UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 08-2354
(Case No. 07-C-513 (E.D. Wis.))

JAY STARKWEATHER,

Petitioner-Appellant,

v.

JUDY P. SMITH, Warden,
Oshkosh Correctional Institution,

Respondent-Appellee.

Appeal From A Final Judgment Denying Petition For Writ Of Habeas Corpus and the Order Entered In The United States District Court For The Eastern District of Wisconsin, Honorable William C. Griesbach, 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, Jay A. Starkweather, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) The party represented is Jay A. Starkweather

(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:

Boyle, Boyle & Smith, S.C. (now Boyle, Boyle & Boyle, S.C.)

Gray & Malacko

(3)(i) N/A

(3)(ii) N/A

Dated: _____ _____

Robert R. Henak

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BRIEF OF PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

Jay A. Starkweather appeals from the final judgement entered by the District Court on April 29, 2008, dismissing Starkweather'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.

Starkweather filed his notice of appeal in the District Court on May 29, 2008. By Order dated May 30, 2008, that court granted his motion for a certificate of appealability on the issues raised in this brief.

There are no motions for a new trial or alteration of the judgment, or any other

motion which would toll the time in which to appeal pursuant to Fed. R. App. P. 4(b)(3).

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

This is a collateral attack on Starkweather's criminal conviction in Wisconsin state court. Starkweather's current place of confinement is the Oshkosh Correctional Institution, 1730 W. Snell Rd., Oshkosh, WI 54903-3310. The warden at that institution is Judy Smith.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

As set forth in the District Court's Order granting Starkweather a Certificate of Appealability, the issues presented on this appeal are as follows:

1. Whether Starkweather was denied effective assistance of trial counsel on grounds that counsel failed to properly advise him regarding his right to testify on the issue of guilt or innocence.

2. Whether Starkweather was denied the effective assistance of trial counsel on the ground that counsel failed to use exculpatory evidence that Mr. Demery had been dead for some time before the police arrived.

3. Whether Starkweather was denied the effective assistance of appellate counsel on direct appeal on the ground that counsel failed to adequately challenge trial counsel's unreasonable advice regarding his right to testify.

4. Whether Starkweather was denied effective assistance of appellate counsel on direct appeal on the ground that counsel failed to challenge the trial court's [sic counsel's] failure to use exculpatory evidence.

5. Whether Starkweather was denied the effective assistance of appellate counsel on the ground that the issues [sic] that counsel failed to challenge the denial of a lesser included offense instruction on the homicide charge.

(R55:2; App. 102).[1]

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 Starkweather's constitutional rights to testify and present a defense, to the effective assistance of trial and post-conviction/appellate counsel, and to be free from conviction absent sufficient evidence of guilt, all in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This appeal addresses only the claims of ineffective assistance of trial and post-conviction/appellate counsel.

Procedural History of the Case

On June 7, 1995, the state charged Jay Starkweather with four counts of attempted first degree intentional homicide while armed. The state subsequently added a count of first degree recklessly endangering safety while armed. The charges were based on an incident on June 6, 1995, during which Starkweather, looking "totally insane," shot and injured two of his best friends, and then was involved in a

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[1] Throughout this brief, 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."), Attachment ("Attach."), or page number of the document.

References to the state transcripts contained in Exhibit L to the Respondent's Answer (R24 Attachments 116-127) will take the form Tr.__:___, with the Tr.__ reference denoting the specific transcript (by state docket number) and the following :__ reference denoting the page number of that document.

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

shoot-out with police. (R1:Attach.1:9).

On June 14, 1995, the state filed a second complaint, charging Starkweather with a single count of first degree intentional homicide while armed. That charge was based on the fact that, shortly after the police had shot Starkweather, they found Ted Demery dead of a gunshot wound in his trailer nearby. (*Id.*).

The cases were consolidated and Starkweather entered pleas of Not Guilty and Not Guilty by Reason of Mental Disease or Defect (R1:Attach.9:3; App. 114). Phase I of the jury trial commenced on September 16, 1996, and culminated in guilty verdicts on all six counts on September 26, 1996 (Tr116-Tr124; Tr124:141-50). Phase II of the trial commenced on September 30, 1996 and ended on October 2, 1996 with a non-unanimous jury verdict finding that Starkweather suffered from a mental disease or defect, but that he did not as a result lack substantial capacity to appreciate the wrongfulness of his actions or to conform to the requirements of the law. (Tr125-Tr127; Tr127:254-57).

