UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 07-4079
(Case No. 07-C-397 (W.D. Wis.))

CHAS SIMONSON,

Petitioner-Appellant,

v.

RANDALL HEPP, Warden,
Jackson Correctional Institution,

Respondent-Appellee.

Appeal From A Final Judgment Denying Petition For Writ Of Habeas Corpus Entered In The United States District Court For The Western District of Wisconsin, Honorable Barbara B. Crabb, Presiding

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CORRECTED BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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

(1) The party represented is Chas Simonson

(2) Law firms which have represented the party in this matter:

Henak Law Office, S.C.

Attorneys and law firms which have represented the party in related, state-court matters:

Schembera & Smith

(3)(i) N/A

(3)(ii) N/A

Dated: _____ _____

Robert R. Henak

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JURISDICTIONAL STATEMENT

Chas Simonson appeals from the final judgement entered by the district court on November 23, 2007, denying his Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The district court had jurisdiction over this federal habeas action under 28 U.S.C. §§2241 & 2254. The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§1291 & 2253.

Simonson filed his notice of appeal on December 19, 2007. By Order dated December 26, 2007, the District Court granted his motion for a certificate of appealability on the issues raised in this brief.

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

appeal.

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

This is a collateral attack on Simonson's criminal conviction in Wisconsin state court. Simonson's current place of confinement is the Jackson Correctional Institution, N6500 Haipek Rd., Black River Falls, WI 54615. The warden at that institution is Randall Hepp.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the state court's exclusion of evidence of a possible alternative cause for the alleged damage to D.S.'s hymen denied Simonson the right to present a defense and justifies habeas relief.

2. Whether the sentencing court's reliance upon inaccurate information violated Simonson's rights to due process and justifies habeas relief.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This is an appeal from the denial of a federal habeas petition under 28 U.S.C. §2254 by a person in custody pursuant to a state court judgment of conviction. The petition claimed violation of Simonson's constitutional rights to present a defense and to be sentenced based only on accurate information, all in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Procedural History of the Case

On January 30, 2002, Chas Simonson went to trial in Wisconsin state court on a single count information charging that he had sexually assaulted his six-year-old daughter, D.S., in violation of Wis. Stat. §948.02(1) "in the spring or summer of the

year 2000." (R5:Exh.I:16).[1] The state's case relied almost exclusively upon belated and twice recanted allegations by Simonson's daughter which the state sought to corroborate with evidence of damage to her hymen. However, the trial court excluded relevant, exculpatory defense evidence of a possible alternative cause for the alleged damage. Specifically, the court excluded testimony from Simonson and D.S.'s mother that, when D.S. was very young, she suffered from severe constipation to the extent that consisted in part of direct pressure on her rectal and vaginal area in an attempt to force the stool out.

On January 31, 2002, the jury returned a guilty verdict. (R5:Exh.J:141-43).

On March 15, 2002, the circuit court, Hon. William C. Stewart, Jr., presiding, sentenced Simonson to 10 years initial confinement and 10 years extended supervision (R5:Exh.K:31-32; App. 152). In imposing that sentence the court noted the gravity of sexually assaulting one's own seven-year-old daughter and the fact that the offense was "totally incongruous" to the defendant's character as reflected in the alternative presentence investigation report and the many letters submitted in support of him. The court also expressed a desire to protect Simonson's daughter and to ensure that she does not have to see him for a long time. (R5:Exh.K:29-31; App. 152).

The sentencing court's primary focus, however, was on what it viewed as "a

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

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

very, very high need to protect the public" given that those guilty of sexually assaulting a child "typically do it more than once with more than one victim:"

> But above and beyond that [i.e., the gravity of the offense, Chas' character, and the desire that his daughter need not have contact with him], based on my experience, individuals who undertake this type of behavior typically do it more than once with more than one victim, unlike charges like homicide where statistically the likelihood is they're never going to do it again. But in these kinds of cases, if it happened once, it's very likely going to happen again. Or at least the temptation to do it again is going to be there. So I see a very, very high need to protect the public.

(R5:Exh.K:31; App. 152).

On September 29, 2005, the Wisconsin Court of Appeals reinstated Simonson's direct appeal rights. *State ex rel. Chas Simonson v. Randall Hepp,* Case No. 2005AP1354-W (Wis. Ct. App.) (*See* R5:Exh.B:2).

Simonson timely filed his post-conviction motion raising the same issues presented here, among others (R7:Exhs.!-3). At the hearing on that motion, Simonson testified *inter alia* to his personal observations of the efforts to relieve D.S.'s constipation. He also presented evidence establishing that the sentencing court had confused recidivism rates of child molesters in general, for which there is a relatively high rate of re-offense, with the low recidivism rate for incest offenders such as he is alleged to be. (R5:Exh.L:16-19; R7:Exh.1:40-42; R7:Exh.3).

Following further briefing (R7:Exhs.4-6), the circuit court issued its written Decision and Order denying the motion on March 9, 2006 (R5:Exh.B:App.1-16; App. 133-48).

Simonson unsuccessfully raised the same issues on appeal to the Wisconsin

Court of Appeals (R5:Exhs. B-D). By decision dated October 31, 2006, that court affirmed (R5:Exh.E; App. 128-32). The Wisconsin Supreme Court denied review on January 7, 2007 (R5:Exh.H; App. 124).

Simonson filed his habeas petition pursuant to 28 U.S.C. §2254 with the District Court on July 23, 2007. As he did in the state courts, Simonson alleged that the state court's exclusion of evidence of a possible alternative cause for the alleged damage to D.S.'s hymen denied him the right to present a defense and that the sentencing court's reliance upon inaccurate information violated his right to due process. (R1). Simonson also filed a Memorandum in support of his petition (R2).

Although the state filed an Answer (R5), it never filed a brief responding to the arguments set forth in Simonson's Memorandum. The Magistrate Judge nonetheless issued a Report and Recommendation on October 23, 2007, recommending that the District Court deny Simonson's Petition (R9; App. 108-23). Simonson timely filed his objections to that Recommendation (R10). The District Court nonetheless denied Simonson's Petition by Order and Judgment entered on November 23, 2007 (R11; R12; App. 1-6).

Simonson timely filed his notice of appeal, docketing statement, and request for a certificate of appealability on December 19, 2007 (R13; R15). By Order dated December 26, 2007, the District Court granted him a certificate of appealability on the issues raised on this appeal (R16; App. 101-04).

