuel, her daughter was returned to her on March 14, 1997. (R9:Exh.Q:16, 48)

1. Pretrial Motion to Suppress

Prior to trial, Samuel moved for suppression of Tisha's statements to the agents on the grounds they were coerced. The evidentiary hearing on the claim (R9:Exh.Q:8-54), established the following:

Tisha gave birth to her daughter on March 10, 1997. On March 12, 1997, a

secure custody hearing was held to determine placement for Tisha and her baby. Tisha was placed in her father's custody, while the baby was placed in the custody of the Department of Social Services, with placement to be determined at an intake conference. (R9:Exh.Q:44-45).

An intake conference was held immediately following the custody hearing. Present were Corporation Counsel Grant Thomas; County intake worker Kim Threw; Chris Stanaszak, the social worker on Tisha's delinquency matters; David Keck, Tisha's attorney; and a physical and sexual abuse investigator from the Department of Social Services, Rodney Schraufnagel. Tisha's father, Peter L., arrived later, as did Police Officer Steven Sagmeister and Peter's girlfriend, Catherine Stelzner. The supposed purpose of the intake conference was to determine where the baby would be placed. (*Id.*:44-45).

Tisha testified that, at the time of the intake conference, she was tired and under the influence of pain medication, having only recently given birth (R9:Exh.Q:10, 12). She also testified that, despite the supposedly limited purpose of the intake conference, a number of questions were asked at that time regarding her sex life with Stanley Samuel and where they had been during their trip (*id.*:10-11, 19-20). When Tisha declined to answer the questions as irrelevant to placement of her baby, the questioners were not satisfied and told her several times that she must "cooperate" in order to get her baby back. They told her that she would have to give Officer Sagmeister a statement prior to a March 14 hearing on the baby's custody in order to

get her back. (*Id.*:10-14, 20-23, 46-47).

Tisha felt quite intimidated and believed that she had to "cooperate" with the criminal investigation of Samuel to get her baby back (R9:Exh.Q:14-15). Accordingly, she met with Sagmeister and Schraufnagel on March 13, 1997, and gave them the statement they demanded (*id.*:15-16). Beforehand, her father told her he had spoken with Schraufnagel and that what the state agents wanted was an account of a sexual relationship with Samuel before they left Wisconsin and a statement that she wanted to come home (*id.*:27-28). After she gave the inculpatory statement, her baby was returned to her on March 14, 1997 (*id.*:16, 48).

Immediately after the hearing on March 14, Schraufnagel and Sagmeister had Tisha give a second statement because the tape recording of the first one did not come out (R9:Exh.Q:21). On March 21, 1997, Schraufnagel and Sagmeister had Tisha provide a written statement. Although her daughter had been returned to her and the officers made no express threats to her at that time, Tisha was still intimidated by the statements and results of the intake conference and felt she still needed to continue "cooperating" to keep her baby (*id.*:17-18).

Peter L. testified that he was surprised by the questions at the intake conference, which he thought would be limited to placement for the baby (R9:Exh.Q:34). The questioners became angry for Tisha's "not cooperating" in the investigation and stated that, in the absence of such "cooperation," they could not trust her with the baby (*id.*:36-37). Peter admitted that Investigator Schraufnagel had

relayed to him the areas of "cooperation" they were interested in addressing (*id.*:38).

Cathy Stelzner testified that she asked at the intake conference for the rationale for taking Tisha's baby. She was told that Tisha was not giving them the information that they wanted, but that they would consider giving the baby back if they saw some "cooperation." Stelzner viewed their position as "blackmail" and felt they were using the baby as a pawn. (R9:Exh.Q:49-51).

Although Attorney Keck claimed to have perceived no threats, he acknowledged that Tisha's baby was placed in a foster home pending her "cooperation" with the police, which he understood to mean a statement supporting a criminal prosecution of Samuel (R9:Exh.Q:46-48).

Keck was not with Tisha when she subsequently gave the inculpatory statements (R9:Exh.Q:48), and her father was only with her for a short time during the statements and then left (*id.*:39, 41, 42).

The state chose to present no witnesses at the hearing. (R9:Exh.Q:54).

By written decision dated November 14, 1997, the circuit court denied the motion to suppress Tisha's statements. (R9:Exh.B:App.12-13). The court made no factual findings and refused to decide whether Tisha's prior statements in fact were coerced. Instead, it held that the statements could not be suppressed even if they were coerced:

> I conclude that, if otherwise admissible, Tisha's statements cannot be excluded soley [sic] on the ground that they were coerced, and deny defendant's motion to suppress them.

(*Id.*:App.13).

2. Jury Trial and Sentencing

The case proceeded to a jury trial on December 1, 1997 (R9:Exhs.R-U).

Tisha L. testified at trial that she met Stanley Samuel through her mother, Cindy Jones, during the summer of 1995 (R9:Exh.S:118). Jones and Tisha's father, Peter L., were divorced, and Tisha was living with her mother at the time in Oshkosh, Wisconsin (*id.*:117-18). Tisha, who turned 15 in September, 1995, and Samuel developed a friendship over the following months (*id.* at 118-19).

In late November, 1995, Tisha and Samuel reported Jones to Samuel's parole officer and to Social Services for the unsanitary condition of her home and for additional reasons excluded from evidence at trial.[2] (R9:Exh.S:17, 123, 130; R9:Exh.T:128-29, 187-88; R9:Exh.U:13-14). The relationship between Jones and Tisha then deteriorated, with Jones seeking and obtaining a no-contact order from Samuel's parole officer (R9:Exh.S:134-36). After Samuel moved to South Dakota in December, 1995, Jones' relationship with Tisha continued to deteriorate until she gave Tisha two weeks notice in mid-January, 1996, that she would have to leave (R9:Exh.T:187).

On January 29, 1996, Tisha voluntarily left with Samuel because she wanted to leave and because her mother had kicked her out (R9:Exh.S:141; R9:Exh.T:190-91,

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[2] The primary focus of the reports was not the condition of the home, but the claim that Jones' upstairs neighbor had been molesting Tisha's younger sister, Laura (R9:Exh.U:13-14; *see* R9:Exh.S:130; R9:Exh.T:187-88). This claim, however, was excluded from evidence at trial (R9:Exh.S:17; R9:Exh.T:128-29, 187-88; R9:Exh.U:13-14).

221).

Tisha testified that she and Samuel were just friends prior to leaving, and that she left with him because she had nowhere else to stay (R9:Exh.S:143, 154-55; R9:Exh.T:221-22). Their relationship did not develop into anything more than friendship until March or April of 1996 when they were outside of Wisconsin. The two did not have sex in Wisconsin or before they had left Winnebago County on January 29, 1996. (R9:Exh.S:139-40; R9:Exh.T:196).

In response to this testimony, the state relied primarily upon Tisha's prior, unsworn statements to the police to the effect that she had sex with Samuel in September, 1995, when she had just turned 15 (R9:Exh.S:155, 165-68, 171-73; R9:Exh.T:19, 22, 26-27, 83-84, 87, 89-99; R56:Exh. 7).[3] The state also presented testimony of Tisha's parents to the effect that they did not consent to her leaving with Samuel (R9:Exh.R:120-21, 186), and Jones' claim that she did not throw her daughter out of the house (*id.*:121).

The state also called as witnesses two girls who said they were friends of Tisha's and that Tisha had told them that she had sex with Samuel (R9:Exh.S:101-04, 201, 203). The state also called a boy who claimed that Tisha told him the same thing while he was attempting to make out with her after a party (*id.*:88-89).[4] Tisha's 10-

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[3] In Wisconsin, prior inconsistent statements are admissible as substantive evidence, and not merely for impeachment. *Vogel v. State*, 96 Wis.2d 372, 291 N.W.2d 838 (1980).

[4] Contrary to the claims of these witnesses, Tisha's best friend at the time, Molly Maxwell, testified that Tisha never talked much about her boyfriends and that Tisha never said she was having sex with Samuel (R9:Exh.S:191-92).

year old sister, Laura, also testified that she had seen Samuel at Jones' house when Jones was not there, that she had seen Samuel once kiss Tisha on the cheek, that she had seen Tisha and Samuel on Tisha's bed one time, and that she had seen Tisha and Samuel sitting on a "bed" in the back of Samuel's pickup (R9:Exh.R:156-61).

One neighbor, Judy Paulick, confirmed the unsanitary condition of Jones' house, describing it as a "disgusting pigsty," but also claimed to have once seen Samuel kiss Tisha goodby (R9:Exh.S:12-13). Another neighbor, and friend of Jones, Rachel Davis, claimed that she saw Samuel's car at Jones' home almost every night after Jones left on her paper route (*id.*:19-20).

Samuel's probation officer, Darryl Meenk, however, testified that Samuel was on DIS electronic monitoring until sometime in October, 1995, requiring him to be at home in the evenings (R9:Exh.S:34).

A jail inmate, Mark O'Kray, also testified. Soon after getting into a fight with Samuel in jail in April, 1997, O'Kray contacted the police and claimed that Samuel had admitted to him that he and Tisha had sex in her bedroom the night before they left (R9:Exh.S:38-41).

Tisha admitted making the statements to Sagmeister and Schraufnagel, but testified that they were false and made only because she was told that she would not get her baby back unless she "cooperated." (R9:Exh.S:154-73; R9:Exh.T:206-11). She also testified that she never told her friends that she was having sex with Samuel (R9:Exh.T:212-16).

Officer Sagmeister was present at the intake conference as the lead investigator for possible criminal charges against Samuel (R9:Exh.T:110-11). He declined to describe Tisha as uncooperative during the intake conference, instead labeling her answers as more confused and vague (*id.*:55). He conceded, however, that the conference ended with the baby being placed in a foster home and with Tisha told to that she was a victim and that she needed to contact Officer Sagmeister or Investigator Schraufnagel prior to next hearing to determine what would be done with her child (*id.*:56).

Rodney Schraufnagel was a Winnebago County social worker who specialized in child abuse and sexual abuse investigations, having conducted more than 750 child abuse investigations, more than half of which were sexual abuse investigations (R9:Exh.T:54, 68-69). He became involved in this matter at the request of police officer Sagmeister (*id.*:69), due to concerns that Tisha was a victim of child abuse, as well as concerns for her baby (*id.*:71).

Schraufnagel claimed that, although the intake conference concerned whether Tisha should be allowed to keep her baby, he viewed Tisha as a victim (*id.*:73, 106, 131-32), and conceded that questions were asked to verify that belief (*id.*:110). Even regarding whether Tisha would be allowed to keep her baby, he placed great emphasis on whether she would be "honest" about her mistakes and willing to talk about her life and decisions (*id.*:75), while others wanted to know where Tisha had been, who she was with and what took place while she was gone (*id.*). Although Tisha answered

questions at that conference regarding care of the child, she viewed as irrelevant questions dealing with Samuel, where they had been or what they did (*id.*:108-10).

On December 4, 1997, the jury returned verdicts convicting Samuel on all three charges (R9:Exh.U:101).

The circuit court subsequently sentenced Samuel to 38 years imprisonment and a consecutive term of 16 years probation in lieu of a stayed prison term (R9:Exh.2:68-70), and entered judgment (R9:Exh.A; R13:Exh.1).

3. State Post-Conviction and Appellate Proceedings

By post-conviction motion filed as part of his direct appeal, *see* Wis. Stat. (Rule) 809.30, Samuel again raised the suppression issue. The circuit court nonetheless denied the motion. (R9:Exh.V:26-7).

By opinion dated December 27, 2000, the Wisconsin Court of Appeals reversed, holding that due process mandates exclusion of involuntary witness statements extracted by government coercion just as it requires exclusion of statements coerced from the defendant. (R9:Exh.E:2-11; App. 138-47); *State v. Samuel*, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565. That Court rejected the state's proposed limitations on the traditional standards for assessing voluntariness of a statement, following instead the principle that "'methods offensive when used against an accused do not magically become any less so when exerted against a witness . . ..'" (R9:Exh.E:10; App. 146, *quoting United States v. Gonzales*, 164 F.3d 1285, 1289 n.1 (10th Cir. 1999)). Because the circuit court had made no factual

findings after the pre-trial evidentiary hearing on this issue, however, the Court remanded the case for a new voluntariness hearing (R9:Exh.E:11-12; App. 147-48).

The Wisconsin Supreme Court in turn reversed the Court of Appeals' suppression ruling in a decision dated April 25, 2002. (R9:Exh.L; App. 111-36); *State v. Samuel*, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423.

That Court rejected both the state's proposal that suppression be limited to cases of "extreme coercion or torture" (R9:Exh.L:7-8; App. 117-18), and application of the traditional standards for assessing involuntariness (R9:Exh.L:8-10; App. 118-20), which ask whether the government coercion has overcome the individual's will to resist, *see, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973); *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). Instead, the Court imposed a standard requiring not only involuntariness under traditional standards, but also "egregious" police misconduct "such that it produces statements that are unreliable as a matter of law." (R9:Exh.L:13-14; App. 123-24). The Court then held that the agents' taking of Tisha's newborn child pending Tisha's "cooperation" with the prosecution of Samuel failed to meet its new standard for suppression. (R9:Exh.L:19-21; App. 129-31).

Justice Bablitch, in dissent, concurred in the Court's new-found due process standard, but found it "impossible . . . to reconcile the enunciated standard with" the Court's ultimate decision to uphold admission of Tisha's statements:

> This does not strike me as a close case at all. As a result, lower courts will ask, with some degree of confusion, if these facts do not do it, what

does?

(R9:Exh.L:24-26; App. 134-36).

The United States Supreme Court denied Samuel's petition for certiorari on November 12, 2002 (R9:Exh.O; *see* R9:Exh.M). *Samuel v. Wisconsin*, 537 U.S. 1018 (2002).