On December 27, 1996, the circuit court sentenced Starkweather to life in prison plus five years on the homicide count and set parole eligibility at 2068. It further sentenced Starkweather to 45 years on each of the attempted homicide counts and nine years on the reckless endangerment count, all to be served concurrently with each other and with the homicide sentence. (R9:Exh.A-1 & A-2).

Starkweather timely sought post-conviction review under Wis. Stat. §974.02 and (Rule) 809.30, represented by new counsel, Gerald Boyle and Jonathan Smith.

Boyle and Smith filed a post-conviction motion challenging the effectiveness of trial counsel on a number of grounds and claiming that the sentence was excessive. (R9:Exh.H:3-4). The circuit court summarily denied that motion without a hearing (R9:Exh.H:App.19).

Boyle and Smith appealed the denial, unsuccessfully raising the same issues and others (R1:Attach.2; R9:Exhs.B-D; App. 142-59). The Wisconsin Supreme Court denied review on January 12, 1999 (R1:Attach.3; App. 141).

No longer represented by counsel, Starkweather filed a *pro se* petition pursuant to Wis. Stat. §974.06 and various other documents on December 22, 1999. That motion, 179 pages long and with another 175 or so pages of attachments (*see* R18:Exh.1:4), raised a number of claims reflecting both his lack of legal skills and continued mental illness (*see* R1:Attach.1:2-3). The circuit court summarily denied the motions (*see* R9:Exh.H:4).

After a number of procedural stumbles, Starkweather again appealed, still *pro se*. After briefing was completed, however, undersigned counsel was retained by Starkweather's family. (*See* R9:Exh.H:4).

The Court of Appeals stayed consideration of Starkweather's appeal pending counsel's review but denied his later request for remand to file supplemental motions so that counsel could correct the errors made in Starkweather's *pro* se pleadings and so that all of Starkweather's meritorious claims could be presented on the same appeal. Instead, the Court directed counsel either to proceed with Starkweather's *pro*

se briefs, withdraw those briefs and file substitute briefs limited to the issues already raised by Starkweather, or dismiss the appeal (R18:Exhs.2-7).[2] Given that many of Starkweather's *pro se* claims were obviously frivolous, counsel was forced to withdraw his *pro se* briefs. Upon further review, counsel determined that none of the claims raised *pro se* by Starkweather had any reasonable chance of success. Following consultations with Starkweather, therefore, the appeal was voluntarily dismissed (R18:Exhs.8-9).

On October 17, 2002, undersigned counsel (now proceeding *pro bono*) filed his post-conviction motion pursuant to Wis. Stat. §974.06 on Starkweather's behalf, raising the issues presented here, among others (R9:Exh.H:App.32-63).

At approximately the same time counsel filed Starkweather's §974.06 motion, he also filed a habeas petition on Starkweather's behalf in the Wisconsin Court of Appeals (R9:Exh.H). Consistent with the dictates of *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992), Starkweather there challenged the effectiveness of the counsel on his direct appeal, based in part on their failure to present Starkweather's claim that the trial court erred in refusing Starkweather's request for a lesser-included offense instruction on the homicide count. That petition also alleged that, if prior counsel had failed to adequately preserve the right to testify and related ineffective-

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[2] Although Smith objected to Starkweather's motion that she include additional documents in the record necessary to meet her obligations under Rules 5 and 7 Governing §2254 Cases and for a fair assessment of Starkweather's claims (R20), and the District Court denied Starkweather's request (R25: App. 104-05), Smith did not oppose inclusion of those documents actually attached to Starkweather's motion (R20:2).

ness claim, then appellate counsel was ineffective on this ground as well. (R9:Exh.H).

The Court of Appeals summarily denied that petition on February 12, 2003 (R1:Attach.4; App.139-40), the Wisconsin Supreme Court summarily remanded to the Court of Appeals for reconsideration on June 12, 2003 (R1:Attach.5; App.137-38), and the Court of Appeals then reaffirmed its prior decision on June 18, 2003 (R1:Attach.6; App.134-36). The court held that Starkweather was not denied the effective assistance of appellate counsel because there was no basis in the facts for the lesser-included offense instruction. The Court did not address the right to testify claims, deeming them more conveniently addressed in the pending §974.06 proceeding. (*Id.*). The Wisconsin Supreme Court denied Starkweather's petition for review on October 1, 2003 (R1:Attach.7; App.133).