State Trial Evidence

Chas and Kristina Simonson were married on August 17, 1992.

(R5:Exh.I:229). They had two daughters, D.S. and her younger sister, L.S. (*Id.*:204; *see* R5:Exh.J:16-17). During the period from 1999 to 2000, Chas and Kristina only lived together off and on, ultimately divorcing on July 27, 2001 (R5:Exh.I:229-230, 240; R5:Exh.J:50-54).

Evidence was presented that, in the fall of 2000, Chas had made the decision to seek full custody of his children (R5:Exh.J:23, 38, 68-69). Although Kristina claimed not to recall that Chas had informed her of that intent (R5:Exh.I:256), Chas testified that he informed her on December 1, 2000 (R5:Exh.J:68-69), and Kristina's friend, Brenda Koehler, testified that Kristina had told her Chas was threatening her regarding custody of the children (*id.*:41-42).

On December 3, 2000, D.S. reportedly first claimed that her father had sexually assaulted her (R5:Exh.I:232, 255-257). Three days later, Kristina took her to the police where D.S. provided a statement to the effect that Chas twice had sex with her, once in April or May, 1999 and once in March or April, 2000 (R5:Exh.I:254; R5:Exh.J:6-8).

Shortly after D.S. first made her claims, she recanted them, explaining to her parents, and later to police, that they were only a dream. (R5:Exh.I:234, 258-260; R5:Exh.J:8, 26-27, 66). The parties disputed how the recantation came about. Kristina claimed that D.S. was speaking to Chas on the phone when Kristina came out of the bathroom. According to Kristina, Chas told D.S. "You know I didn't do this – Daddy would never do this to you." (R5:Exh.I:234-235). Chas and his current wife, Linda, however, testified that they were having a three-way telephone conversation

with Kristina when D.S. spontaneously began crying and admitted it never happened and was only a dream. All Chas said was "[D.], daddy loves you." He never spoke with D.S. without Kristina present. (R5:Exh.J:26-27, 66).

At trial, D.S. stated that once during the summer while she was in first grade (1999), she was sleeping when her father carried her to his room, took off their clothes, and put his penis inside her crotch (R5:Exh.I:204-208). She stated that a similar thing happened the following year while she was still in school. Again, she said she was sleeping when the television awakened her. After she went to sit on her father's lap in the living room, he carried her into his room and did the same thing as before, although he placed some lotion on his penis. (*Id.*:208-211).

D.S. was nine years old at the time of trial. (R5:Exh.I:202).

Kristina admitted at trial that she had spoken with D.S. regarding the alleged abuse "every once in a while" since the time of her recantation. (*Id.*:236). She also admitted that, during the springs and summers of 1999 and 2000, she never noticed anything physically wrong with D.S. D.S. never reported any pain or discomfort in her pelvic area and Kristina never saw any evidence of vaginal bleeding. (*Id.*:260).

Lori Holmes, a social work training coordinator for a child abuse evaluation center, testified that is was not unusual for a child to delay reporting sexual abuse, to be unable to remember dates, to change details of allegations, or to recant allegations. (R5:Exh.I:220-225). She also claimed that children are much more likely to underreport abuse than to exaggerate or make up such claims. (*Id.*:224-225).

Julie Kennedy-Oehlert, a Sexual Assault Nurse Examiner (S.A.N.E.), also

testified regarding a forensic examination she performed on D.S. on January 22, 2001. (R5:Exh.I:270-277). She testified that her job was to "collect factual medical legal evidence for the crimes of sexual assault and domestic violence." (*Id.*:270). Her examination of D.S. revealed what she described as "a slightly misshapen area" in that some of D.S.'s hymenal tissue was missing in the area closest to her rectum. (*Id.*:272).

While initially stating her opinion that the apparent damage to D.S.'s hymen was caused by insertion of something into her vagina, Kennedy-Oelert went on to explain that, before a young girl is estrogenized, her hymen would be "very friable, very painful to the touch, thin, easy to rip and tear," but that it "generally stays intact" "unless there is some pressure put directly on that tissue or near that tissue." (*Id.*:272-273; *see id.*:276).

On redirect examination, Kennedy-Oelert stated that, when she asked D.S. "if someone had put anything in her vagina, she stated that dad had put his privates – his wiener in." (*Id.*:277).

D.S.'s sister, L.S., did not allege any abuse (R5:Exh.J:15).

Chas testified that he did not sexually assault D.S. (R5:Exh.J:48, 71).

SUMMARY OF ARGUMENT

The District Court erred in denying Simonson's §2254 petition. The state court of appeals' finding that Simonson was not denied the right to present a defense by the exclusion of evidence of a possible alternative source of the damage to D.S.'s hymen was not merely wrong; it was based on both an unreasonable application of

controlling Supreme Court authority and an unreasonable interpretation of the facts. That violation also was not harmless under the legal standard applicable where, as here, the state court did not address harmlessness.

The District Court also erred in denying Simonson's claim that he was sentenced based on inaccurate information and thus in violation of his right to due process. The sentencing court effectively admitted both prongs of the applicable due process standard. The state courts and the District Court nonetheless denied relief based on a harmlessness theory alien to controlling Supreme Court authority. The state court of appeals and the District Court also denied relief based on an unreasonable misinterpretation of the factors relied upon by the sentencing court.

ARGUMENT

I.

BARRING CRITICAL EVIDENCE OF A POSSIBLE ALTERNATIVE CAUSE FOR THE ALLEGED DAMAGE TO D.S.'S HYMEN DENIED SIMONSON THE RIGHT TO PRESENT A DEFENSE AND JUSTIFIES HABEAS RELIEF

The trial court erred and denied Simonson due process and the right to present a defense by excluding relevant, exculpatory evidence of a viable innocent explanation for the primary, if not exclusive, evidence provided by the state in its attempt to corroborate D.S.'s vacillating claim of sexual assault. Specifically, the state presented evidence through S.A.N.E. nurse Kennedy-Oelert to the effect that the apparent damage to D.S.'s hymen would have been caused by "pressure put directly on that tissue or near that tissue." (R5:Exh.I:273). The only evidence presented to the jury concerning a possible cause for the condition of D.S.'s hymen consisted of the alleged sexual assault by her father.