4. Federal Habeas Proceedings

On November 19, 2003, Samuel filed his habeas petition, alleging in part that admission of Tisha's coerced statements at trial denied him due process (R1). After the district court, Hon. Lynn Adelman presiding, appointed undersigned counsel to represent Samuel (R6; App. 106-09), Frank filed his response (R9), and the parties briefed the issues (R12; R20; R23). On December 18, 2006, the district court, Hon. Lynn Adelman presiding, entered its decision and order denying Samuel's petition on its merits (R32; App. 20-37). On December 19, 2006, that court entered its amended decision and order, correcting a typographical error in the original decision (R33; App. 2-19).

The district court held that the Wisconsin Supreme Court's standard for assessing when admission of coerced witness statements violates due process was not an unreasonable application of controlling Supreme Court precedent (R33:9-12; App. 10-13), and that the state court did not rely upon unreasonable findings of fact in concluding that admission of Tisha's prior statements did not violate Samuel's due process rights (R33:12-15; App. 13-16).

The district court entered its judgment denying Samuel's petition on January 3, 2007 (R34; App. 1).

Samuel filed his notice of appeal on January 25, 2007 (R35). By Order entered February 1, 2007, the district court granted him a certificate of appealability and granted him leave to appeal *in forma pauperis*. (R40; App. 101-04).

SUMMARY OF ARGUMENT

Stanley Samuel appeals from dismissal of his federal habeas petition under 28 U.S.C. §2254. That petition claimed violation of Samuel's right to due process due to the admission of statements given by Tisha in response to the taking of her newborn child pending her "cooperation" with Samuel's prosecution. Despite the limitations of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), habeas relief is appropriate here.

While the Wisconsin Supreme Court properly held that the defendant's due process rights bar the admission of coerced witness statements against him, that court's standard for assessing such statements unreasonably applied controlling United States Supreme Court precedent. Specifically, that Court held that coerced witness statements do not violate due process unless they are both involuntary *and* obtained by official conduct so egregious that they are unreliable as a matter of law (R9:Exh.L:2; App. 112). Among other things, that Court's standard overlooks the Supreme Court's recognition that statements deemed involuntary under traditional standards are inherently unreliable. *E.g.*, *Dickerson v. United States*, 530 U.S. 428,

433 (2000); *Spano v. New York*, 360 U.S. 315, 320 (1959).

Habeas relief likewise is appropriate because the Wisconsin Supreme Court's assessment of the statements at issue here relied upon unreasonable findings of fact. The evidence established that Tisha's statements incriminating Samuel were obtained by explicit or clearly implicit threats to take her child and by actually taking the child from her, pending her "cooperation" with Sexual Abuse Investigator Schraufnagel and Police Officer Sagmeister. The Supreme Court has deemed such police tactics the equivalent of torture, rendering the resulting statements involuntary. *See Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

ARGUMENT

ADMISSION OF TISHA'S STATEMENTS TO STATE AGENTS VIOLATED SAMUEL'S RIGHT TO DUE PROCESS AND JUSTIFIES HABEAS RELIEF

The central issue here concerns when a criminal defendant's right to due process mandates exclusion of an involuntary, out-of- court statement extracted from a third party by police coercion. The Supreme Court has established that a defendant's constitutional rights are implicated where the state (or even the judge) employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to provide evidence. *Webb v. Texas*, 409 U.S. 95 (1972) (due process violated where judge "gratuitously singled out" defense witness for a lengthy and unnecessarily strong admonition on dangers of perjury, resulting in witness' refusal to testify). The use of such tactics by state agents to

extract incriminating statements from such witnesses is no more constitutionally acceptable.

A. Standard of Review

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

> unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

A state court's decision is "contrary to . . . clearly established Federal law as established by the United States Supreme Court" if it is "substantially different from relevant [Supreme Court] precedent." *Washington v. Smith*, 219 F.3d 620, 627 (7th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)):

> Under the "contrary to" clause of §2254(d)(1), [a court] could grant a writ of habeas corpus . . . 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.

Id. The "unreasonable application" clause is broader, however, and "allows a federal

habeas court to grant habeas relief whenever the state court 'unreasonably applied [a clearly established] principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 529 U.S. at 413).

"An 'unreasonable application' of Supreme Court precedent occurs when 'the state court identifies the correct governing legal rule... but unreasonably applies it to the facts of the particular state prisoner's case' or 'if the state court either unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Dixon v. Snyder,* 266 F.3d 693, 700 (7th Cir.2001) (quoting *Williams*, 529 U.S. at 405. "Clearly established" Supreme Court precedent is "the holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade,* 538 U.S. 63, 71 (2003).

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. *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 sup-

ported by the record, or so arbitrary, that a writ must issue.

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

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

B. The Wisconsin Supreme Court Acted Unreasonably In Holding That Admission of Tisha's Coerced and Involuntary Statements Did Not Violate Due Process

1. The Wisconsin Court's standard is itself unreasonable in light of controlling Supreme Court authority

The Wisconsin Supreme Court recognized that the defendant has a due process right to exclusion of coerced witness statements. This general conclusion is consistent both with the Supreme Court's recognition in *Webb* that coercion of defense witnesses violates due process, 409 U.S. at 98. and the consensus among the lower courts.

As the Alaska Supreme Court has recognized, "both our case law and that of other jurisdictions uniformly recognize a defendant's ability to assert a due process violation based on the coercion of witnesses whose statements are used against the defendant at trial." *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000). *See, e.g.*, *United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999); *Clanton v. Cooper*,

129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[B]ecause the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person"); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause"), *cert. denied,* 513 U.S. 1085 (1995); *United States v. Merkt*, 764 F.2d 266, 274 (5th Cir. 1985) ("A defendant may assert her own fifth amendment right to a fair trial as a valid objection to the introduction of statements extracted from a non-defendant by coercion or other inquisitional tactics" (footnote and citations omitted)); *United States v. Cunningham v. DeRobertis*, 719 F.2d 892, 896 (7th Cir. 1983) (violation of another's Fifth Amendment rights may violate one's own right to a fair trial); *Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973), *aff'g* 354 F.Supp. 1331 (E.D. Mich. 1972). *See also LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974):

> It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case . . .. Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.

Justice Rutledge, dissenting in *Malinski v. New York*, 324 U.S. 401 (1945), agreed:

> Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal.

Id. at 430-31 (Rutledge, J., dissenting). *See also Bradford v. Michigan*, 394 U.S. 1022 (1968) (Warren, Douglas, & Marshall, JJ., dissenting from denial of certiorari).

This right to suppression of coerced witness statements is based in the due process right to a fair trial. As such, it is wholly independent of the defendant's right to be free from compelled self-incrimination or from use of his or her own coerced statements at trial. *E.g.*, *Gonzales*, 164 F.3d at 1289.

Despite its agreement on the general principle, the Wisconsin Supreme Court's decision in this case asserts that involuntary witness statements resulting from state coercion nonetheless are admissible at another's trial so long as they did not result from police misconduct so "egregious" that "it produces statements that are unreliable as a matter of law." (R9:Exh.L:2; App. 112). Left undefined is exactly what is required over and above the types of egregious governmental coercion already required under the traditional due process standard. All we know from the decision below is that the type of preying on the maternal instinct exemplified by the facts of this case apparently are not enough.

With all due respect, the Wisconsin Court's holding is an unreasonable application of controlling Supreme Court authority. The established legal principles upon which Samuel rests this claim are as follows:

> – A defendant's constitutional rights are implicated where the state (or even the judge) employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to provide evidence. *Webb v. Texas*, 409 U.S. 95 (1972)
>
> – Regardless whether they may be accurate in a particular case, statements

coerced under the traditional voluntariness standard are nonetheless inherently unreliable. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 433 (2000); *Spano v. New York*, 360 U.S. 315, 320 (1959).

– Exclusion of coerced statements is based on the mistaken assumption that involuntary statements are inherently untrustworthy and their use violates our fundamental sense of decency. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

– Coercion can be mental as well as physical, depending on the individual characteristics of the victim; psychological means can be as effective as physical torture. *E.g.*, *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

– One recognized means of psychological coercion is the threat to take one's child pending "cooperation" with authorities. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

The Wisconsin Supreme Court's holding that due process bars only witness statements that are *both* involuntary *and* the result of "egregious" police tactics that render the statements "unreliable as a matter of law" (R9:Exh.L:13-14; App. 123-24), constitutes an objectively unreasonable application of these controlling standards.

The state court's suggested standard makes no sense in light of the structure and intent of the established due process test for voluntariness. Although coercive police activity is a necessary predicate to finding that a statement is involuntary under the Due Process Clause, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), coercive activity alone does not, in and of itself, establish involuntariness. Rather, the determination of whether a statement is voluntary "'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.'" *Dickerson*, 530 U.S. at 434 (citation omitted). *See also Mincey v. Arizona*, 437 U.S. 385 (1978) (statement involuntary where, given interrogation techniques and

particular circumstances of case, it was unlikely to have been the product of a free and rational will).

Under this traditional balancing approach, therefore, a lower level of coercion may result in an involuntary statement from a weak-willed person, although it would not affect one more self-assured. *See Blackburn*, 361 U.S. at 206. Under the state court's proffered standard, however, the first person's statement would be admissible, even though it was just as involuntary, just as unreliable, and just as improperly extracted as one resulting from physical torture.

Also, although that Court acknowledged that "a conviction based on unreliable evidence undermines the fundamental fairness of a defendant's trial" and thus violates due process (R9:Exh.L:14; App. 124), the central premise on which it based its standard, i.e., that coerced statements still may be "reliable" (*see* R9:Exh.L:13; App. 123 (asserting that, although involuntary statements "may in some cases be unreliable, in other cases they are reliable")), is simply wrong.

Regardless whether they may be accurate in a particular case, statements coerced under the traditional voluntariness standard are nonetheless inherently unreliable. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 433 (2000); *Spano v. New York*, 360 U.S. 315, 320 (1959). *See also Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause."), citing *Arizona v. Fulminante*, 499

U.S. 279 (1991).

Indeed, coerced statements are even more unreliable when the speaker is a mere witness rather than a suspect. The Supreme Court has noted that false statements may arise whenever an individual is placed in a dilemma where a false statement is the more promising of two alternatives between which she must choose. *See In re Gault*, 387 U.S. 1, 44-45 (1967), quoting 3 J. Wigmore, Evidence §822 (3d ed. 1940). Yet, while a criminal suspect will always have a strong interest in not caving in to police coercion and falsely incriminating himself, the witness will have no such inherent counterbalance to the coercive pressures of the police. Unlike the suspect, the relative balance for the witness subject to police coercion for a statement against someone else more squarely falls on the side of telling the police what they want, regardless whether it is true.

For similar reasons, the engrafting of an "egregious state conduct" requirement onto the traditional due process standard is itself patently unreasonable. Because police-coerced statements which are involuntary under traditional due process standards already are inherently unreliable, *e.g.*, *Dickerson*, *supra*, there is no rational basis for requiring such coercion to be "egregious" as well.

As the Supreme Court has recognized, moreover, less medieval forms of coercion may be just as effective in extracting an involuntary (and thus unreliable) statement as full-fledged torture, depending on the target of the police abuse:

> [C]oercion can be mental as well as physical, and ...the blood of the accused is not the only hallmark of an unconstitutional inquisition. A

> number of cases have demonstrated, if demonstrations were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."

Blackburn v. Alabama, 361 U.S. 199, 206 (1960). *See also Raphael*, 994 P.2d at 1008. Indeed, that Court in *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), identified the threat to take one's child upon detention, the state agents' coercion of choice in this case, as falling squarely within this category of coercive "persuasion."

The Supreme Court has explained exclusion of coerced statements on the grounds that involuntary statements are inherently untrustworthy and their use violates our fundamental sense of decency. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964). What that Court observed about coerced confessions applies equally to statements coerced from those not even suspected of crimes:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Spano, 360 U.S. at 320.

Indeed, all of these reasons for suppression of statements coerced from a suspect apply equally when it is a witness whose statements are coerced. *See, e.g.*, *Dimmick v. State*, 473 P.2d 616, 619-20 (Alaska 1970):

> Statements which are the product of coercion may be unreliable and untrustworthy, and thus should be excluded as evidence against one not coerced into making them. But more important, coerced statements are condemned because of the "strongly felt attitude of our society that

> important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." Those human values may be as much involved and in need of protection when an involuntary statement is used to convict one not coerced into making it as well as when used against the one from whom the statement was obtained.

See also People v. Underwood, 389 P.2d 937, 943 (Cal. 1964):

> [an involuntary] statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crime.

There is no rational reason why the types of improper coercion deemed unacceptable when applied to criminal suspects should be encouraged by permissive due process standards when the same manipulative techniques are applied to witnesses. As the Wisconsin Court of Appeals recognized below, "'methods offensive when used against an accused do not magically become any less so when exerted against a witness . . ..'" (R9:Exh.E:10; App. 146, *quoting United States v. Gonzales*, 164 F.3d 1285, 1289 n.1 (10th Cir. 1999)).

The actions of state agents preying upon the maternal instincts of a mother by taking or threatening to take her child pending her "cooperation" with the police was egregious and unacceptable when the Supreme Court decided *Lynumn*, *supra*, in 1963, and they remain so today. A legal standard which allows the state to benefit from its own wrongdoing can only encourage such misconduct.

These facts also demonstrate why the Wisconsin Supreme Court's references

to additional reasons justifying suppression of a defendant's own coerced statements are simply irrelevant (R9:Exh.L:9-10; App. 119-20). Due process mandates suppression of involuntary statements because they are inherently unreliable and their use violates our fundamental sense of decency. *Jackson*, 378 U.S. at 385-86. The fact that additional reasons applicable only to the defendant's own statements *also* supports the same remedy does not rationally support the state court's conclusion that suppression is somehow unnecessary where involuntary statements of witnesses result from more "run-of-the-mill" police coercion not falling to the level of "egregious" misconduct. There are doubtless many reasons why it is not a good idea to shoot oneself in the head. It does not suddenly become a good idea just because a couple of those reasons may not apply in a particular circumstance.