Meanwhile, on February 15, 2006, the circuit court finally denied Starkweather's §974.06 motion without a hearing. Ruling against Starkweather on the underlying ineffectiveness and right to testify claims, that court determined that there accordingly was no ineffectiveness of post-conviction counsel and thus no "sufficient reason" under Wis. Stat. §974.06(4) for not having raised the claims on his direct appeal. (R1:Attach.8; App.118-32).

The Court of Appeals affirmed on February 13, 2007 (R1:Attach.9; App.112-17). That court deemed Starkweather's right to testify and related ineffectiveness claims "nothing more than artful rephrasing of the issue that has already been

decided" on direct appeal (R1:Attach.9:5; App.116). The court also deemed any reargument barred by Starkweather's failure to raise the issue in his *pro se* §974.06 motion (*id*.). The court rejected Starkweather's second ineffectiveness claim - based on trial counsel's failure to use the investigator's admission that Demery was dead long before Starkweather was alleged to have shot him - as meritless because, in the court's view, the omitted evidence would negate another defense presented to that charge (R1:Attach.9:5-6; App.116-17). The court also summarily asserted in a footnote that the issue was procedurally barred because the facts supporting the claim were included in the *pro se* motion subject to the voluntary dismissal (R1:Attach.9:6 n.3; App.117).

The Wisconsin Supreme Court denied Starkweather's timely-filed petition for review on May 22, 2007 (R1:Attach.10; App.111).

Starkweather filed his habeas petition in the District Court on June 4, 2007 (R1). Although raising eight separate claims due to ineffectiveness of counsel at various levels of the state system, Starkweather's petition focused on four core issues:

1. Denial of the right to testify and present a defense and related denial of the effective assistance of trial and post-conviction/appellate counsel;

2. Sufficiency of the evidence on the homicide charge and related denial of effective assistance of post-conviction/appellate counsel;

3. Ineffective assistance of appellate counsel for failure to raise denial of lesser-included offense instruction on homicide count; and

4. Ineffective assistance of trial and post-conviction counsel regarding failure to present exculpatory evidence.

(R1; *see* R15).

Although the District Court ordered a response (R3; App.106-09), Smith provided only partial versions of the state court briefs (omitting the appendices), excluded others (such as the petitions for review) entirely, and at least initially refused even to provide the trial transcripts (R7; R9). Only after Starkweather moved to expand the record to include additional documents necessary to a fair assessment of his claims (and Smith's procedural defenses) (*see* R18), did Smith finally provide the trial transcripts (R22). However, she still refused to include additional necessary documents or unexpurgated copies of the state briefs (*see* R20), and the District Court declined to require her to do so (R25; App.104-05).

After briefing (R15; R26; R30), the District Court denied Starkweather's petition by Decision and Order dated April 29, 2008 (R40; App.2-17). Regarding the right to testify issues, that Court hypothesized multiple reasons why trial counsel may have deemed it better as a matter of strategy that Starkweather either not testify at all or that he wait to testify until the responsibility phase of the trial, and concluded that the state court's denial of these claims accordingly were not unreasonable (R40:6-9; App.6, 10).

As for the claims of trial and appellate ineffectiveness based on trial counsel's failure to use available evidence that Demery had been dead for quite some time before the police found him, the District Court acknowledged that the state appellate court's decision that such evidence would conflict with Starkweather's defense at trial

made no apparent sense and that Smith had made no attempt to justify that court's holding. (R40:12 & n.4; App.13). Instead, the court chose to focus on the state circuit court's holding, finding reasonable its conclusion that, although the evidence was potentially helpful to the defense and its omission thus likely deficient performance, its exclusion did not prejudice the defense. (R40:11-14; App.12-15). The District Court also denied Starkweather's appellate ineffectiveness claim regarding the denial of a lesser-included offense instruction on the homicide count, finding that the state court of appeals' holding that there was no reasonable view of the evidence that would support acquittal on the intentional homicide charge or conviction for reckless homicide was reasonable (R40:14-15; App.15-16).