Simonson's counsel, however, sought to present evidence of a possible alternative cause of the condition. First through Simonson's ex-wife, Kristina, and later through Simonson's own testimony, she sought to show that, as a small child, D.S. once suffered from constipation to the extent that her parents took her for medical treatment which ultimately included pressure on her vaginal and anal area in an attempt to extract the stool. The circuit court, however, excluded the evidence on the grounds that Kristina denied having personally performed this "rectal stimulation" and that the evidence was irrelevant absent expert medical testimony. (R5:Exh.I:243-

247; R5:Exh.J:49-50; *see also* id.:75-79).

In denying Simonson's post-conviction motion raising this claim, the circuit court shifted gears somewhat, adding the rationale that Simonson himself "eliminated himself as having any personal knowledge of any alternative explanation or act(s) which may have caused damage to D.S.'s hymen." (R5:Exh.B:App.3-5; App. 135-37).

The Wisconsin Court of Appeals affirmed on the grounds that, despite the S.A.N.E. nurse's testimony that a young girl's hymen is easily torn by pressure on or near that tissue, evidence of the alternative source of damage was irrelevant absent expert testimony specifically connecting the exact form of rectal stimulation at issue here to the exact damage allegedly observed (R5:Exh.E:3-4; App. 127-28).

The District Court below took yet another tack, first questioning whether defense evidence of the rectal manipulation was true and accurate, and second, holding that it would be "highly speculative" to guess what the S.A.N.E. nurse would have said had she been asked specifically regarding the effect of the type of rectal manipulation used on D.S. (R11:2-3; App. 3-4).

With all due respect to the state courts and the court below, the state court of appeals' decision rested on an unreasonable application of controlling United States Supreme Court authority and, to the extent that it relied in part on the circuit court's findings that there was no evidence of rectal manipulation, rested upon unreasonable findings of fact as well. Exclusion of the exculpatory evidence also was far from harmless. Habeas relief accordingly is appropriate here.

A. Applicable Legal Standards

1. Right to present a defense

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

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Taylor v. Illinois, 484 U.S. 400, 409 (1988), quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967). The Constitution, in short, "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted); *see Holmes v. South Carolina*, 547 U.S. 319, 326 (2006).

While the admission of evidence generally rests within the sound exercise of trial court discretion and may be subject to reasonable restrictions, *United States v. Scheffer*, 523 U.S. 303, 308 (1998), such limitations may deny the defendant his rights to due process, compulsory process, and confrontation where, as in this case, they have the effect of concealing relevant, exculpatory evidence from the jury. *See*

Delaware v. Van Arsdall, 475 U.S. 673 (1986). The jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [a witness'] testimony which provided 'a crucial link in the proof. . . of petitioner's act.'" *Davis v. Alaska*, 415 U.S. 308, 317 (1974) (citation omitted).

A defendant's right to present a defense includes the right to offer testimony by witnesses and to compel their attendance. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. at 19. The Supreme Court has recognized that "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302. The opportunity to be heard is "an essential component of procedural fairness" that is effectively denied "if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." *Crane*, 476 U.S. at 690.

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."

Taylor, 484 U.S. at 408-09, quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974).

At the same time, a defendant's right to present relevant testimony is not without limitation and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295; *Rock*,

483 U.S. at 55. Accordingly, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326 (citations omitted). The Constitution likewise "permits judges 'to exclude evidence that is "repetitive . . ., only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues."'" *Id.* at 326-27 (citations omitted).

Still, while "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Scheffer*, 523 U.S. at 308, the Supreme Court has expressed disapproval of rules "applied mechanistically to defeat the ends of justice," *Rock*, 483 U.S. at 55. Accordingly, such rules violate the right to present a defense if their application in a particular case is "arbitrary" or "disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 56; *see Holmes*, 547 U.S. at 325. A state rule is "arbitrary" if it "excluded important defense evidence but . . . did not serve any legitimate interests." *Id.*

2. AEDPA

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

unless the adjudication of the claim --

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

28 U.S.C. §2254(d).

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

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

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

The 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 as requiring "reasonableness" review regarding application of that precedent to the particular facts of the case:

> Under these new standards, our review of state courts' legal determinations continues to be *de novo*. So, too, does our review of mixed questions of law and fact. [Citations omitted]. Under the AEDPA, however, we must answer the more subtle question of whether the state court "unreasonably" applied clearly established federal law as the Supreme Court has determined it.

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

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

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

Although the AEDPA mandates a certain level of deference, that deference is limited to assessment of whether the state court decision on the merits of the petitioner's claims was either contrary to, or an unreasonable application of, controlling Supreme Court authority. As the Supreme Court recently held in *Panetti v. Quarterman*, ___ U.S. ___, 127 S.Ct. 2842 (2007), if the state court decision fails either standard, then the permitted deference under the AEDPA is expended and review must be made under pre-AEDPA standards:

> When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in §2254(d)(1) is satisfied. A federal court must then resolve the

> claim without the deference AEDPA otherwise requires. [Citations omitted].

127 S.Ct. at 2858-59.

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

3. Standard of Appellate Review

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

B. The State Courts Unreasonably Applied Controlling Supreme Court Authority in Denying Simonson his Right to Present a Defense

The state court of appeals' decision upholding exclusion of the alternative source evidence rested on two grounds. First, that court held that "expert testimony was required because making a causal link between the alleged treatment and the torn hymen is not within the realm of ordinary experience and common sense." (R5:Exh.E:3). Although of questionable validity, Simonson does not challenge that

conclusion here.

The court's second ground for excluding the evidence was that the expert testimony of the examining nurse was insufficient to make the evidence relevant because she was not asked whether the specific type of pressure at issue here would cause the specific type of damage she observed. According to the court of appeals, the absence of such hyperspecific expert testimony rendered the alternative source evidence "speculative" and therefore irrelevant (R5:Exh.E:4). This latter finding is a patently irrational application of controlling Supreme Court authority.

The Supreme Court has made clear that, to be relevant, an item of proof need not prove a matter by itself; it need only be a single link in the chain of proof. As the Court explained in *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990):

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"

(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985)). Accordingly, a mere declaration that certain evidence is "legally irrelevant" does not make it so. *Id.* at 441, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

The Supreme Court's holding on this point applies squarely to the issue here. It long was the rule that expert opinion testimony was not even admissible on the ultimate issue in a case, let alone required to render other evidence relevant. *See* 1972 Advisory Committee Notes to Fed. R. Evid. 704. The fact that both Wisconsin and

Federal evidence rules now have eliminated the bar against ultimate issue opinion evidence, Wis. Stat. §907.04; Fed. R. Evid. 704(a), does not rationally mean that criminal defendants can be denied the benefit of common-sense inferences by the jury based on an expert's explication of the controlling principles. After all, "[c]ausation is generally a question of fact for the jury, 'unless the proof is insufficient to raise a reasonable inference that the act complained of was the proximate cause of the injury.'" *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770 (9th Cir.1981) (citation omitted)).