Frank's suggestion that exclusion of involuntary witness statements will somehow interfere with the truth-seeking function of the trial (R20:20), similarly ignores the fact that such evidence is inherently unreliable, *e.g.*, *Dickerson*, *supra*, and thus can have no legitimate role in the search for truth. Indeed, it has just the opposite effect. *See Stein v. New York*, 346 U.S. 156, 192 (1953) (referring to coerced statements at "illusory and deceptive evidence").

Because the state court's legal standard fails to account for these established legal principles mandated by controlling Supreme Court precedent, the decision upholding Samuel's conviction "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court." 28 U.S.C.

§2254(d)(1).

2. Even assuming the Wisconsin court's standard to be reasonable, its application of that standard was not

Regardless whether its novel legal standard can be deemed reasonable in light of controlling Supreme Court authority, the Wisconsin Court's application of that standard was patently unreasonable. As Justice Bablitch explained in dissent (R9:Exh.L:24-26; App. 134-36), the Wisconsin Supreme Court's decision cannot rationally be justified given the facts here even under its "egregious state conduct" standard.

There is no doubt that Tisha's statements were coerced. *See also* Section B,3, *infra*. She was told numerous times that she would have to "cooperate" with the police or her newborn baby would be taken from her. When she did not "cooperate" by providing a statement against Samuel, the officers followed through on their threat and took her baby. Tisha was told that the return of her baby turned on her "cooperation" in the criminal investigation. She also was told that her "cooperation" was necessary to prosecute Samuel. (*E.g.*, R9:Exh.Q:38-9, 41, 43).

From the context of these statements to her it was quite obvious to all involved what the supposed "cooperation" entailed. Samuel was under arrest and it was the police and a sexual abuse investigator, not the social workers, with whom Tisha was to "cooperate" in order to get her baby back. At the intake conference, Grant Thomas and Kim Threw became angry with Tisha, said that "she was failing to cooperate in

the investigation" (R9:Exh.Q:36), and directed her to speak with Officer Sagmeister and Investigator Schraufnagel who, she was also told, needed her cooperation in order to prosecute Samuel *(e.g.*, *id.*:43). As if it were necessary to spell out what they wanted under these circumstances, Schraufnagel, through Tisha's father, expressly told her that she had to give an account of a sexual relationship with Samuel before they left Wisconsin (*id.*:27-28).

It does not take a rocket scientist to understand that the "cooperation" at issue under these circumstances did not include statements exculpating Samuel, but rather required just the opposite. It was eminently reasonable to construe the agents' statements about "cooperation," as Tisha and Attorney Keck did, as requiring statements supporting a prosecution of Samuel. (R9:Exh.Q:31, 43, 46-48).

The statements thus plainly were coerced, the facts here being indistinguishable from those in *Lynumn v. Illinois*, 372 U.S. 528 (1963) (oral confession, made by defendant only after police told her that state aid would be cut off and her children taken from her, was coerced in violation of due process). Here, as in *Lynumn*, the target of state interrogation was a woman detained for her own alleged misconduct. Here, as in *Lynumn*, the state agents threatened loss of a child absent "cooperation." Here, as in *Lynumn*, the statements resulting from such threats were coerced and involuntary.

The Ninth Circuit Court of Appeals similarly explained, in language equally applicable here, the coercive nature of such threats to take a child in the absence of

"cooperation:"

> We think it clear that the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time. We think it equally clear that such would be the conclusion which Tingle could reasonably be expected to draw from the agent's use of this technique. *The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit "cooperation," they exert the "improper influence" proscribed by Malloy [v. Hogan, 378 U.S. 1 (1964).]*

United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (Emphasis added).[5]

Although apparently ignored by the Wisconsin Supreme Court majority, this is only common sense. Any parent would readily understand that the removal of a newborn child pending one's "cooperation" in a criminal prosecution easily constitutes the equivalent of either "extreme coercion" or "torture." Indeed, the taking of one's child may be viewed as more coercive than even one's own incarceration. *Raphael*, 994 P.2d at 1010.

See also Vaughn v. Ruoff, 253 F.3d 1124, 1128-29 (7th Cir. 2001) (removing children pending mother's submission to sterilization procedure rendered procedure coerced and involuntary); *id.* at 1130 ("[A]ny reasonable social worker--indeed, any reasonable person, social worker or not-- would have known that a sterilization is compelled, not voluntary, if it is consented to under the coercive threat of losing one's children, and hence unconstitutional").

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[5] Although only Supreme Court authority is directly relevant under the AEDPA, lower court decisions can be instructive on the issue of reasonableness.

As in *Lynumn* and *Tingle*, the state agents deliberately preyed on Tisha's maternal instinct and inculcated fear in her that her newborn child would not be returned to her until and unless she provided "cooperation" by incriminating Samuel. Indeed, the coercive effect of the agents' actions in this case was, if anything, more forceful than those in the cited authorities, because the officers here in fact did take Tisha's baby from her pending her "cooperation." The officers in *Lynumn* and *Tingle* merely threatened to do so. While the defendants in those cases may have believed the officers had the authority and would follow through on their threats, Tisha knew first hand that the officers here would do so because they already had taken her baby from her for her failure to "cooperate." *See also Raphael*, *supra* (incarceration of witness and taking of her children pending her testimony against defendant resulted in coerced testimony and reversal).

Even if Tisha's conduct could have justified the temporary removal of her child, the evidence is clear that it was not her actions with Samuel, but her refusal to tell the officers what they wanted to hear, that in fact placed the child in a foster home. The key to releasing the child to her mother was Tisha's statements incriminating Samuel; nothing changed between March 12, when the agents took her child, and March 14, when they returned her, except that Tisha caved in and provided such a statement.

In addition to the official coercion, the Court must consider whether Tisha's personal characteristics were sufficient to resist the overwhelming coercive effect of

the taking of her child pending her "cooperation" against Samuel. *Dickerson*, 530 U.S. at 434. Nothing suggests that she had such extraordinary willpower.

Tisha was not at all inclined to make inculpatory statements to the state agents and declined to do so prior to being subjected to the coercive tactics employed here. *Cf. Haynes v. Washington*, 373 U.S. 503, 514 (1963). However, she was only 16 years old at the time of her statements, was left alone to deal with the officers,[6] and had only recently given birth to her first child. It was that child, moreover, whom the state agents used as their lever to pry an inculpatory statement from her. In *Tingle*, *Lynumn*, and *Raphael*, it appears that both the victims of the official coercion and their children were much older.

Finally, this is not a case in which the state merely coerced a witness to attend the trial or to answer questions put to her. The state, like the defense, is entitled to subpoena witnesses and to require them to testify at trial. Rather, whether Tisha's baby would be returned to her turned not only on *whether* she made a statement, but on the *substance* of that statement as well. The officers insisted on "cooperation" in the prosecution, not statements exculpating Samuel. When a witness can interpret coercive police action as an attempt to influence the *substance* of her statements, as the record indicates was the case here, the risk that the witness may not speak freely and truthfully is too great for due process to bear. *Raphael*, 994 P.2d at 1010.

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[6] Contrary to the post-conviction court's finding (R9:Exh.V:26), Tisha's attorney was not with her when she gave the inculpatory statements (R9:Exh.Q:48), and her father was only with her for a short time during the statements and then left (R9:Exh.Q:39, 41, 42). That finding thus was patently unreasonable.

"The entire thrust of police interrogation [in this case] was to put [Tisha] in such an emotional state as to impair [her] capacity for rational judgment." *Miranda v. Arizona*, 384 U.S. 436, 465 (1966). In this, the state succeeded. The resulting statements therefore were involuntary, even under the state court's standard. Given the Supreme Court's recognition in *Lynumn* of the extreme coercive power of threats to take one's child, Justice Bablitch is correct that the state court's holding to the contrary is wholly irrational, if not directly contrary to the holding in *Lynumn*.

3. The Wisconsin Court's decision was based on unreasonable findings of fact

The Wisconsin Supreme Court's application of its standard for assessing coerced witness statements was unreasonable, not merely because its ultimate conclusions reflect an unreasonable application of controlling Supreme Court authority, but also because it was based on patently unreasonable determinations of the facts.

Under 28 U.S.C. §2254(d)(2), a federal court may grant habeas relief to one in custody in violation of the Constitution when the state court's decision rests upon factual determinations that are objectively unreasonable in light of the evidence presented in the state court proceedings. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). This Court has explained that "[a] state court decision that rests upon a determination of fact that lies against the clear weight of the evidence is, by definition, a decision 'so inadequately supported by the record' as to be arbitrary and

therefore objectively unreasonable." *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003) (citations omitted). The Court also may find a state court factual determination unreasonable where the state court failed to consider key aspects of the record. *Miller-El*, 537 U.S. at 346-47.

With all due respect to the Wisconsin Supreme Court, its conclusion that "[n]o reasonable view of the evidence can support the conclusion that Tisha's statements were coerced by egregious methods that produced statements unreliable as a matter of law" (R9:Exh.L:19; App. 129), is totally incomprehensible in light of the evidence presented in the state courts.

Samuel notes, moreover, that the state trial court that heard his pretrial suppression motion made no factual findings and that the Wisconsin Supreme Court does not have the authority to resolve factual disputes. *Wurtz v. Fleischman*, 97 Wis.2d 100, 293 N.W.2d 155, 159 (1980) ("When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings" (citations omitted)). That Court's findings, therefore, was not that the facts found did not demonstrate a due process violation, but that there was no possible factual basis on which to find such a violation, thus rendering remand and a full evidentiary hearing unnecessary.

Although the Wisconsin Supreme Court declined to remand the case for a hearing to resolve the factual disputes relevant to its new legal standard, it did so

under the clearly mistaken (and objectively unreasonable) conclusion that a hearing would be "futile" because the court which had heard the trial and suppression hearing evidence already had decided there was no coercion (R9:Exh.L:19-20 & fn.6; App. 129-30). The circuit court judge who made those comments, however, was not the same one who heard the trial and suppression hearing and was thus in no better position to resolve the factual disputes than was the Supreme Court itself.[7]

In any event, the state court's conclusion that "[n]o reasonable view of the evidence" would support suppression of Tisha's statements appears to have been based on a number of factual assertions. Those assertions, however, either do not rationally support the conclusion or are not rationally supported by the record.

> – "[T]here is little if any credible evidence that Tisha was specifically coached on what to say or that the authorities' questions were blatantly tailored in order to compel her to implicate Samuel." (R9:Exh.L:20; App. 130).
>
> – "Tisha's father testified that neither Officer Sagmeister nor the social worker, Schraufnagel, told Tisha that she needed to say anything in particular in order to get her baby back." (R9:Exh.L:20; App. 130).

Unless the Court meant to suggest only that the officers did not dictate the particular words Tisha would have to use, this is simply false. Tisha's child was taken pending her "cooperation" in the form of a statement to the police. Tisha's father specifically corroborated Tisha's testimony that Schraufnagel had relayed a message to her through her father that what the state agents wanted was an account of a sexual

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[7] Judge Thomas S. Williams heard the suppression hearing and presided at trial (R9:Exh.Q:1; R9:Exh.R:1). Judge Barbara H. Key decided Samuel's post-conviction motions (R9:Exh.B:App.1; R9:Exh.V:1).

relationship with Samuel before they left Wisconsin and a statement that she wanted to come home (R9:Exh.Q:27-28, 38). If the Court merely meant to suggest that the agents did not "coach" or dictate the specific details they wanted to hear beyond those general outlines, the finding is wholly irrelevant. Having already notified Tisha of the information they wanted in exchange for her child, the fact that they did not require any "particular" language neither mitigates the coercive effect nor renders the resulting account any less unreliable.

The reference to Schraufnagel as a "social worker" also distorts the conduct at issue here. Schraufnagel was not a mere "social worker." He was a physical and sexual abuse investigator from the Department of Social Services (R9:Exh.T:54, 68-69), and it was this sexual abuse investigator and a police officer with whom Tisha was required to "cooperate" in order to get her child back (*id.*:56).

> – "Tisha's testimony focused on the fact that she was repeatedly told she had to 'cooperate' in general," and while she indicated at one point that "someone said she would not get her baby back until she implicated Samuel, when pressed, she could not remember who had said this or whether those were the exact words the speaker had used." (R9:Exh.L:20-21; App. 130-31).
>
> – "[T]he record does not show that authorities ever expressly threatened Tisha with the loss of her baby, although that was a possibility regardless of whether Tisha implicated Samuel." (R9:Exh.L:21; App. 131).
>
> – While Cathy Stelzner testified that she thought there was "blackmail" involved, she was "unable to explain in any detail why she so believed." (R9:Exh.L:21; App. 131).

These findings focus on what the Court perceived as the absence of any "express" threat to keep Tisha's baby from her pending her cooperation in the

criminal investigation of Samuel. As so limited, the finding is not unreasonable. It is, however, wholly irrelevant.

The evidence established that, implicitly if not explicitly, the agents made it clear that the return of Tisha's baby turned on her "cooperation" in the form of a statement supporting the criminal prosecution of Samuel.[8] Attorney Keck, for instance, acknowledged his impression that the desired "cooperation" from Tisha as a condition of the return of her child was a statement regarding a criminal prosecution against Samuel. (R9:Exh.Q:47).

It matters not one whit that this prerequisite for return of the baby was not "express;" the agents' meaning was so clear that the same impression was shared by the others who testified at the suppression hearing. Tisha's child was taken from her. She was told she had to "cooperate" in order to get her child back. She was told that she had to "cooperate" by providing a statement, not to a social worker, but to a sex abuse investigator and a police officer. The agents told Tisha, through her father, that

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[8] Tisha, for instance, testified that the state agents at the intake conference specifically told her that she would not get her baby back unless she "cooperated" with the police. It was obvious to her that what they required her to tell them was not the truth but what they wanted to hear about Mr. Samuel. (R9:Exh.Q:12-14).