Starkweather timely filed his notice of appeal, request to proceed *in forma pauperis*,[3] docketing statement, and request for a certificate of appealability on May 29, 2008 (R42; R44; R45; R47). By Order dated May 30, 2008, the district court granted him *in forma pauperis* status and a certificate of appealability on the issues raised on this appeal (R55; App.101-03).

State Trial Evidence

Jay Starkweather's ("Starkweather's") father, Leo Starkweather ("Leo"), owned a wooded lot of land known as Pick-Nick Point Resort on Tainter Lake in Dunn County, Wisconsin. The property contained a few houses, two mobile homes, various outbuildings, and a building containing three apartments. Starkweather lived

[3] Undersigned counsel appears *pro bono*.

in one of the apartments. (Tr117:148-63).

When Starkweather began to research the property with hopes of eventually developing it, he believed it to be about 14 acres. His investigation, however, led him to believe there was a conspiracy to take that land, and a 1995 survey revealed it was only about 7 acres. As time went by, Starkweather dug deeper into the land records and became increasingly more paranoid and convinced that he had uncovered a large-scale fraud involving a number of prominent Dunn County individuals and the disclosure of which accordingly would place him in great danger. (Tr117:164-67, 194-98, 203-06; Tr121:193-95; Tr122:17-21, 212-15, 218-21; Tr126:7-23, 32-37, 42-48, 59-152).

Starkweather, with the help of his best friend, Marty Austreng, and Wayne Kittleson, was remodeling an old schoolhouse some distance from Pick-Nick Point during the winter and spring of 1995. (Tr117:168, 199-202, 216-17). According to Austreng, when he met Starkweather at the schoolhouse to work on the morning of June 6, 1995, Starkweather was very agitated. The two had a disagreement and Starkweather left. Starkweather later called Austreng and told him he could have the schoolhouse and the land. (Tr117:169-73).

Austreng then went to Starkweather's apartment, told him he didn't want the property, and threw down his keys. At that point, Starkweather pulled a gun and shot both Austreng and Kittleson, who was sitting in the kitchen with Starkweather. Austreng then ran away. (Tr117:175-76, 222-23).

According to the state's witnesses, Starkweather then went in search of Austreng, passing by two individuals who were in the process of moving a mobile home from the property (Tr118:3-12, 42-50). Rebecca Wheelock, whose family rented a house on the Pick-Nick Point property, claimed that she saw Starkweather looking upset and walking toward his parents' house a little after 8:30 that morning. According to Wheelock, Starkweather entered her house about 15 to 20 minutes later, looking "totally insane" and carrying two guns. He stated he was looking for Austreng and began searching her house, but left when she told him to get out. She claimed that, a short time later, she heard a single shot from the direction of Ted Demery's trailer, the first shot she heard that morning. (Tr118:72-84, 92-94).

According to Leo's preliminary examination testimony, which was admitted over objection at trial following Leo's death, Starkweather entered his home that morning, threatened him, and took Leo's gun and some bullets before leaving. (Tr122:2-21).

When the police arrived, a gunfight ensued and Starkweather ultimately was shot by the police and arrested. (Tr118:143-52, 176-79, 208-14, 233-42). Although Starkweather had a handgun in each hand when he was shot, one a 9mm and the other a .380, he only fired the 9mm during the gunfight (Tr118:178-79).

Shortly after the gunfight, the officers discovered Ted Demery's body in his trailer (Tr118:162-64, 223-26, 246-47). He had been shot once in the face, and state witnesses testified that the only bullet found in the trailer, which was therefore

presumed to have been that which killed Demery, had been shot from the .380. (Tr121:118-24). However, neither that bullet nor a matching shell casing was found until some time after the initial search of the trailer and no blood or other trace evidence was found on the bullet (Tr119:183-90, 199-207, Tr120:23-26; Tr121:123-24).