While the S.A.N.E. nurse, Julie Kennedy-Oehlert, testified to her opinion that the perceived damage to D.S.'s hymen was caused by insertion of something into the vagina, her explanation of that conclusion permitted a much broader scope of potential causes:

> A That area in a child who – a girl who is not estrogenized – when a young girl becomes estrogenized their hymens [sic] get big and fluffy. They allow objects to be put in and out of the vagina without causing much injury. But before girls have estrogen that tissue is very friable, very painful to the touch, thin, easy to rip and tear. And women are built to have a bony prominence that very much protects that area. *So unless there is some pressure put directly on that tissue or near that tissue it generally stays intact.*

(R5:Exh.I:273 (emphasis added)).

> Q And in a child pre-estrogenated, would that be more easily torn or harder?
>
> A If a child doesn't have – if a young woman doesn't have an estrogenized hymen that tissue is considered friable, which means that it tears easily. It's taut and tears easily as opposed to estrogen makes it big and fluffy and gives, gives it a give to it.

(R5:Exh.I:276).

Kennedy-Oehlert's expert testimony thus establishes that (1) the hymen of a young girl is very easily torn and (2) damage to that tissue may result from pressure put directly on that tissue or near that tissue - exactly the circumstance presented by the evidence which Simonson was denied permission to present. Even if the jury would not otherwise know that squeezing a hard stool against the vagina of a small child while pressing down on the vagina with one's thumbs could cause damage to the hymen, it reasonably could make that inference given the nurse's testimony.

Expert testimony is intended to "assist the trier of fact to understand the evidence or to determine a fact in issue," Wis. Stat. §907.02, not merely spoon-feed it ultimate conclusions. "The expert's opinions are a product of the reasoned application of the specialized knowledge (major premises) to the case-specific facts (minor premises)." Blinka, *Wisconsin Practice Evidence 2d* §702.202 at 479 (footnote omitted). Given the S.A.N.E. nurse's expert testimony that a young child's hymen is easily torn and may be damaged by pressure put directly on that tissue or near it (major premise), a jury rationally could apply that premise on its own to find a reasonable probability of causation from the case-specific facts of rectal stimulation without further expert assistance. The possibility that the jury reasonably could reach other inferences as well does not render the reasonable inference suggested by the defense "speculative."

Although Kennedy-Oehlert did not testify that the specific actions proffered by Chas could have resulted in D.S.'s torn hymen, therefore, she did not have to. The

jury is free, after all, to reject an expert's conclusion, such as the nurse's suggestion that penetration caused the injury here, given the absence of evidence the nurse knew or considered evidence of a reasonable alternative cause (R5:Exh.J:91-92).

The state court of appeals' finding that the S.A.N.E. nurse's explanation that the hymen of a young girl is very easily torn and may be damaged by pressure put directly on that tissue or near that tissue "would not sufficiently enlighten the jury to allow it to accept Chas's alternate theory" because she did not expressly opine on Simonson's alternative theory of causation (R5:Exh.E:4; App. 128), accordingly is an unreasonable application of controlling Supreme Court precedent. That decision requires a level of hyperspecificity of defense evidence contrary to decisions such as *McKoy*, *supra*.

Nor does the District Court's decision denying habeas relief make sense in this case. That court's conclusion that the state court of appeals acted reasonably in upholding exclusion of the alternative source evidence was not based solely on the state court's invalid "speculation" theory. Rather, the district court also based its decision on the suggestion, not raised by the state court, that the defense evidence of the rectal manipulation may not have been true and accurate (R11:2-3; App. 3-4).

However, issues of credibility are for the jury to decide, not the courts. *E.g.*, *United States v. Swanquist*, 161 F.3d 1064, 1071 (7th Cir.1998) (court must defer to the jury's reasonable inferences). *See also United States v. Scheffer*, 523 U.S. 303, 313 (1998) (plurality opinion) ("Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs

to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" (citation omitted)). Decision here should not be based upon speculation that the jury would refuse to credit defense evidence that is not inherently incredible.

The District Court's finding that "the victim's mother [told] the court that she never took part in any such [rectal manipulation]" (R11:2-3; App. 3-4), also must be rejected as clearly erroneous. Kristina did not dispute the fact of the rectal stimulation, only her direct participation in it. Even then, she only did so inferentially. Instead, she suggested (before the court cut her off) that the nurse had performed it, thereby supporting Simonson's proffer:

> MS. SMITH: You're testifying that you never did that?
>
> THE WITNESS: Did I do it or did the nurse do it?
>
> THE COURT: All right. The allegation is that you did it. I'm going to sustain the objection. . . .

(R5:Exh.I:246). Of course, the critical fact here was that actions were taken that could have caused the damage innocently; who specifically took those actions was wholly irrelevant.

The suggestion in the magistrate judge's recommendation that the state court of appeals may have based its decision, not on an unreasonable application of the law of relevance in violation of cases such as *McKoy, supra*, but on the allegation that Simonson "failed to lay a proper foundation" under some unidentified state procedure (R9:9-11; App. 117-19), likewise does not make sense. That recommendation overlooks the fact that, as relevant here, the state court's decision was based, not on

some specific state evidentiary rule requiring expert testimony on the ultimate issue of causation, but on a general analysis of relevance. According to the state court of appeals, Simonson's proffered evidence was excluded, not because of some rule that expert testimony is always required, but because it concluded that the specific evidence proffered in this case was not relevant.

Of course, to the extent that the state court of appeals did base its decision on some previously-unrecognized state law rule that expert testimony is required on the ultimate issue of causation rather than allowing reasonable inferences by the jury based on general principles identified by the expert, such a novel requirement is not only contrary to controlling Supreme Court precedent, *e.g.*, *McKoy*, 494 U.S. at 440 (evidence need not conclusively prove ultimate fact to be relevant), but also arbitrary and serves no legitimate state purpose. Because the inferences critical to Simonson's defense logically flowed from the S.A.N.E. nurse's statement of general principles regarding the ease with which a young girl's hymen can be damaged by pressure on or near it and evidence of exactly such pressure, there is no danger of jury speculation. The jury is entitled to make reasonable inferences, and that is all that Simonson asked that it be allowed to do here.