Tisha's father testified that he was surprised at the questions asked, given the supposed purpose of the intake conference (R9:Exh.Q:34). He further testified that, although there were no *express* threats, the agents were very angry for Tisha's failure to "cooperate" in the investigation of Samuel and, as a result, the baby was taken from her (*id.*:36-37). He was told that Tisha's "cooperation" was needed to prosecute Samuel and relayed the officers' message to Tisha about what information they wanted (*id.*:41, 43).

Although Attorney Keck claimed to have perceived no threats, he acknowledged as well that Tisha's baby was placed in a foster home pending her "cooperation" with the police, which he understood to mean a statement supporting a criminal prosecution of Samuel (R9:Exh.Q:46-48).

Finally, Cathy Stelzner testified that the agents told her at the intake conference that they would consider giving the baby back to Tisha at the next hearing if they saw some "cooperation," a position she viewed as "blackmail." (R9:Exh.Q:50-51).

the areas of "cooperation" included information implicating Samuel in a sexual relationship before they left Wisconsin. At the beginning of the meeting to provide that information, the agents again emphasized the kind of information they needed to prosecute Samuel (R9:Exh.Q:41). The agents thus could not have made more clear that the return of Tisha's child turned on her providing a statement incriminating Samuel.

For similar reasons, the Court's reference to "'cooperat[ion]' in general" misstates the record. If the Court again is merely referring to its perception that there was no *express* equation of "cooperation" with providing a statement supporting a criminal prosecution, that finding may not be unreasonable. If, however, the Court intends to suggest that the agents' repeated demands for "cooperation" involved nothing more than statements regarding where she had been and how she intended to take care of the baby, that "finding" is again wholly irrational for the reasons already stated. There was no doubt based on the evidence that the desired "cooperation" meant cooperation in providing a statement supporting a criminal prosecution. (*E.g.*, R9:Exh.Q:47). *See also Lynumn*, *supra* (oral confession, made by defendant only after police told her that state aid would be cut off and her children taken from her upon conviction absent her "cooperation," was coerced in violation of due process).

> – "The record does not show that anyone presented Tisha with an illegal quid pro quo, such as a promise that she would be able to keep her baby if she agreed to implicate Samuel." (R9:Exh.L:21; App. 131).

Again, the Court's finding either rests upon the irrelevant technicality that the

statement implicating Samuel as a prerequisite to return of the baby was only implied rather than "express," or simply ignores the undisputed evidence at the suppression hearing that the return of Tisha's child in fact depended on exactly that illegal *quid pro quo*. The agents made crystal clear that, if she did not incriminate Samuel, she would not get her child back.

> – The record does not support a conclusion that the legitimate purpose for questioning Tisha was transformed into an illegitimate pretext for criminal investigation. (R9:Exh.L:21; App. 131).

While there may have been a legitimate purpose in questioning Tisha on some topics, there was no possible rational connection between Tisha's competence to care for the baby (the supposed purpose of the intake conference) and whether she had a sexual relationship with Samuel before leaving Wisconsin. In demanding Tisha's "cooperation" by keeping the baby from her, the state agents made no effort to distinguish between the possibly legitimate areas of inquiry and those which plainly were not. The areas of "cooperation" relayed to Tisha through her father included an account of a sexual relationship before leaving Wisconsin (R9:Exh.Q:27-28, 38). The true purpose of the demanded "cooperation" also was evident from the fact that Tisha was required to "cooperate," not with social workers whose primary concern was the baby, but with a police officer and a sexual abuse investigator. The agents then began the meeting required of Tisha for return of her child by emphasizing the need of such information to prosecute Samuel (*id.*:41).

It is thus irrelevant whether the agents really were interested in Tisha's ability

to care for her baby or whether they merely feigned that interest as a pretext to get the incriminating statements they desired. The fact is that they definitely had an interest in obtaining incriminating evidence against Samuel. That was expressed both in their message to Tisha's father and their preliminary statements at their March 13 meeting with Tisha of the areas of "cooperation" they intended to cover. The possibility that the agents *also* had legitimate reasons to ask Tisha about *other* issues, such as where she had been and how she planned on caring for the baby, and perhaps even legitimate grounds for retaining her child pending adequate responses to those particular concerns, did not rationally allow them to retain her child pending her "cooperation" in providing incriminating statements bearing no rational connection to her competence as a mother.

The intent of the state agents is irrelevant in any event when assessing the coercive effect of their actions. It is well-established that coercion is determined from the perspective of the person being questioned, and not from the perspective of the questioner. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990), citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). *See also United States v. Huerta*, 239 F.3d 865, 871 (7th Cir.2001) (the Court "analyze[s] coercion from the perspective of a reasonable person in the position of the suspect"). The purported good faith or legitimate purpose of the agents' actions thus are irrelevant.

The factual findings upon which the Wisconsin Supreme Court based its

ultimate decision without so much as a hearing and findings of fact accordingly are either wholly unreasonable or wholly irrelevant. *See Ward*, *supra*.

4. The erroneous admission of Tisha's coerced statements was not harmless

Because it erroneously concluded that Tisha's statements were admissible, the Wisconsin Supreme Court did not address whether admission of those statements was harmless. This Court accordingly owes no deference to that court's decision on this issue. *Dixon v. Snyder*, 266 F.3d 693, 701, 702 (7th Cir. 2001).

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In order to find an error harmless beyond a reasonable doubt, the Court must determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).[9]

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

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

prejudice, *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995).

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

If the Court is convinced that "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *O'Neal*, 513 U.S. at 437. If, however, the Court is not fairly assured that there was no effect on the verdict, it must reverse. *Id.* In the "narrow circumstance" in which the Court is in "grave doubt" as to the effect of the constitutional error, it must assume that there was such an effect and grant the petition. *Id.* at 436, 438.

Thus, while the term "burden of proof" may be more appropriate to the determination of facts rather than the purely legal issue of assessing prejudice, *id.* at 436-37, the concept remains the same. If the state fails to persuade the Court that there was no substantial or injurious effect on the verdict, the error is not harmless. Placing the "risk of doubt" on the state in such circumstances is fully consistent with prior Supreme Court authority that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error. *Id.* at 437-44; *e.g.*, *United States v. Olano*, 507 U.S. 725, 741 (1993) (government bears the "burden of

showing the absence of prejudice"). *See also Brecht*, 507 U.S. at 640-41 (Stevens, J., concurring) (noting that *Kotteakos v. United States*, 328 U.S. 750 (1946), the decision on which *Brecht* was based, "places the burden on prosecutors to explain why those errors were harmless").[10]

The error was not harmless. Indeed, virtually the state's entire case consisted of Tisha's coerced statements and its efforts to provide some minimal level of corroboration for peripheral aspects of those statements. Tisha's trial testimony directly contradicted those portions of the prior statements helpful to the state. Without the prior statements, in short, the state had no case.

The coerced statements were the centerpiece of the state's case, and whatever makeweight which may have been added by other allegations falls far short of the kind of overwhelming evidence necessary for a finding of harmlessness.

Each bit of evidence relied upon by the state was impeached, either by the circumstances under which the allegations were made (as with the boy whose overtures were rejected by Tisha at a party (R9:Exh.S:88-89), and the inmate who went to the police with his story after a fight with Samuel (*id.*:38-41)), or by other evidence (such as that of the two supposed "friends" of Tisha whose testimony was contradicted by that of Tisha's best friend at the time to the effect that she never talked much about her boyfriends and never said she was having sex with Samuel

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

(*id.*:191-92)). All, moreover, were rebutted by Tisha, who testified under oath that she and Samuel were nothing more than friends before they left Wisconsin (*id.*:139-40; R9:Exh.T:196). There was nothing inherently incredible about Tisha's testimony and, but for the damaging effect of the coerced statements, it easily could have been credited by the jury.

Nor can admission of the coerced statements be deemed harmless on the remaining counts. There can be no doubt that the coerced statement tainted the jury evaluation of *all* of Tisha's testimony. A reasonable jury easily could have credited Tisha's testimony regarding the deterioration of her relationship with her mother after she reported Jones to Social Services and that her mother ultimately threw her out. That testimony was not inherently incredible and was corroborated by independent evidence that Tisha did report her mother and that Jones' home was, in fact, a "disgusting pigsty" as she claimed (R9:Exh.R:117; R9:Exh.S:12-13, 34-35).

Admission of Tisha's coerced statements, however, forced the jury either to believe Tisha's testimony as a whole or not to believe it. The only relevant dispute on the abduction and interference claims was between Tisha's testimony that Jones threw her out and Jones' uncorroborated denials. Admission of the coerced statements, however, transformed the credibility dispute into one between Tisha on the one hand and Jones and the officers on the other, with the officers' testimony about the statements effectively bolstering Jones' claims by rebutting Tisha's.

The state Court of Appeals was right (R9:Exh.E:14, 17-18; App. 150, 153-54).

Under these circumstances, in which admission of the coerced statements acted unfairly to besmirch Tisha's credibility across the board, the error cannot be written off as harmless.

CONCLUSION

For these reasons, Stanley A. Samuel respectfully asks that the Court reverse the judgment below and grant the requested writ of habeas corpus. Should the Court decline to grant such relief, Samuel asks that the Court reverse the judgment below and remand the case for an evidentiary hearing on his due process claim.

Dated at Milwaukee, Wisconsin, April 5, 2007.

Respectfully submitted,

STANLEY A. SAMUEL, Petitioner-Appellant

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____

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 11,423 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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Robert R. Henak

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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

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

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Robert R. Henak

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊗

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

STANLEY A. SAMUEL,
Petitioner,

v.

CASE NUMBER: 03C1279

MATTHEW J. FRANK,
Respondent.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Stanley A. Samuel's petition for a writ of habeas corpus is DENIED and this action is DISMISSED.

December 30, 2006
Date

Clerk of Court

/s
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STANLEY A. SAMUEL,

Petitioner,

v. **Case No. 03-C-1279**

MATTHEW FRANK,

Respondent.

DECISION AND ORDER

Petitioner Stanley A. Samuel, a Wisconsin state prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his Winnebago County Circuit Court conviction of second-degree sexual assault of a child, interference with child custody and abduction. Petitioner claims that his right to due process was denied because the trial court admitted in evidence out-of-court witness statements that were coerced and sentenced him based in part on sealed evidence to which he had no access.

I. FACTUAL AND PROCEDURAL BACKGROUND

The charges against petitioner arose out of his involvement with Tisha Leyh ("Tisha"). In January 1996, petitioner, then forty-seven and Tisha, then fifteen, left Wisconsin and spent the next thirteen months together. Winnebago County charged petitioner with interference with child custody and issued a warrant for his arrest and a capias – the equivalent of a warrant – for Tisha, who was a juvenile. On March 8, 1997, petitioner was arrested in Missouri. Petitioner waived extradition, and Tisha's father Peter Leyh ("Peter") and his girlfriend Catherine Stelzner ("Catherine"), drove to Missouri to pick up Tisha, who was nine months pregnant.

On March 10, 1997, Tisha gave birth to a daughter. On March 12, 1997, juvenile court and social service officials convened an intake conference to determine temporary placement of Tisha's daughter. A juvenile court intake worker, a social services staffer, Tisha, Peter, Catherine, Tisha's attorney David Keck, county social services sexual assault investigator Rodney Schraufnagel, and Oshkosh police officer Steven Sagmeister attended the conference. At the conference, the officials questioned Tisha about her and petitioner's activities over the preceding thirteen months. Tisha declined to answer many of the officials' questions. At the end of the conference, dissatisfied with Tisha's refusal to answer questions, Tisha's daughter was temporarily placed in foster care, and another placement conference was scheduled to take place two days later. The officials directed Tisha to address their questions in the meantime. They permitted Tisha to spend time with and breast-feed her daughter in the foster home.

On March 11, 1997, Tisha met with Schraufnagel and Sagmeister at the police department. Schraufnagel asked Tisha questions about her and petitioner's activities from the time they met until the present, and Tisha answered them. As a result, at the conference the next day, the officials placed the baby with Tisha. Subsequently, Tisha gave the officials two additional statements.

At petitioner's trial, petitioner argued that the state couldn't prove that he had sex with Tisha until after they left Wisconsin, and thus that he was guilty of committing sexual assault here. Tisha testified that she and petitioner did not have sex in Wisconsin. The state then introduced Tisha's statements to Schraufnagel and Sagmeister acknowledging that she had sex with petitioner in Winnebago County. The jury found petitioner guilty, and petitioner appealed. The state court of appeals reversed, holding that due process barred the admission of involuntary witness statements, and remanded for a determination concerning the voluntariness of Tisha's statements. State v. Samuel, 240 Wis. 2d 956 (Ct. App. 2000). The state supreme

court granted the state's petition for review and reversed the court of appeals. State v. Samuel, 252 Wis. 2d 26 (2002). The court adopted a new standard for determining the admissibility of allegedly coerced witness statements, holding that such statements were inadmissible only if they were involuntary and obtained by official conduct so egregious that they were unreliable as a matter of law. The court further determined that under such standard, Tisha's statements were admissible. Petitioner unsuccessfully petitioned for certiorari to the United States Supreme Court.

II. TESTIMONY AT SUPPRESSION HEARING AND TRIAL

A. Suppression Hearing

Prior to trial, petitioner moved to suppress Tisha's statements, and the circuit court held a hearing. Tisha testified that at the intake conference she was very fatigued because she had given birth two days previous and was heavily medicated. She testified that at the conference, officials questioned her mostly about her activities with petitioner, including where they had been for the past thirteen months and their sexual activities. Tisha testified that officials did not ask her about her relationship with petitioner before leaving Wisconsin. She testified that she refused to answer many of their questions, that they told her that if she did not cooperate she wouldn't be able to keep her baby, and that at the end of the conference, they decided that she "wasn't cooperating enough" and placed her baby in foster care. (Answer Ex. Q at 14.) She further stated that the officials instructed her to give a statement to Sagmeister before the next conference, scheduled two days later, though they did not tell her what to say. Tisha testified that she felt that she had to give a statement about petitioner to get her baby back. (Id. at 9-20.)