State witnesses also testified that Demery had been shot at relatively close range, between about 1 and 2 feet (Tr120:149, 152). The officers claimed that, although Demery had "bled out" by the time they arrived, the blood appeared fresh (Tr118:188, 246-47, 250, 255-57; Tr119:62-68; Tr122:58-63). They did not feel the blood or the body to see if it was warm or stiff, and the lead investigator, Craig Koser, directed the medical examiner to stay away from the body until Koser finished his investigation (Tr118:182-85, 192, 257; Tr122:65). Accordingly, the medical examiner was not allowed to examine and remove the body until 10:30 that evening, and the first photos of the body apparently were not taken until about that time (Tr119:33-36, 48-49; Tr122:76-80). Given the delay, the autopsy conducted at 12:05 p.m. the following day (June 7, 1995) could only place the time of death within the prior 12 to 36 hours (Tr120:140, 160-63, 173).

Wheelock's sister-in-law, Jolene Johnson, testified that she had heard what she believed to be a gunshot sometime around midnight the night before this incident while babysitting for the Wheelocks. (Tr118:88-89, 110-12, 127-28; Tr121:4-5).

Although Starkweather originally had intended to testify in Phase I of the trial,

his attorney, Earl Gray, advised him that what he had to say would be more appropriate in Phase II. (Tr123:3-5; Tr125:203-04). Gray did, however, elicit testimony from a police officer who interviewed Starkweather in the hospital shortly after he was shot to the effect that Starkweather only shot two people (Tr122:199-200).

In Phase II of the trial, Drs. John Marshall and Dennis Philander testified that Starkweather suffered from a mental illness, delusional disorder of a persecutory type, and accordingly was not responsible for his conduct on June 6, 1995. (Tr125:67-74, 78-79, 157-59, 193-96). Dr. Frederick Fosdal agreed that Starkweather was mentally ill but could not state one way or the other whether the illness rendered Starkweather not responsible (Tr127:122-27, 157-60). Dr. Patricia Jens originally concluded that Starkweather was mentally ill, but subsequently felt she could not state that conclusion to the necessary degree of certainty and believed he may suffer from drug-induced psychosis (Tr127:30-39). Other, non-expert witnesses testified to Starkweather's delusional and paranoid tendencies (Tr125:215-21; Tr126:7-23, 32-37, 42-48).

Starkweather testified on his own behalf in Phase II, explaining that he did not shoot Demery, and that he only shot Austreng and Kittleson in self-defense because they were there to kill him and he believed they had guns. Starkweather further testified that he did not recall shooting directly at the police, and that they shot him while he was surrendering with his hands were in the air. (Tr126:154-72, 187-88).

SUMMARY OF ARGUMENT

The District Court erred in holding that Starkweather was not entitled to habeas relief on the grounds that he was denied the effective assistance of trial and post-conviction/appellate counsel.

Although raised as five separate claims due to ineffectiveness of counsel at various levels of the state system, Starkweather's entitlement to relief focuses on prior counsels' errors regarding three core issues:

1. Denial of the right to testify and present a defense, *see* Sections I,B,1 & II,C,1, *infra*;

2. Failure to present exculpatory evidence, *see* Sections I,B,2 & II,C,2, *infra*; and

3. Denial of a lesser-included offense instruction on the homicide count, *see* Section II,C,3, *infra*.

Given that trial counsel stated on the record the advice on which Starkweather based his decision not to testify, and given that such advice was in fact inaccurate and patently unreasonable (advising that Starkweather's claims of innocence were more appropriate for the responsibility phase of the trial than the guilt/innocence phase), there is little rational dispute that Starkweather was denied his rights to the effective assistance of counsel regarding the decision whether to testify. The Wisconsin Court of Appeals' holding to the contrary, like its holding that trial counsel's advice was not deficient, overlooks the inaccuracy of the advice and accordingly is objectively unreasonable.

As for trial counsel's failure to use evidence that Demery was dead long before Starkweather's alleged shooting spree, the District Court properly recognized that the state appellate court's conclusion on the merits that the exculpatory evidence conflicted with the defense presented at trial was unreasonable. Contrary to the District Court's apparent belief, however, that fact does not justify transferring the deference owed under the AEDPA from the appellate court to the state circuit court. Rather, it exhausts that deference, resulting in *de novo* review of this claim. Upon such review, it is clear that the state circuit court was right in holding that reasonable counsel would have recognized such evidence was exculpatory, although it erred in abrogating to itself the resulting credibility determination properly left to the jury.[4]

Finally, although appellate counsel's unreasonable failure to challenge the denial of a lesser-included offense instruction on the homicide count concerns an underlying issue of state law, there being as yet no constitutional right to a lesser-included offense instruction in non-capital cases, the ineffectiveness claim remains cognizable on federal habeas. *Perry v. McCaughtry*, 308 F.3d 682, 688 (7th Cir. 2002). Also, although the state appellate court ruled against Starkweather on the merits, finding that there was no legitimate factual basis for acquittal on the intentional homicide charge and conviction on the lesser charge, its holding was based on a patently unreasonable interpretation of the facts.