Contrary to the Recommendation's assumption, therefore, the proper analysis is not whether some non-existent state evidentiary rule is arbitrary, but whether the state court's analysis of whether Simonson's evidence was relevant was contrary to or an unreasonable application of authority such as *McKoy*.

C. The State Circuit Court's Factual Findings Were Unreasonable

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.

Although this Court is to limit its review to the decision of the last state court to rule on the merits of the petitioner's claim, *e.g.*, *Charlton v. Davis*, 439 F.3d 369, 374 (7th Cir. 2006), it is important to note that the state circuit court's alternative bases for exclusion also make no sense and would justify relief under §2254(d)(2).

Shifting away from the exclusionary rationale used at trial, the post-conviction court placed much emphasis on what it claimed was the absence of evidence "even at this late date" that the rectal stimulation in fact occurred (R5:Exh.B:App.3-5, 11; App. 135-37, 143). That suggestion, however, ignores Simonson's offer of proof (R5:Exh.I:243-246), his own proffered testimony at trial before the circuit court cut him off (R5:Exh.J:48-49), and his post-conviction testimony (R5:Exh.L:11-13). That

suggestion accordingly is a patently unreasonable finding of fact.

Contrary to the circuit court's suggestion at trial, moreover, Simonson's lack of personal knowledge in the *causal connection* between the rectal stimulation and the alleged injury to D.S.'s hymen cannot rationally be viewed as a denial of personal knowledge of the *act* of rectal stimulation. (R5:Exh.J:48-49). The state court of appeals itself held that drawing that causal connection was beyond the realm of ordinary experience and common sense. (R5:Exh.E:3; App. 127). Simonson personally observed the act of rectal stimulation, however, and the circuit court's suggestion that he "eliminated himself as having any personal knowledge of any alternative explanation or act(s) which may have caused damage to D.S.'s hymen" (R5:Exh.B:App.3; App. 135) thus is patently unreasonable as well.

D. The Violation of Simonson's Right to Present a Defense Was Not Harmless

Because it erroneously upheld exclusion of Simonson's exculpatory evidence, the Wisconsin Court of Appeals did not address whether exclusion of that evidence was harmless. This Court accordingly owes no deference to that court's decision on this issue. *Dixon 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).[2]

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)),[3] the burden remains on the state to disprove prejudice, *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995).

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

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

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

[3] The *Brecht* standard applies even where, as here, the state court did not address harmlessness. *Fry v. Pliler*, ___ U.S. ___, 127 S.Ct. 2321 (2007).

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").

The error was not harmless. The central issue at trial was whether Simonson sexually assaulted his own daughter. Simonson testified that he did not. (R5:Exh.J:48, 70). D.S. claimed at trial that he did (R5:Exh.I:203-211), although she previously had admitted that he did not (*id.*:234, 258-260; R5:Exh.J:7-8, 24-27, 64-67).

Simonson's ex-wife, Kristina, moreover, had a strong motive to either intentionally or unintentionally manipulate D.S. into making the allegations, as she had recently been informed that Simonson would attempt to obtain full custody of

their children. (R5:Exh.J:67-68).[4] As the custodial parent from before the allegations were made through the trial, moreover, Kristina was in a position to influence what D.S. "remembered" and said. It is well recognized that the manner of questioning a young child can have a direct effect on what the child "remembers" about an event. *See, e.g.*, Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 Ariz. L. Rev. 927, 933 (1993); Coleman and Clancy, *False Allegations of Child Sexual Abuse: Why Is It Happening? What Can We Do?*, Criminal Justice, Fall 1990, at 14, 46; Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 721 (1987).

The state also had to contend with the fact that at least two pieces of physical evidence contradicted D.S.'s claims. D.S. never complained of vaginal pain during the time when she allegedly was sexually assaulted, and there was no evidence of vaginal bleeding during that time frame. (R5:Exh.I:260-261). Added to that, the state also had to contend with the fact that Simonson was rarely present during the time frame alleged. D.S. claimed at trial that the incident took place while she was still in school (*id.*:208), but Simonson did not move back in with Kristina until June 2, 2000. Also, he moved out again in early or mid-July, and even while he technically lived with Kristina and the children, he worked as an over-the-road truck driver and was

[4] While Kristina could not recall Simonson stating that he intended to seek full custody (R5:Exh.I:256), the jury reasonably could accept Simonson's account, especially given the independent evidence that she told her friend, Brenda Koehler, that he was threatening her regarding custody of the children. (*See* R5:Exh.J:41-42).

gone most of that time. (*Id.*:248; R5:Exh.J:53-54). Kristina also admitted that she did not work during the summer of 2000 (R5:Exh.I:264-65), further limiting the times when Simonson would have been home alone with D.S.

Corroboration thus was critical to the state's case. Its primary attempt at corroboration consisted of the physical evidence of damage to D.S.'s hymen, which the nurse attributed to insertion of something into D.S.'s vagina. However, the court erroneously excluded important evidence that could have nullified the physical evidence by providing a possible innocent explanation for the hymen damage.

Had Simonson been allowed to present his complete defense, therefore, the state would have been left with an exceedingly weak case, a vacillating chief witness, evidence of both the motive and the opportunity for her mother to manipulate her testimony, and, at best, ambiguous physical evidence. The absence of Simonson's proffered exculpatory evidence, on the other hand, dramatically skewed the jury's assessment of the relative credibility of D.S.'s claims and Simonson's testimony.

The Wisconsin Supreme Court noted in a related context that

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

State v. Cuyler, 110 Wis.2d 133, 142, 327 N.W.2d 662 (1983) (citation omitted).

Similarly, in *State v. Hicks*, 202 Wis.2d 150, 549 N.W.2d 435 (1996), that Court held that the absence of DNA evidence to the effect that a hair found in the apartment of a rape victim could not have been the defendant's, when combined with the prosecutor's use of the hair at trial as affirmative proof of the defendant's guilt,

mandated relief in the interests of justice:

> To maintain the integrity of our system of criminal justice, the jury must be afforded the opportunity to hear and evaluate such critical, relevant, and material evidence, or at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts. Only then can we say with confidence that justice has prevailed. [citation omitted]. The major issue in this case was that of identification. In view of the DNA evidence, the issue of identification was not fully tried.