Tisha testified that she agreed to meet with Sagmeister and Schraufnagel the day after the intake conference at the police station in Oshkosh. She testified that Schraufnagel asked her about her activities with petitioner, from the time they met through the time that they traveled

together, and that about half the questions were open-ended. She stated that no one told her that she needed to implicate petitioner, but that Schraufnagel had previously told her father that she should say that she wanted to come home and that she had had sex with petitioner before they left town. Tisha testified that she gave Schraufnagel and Sagmeister incriminating information about petitioner because "they didn't like what I had to say in the first place at the intake conference." (Id. at 16.) She testified that after she gave a statement, officials returned her daughter to her. Tisha testified that Sagmeister and Schraufnagel asked her to give another statement because the recording of the statement she gave at the police station was inaudible. She further testified that they subsequently asked her for a written statement. Tisha testified that officials did not threaten or coerce her to get the additional statements, but she felt that if she didn't give them, she might lose her baby again. (Id. at 16-28.)

Tisha's father, Peter, also testified. He stated that at the intake conference, officials asked Tisha where she had been and with whom she had been associating and that she answered some questions and not others. Peter testified that the officials told Tisha to "cooperate." He testified that no one told her that she had to cooperate to keep the baby but that officials said that if she did not cooperate, they could not trust her. He testified that they became angry when Tisha refused to tell them where she and petitioner went and refused to give them addresses of people who they stayed with, and told Tisha they couldn't trust her with the baby because she could run away and take shelter with one of petitioner's friends. Peter testified that after the intake conference, Schraufnagel told him of the "areas of cooperation" that the police wanted: "in order to prosecute [petitioner] they needed to know where they were, where they had sex, where – who their friends were. . . who witnessed their activities." (Id. at 38-39.) He testified that he conveyed Schraufnagel's statements to Tisha. He testified that at the police station the next day, he did not hear anyone coach Tisha on what to say. (Id. at 33-40.)

David Keck, the attorney who represented Tisha at the intake conference, testified that most of the questions at the conference focused on petitioner, and that officials repeatedly told Tisha to cooperate. He stated that at one point the officials told Tisha to cooperate by meeting with Sagmeister after the conference. He testified that it was not clear whether this meeting would be related to petitioner's prosecution or not, but that it was his impression that in order to get her baby back, Tisha needed to give the officer a statement regarding the criminal prosecution of petitioner. However, he testified that he did not hear any threats. He testified that he attended the second conference, held the day after Tisha had given the police a statement and the officials returned Tisha's baby to her. (Id. at 46-48.)

Peter's girlfriend, Catherine, testified that she did not attend the whole intake conference, but that after the officials took Tisha's baby, she expressed anger to them. She further testified that an official told her that "if they saw some cooperation they would consider giving the baby back at a hearing on Friday." (Id. at 50.)

The state did not call any witnesses at the suppression hearing. The court denied petitioner's motion to suppress Tisha's statements, holding that he lacked standing to assert the objection. The court also indicated that in its view, officials had not coerced Tisha's statements.

B. Trial

At the trial, Tisha denied having sex with petitioner before they left Oshkosh and, as she had at the suppression hearing, stated officials had coerced her statements to the contrary. The court admitted such statements, and the parties also presented evidence regarding their

voluntariness.[1] Tisha, Peter and Catherine testified generally as they had at the suppression hearing, with one notable exception. Peter testified that when officials gave Tisha her baby back, they said that they did so because Tisha had visited her baby at the foster home and "exhibited appropriate maternal behavior." (Answer Ex. T at 150.)

Sagmeister testified that he arrived late for the intake conference. He said that in responding to questions at the conference, Tisha was "cautious," "confused" and "vague," and that officials told her to "cooperate." (Id. at 55.) Sagmeister stated that at the end of the conference, officials told Tisha to contact Schraufnagel or himself before the next conference. (Id. at 56.) He testified that "juvenile court intake and social services" made the decision to place Tisha's baby in foster care and that the decision was unrelated to the police investigation of petitioner. (Id. at 16-17.) He testified that the officials instructed Tisha to speak with himself or Schraufnagel because "she was still on an outstanding capias" and may have been the victim of a crime. (Id. at 56.)

Sagmeister testified that he and Schraufnagel questioned Tisha at the police station the day after officials took her baby and did not tell her what information she should give them. He stated that Tisha's father was present for part of the time that he and Schraufnagel questioned Tisha, but that she said that she would be more comfortable talking about petitioner if her father

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[1]Petitioner argues that in assessing the merits of his petition, I should only consider the testimony at the suppression hearing and not the testimony at trial. On direct appeal, a court generally examines the correctness of a particular ruling as of the time that it was made and according to the record before the lower court. 24 C.J.S. Criminal Law §1709, at 369 (1989). However, habeas corpus is an "extraordinary" writ, Calderon v. Coleman, 525 U.S. 141, 146 (1998), and a habeas court examines the entire record, United States v. Bolin, 514 F.2d 554, 557 (7th Cir. 1975) (stating that it is well-settled that "the validity of a search or arrest can be supported by evidence which was adduced at trial even though it was not presented at the pretrial suppression hearing"). Thus, I will consider the testimony presented both at the suppression hearing and at the trial.

left the room. Sagmeister stated that Schraufnagel asked most of the questions, and that they were primarily open-ended. (Id. at 17-19.)

Sagmeister testified that at the conference the next day, county officials, "based on the interview that we had with Tisha," returned the baby to Tisha. (Id. at 20.) He testified that at that conference he told Tisha that he needed her to make another statement because the audio recording had not come through, and that he and Schraufnagel met with Tisha later that afternoon for her to repeat her statement. Sagmeister testified that in giving a second statement, Tisha did not object to any of the questions asked and answered the questions in the same way that she had the previous day. He testified that he never told Tisha that she needed to say that she had sex with petitioner in Winnebago County prior to 1995, but that she gave him that information. He testified that, later, he and Schraufnagel went to Peter's home, where Tisha lived, and asked Tisha to repeat her statement in writing, which she did. (Id. at 20-22.)

Schraufnagel testified that Sagmeister brought him into the case when Tisha was in the hospital. He testified that he was concerned about Tisha and her child and not about prosecuting petitioner. He stated that he believed that Tisha and her baby should be kept together, and that the initial intake conference focused on whether Tisha could be "trusted with her baby" or if she would "run away again." (Id. at 73-74.) He testified that he told Tisha at the conference that she was a "victim." (Id. at 106.) He testified that no one asked Tisha about sex with petitioner, but officials did ask her whether petitioner was the father of her baby, and where Tisha and petitioner had been and what they had done for the past thirteen months. (Id. at 74-75, 109-10.) He testified that at one point in the conference Tisha denied that petitioner was the father, which caused concerns regarding health hazards and paternal rights. (Id. at 77.)

Schraufnagel stated that after the conference, Tisha only needed to talk with him about such things as prenatal care. Schraufnagel acknowledged that after the conference he talked

with Tisha's father but stated that he didn't tell him what Tisha needed to say, only that he should "talk with his daughter about the problems that he felt she was in." (Id. at 113-17.) His testimony about the questioning at the police station was generally the same as Sagmeister's.

The prosecution presented evidence besides Tisha's statements that petitioner and Tisha had sex before leaving Wisconsin. Three of Tisha's friends or acquaintances testified that before Tisha and petitioner left, Tisha told them that she and petitioner had sex. A cellmate of petitioner testified that petitioner told him that he had sex with Tisha long before leaving Wisconsin. Tisha's mother, Cindy, testified that before they left the state, petitioner drove Tisha to Planned Parenthood, a reproductive health care clinic. Tisha's sister testified that she had seen petitioner and Tisha lying in Tisha's bed underneath a blanket, and had seen them sitting on a bed in the back of petitioner's pick-up truck. One of Cindy's neighbors testified that she often saw petitioner's vehicle parked at Cindy's house at night after Cindy left for work.

As to the abduction and interference with custody charges against petitioner, Tisha testified that she did not run away, but was kicked out of Cindy's house after Tisha reported to state authorities that Cindy maintained her home in an unsanitary condition. She also testified that her father had indicated that she could not live with him. Cindy and Peter testified that they did not consent to Tisha's leaving town. Peter testified that he and Cindy contacted police soon after Tisha left and reported incoming calls from Tisha to the police. Two of Tisha's acquaintances testified that Tisha had spoken of running away.

I will discuss additional testimony in the course of the decision.

III. STANDARD

A federal court may grant habeas relief to a state prisoner who is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3) and 2254(a). Because petitioner filed his petition after the effective date of the Antiterrorism and

Effective Death Penalty Act of 1996 ("AEDPA"), the AEDPA standard of review governs his claims. Ouska v. Cahill-Masching, 246 F.3d 1036, 1044 (7th Cir. 2001). AEDPA limits a federal court's authority to grant habeas relief to a person who is being unlawfully held in custody. Under AEDPA, I may grant relief only if the state court decision under review was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States"; involved an "unreasonable application" of such clearly established law, 28 U.S.C. § 2254(d)(1); or "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)(2).

IV. WITNESS STATEMENTS

Petitioner asserts that the admission of Tisha's out-of-court statements at his trial violated his Fourteenth Amendment right to due process. He argues that AEDPA does not bar relief because the Wisconsin Supreme Court's opinion finding otherwise both involved an unreasonable application of clearly established Supreme Court law, see § 2254(d)(1), and was based on an unreasonable determination of the facts in light of the evidence presented, see § 2254(d)(2).

A. Application of Clearly Established Law

A state court unreasonably applies Supreme Court precedent when it "'identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case'" or "'if the state court either unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" Dixon v. Snyder, 266 F.3d 693, 700 (7th Cir. 2001) (quoting Williams v. Taylor, 529 U.S. 362, 407 (2000)). "[A]n unreasonable application is different from an incorrect one." Bell v. Cone, 535 U.S. 685, 694 (2002) (citing Williams, 529 U.S. at 409-10). Under the unreasonable application prong of the habeas statute,

"substantial deference is due state court determinations." Searcy v. Jaimet, 332 F.3d 1081, 1089 (7th Cir. 2003). Thus, I must uphold the state court decision if it is "at least minimally consistent with the facts and circumstances of the case . . . even if it is not well reasoned or fully reasoned, or even if it is one of several equally plausible outcomes." Id. (quoting Schaff v. Snyder, 190 F.3d 513, 523 (7th Cir. 1999)). However, the reasonableness standard is not ineffectual, and the federal courts should not defer in all cases to the state court's decision. Hall v. Washington, 106 F.3d 742, 748-49 (7th Cir. 1997).

The Supreme Court has clearly established that due process bars a court from admitting a criminal defendant's involuntary statements. See, e.g., Dickerson v. United States, 530 U.S. 428, 432-34 (2000); Jackson v. Denno, 378 U.S. 368, 385-86 (1964); Spano v. New York, 360 U.S. 315, 320-21 (1959). Petitioner argues that Tisha's statements were involuntary and that the Wisconsin Supreme Court unreasonably refused to extend to rule that a defendant's involuntary statements are inadmissible to a prosecution witness's involuntary statements. The reasoning of some Supreme Court cases suggests that it might be logical to extend the rule governing defendants' statements to witness statements. See, e.g., Colorado v. Connelly, 479 U.S. 157, 166 (1986) (stating that the reason for excluding involuntary admissions is to deter the police from engaging in coercive conduct in the future); United States v. Calandra, 414 U.S. 338, 355-64 (1974) (Brennan, J., dissenting) (stating that the exclusionary rule assures citizens that the government will not benefit from official lawlessness, and thereby encourages trust in government); see also United States v. Gonzales, 164 F.3d 1285, 1289 (10th Cir. 1999) (stating that the admission of coerced witness statements at trial violates the due process rights of the defendant).

However, I cannot say that the Wisconsin Supreme Court was unreasonable in refusing to extend the rule governing defendants' statements to witness statements and instead adopting

a rule permitting involuntary witness statements to be admitted as long as the State actors did not engage in egregious misconduct. In justification of its decision, the Wisconsin Supreme Court pointed out that the rule requiring the exclusion of involuntary admissions is based on several constitutional principles, not all of which apply to involuntary witness statements. The court noted, for example, that the rule requiring suppression of involuntary admissions was supported not only by due process considerations, but also by the Fifth Amendment right against self-incrimination, and that the latter right had no application in the case of a non-defendant. Samuel, 252 Wis. 2d at 39. The state supreme court also stated that "the idea that the government must produce evidence by its own independent labors rather than compelling it from the mouth of the accused does not seem to justify the suppression of statements by those other than the accused." Id.

Moreover, in determining whether to exclude an involuntary witness statement, some other courts have applied a more stringent standard than in the case of an involuntary defendant statement. See, e.g., United States v. Merkt, 764 F.2d 266, 275-76 (5th Cir. 1985) (concluding that even if law enforcement agents had improperly intimidated and coerced witnesses, the conduct was not so egregious as to require exclusion of the witnesses' statements as a prophylactic measure); United States v. Fredericks, 586 F.2d 470, 481 (5th Cir. 1978) (upholding admission of witness's statements when the police actions were "not the sort of third-degree physical or psychological coercion that might prompt the court to disregard the societal interest of law enforcement by excluding probative testimony"); see also United States v. Chiavala, 744 F.2d 1271, 1273 (7th Cir. 1984) (suggesting that due process rights are implicated when the government seeks to admit a witness statement obtained by extreme coercion or torture); Bradford v. Johnson, 354 F. Supp. 1331, 1335-37 (E.D. Mich. 1972) (stating that because statements were produced by torture, they should not have been admitted). The decisions of

these courts also support the notion that the rule adopted by the Wisconsin Supreme Court is not unreasonable. See Price v. Vincent, 538 U.S. 634, 643 n.2 (2003) (citing lower court cases to show that the state court's decision was not objectively unreasonable).

B. Determinations of Facts

Section 2254(d)(2) permits a district court to issue a writ of habeas corpus to a prisoner in custody in violation of the Constitution where such prisoner can show that the state courts' factual determinations were objectively unreasonable in light of the evidence presented in the state-court proceeding.[2] Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). A habeas court may find a state court factual determination unreasonable where the state court failed to consider key aspects of the record, Miller-El, 537 U.S. at 346-47, where the determination is unsupported by the record, Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir. 2004), where the court's credibility determination is unreasonable, Miller-El, 537 U.S. at 340, or where the court relied on testimony of an individual who lacked personal knowledge of facts, Bui v. Haley, 321 F.3d 1304, 1315-16 (11th Cir. 2003). Courts "may no more uphold such a factual determination than we may set aside reasonable state-court fact-finding." Taylor, 366 F.3d at 1008.

In the present case, petitioner argues that the facts unequivocally show that state officials took custody of Tisha's baby in order to coerce her to make incriminating statements about

[2]The circuits are split as to how exactly § 2254(d)(2) interacts with § 2254(e)(1), which provides that in a habeas proceeding, any state court factual determination is presumed to be correct, and a petitioner can only rebut this presumption by clear and convincing evidence. Lambert v. Blodgett, 393 F.3d 943, 972 n.19 (9th Cir. 2004) (describing the split and collecting cases). The Seventh Circuit appears to treat § 2254(e)(1) as setting forth the standard for determining unreasonableness under § 2254(d)(2). Montgomery v. Uchtman, 426 F.3d 905, 912 (7th Cir. 2005) (stating that in order for a petitioner to prevail on a § 2254(d)(2) claim alleging that a state court's factual determination was unreasonable, she must offer clear and convincing evidence that the state court's determination was wrong).

petitioner.[3] The state supreme court rejected this characterization of the facts. And based on the evidence in the record, I cannot conclude that the state court's contrary factual determinations were "objectively unreasonable." See Miller-El, 537 U.S. at 340. There is evidence that county officials conducted the intake conference because they had legitimate concerns about placing the baby with Tisha. Tisha had been on the run for thirteen months with a man more than three times her age and was subject to an outstanding capias, and the officials knew nothing about what she had been doing. Thus, officials were concerned that Tisha might have been involved in activities relevant to whether the baby should be placed with her, such as crime and drug use. Officials were also concerned about the quality of Tisha's pre-natal care as well as her attitude toward motherhood and child care. Further, during the conference, Tisha denied that petitioner was the father of her baby. It was reasonable for the officials to be concerned about the implications of this statement.

And there is evidence that the officials at the intake conference limited their questions about petitioner to those relevant to these concerns. All witnesses, including Tisha, agreed that at the intake conference, the officials did not ask Tisha whether she had sex with petitioner prior to leaving Wisconsin. Schraufnagel went further, testifying that no one asked Tisha about sexual encounters between her and petitioner even while on the road, except to determine whether

[3]If petitioner's view of the facts was the only reasonable view, then the admission of Tisha's out-of-court statements in evidence would likely have violated petitioner's right to due process. See Dowling v. United States, 493 U.S. 342, 353 (1990) (stating that evidence must be excluded from a criminal trial if it was procured by actions violative of "the fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency"); Turner v. Pennsylvania, 338 U.S. 62, 66 (1949) (assuming that the due process clause would be implicated by the admission of testimony coerced from a witness); Hysler v. Florida, 315 U.S. 411, 413 (1942) (same); United States v. Chiavala, 744 F.2d 1271, 1273 (7th Cir. 1984) (stating that due process rights are implicated when the government seeks to admit a witness statement obtained by extreme coercion such that the resulting trial was "fundamentally unfair"); see also Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (holding that a threat to take a child is coercive).

petitioner was the father of Tisha's baby. Peter testified that officials asked Tisha for information about where and with whom she had been, and said that they could not trust Tisha with her baby if she had "the ability to leave here and run away and take shelter with a baby with one of [petitioner]'s friends . . ." (Answer Ex. Q at 36-38, 37.)

In addition, there is evidence in the record supporting the Wisconsin Supreme Court's finding that officials did not tell Tisha what to say. Peter testified that Schraufnagel told him only "areas of cooperation or information" in which the officials were interested, but that Tisha was not told "you need to say this or you won't get your baby back." (Id. at 38-41.) Schraufnagel testified similarly, stating that he spoke to Tisha's father about the trouble she was in "that she had potentially been a victim of one or more people; that she has a capias outstanding; that it remains to be seen whether she's been involved in any other illegal activities and in order to determine what's best for Tisha and what's best for the baby we need to have some sense of cooperation from Tisha to understand what's happened to her." (Answer Ex. T at 115-16.)

Further, to the extent that the state supreme court implicitly determined that the officials' decision to take temporary custody of Tisha's baby was not intended to serve as a threat, such determination was reasonable. Sagmeister testified that the police department had no role in the decision to take Tisha's baby and that the decision was unrelated to the investigation of petitioner. Supporting this contention, it appears from the record that the juvenile court intake worker was the primary questioner at the intake conference and that she made the decision to take Tisha's baby. Further, it appears from Schraufnagel's testimony that a court commissioner authorized social services to take temporary custody of Tisha's baby prior to the intake conference. (Answer Ex. T at 73.) As to the meeting with Sagmeister and Schraufnagel on March 13, Sagmeister testified that Tisha had been instructed to meet with him – a police officer – because she had to meet with him anyway to discuss her capias and whether she had been

the victim of a crime. It may well be that Sagmeister and Schraufnagel took advantage of the fact that social service employees instructed Tisha to speak with them by Friday, using the opportunity to ask questions that were irrelevant to custody. However, Schraufnagel testified that Tisha only needed to answer those questions relating to prenatal care and her risk of flight, and no one testified that Tisha resisted answering any of the questions or that anyone threatened Tisha at the station.

Only Tisha's testimony suggested that the officials engaged in an egregious, concerted effort to threaten her by wrongfully taking her baby. But the state court could have reasonably found that such testimony was not credible, as Tisha stated that she could not remember who threatened her or what they said exactly. In addition, Tisha testified that she loved petitioner, wanted to marry him and would do everything possible to protect him. (Answer Ex. S at 184.)

Under the deferential AEDPA standard, I cannot conclude that the state supreme court's factual determination was unreasonable. Therefore, I need not address whether the admission of Tisha's out-of-court statements was harmless error.

V. SENTENCING

Petitioner also contends that he was denied due process at sentencing because, in imposing the sentence, the court relied on two sealed documents used in a "Children in Need of Protection or Services" ("CHIPS") proceeding for Tisha and on a transcript from the CHIPS proceeding to which petitioner had no access. At the sentencing hearing, the court stated:

> As to the seriousness [of the offense], the Court has heard testimony in another proceeding . . . the effect on [Tisha], whether she recognizes it or not, is substantial. And she will require long-term counseling, perhaps treatment in the future. She's been exposed to a criminal environment over a long period of time. There is testimony that she has considerable disrespect for authority, and certainly that exposure [to petitioner] can hardly be expected not to have increased that.

(Mot. to Expand Ex. 2 at 63-64.) In the present case, the Wisconsin Court of Appeals, the last state court to rule on this claim, did not base its decision on the merits of petitioner's arguments, but rather concluded that petitioner had waived review of this claim. In the present case, the parties agree that this waiver is not "independent of the federal ground and adequate to support the judgment," Moore v. Bryant, 295 F.3d 771, 775 (2002). (See Br. in Opp'n to Pet. at 33.) Thus, petitioner is not procedurally barred from asserting the claim that his due process rights were violated when the sentencing court relied on testimony and documents from a proceeding to which petitioner was not a party. See Perruquet v. Briley, 390 F.3d 505, 515 (2004) (explaining that the state can waive procedural default by intentionally relinquishing its right to assert that defense).[4] Because the state court relied solely on petitioner's waiver to dismiss this claim, there has been no determination "on the merits in State court proceedings" as described in 28 U.S.C. § 2254(d). As such, the more lenient standard prescribed in § 2254(a), whether petitioner is in custody in violation of the Constitution or laws of the United States, applies.

Thus I must consider the merits of the claim and, if a constitutional error was committed, whether the error was harmless, i.e. whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict'" or in the present case, the sentencing judge's decision. Aleman v. Sternes, 320 F.3d 687, 690-91 (7th Cir. 2003) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). If I am convinced upon review of the entire record that the error did not influence the sentencing decision or had but slight effect, the sentence must

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[4]Despite respondent's withdrawal of the procedural default defense, respondent still argues that petitioner waived his claim that his due process rights were violated by the sentencing court under federal waiver law. Essentially, respondent is seeking to import a federal procedural rule into my habeas review of a state court decision. However, during a habeas review, I rely on "state, not federal, procedural rules. Thus, a waiver on which the state court did not explicitly rely will not bar [my] review of the merits of a claim." DeBerry v. Portuondo, 403 F.3d 57, 66 (2d Cir. 2005).

stand. Stewart v. Erwin, No. 1-03-201, 2005 U.S. Dist. LEXIS 26658, at *13-14 (S.D. Ohio Nov. 4, 2005). In contrast, if I am "left in grave doubt," I must find that the error had substantial influence on the sentence and cannot stand. Id. (citing Kotteakos v. United States, 328 U.S. 750, 765 (1946)); see also United States v. Patrick, 988 F.2d 641, 648 (6th Cir. 1993) (explaining that improprieties on the part of the sentencing judge are subject to review under harmless error analysis).

In the present case, regardless of whether the sentencing procedure violated petitioner's due process rights,[5] I cannot conclude that the documents relied on by the sentencing judge had a "substantial and injurious effect" on the sentencing judge's decision. See Aleman, 320 F.3d at 691 (explaining that "[u]nless its jurisdiction is at stake, a court may take up issues in whatever sequence seems best, given the nature of the parties' arguments and the interest in avoiding unnecessary constitutional decisions"). This is so because the two sealed documents used in the CHIPS proceeding and relied upon by the sentencing judge consisted of the psychological reports of Drs. Hauer and Kaplan. Petitioner clearly had access to these documents at the sentencing hearing and had the opportunity to rebut their conclusions. In fact, during the hearing, petitioner's attorney explicitly referred to both reports. (Mot. to Expand Ex. 2 at 47-48.)

Moreover, with respect to the testimony from the CHIPS proceeding, I have reviewed the transcript in camera and am convinced that because the testimony at issue was that of Dr. Hauer, the relevant portions of the testimony are merely cumulative of Dr. Hauer's psychological report and thus the sentencing judge's reliance upon them was harmless. See Patrick, 988 F.2d at 648 (explaining that a court's reliance on extra-record information was harmless because the information was cumulative of evidence in the record); see also Washington v. Smith, 219 F.3d

[5]It is clear that the sentencing process must satisfy the requirements of the due process clause. Gardner v. Florida, 430 U.S. 349, 358 (1977).

620, 634 (7th Cir. 2000) (stating that "[e]vidence is cumulative when it supports a fact established by existing evidence"). Thus, given that petitioner had access to the sealed documents relied upon by the sentencing judge and the fact that the testimony given in the CHIPS proceeding was cumulative of other evidence relied on by the sentencing judge, any constitutional error committed during sentencing was harmless.

VI. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that petitioner's application for writ of habeas corpus is **DENIED**.

IT IS FURTHER ORDERED that this case is **DISMISSED**.

Dated at Milwaukee, Wisconsin, this 19th day of December, 2006.

s/Lynn Adelman
LYNN ADELMAN
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STANLEY A. SAMUEL,

Petitioner,

v. **Case No. 03-C-1279**

MATTHEW FRANK,

Respondent.

DECISION AND ORDER

Petitioner Stanley A. Samuel, a Wisconsin state prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his Winnebago County Circuit Court conviction of second-degree sexual assault of a child, interference with child custody and abduction. Petitioner claims that his right to due process was denied because the trial court admitted in evidence out-of-court witness statements that were coerced and sentenced him based in part on sealed evidence to which he had no access.

I. FACTUAL AND PROCEDURAL BACKGROUND

The charges against petitioner arose out of his involvement with Tisha Leyh ("Tisha"). In January 1996, petitioner, then forty-seven and Tisha, then fifteen, left Wisconsin and spent the next thirteen months together. Winnebago County charged petitioner with interference with child custody and issued a warrant for his arrest and a capias – the equivalent of a warrant – for Tisha, who was a juvenile. On March 8, 1997, petitioner was arrested in Missouri. Petitioner waived extradition, and Tisha's father Peter Leyh ("Peter") and his girlfriend Catherine Stelzner ("Catherine"), drove to Missouri to pick up Tisha, who was nine months pregnant.

On March 10, 1997, Tisha gave birth to a daughter. On March 12, 1997, juvenile court and social service officials convened an intake conference to determine temporary placement of Tisha's daughter. A juvenile court intake worker, a social services staffer, Tisha, Peter, Catherine, Tisha's attorney David Keck, county social services sexual assault investigator Rodney Schraufnagel, and Oshkosh police officer Steven Sagmeister attended the conference. At the conference, the officials questioned Tisha about her and petitioner's activities over the preceding thirteen months. Tisha declined to answer many of the officials' questions. At the end of the conference, dissatisfied with Tisha's refusal to answer questions, Tisha's daughter was temporarily placed in foster care, and another placement conference was scheduled to take place two days later. The officials directed Tisha to address their questions in the meantime. They permitted Tisha to spend time with and breast-feed her daughter in the foster home.

On March 11, 1997, Tisha met with Schraufnagel and Sagmeister at the police department. Schraufnagel asked Tisha questions about her and petitioner's activities from the time they met until the present, and Tisha answered them. As a result, at the conference the next day, the officials placed the baby with Tisha. Subsequently, Tisha gave the officials two additional statements.