Hicks, 202 Wis.2d at 171-72.

Here, as in *Hicks*, the state affirmatively asserted that the damage to D.S.'s hymen corroborated her testimony. As in *Hicks*, the evidence denied to the jury nullifies that claim, depriving the state of critical corroboration in a strictly one-on-one credibility contest.

Under these circumstances, the error in excluding Simonson's exculpatory evidence cannot be written off as harmless.

II.

THE SENTENCING COURT'S RELIANCE UPON INACCURATE INFORMATION VIOLATED SIMONSON'S RIGHTS TO DUE PROCESS AND JUSTIFIES HABEAS RELIEF

The sentencing court's reliance upon materially inaccurate information violated Simonson's constitutional rights to due process. Specifically, the sentencing court based the lengthy sentence in significant part on the perceived need to protect the public given what it viewed as the high likelihood of recidivism among child sex offenders in general, and thus in terms of Simonson in particular. Overlooked by that

court, however, was the fact that the relatively high recidivism rates on which it relied do not apply to incest offenders such as Simonson is alleged to be.

Because the state court decisions upholding the sentence are based on both unreasonable application of controlling Supreme Court precedent and unreasonable findings of fact, habeas relief is appropriate.

A. Applicable Legal Standards

The general principles for assessing denial of due process in such circumstances are well-settled and not in dispute. A criminal defendant is constitutionally entitled to be sentenced only upon proper and accurate information. Accordingly, "a sentence founded at least in part upon misinformation" violates due process. *United States v. Tucker*, 404 U.S. 443, 447 (1972); *see Townsend v. Burke*, 334 U.S. 736 (1948) (Court violates due process when sentencing based upon materially untrue assumptions about defendant's criminal record). *See also United States v. Watts*, 519 U.S. 148, 156-57 (1997) (consistent with due process, court may consider at sentencing only such evidence as is proven by preponderance of the evidence (citations omitted)).

A defendant is entitled to resentencing due to use of inaccurate information at the original sentencing if he or she can show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *Lechner v. Frank*, 341 F.3d 635, 639 (7th Cir. 2003), citing *Tucker*, *supra*, and *United States ex rel. Welch v. Lane*, 738 F.2d 863, 865 (7th Cir. 1984).

Because the state court of appeals ruled on the merits of Simonson's inaccurate

information claim (R5:Exh.E:6-7; App. 130-31), the AEDPA applies. Simonson accordingly must show that the state court's decision was either contrary to, or involved an unreasonable application of, controlling Supreme Court authority, or was based on an unreasonable determination of the facts. 28 U.S.C. §2254(d).

This Court reviews the District Court's findings of fact for clear error and legal conclusions *de novo*. *E.g.*, *Dunlap*, 436 F.3d at 741.

B. The State Courts Unreasonably Applied Controlling Supreme Court Authority in Upholding Simonson's Sentence

In response to Simonson's post-conviction motion, the state circuit court did not dispute Simonson's showing that its original view of the statistical likelihood of re-offense was inaccurate. Nor did it hold that it had not relied upon its erroneous view of the statistical likelihood of re-offense when imposing a sentence of ten years initial confinement and ten years extended supervision in this case. Rather, it sought to justify itself by noting that "the Court did not base that conclusion *only* upon generalized information that child sex abusers are all likely to reoffend." (R5:Exh.B:App. 13-14; App. 145-46 (emphasis added); *see id.* ("the Court used additional information [beyond just the invalid statistical data] to determine that Mr. Simonson would reoffend")).

The sentencing court itself thus conceded both inaccuracy and actual reliance, establishing the due process violation under *Tucker*, 404 U.S. at 447 ("a sentence founded at least in part upon misinformation" violates due process).

The state court of appeals' rationale for nonetheless affirming the sentence is

far from clear. Significantly, however, that court did not hold, as suggested by the Magistrate Judge's Recommendation (R9:14; App. 121), that the statistics cited by the sentencing court were accurate as applied to Simonson. Rather, the Court of Appeals held that the sentencing court did not rely upon inaccurate generalizations about recidivism rates and instead based its perception of Simonson on other factors:

> The trial court denied the motion for resentencing, stating that it based the sentence not on generalized information about the likelihood of child abusers re-offending, but on the facts and circumstances of this case. The record shows that Chas continued to deny his guilt. The court also received information that Chas had sexual contact with an unrelated thirteen-year-old. The fact that perpetrators of incest may have a lower rate of recidivism than other sexual abusers does not establish that he presents a low risk to his children or others.

(R5:Exh.E:7; App. 131).

Because the state court of appeals' denial of his due process claim was both based on unreasonable findings of fact and involved an unreasonable application of controlling Supreme Court authority, Simonson is entitled to habeas relief on this ground as well.

1. Actual Reliance

a. The sentencing court actually relied upon the recidivism generalizations

Reliance, the first prong of the *Tucker* analysis, cannot reasonably be disputed here. The sentencing court placed significant weight on its perception that the lengthy prison component of the sentence imposed was necessary to protect the public because Simonson is highly likely to reoffend given the nature of the offense:

> But above and beyond that, based on my experience, individuals

> who undertake this type of behavior typically do it more than once with more than one victim, unlike charges like homicide where statistically the likelihood is they're never going to do it again. But in these kinds of cases, if it happened once, it's very likely going to happen again. Or at least the temptation to do it again is going to be there. So I see a very, very high need to protect the public.

(R5:Exh.K:31; App. 152).

In denying Simonson's post-conviction motion, the circuit court could not and did not dispute that it in fact relied upon its belief that child sex offenders are inherently and highly likely to reoffend. Rather, it merely claimed that it *also* relied upon other information in imposing what it admitted to be a "harsh" sentence. (R5:Exh.B:App.13-14; App. 145-46).

Of course, that court's rationale for denying Simonson's inaccurate information claim, i.e., that the sentencing court also considered other factors in imposing the concededly "harsh" sentence (*id.*), is contrary to or an unreasonable application of controlling Supreme Court precedent. Under the Supreme Court's decision in *Tucker*, the inaccurate information need not have been the sole basis for the sentence, or even a substantial basis for it. Rather, due process requires that "a sentence must be set aside where the defendant can show that false information was *part* of the basis for the sentence." *Welch*, 738 F.2d at 865 (emphasis added); *see Tucker*, 404 U.S. at 447 ("a sentence founded at least in part upon misinformation" violates due process).