At petitioner's trial, petitioner argued that the state couldn't prove that he had sex with Tisha until after they left Wisconsin, and thus that he was guilty of committing sexual assault here. Tisha testified that she and petitioner did not have sex in Wisconsin. The state then introduced Tisha's statements to Schraufnagel and Sagmeister acknowledging that she had sex with petitioner in Winnebago County. The jury found petitioner guilty, and petitioner appealed. The state court of appeals reversed, holding that due process barred the admission of involuntary witness statements, and remanded for a determination concerning the voluntariness of Tisha's statements. State v. Samuel, 240 Wis. 2d 956 (Ct. App. 2000). The state supreme

court granted the state's petition for review and reversed the court of appeals. State v. Samuel, 252 Wis. 2d 26 (2002). The court adopted a new standard for determining the admissibility of allegedly coerced witness statements, holding that such statements were inadmissible only if they were involuntary and obtained by official conduct so egregious that they were unreliable as a matter of law. The court further determined that under such standard, Tisha's statements were admissible. Petitioner unsuccessfully petitioned for certiorari to the United States Supreme Court.

II. TESTIMONY AT SUPPRESSION HEARING AND TRIAL

A. Suppression Hearing

Prior to trial, petitioner moved to suppress Tisha's statements, and the circuit court held a hearing. Tisha testified that at the intake conference she was very fatigued because she had given birth two days previous and was heavily medicated. She testified that at the conference, officials questioned her mostly about her activities with petitioner, including where they had been for the past thirteen months and their sexual activities. Tisha testified that officials did not ask her about her relationship with petitioner before leaving Wisconsin. She testified that she refused to answer many of their questions, that they told her that if she did not cooperate she wouldn't be able to keep her baby, and that at the end of the conference, they decided that she "wasn't cooperating enough" and placed her baby in foster care. (Answer Ex. Q at 14.) She further stated that the officials instructed her to give a statement to Sagmeister before the next conference, scheduled two days later, though they did not tell her what to say. Tisha testified that she felt that she had to give a statement about petitioner to get her baby back. (Id. at 9-20.)

Tisha testified that she agreed to meet with Sagmeister and Schraufnagel the day after the intake conference at the police station in Oshkosh. She testified that Schraufnagel asked her about her activities with petitioner, from the time they met through the time that they traveled

together, and that about half the questions were open-ended. She stated that no one told her that she needed to implicate petitioner, but that Schraufnagel had previously told her father that she should say that she wanted to come home and that she had had sex with petitioner before they left town. Tisha testified that she gave Schraufnagel and Sagmeister incriminating information about petitioner because "they didn't like what I had to say in the first place at the intake conference." (Id. at 16.) She testified that after she gave a statement, officials returned her daughter to her. Tisha testified that Sagmeister and Schraufnagel asked her to give another statement because the recording of the statement she gave at the police station was inaudible. She further testified that they subsequently asked her for a written statement. Tisha testified that officials did not threaten or coerce her to get the additional statements, but she felt that if she didn't give them, she might lose her baby again. (Id. at 16-28.)

Tisha's father, Peter, also testified. He stated that at the intake conference, officials asked Tisha where she had been and with whom she had been associating and that she answered some questions and not others. Peter testified that the officials told Tisha to "cooperate." He testified that no one told her that she had to cooperate to keep the baby but that officials said that if she did not cooperate, they could not trust her. He testified that they became angry when Tisha refused to tell them where she and petitioner went and refused to give them addresses of people who they stayed with, and told Tisha they couldn't trust her with the baby because she could run away and take shelter with one of petitioner's friends. Peter testified that after the intake conference, Schraufnagel told him of the "areas of cooperation" that the police wanted: "in order to prosecute [petitioner] they needed to know where they were, where they had sex, where – who their friends were. . . who witnessed their activities." (Id. at 38-39.) He testified that he conveyed Schraufnagel's statements to Tisha. He testified that at the police station the next day, he did not hear anyone coach Tisha on what to say. (Id. at 33-40.)

David Keck, the attorney who represented Tisha at the intake conference, testified that most of the questions at the conference focused on petitioner, and that officials repeatedly told Tisha to cooperate. He stated that at one point the officials told Tisha to cooperate by meeting with Sagmeister after the conference. He testified that it was not clear whether this meeting would be related to petitioner's prosecution or not, but that it was his impression that in order to get her baby back, Tisha needed to give the officer a statement regarding the criminal prosecution of petitioner. However, he testified that he did not hear any threats. He testified that he attended the second conference, held the day after Tisha had given the police a statement and the officials returned Tisha's baby to her. (Id. at 46-48.)

Peter's girlfriend, Catherine, testified that she did not attend the whole intake conference, but that after the officials took Tisha's baby, she expressed anger to them. She further testified that an official told her that "if they saw some cooperation they would consider giving the baby back at a hearing on Friday." (Id. at 50.)

The state did not call any witnesses at the suppression hearing. The court denied petitioner's motion to suppress Tisha's statements, holding that he lacked standing to assert the objection. The court also indicated that in its view, officials had not coerced Tisha's statements.

B. Trial

At the trial, Tisha denied having sex with petitioner before they left Oshkosh and, as she had at the suppression hearing, stated officials had coerced her statements to the contrary. The court admitted such statements, and the parties also presented evidence regarding their

voluntariness.[1] Tisha, Peter and Catherine testified generally as they had at the suppression hearing, with one notable exception. Peter testified that when officials gave Tisha her baby back, they said that they did so because Tisha had visited her baby at the foster home and "exhibited appropriate maternal behavior." (Answer Ex. T at 150.)

Sagmeister testified that he arrived late for the intake conference. He said that in responding to questions at the conference, Tisha was "cautious," "confused" and "vague," and that officials told her to "cooperate." (Id. at 55.) Sagmeister stated that at the end of the conference, officials told Tisha to contact Schraufnagel or himself before the next conference. (Id. at 56.) He testified that "juvenile court intake and social services" made the decision to place Tisha's baby in foster care and that the decision was unrelated to the police investigation of petitioner. (Id. at 16-17.) He testified that the officials instructed Tisha to speak with himself or Schraufnagel because "she was still on an outstanding capias" and may have been the victim of a crime. (Id. at 56.)

Sagmeister testified that he and Schraufnagel questioned Tisha at the police station the day after officials took her baby and did not tell her what information she should give them. He stated that Tisha's father was present for part of the time that he and Schraufnagel questioned Tisha, but that she said that she would be more comfortable talking about petitioner if her father

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[1]Petitioner argues that in assessing the merits of his petition, I should only consider the testimony at the suppression hearing and not the testimony at trial. On direct appeal, a court generally examines the correctness of a particular ruling as of the time that it was made and according to the record before the lower court. 24 C.J.S. Criminal Law §1709, at 369 (1989). However, habeas corpus is an "extraordinary" writ, Calderon v. Coleman, 525 U.S. 141, 146 (1998), and a habeas court examines the entire record, United States v. Bolin, 514 F.2d 554, 557 (7th Cir. 1975) (stating that it is well-settled that "the validity of a search or arrest can be supported by evidence which was adduced at trial even though it was not presented at the pretrial suppression hearing"). Thus, I will consider the testimony presented both at the suppression hearing and at the trial.

left the room. Sagmeister stated that Schraufnagel asked most of the questions, and that they were primarily open-ended. (Id. at 17-19.)

Sagmeister testified that at the conference the next day, county officials, "based on the interview that we had with Tisha," returned the baby to Tisha. (Id. at 20.) He testified that at that conference he told Tisha that he needed her to make another statement because the audio recording had not come through, and that he and Schraufnagel met with Tisha later that afternoon for her to repeat her statement. Sagmeister testified that in giving a second statement, Tisha did not object to any of the questions asked and answered the questions in the same way that she had the previous day. He testified that he never told Tisha that she needed to say that she had sex with petitioner in Winnebago County prior to 1995, but that she gave him that information. He testified that, later, he and Schraufnagel went to Peter's home, where Tisha lived, and asked Tisha to repeat her statement in writing, which she did. (Id. at 20-22.)

Schraufnagel testified that Sagmeister brought him into the case when Tisha was in the hospital. He testified that he was concerned about Tisha and her child and not about prosecuting petitioner. He stated that he believed that Tisha and her baby should be kept together, and that the initial intake conference focused on whether Tisha could be "trusted with her baby" or if she would "run away again." (Id. at 73-74.) He testified that he told Tisha at the conference that she was a "victim." (Id. at 106.) He testified that no one asked Tisha about sex with petitioner, but officials did ask her whether petitioner was the father of her baby, and where Tisha and petitioner had been and what they had done for the past thirteen months. (Id. at 74-75, 109-10.) He testified that at one point in the conference Tisha denied that petitioner was the father, which caused concerns regarding health hazards and paternal rights. (Id. at 77.)

Schraufnagel stated that after the conference, Tisha only needed to talk with him about such things as prenatal care. Schraufnagel acknowledged that after the conference he talked

with Tisha's father but stated that he didn't tell him what Tisha needed to say, only that he should "talk with his daughter about the problems that he felt she was in." (Id. at 113-17.) His testimony about the questioning at the police station was generally the same as Sagmeister's.

The prosecution presented evidence besides Tisha's statements that petitioner and Tisha had sex before leaving Wisconsin. Three of Tisha's friends or acquaintances testified that before Tisha and petitioner left, Tisha told them that she and petitioner had sex. A cellmate of petitioner testified that petitioner told him that he had sex with Tisha long before leaving Wisconsin. Tisha's mother, Cindy, testified that before they left the state, petitioner drove Tisha to Planned Parenthood, a reproductive health care clinic. Tisha's sister testified that she had seen petitioner and Tisha lying in Tisha's bed underneath a blanket, and had seen them sitting on a bed in the back of petitioner's pick-up truck. One of Cindy's neighbors testified that she often saw petitioner's vehicle parked at Cindy's house at night after Cindy left for work.

As to the abduction and interference with custody charges against petitioner, Tisha testified that she did not run away, but was kicked out of Cindy's house after Tisha reported to state authorities that Cindy maintained her home in an unsanitary condition. She also testified that her father had indicated that she could not live with him. Cindy and Peter testified that they did not consent to Tisha's leaving town. Peter testified that he and Cindy contacted police soon after Tisha left and reported incoming calls from Tisha to the police. Two of Tisha's acquaintances testified that Tisha had spoken of running away.

I will discuss additional testimony in the course of the decision.

III. STANDARD

A federal court may grant habeas relief to a state prisoner who is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3) and 2254(a). Because petitioner filed his petition after the effective date of the Antiterrorism and

Effective Death Penalty Act of 1996 ("AEDPA"), the AEDPA standard of review governs his claims. Ouska v. Cahill-Masching, 246 F.3d 1036, 1044 (7th Cir. 2001). AEDPA limits a federal court's authority to grant habeas relief to a person who is being unlawfully held in custody. Under AEDPA, I may grant relief only if the state court decision under review was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States"; involved an "unreasonable application" of such clearly established law, 28 U.S.C. § 2254(d)(1); or "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)(2).

IV. WITNESS STATEMENTS

Petitioner asserts that the admission of Tisha's out-of-court statements at his trial violated his Fourteenth Amendment right to due process. He argues that AEDPA does not bar relief because the Wisconsin Supreme Court's opinion finding otherwise both involved an unreasonable application of clearly established Supreme Court law, see § 2254(d)(1), and was based on an unreasonable determination of the facts in light of the evidence presented, see § 2254(d)(2).

A. Application of Clearly Established Law

A state court unreasonably applies Supreme Court precedent when it "'identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case'" or "'if the state court either unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" Dixon v. Snyder, 266 F.3d 693, 700 (7th Cir. 2001) (quoting Williams v. Taylor, 529 U.S. 362, 407 (2000)). "[A]n unreasonable application is different from an incorrect one." Bell v. Cone, 535 U.S. 685, 694 (2002) (citing Williams, 529 U.S. at 409-10). Under the unreasonable application prong of the habeas statute,

"substantial deference is due state court determinations." Searcy v. Jaimet, 332 F.3d 1081, 1089 (7th Cir. 2003). Thus, I must uphold the state court decision if it is "at least minimally consistent with the facts and circumstances of the case . . . even if it is not well reasoned or fully reasoned, or even if it is one of several equally plausible outcomes." Id. (quoting Schaff v. Snyder, 190 F.3d 513, 523 (7th Cir. 1999)). However, the reasonableness standard is not ineffectual, and the federal courts should not defer in all cases to the state court's decision. Hall v. Washington, 106 F.3d 742, 748-49 (7th Cir. 1997).

The Supreme Court has clearly established that due process bars a court from admitting a criminal defendant's involuntary statements. See, e.g., Dickerson v. United States, 530 U.S. 428, 432-34 (2000); Jackson v. Denno, 378 U.S. 368, 385-86 (1964); Spano v. New York, 360 U.S. 315, 320-21 (1959). Petitioner argues that Tisha's statements were involuntary and that the Wisconsin Supreme Court unreasonably refused to extend to rule that a defendant's involuntary statements are inadmissible to a prosecution witness's involuntary statements. The reasoning of some Supreme Court cases suggests that it might be logical to extend the rule governing defendants' statements to witness statements. See, e.g., Colorado v. Connelly, 479 U.S. 157, 166 (1986) (stating that the reason for excluding involuntary admissions is to deter the police from engaging in coercive conduct in the future); United States v. Calandra, 414 U.S. 338, 355-64 (1974) (Brennan, J., dissenting) (stating that the exclusionary rule assures citizens that the government will not benefit from official lawlessness, and thereby encourages trust in government); see also United States v. Gonzales, 164 F.3d 1285, 1289 (10th Cir. 1999) (stating that the admission of coerced witness statements at trial violates the due process rights of the defendant).