Indeed, this Court in *Welch* rejected exactly such an argument as contrary to *Tucker*. The state there argued "that, in light of the sentencing hearing as a whole, the

false information did not form the basis for the sentence." 738 F.2d at 867. The seriousness of the offense and a number of other factors were asserted as supporting the sentence imposed. *Id.* The *Welch* Court recognized, however, that that "argument simply misconceives the nature of the due process right at stake."

> The Supreme Court in *United States v. Tucker*, [404 U.S. 443 (1972),] rejected an argument like the one advanced here. There the government argued that the sentence need not be set aside because, in light of the entire record, it was "highly unlikely" that the new, untainted sentence would be any different. 404 U.S. at 446, 92 S.Ct. at 591. The Court held that resentencing was required because it simply could not be assumed that the sentencing court would again give the same sentence. 404 U.S. at 448-49 and n. 8, 92 S.Ct. at 592-93 and n.8.
>
> It was, of course entirely proper for the sentencing court to take into consideration each of the factors noted by the respondents; each of these reasons may be relevant in selecting a sentence designed to rehabilitate the offender, protect the public and deter other crimes. *But the fact that the other information might have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as part of the basis of the sentence*.

738 F.2d at 867 (citations omitted; emphasis added).

b. The state court of appeals' analysis was both factually and legally unreasonable

The state court of appeals took a slightly different tack. Whereas the circuit court admitted that it in fact had relied on the perception that child sex offenders have an inherently high risk of reoffending but claimed that it *also* relied on other information, the court of appeals claimed that the sentencing court did not rely at all on those perceptions (R5:Exh.E:6-7; App. 130-31). According to the court of appeals, the sentencing court stated "that it based the sentence not on generalized information

about the likelihood of child abusers re-offending, but on the facts and circumstances of this case." (R5:Exh.E:7; App. 131).

Yet, that assertion is patently unreasonable as a matter of fact. Not only did the circuit court's statements at sentencing in fact establish that it had based the sentence in part on generalized information about the likelihood of re-offense (R5:Exh.K:31; App. 152), but that court admitted as much when denying Simonson's post-conviction motion (R5:Exh.B:App.14; App. 146). The state court of appeals' decision inexplicably omits significant references in the sentencing court's statement of reasons, making it appear that the sentencing court had focused on Simonson's own risk of reoffending rather than statistical averages:

> But above and beyond that, based on my experience, individuals who undertake this type of behavior typically do it more than once with more than one victim, *unlike charges like homicide where statistically the likelihood is they're never going to do it again. But in these kinds of cases*, if it happened once, it's very likely going to happen again. Or at least the temptation to do it again is going to be there. So I see a very, very high need to protect the public.

(*Compare* R5:Exh.K:31; App. 152, *with* R5:Exh.E:6; App. 130 (omitted text emphasized)).

To the extent that the state court of appeals relied upon a factual finding that the sentencing court did not actually rely on its perception of the recidivism rates of child sex offenders in general when deeming Simonson a high-risk offender, that finding was wholly irrational under 28 U.S.C. §2254(d)(2). The circuit court made no such finding and indeed admitted that it had relied on such information. (R5:Exh.B:App.14; App. 146 ("the Court did not base that conclusion [re likelihood

Simonson would reoffend] *only* upon generalized information that child sex abusers are all likely to reoffend" (emphasis added)).

To the extent the state court of appeals' decision can be viewed as denying that the sentencing court relied upon generalizations regarding the recidivism rates of child sex offenders, it is directly contrary to the record and thus unreasonable. *See also United States v. Hubbard*, 618 F.2d 422 (7th Cir. 1979) (sentencing judge's reliance on prior conviction which subsequently was reversed held "manifest and incontrovertible from the record," despite judge's assertion to the contrary in denying post-conviction motion). *See* 28 U.S.C. §2254(d)(2) (habeas relief remains appropriate where state court decision based on unreasonable findings of fact); *State v. Fuerst*, 181 Wis.2d 903, 512 N.W.2d 243, 246-47 (Ct. App. 1994) (state's argument that sentencing court did not rely on defendant's religious convictions unsupported by record).

To the extent that the court of appeals' decision alternatively may be viewed, like the circuit court's, as merely suggesting that the sentencing court relied on other information in addition to its perception of recidivism rates among child sex offenders, its conclusion that Simonson accordingly was not denied due process at sentencing suffers from the same fatal defect as the circuit court's rationale. Because the Supreme Court has clearly held that "a sentence founded *at least in part* upon misinformation" violates due process, *Tucker*, 404 U.S. at 447 (emphasis added), the suggestion that partial reliance upon inaccurate information immunizes a sentence from reversal on due process grounds is contrary to or an unreasonable application of

controlling Supreme Court precedent.

The state court of appeals' speculation that the sentencing court relied, *sub silento*, upon the fact that Simonson maintained his innocence and allegations regarding an unrelated 13-year old (R5:Exh.E.7; App. 131), is not only irrelevant under *Tucker*, but misplaced factually as well. The possibility that the sentencing court may have relied on other factors in addition to inaccurate information does not mitigate the due process violation here. *See, e.g.*, *Tucker*, 404 U.S. at 447 ("a sentence founded *at least in part* upon misinformation" violates due process (emphasis added)); *Welch*, 738 F.2d at 865 (same). The state court of appeals' implicit holding otherwise thus is either contrary to or an unreasonable application of controlling Supreme Court authority in cases such as *Tucker*.

The court of appeals' reference to these additional matters before the sentencing court also demonstrates that its decision rested on still more patently unreasonable findings of fact. The sentencing court never claimed to have relied upon such allegations.[5] In fact, Simonson disputed the other acts allegations and the state deemed prosecution on those allegations to be inappropriate (R5:Exh.K:19-20). Contrary to the court of appeals' speculation, moreover, the sentencing court expressly termed their impact "negligible at best," having "put[] little or no weight" on them (R5:Exh.K:24, 29; App. 150, 152). The court of appeals' suggestion that the circuit court based its sentence on such allegations thus is patently unreasonable and

[5] Under Wisconsin law, a sentencing court is deemed to have relied only upon those factors that it expressly references at the sentencing hearing. *State v. Franklin*, 148 Wis.2d 1, 434 N.W.2d 609, 611 (1989).

itself nullifies the deference otherwise required under the AEDPA. 28 U.S.C. §2254(d)(2); *see Panetti, supra*.