However, I cannot say that the Wisconsin Supreme Court was unreasonable in refusing to extend the rule governing defendants' statements to witness statements and instead adopting

a rule permitting involuntary witness statements to be admitted as long as the State actors did not engage in egregious misconduct. In justification of its decision, the Wisconsin Supreme Court pointed out that the rule requiring the exclusion of involuntary admissions is based on several constitutional principles, not all of which apply to involuntary witness statements. The court noted, for example, that the rule requiring suppression of involuntary admissions was supported not only by due process considerations, but also by the Fifth Amendment right against self-incrimination, and that the latter right had no application in the case of a non-defendant. Samuel, 252 Wis. 2d at 39. The state supreme court also stated that "the idea that the government must produce evidence by its own independent labors rather than compelling it from the mouth of the accused does not seem to justify the suppression of statements by those other than the accused." Id.

Moreover, in determining whether to exclude an involuntary witness statement, some other courts have applied a more stringent standard than in the case of an involuntary defendant statement. See, e.g., United States v. Merkt, 764 F.2d 266, 275-76 (5th Cir. 1985) (concluding that even if law enforcement agents had improperly intimidated and coerced witnesses, the conduct was not so egregious as to require exclusion of the witnesses' statements as a prophylactic measure); United States v. Fredericks, 586 F.2d 470, 481 (5th Cir. 1978) (upholding admission of witness's statements when the police actions were "not the sort of third-degree physical or psychological coercion that might prompt the court to disregard the societal interest of law enforcement by excluding probative testimony"); see also United States v. Chiavala, 744 F.2d 1271, 1273 (7th Cir. 1984) (suggesting that due process rights are implicated when the government seeks to admit a witness statement obtained by extreme coercion or torture); Bradford v. Johnson, 354 F. Supp. 1331, 1335-37 (E.D. Mich. 1972) (stating that because statements were produced by torture, they should not have been admitted). The decisions of

these courts also support the notion that the rule adopted by the Wisconsin Supreme Court is not unreasonable. See Price v. Vincent, 538 U.S. 634, 643 n.2 (2003) (citing lower court cases to show that the state court's decision was not objectively unreasonable).

B. Determinations of Facts

Section 2254(d)(2) permits a district court to issue a writ of habeas corpus to a prisoner in custody in violation of the Constitution where such prisoner can show that the state courts' factual determinations were objectively unreasonable in light of the evidence presented in the state-court proceeding.[2] Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). A habeas court may find a state court factual determination unreasonable where the state court failed to consider key aspects of the record, Miller-El, 537 U.S. at 346-47, where the determination is unsupported by the record, Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir. 2004), where the court's credibility determination is unreasonable, Miller-El, 537 U.S. at 340, or where the court relied on testimony of an individual who lacked personal knowledge of facts, Bui v. Haley, 321 F.3d 1304, 1315-16 (11th Cir. 2003). Courts "may no more uphold such a factual determination than we may set aside reasonable state-court fact-finding." Taylor, 366 F.3d at 1008.

In the present case, petitioner argues that the facts unequivocally show that state officials took custody of Tisha's baby in order to coerce her to make incriminating statements about

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[2]The circuits are split as to how exactly § 2254(d)(2) interacts with § 2254(e)(1), which provides that in a habeas proceeding, any state court factual determination is presumed to be correct, and a petitioner can only rebut this presumption by clear and convincing evidence. Lambert v. Blodgett, 393 F.3d 943, 972 n.19 (9th Cir. 2004) (describing the split and collecting cases). The Seventh Circuit appears to treat § 2254(e)(1) as setting forth the standard for determining unreasonableness under § 2254(d)(2). Montgomery v. Uchtman, 426 F.3d 905, 912 (7th Cir. 2005) (stating that in order for a petitioner to prevail on a § 2254(d)(2) claim alleging that a state court's factual determination was unreasonable, she must offer clear and convincing evidence that the state court's determination was wrong).

petitioner.[3] The state supreme court rejected this characterization of the facts. And based on the evidence in the record, I cannot conclude that the state court's contrary factual determinations were "objectively unreasonable." See Miller-El, 537 U.S. at 340. There is evidence that county officials conducted the intake conference because they had legitimate concerns about placing the baby with Tisha. Tisha had been on the run for thirteen months with a man more than three times her age and was subject to an outstanding capias, and the officials knew nothing about what she had been doing. Thus, officials were concerned that Tisha might have been involved in activities relevant to whether the baby should be placed with her, such as crime and drug use. Officials were also concerned about the quality of Tisha's pre-natal care as well as her attitude toward motherhood and child care. Further, during the conference, Tisha denied that petitioner was the father of her baby. It was reasonable for the officials to be concerned about the implications of this statement.

And there is evidence that the officials at the intake conference limited their questions about petitioner to those relevant to these concerns. All witnesses, including Tisha, agreed that at the intake conference, the officials did not ask Tisha whether she had sex with petitioner prior to leaving Wisconsin. Schraufnagel went further, testifying that no one asked Tisha about sexual encounters between her and petitioner even while on the road, except to determine whether

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[3]If petitioner's view of the facts was the only reasonable view, then the admission of Tisha's out-of-court statements in evidence would likely have violated petitioner's right to due process. See Dowling v. United States, 493 U.S. 342, 353 (1990) (stating that evidence must be excluded from a criminal trial if it was procured by actions violative of "the fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency"); Turner v. Pennsylvania, 338 U.S. 62, 66 (1949) (assuming that the due process clause would be implicated by the admission of testimony coerced from a witness); Hysler v. Florida, 315 U.S. 411, 413 (1942) (same); United States v. Chiavala, 744 F.2d 1271, 1273 (7th Cir. 1984) (stating that due process rights are implicated when the government seeks to admit a witness statement obtained by extreme coercion such that the resulting trial was "fundamentally unfair"); see also Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (holding that a threat to take a child is coercive).

petitioner was the father of Tisha's baby. Peter testified that officials asked Tisha for information about where and with whom she had been, and said that they could not trust Tisha with her baby if she had "the ability to leave here and run away and take shelter with a baby with one of [petitioner]'s friends . . ." (Answer Ex. Q at 36-38, 37.)

In addition, there is evidence in the record supporting the Wisconsin Supreme Court's finding that officials did not tell Tisha what to say. Peter testified that Schraufnagel told him only "areas of cooperation or information" in which the officials were interested, but that Tisha was not told "you need to say this or you won't get your baby back." (Id. at 38-41.) Schraufnagel testified similarly, stating that he spoke to Tisha's father about the trouble she was in "that she had potentially been a victim of one or more people; that she has a capias outstanding; that it remains to be seen whether she's been involved in any other illegal activities and in order to determine what's best for Tisha and what's best for the baby we need to have some sense of cooperation from Tisha to understand what's happened to her." (Answer Ex. T at 115-16.)

Further, to the extent that the state supreme court implicitly determined that the officials' decision to take temporary custody of Tisha's baby was not intended to serve as a threat, such determination was reasonable. Sagmeister testified that the police department had no role in the decision to take Tisha's baby and that the decision was unrelated to the investigation of petitioner. Supporting this contention, it appears from the record that the juvenile court intake worker was the primary questioner at the intake conference and that she made the decision to take Tisha's baby. Further, it appears from Schraufnagel's testimony that a court commissioner authorized social services to take temporary custody of Tisha's baby prior to the intake conference. (Answer Ex. T at 73.) As to the meeting with Sagmeister and Schraufnagel on March 13, Sagmeister testified that Tisha had been instructed to meet with him – a police officer – because she had to meet with him anyway to discuss her capias and whether she had been

the victim of a crime. It may well be that Sagmeister and Schraufnagel took advantage of the fact that social service employees instructed Tisha to speak with them by Friday, using the opportunity to ask questions that were irrelevant to custody. However, Schraufnagel testified that Tisha only needed to answer those questions relating to prenatal care and her risk of flight, and no one testified that Tisha resisted answering any of the questions or that anyone threatened Tisha at the station.

One Tisha's testimony suggested that the officials engaged in an egregious, concerted effort to threaten her by wrongfully taking her baby. But the state court could have reasonably found that such testimony was not credible, as Tisha stated that she could not remember who threatened her or what they said exactly. In addition, Tisha testified that she loved petitioner, wanted to marry him and would do everything possible to protect him. (Answer Ex. S at 184.)

Under the deferential AEDPA standard, I cannot conclude that the state supreme court's factual determination was unreasonable. Therefore, I need not address whether the admission of Tisha's out-of-court statements was harmless error.

V. SENTENCING

Petitioner also contends that he was denied due process at sentencing because, in imposing the sentence, the court relied on two sealed documents used in a "Children in Need of Protection or Services" ("CHIPS") proceeding for Tisha and on a transcript from the CHIPS proceeding to which petitioner had no access. At the sentencing hearing, the court stated:

> As to the seriousness [of the offense], the Court has heard testimony in another proceeding . . . the effect on [Tisha], whether she recognizes it or not, is substantial. And she will require long-term counseling, perhaps treatment in the future. She's been exposed to a criminal environment over a long period of time. There is testimony that she has considerable disrespect for authority, and certainly that exposure [to petitioner] can hardly be expected not to have increased that.

(Mot. to Expand Ex. 2 at 63-64.) In the present case, the Wisconsin Court of Appeals, the last state court to rule on this claim, did not base its decision on the merits of petitioner's arguments, but rather concluded that petitioner had waived review of this claim. In the present case, the parties agree that this waiver is not "independent of the federal ground and adequate to support the judgment," Moore v. Bryant, 295 F.3d 771, 775 (2002). (See Br. in Opp'n to Pet. at 33.) Thus, petitioner is not procedurally barred from asserting the claim that his due process rights were violated when the sentencing court relied on testimony and documents from a proceeding to which petitioner was not a party. See Perruquet v. Briley, 390 F.3d 505, 515 (2004) (explaining that the state can waive procedural default by intentionally relinquishing its right to assert that defense).[4] Because the state court relied solely on petitioner's waiver to dismiss this claim, there has been no determination "on the merits in State court proceedings" as described in 28 U.S.C. § 2254(d). As such, the more lenient standard prescribed in § 2254(a), whether petitioner is in custody in violation of the Constitution or laws of the United States, applies.

Thus I must consider the merits of the claim and, if a constitutional error was committed, whether the error was harmless, i.e. whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict'" or in the present case, the sentencing judge's decision. Aleman v. Sternes, 320 F.3d 687, 690-91 (7th Cir. 2003) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). If I am convinced upon review of the entire record that the error did not influence the sentencing decision or had but slight effect, the sentence must

[4]Despite respondent's withdrawal of the procedural default defense, respondent still argues that petitioner waived his claim that his due process rights were violated by the sentencing court under federal waiver law. Essentially, respondent is seeking to import a federal procedural rule into my habeas review of a state court decision. However, during a habeas review, I rely on "state, not federal, procedural rules. Thus, a waiver on which the state court did not explicitly rely will not bar [my] review of the merits of a claim." DeBerry v. Portuondo, 403 F.3d 57, 66 (2d Cir. 2005).

stand. Stewart v. Erwin, No. 1-03-201, 2005 U.S. Dist. LEXIS 26658, at *13-14 (S.D. Ohio Nov. 4, 2005). In contrast, if I am "left in grave doubt," I must find that the error had substantial influence on the sentence and cannot stand. Id. (citing Kotteakos v. United States, 328 U.S. 750, 765 (1946)); see also United States v. Patrick, 988 F.2d 641, 648 (6th Cir. 1993) (explaining that improprieties on the part of the sentencing judge are subject to review under harmless error analysis).

In the present case, regardless of whether the sentencing procedure violated petitioner's due process rights,[5] I cannot conclude that the documents relied on by the sentencing judge had a "substantial and injurious effect" on the sentencing judge's decision. See Aleman, 320 F.3d at 691 (explaining that "[u]nless its jurisdiction is at stake, a court may take up issues in whatever sequence seems best, given the nature of the parties' arguments and the interest in avoiding unnecessary constitutional decisions"). This is so because the two sealed documents used in the CHIPS proceeding and relied upon by the sentencing judge consisted of the psychological reports of Drs. Hauer and Kaplan. Petitioner clearly had access to these documents at the sentencing hearing and had the opportunity to rebut their conclusions. In fact, during the hearing, petitioner's attorney explicitly referred to both reports. (Mot. to Expand Ex. 2 at 47-48.)

Moreover, with respect to the testimony from the CHIPS proceeding, I have reviewed the transcript in camera and am convinced that because the testimony at issue was that of Dr. Hauer, the relevant portions of the testimony are merely cumulative of Dr. Hauer's psychological report and thus the sentencing judge's reliance upon them was harmless. See Patrick, 988 F.2d at 648 (explaining that a court's reliance on extra-record information was harmless because the information was cumulative of evidence in the record); see also Washington v. Smith, 219 F.3d

[5]It is clear that the sentencing process must satisfy the requirements of the due process clause. Gardner v. Florida, 430 U.S. 349, 358 (1977).

620, 634 (7th Cir. 2000) (stating that "[e]vidence is cumulative when it supports a fact established by existing evidence"). Thus, given that petitioner had access to the sealed documents relied upon by the sentencing judge and the fact that the testimony given in the CHIPS proceeding was cumulative of other evidence relied on by the sentencing judge, any constitutional error committed during sentencing was harmless.

VI. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that petitioner's application for writ of habeas corpus is **DENIED**.

IT IS FURTHER ORDERED that this case is **DISMISSED**.

Dated at Milwaukee, Wisconsin, this 18th day of December, 2006.

s/Lynn Adelman
LYNN ADELMAN
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2007, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant Stanley A. Samuel and 10 hard copies of the Separate Appendix of Petitioner-Appellant Stanley A. Samuel to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of the brief, one hard copy of the separate appendix, one copy of the brief on digital media, and one copy of the available portions of the separate appendix on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG Gregory M. Weber, P.O. Box 7857, Madison, WI 53707-7857.

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