The court of appeals' final comment, that "[t]he fact that perpetrators of incest may have a lower rate of recidivism than other sexual abusers does not establish that [Simonson] presents a low risk to his children or others," misses the point. The issue is not whether the sentencing court's determination that Simonson presents a risk to reoffend was itself inaccurate. Rather, the issue is whether the sentencing court relied (in whole or in part) upon inaccurate information in reaching its conclusion that Simonson presents such a risk and thus merits the harsh sentence imposed here.

Here, the court expressly relied on generalizations about recidivism in assessing Simonson's supposed danger to the public, generalizations that, as demonstrated below, *see* Section II,B,2, *infra*, simply do not apply to Simonson or his offense.

c. The District Court's reliance analysis likewise was fatally flawed

The District Court below recognized that the state court of appeals erred in asserting that the sentencing court had not relied on the erroneous generalizations about sex offenders, but deemed the error harmless based on speculation that the sentencing court likely would have imposed the same sentence anyway (R11:4; App. 5). For the reasons stated in *Welch*, however, harmlessness under *Tucker* is assessed in terms of actual reliance rather than some abstract, speculative attempt to guess what the sentencing court would have done had it known the evidence it relied upon was

inaccurate. 738 F.2d at 867 ("the fact that the other information might have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as part of the basis of the sentence"). Also, like the state court of appeals, the district court below relied upon disputed factual allegations that the sentencing court expressly disavowed (R11:4; App. 5). The suggestion that the sentencing court relied on those factors thus was clearly erroneous.

2. Inaccuracy

Inaccuracy likewise is beyond rational dispute, and the state courts did not suggest otherwise. Because neither the state sentencing court nor the court of appeals disputed the fact that the sentencing court's assertions regarding the statistical likelihood of re-offense were inaccurate as applied to Simonson's alleged offense, there is no state factual finding owed deference by this Court. *See* 28 U.S.C. §2254(e)(1) (presumption of correctness only applies to factual findings actually "made by a State court"). The question thus is not whether the state courts reasonably could conclude that the information was accurate (or "not wholly inaccurate" in the Recommendation's terms (R9:14; App. 121)), but whether the information was, in fact, inaccurate as applied here.

The sentencing court's own statements when imposing sentence reflect that its belief about the likelihood of Simonson re-offending was based, not on anything specifically about Simonson, but on generalizations about "individuals who undertake this type of behavior" (R5:Exh.K:31; App. 152). Established scientific research, however, demonstrates that such generalizations are inaccurate as applied here.

Specifically, the sentencing court confused recidivism rates of child molesters in general, for which there is a relatively high rate of re-offense, with the low recidivism rate for incest offenders such as Simonson is alleged to be. However accurate the court's perceptions may have been regarding child sex offenders in general, those perceptions were wholly inaccurate when it comes to incest offenders.

A study published in 1998 analyzed the results of then-existing studies of the factors that can be used to determine the likelihood that a sexual offender will re-offend. Hanson, R. Karl & Bussiere, Monique T., *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 4/1/98 Journal of Consulting and Clinical Psychology 348 (R7:Exh.3:2-16). Predictors of sexual offense recidivism included age (young) and marital status (single). *Id.* at 351. Additionally, "[t]he risk for sexual offense recidivism was increased for those who had prior sexual offenses, had victimized strangers, *had an extrafamilial victim*, began offending sexually at an early age, had selected male victims, or had engaged in diverse sexual crimes," *id.* (emphasis added), none of which applies to Simonson. Further, contrary to the state court of appeals' implication (R5:Exh.E:7; App. 131), there is no correlation between denial and sexual recidivism. *Id.*

More directly on point, the Center for Sex Offender Management, a project of the Office of Justice Programs, United States Department of Justice, released a report entitled *Recidivism of Sex Offenders* in May, 2001 (R7:Exh.3:17-41). That report likewise reviewed existing recidivism studies and noted that, contrary to the sentencing court's assumption here, recidivism for incest offenders is actually very

low, much lower than that of non-familial child molesters, and the recidivism rate for incest offenders with no prior sexual offenses is even lower. *See* http://www.csom.org/pubs/recidsexof.html (R7:Exh.3:24, 26-27 (Pages 8 & 10-11 of 24)).

Again, the sentencing court did not dispute that its assumptions on the statistical likelihood of re-offense were inaccurate as applied to incest offenders, and the evidence presented by Simonson on the point establishes that it was. The inaccuracy prong of the *Tucker* analysis thus is satisfied here as well.

* * *

The sentencing court's erroneous view of recidivism rates contributing to its perception of Simonson's likelihood of reoffending was critical to the sentence it imposed. Under Wisconsin law, the sentencing court is obligated to impose the least amount of punishment consistent with the purposes of sentencing. *McCleary v. State*, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519 (1971) (citation omitted). In imposing the lengthy sentence here, the sentencing court believed the sentence was necessary because, given the court's understanding of recidivism rates for those convicted of sexually assaulting a child, it viewed Simonson as likely to reoffend. (R5:Exh.K:31; App. 152). The fact that the court's assumption regarding application of those generalizations to alleged incest offenders was inaccurate skewed its entire sentencing calculus in favor of a longer sentence.

Because the record establishes that the circuit court relied upon inaccurate information in imposing the sentence in this case, Simonson was denied the right to

due process. *Welch*, 738 F.2d at 865; *Lechner*, 576 N.W.2d at 925. Because the state court decisions rejecting that claim were based on either unreasonable applications of controlling Supreme Court precedent or unreasonable findings of fact, habeas relief is appropriate despite the restrictions of the AEDPA, and the district court's finding to the contrary must be reversed.

CONCLUSION

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

Dated at Milwaukee, Wisconsin, September 23, 2008.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P.

32(a)(7)(B)(iii), is 11,154 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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Robert R. Henak

TABLE OF CONTENTS TO APPELLANTS' APPENDIX

Items bound with brief:

Items bound in separate appendix:

CIRCUIT RULE 30(c) STATEMENT

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

Robert R. Henak

CIRCUIT RULE 31 STATEMENT

With the exception of those contained in the digital copy, the materials contained in Simonson'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.

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2008, I caused 15 hard copies of the Corrected Brief and Appendix of Petitioner-Appellant Chas Simonson 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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Robert R. Henak

Simonson Corrected Consol. Brf.wpd