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[4] The District Court chose not to address Smith's argument that Starkweather somehow procedurally defaulted this claim. The decision was reasonable given that Smith refused to include in the record the documents necessary to assess that claim and it lacked arguable merit in any event. *See* Section I,B,3, *infra*.

Because the state appellate court's decisions rested upon patently unreasonable findings of fact or applications of controlling Supreme Court authority, relief on these claims accordingly is appropriate despite the deference owed under the AEDPA.

STANDARD OF REVIEW

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 "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. *Pitsonbarger v. Gramley*, 103 F.3d 1293, 1297-98 (7th Cir. 1996).

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

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

Id. at 748-49. "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).

Under 28 U.S.C. §2254(d)(2), a federal court also 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). "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.

The Supreme Court recently made clear, moreover, that deference to state court decisions is limited to that expressly provided under §2254(d). Thus,

> [w]hen 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].

Panetti v. Quarterman, ___ U.S. ___, 127 S.Ct. 2842, 2858-59 (2007).

Finally, this has made clear that 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).

ARGUMENT

I.

HABEAS RELIEF IS APPROPRIATE BECAUSE STARKWEATHER WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Contrary to the District Court's holding (R40:5-9, 11-14; App. 6-10, 12-15), Starkweather was denied the effective assistance of counsel at trial guaranteed by the Sixth Amendment to the United States Constitution. Specifically, trial counsel failed to properly advise Starkweather regarding his right to testify on the issue of guilt or innocence in Phase I of the trial and failed to use evidence that the lead investigator admitted to Starkweather's mother that Demery had been dead for quite some time before the police arrived. Starkweather submits that there was no legitimate tactical basis for the identified failures of counsel, that such failures were unreasonable under prevailing professional norms, and that his defense was prejudiced by them.

A. Standard of Review

A defendant alleging ineffective assistance of trial counsel first must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). A defendant thus must rebut the presumption of attorney competence "by proving that his attorney's representation

was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), *citing Strickland*, 466 U.S. at 688-89. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*., *citing Strickland*, 466 U.S. at 689. Moreover, in analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see Kimmelman*, 477 U.S. at 384.

It is not necessary, of course, to demonstrate total incompetence of counsel. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel. . . may in a particular case be violated by even an isolated error. . . if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight or inattention rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001).

Second, a defendant must show that counsel's deficient performance prejudiced his or her defense. Counsel's performance prejudices the defense when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable." *Strickland*, 466 U.S. at 687.

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

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

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

B. Trial Counsel's Performance was Deficient, and the State Court's Holding to the Contrary is Patently Unreasonable

1. Trial Counsel's Failure to Properly Advise Starkweather Regarding His Right to Testify During Phase I of the Trial

Based upon trial counsel's advice that testimony to the effect that Starkweather did not shoot Demery and that he only shot in self-defense at Austreng, Kittleson and the police was more appropriate for the insanity phase of the trial than the guilt phase, Starkweather chose to defer testifying until the insanity phase. Because this advice was patently false and unreasonable, however, trial counsel failed to provide Starkweather with accurate information necessary to his decision whether to testify to his innocence during Phase I of the trial or instead to wait until Phase II. Contrary to the District Court's conclusion, therefore, trial counsel's misinformation deprived Starkweather of the effective assistance of counsel.

a. Relevant Facts

Starkweather insisted on telling his side of the story in this case, and made clear that he intended to testify during Phase I. (*See* Tr122:133, 232-33). On the advice of counsel, however, and only on the advice of counsel, he ultimately waited until Phase II to testify:

> THE DEFENDANT: Well, Your Honor, with all due respect to my counsel and the proceedings and everything, I understand Mr. Gray's doing the best he can, and according to his wishes, I did not testify during the first phase against -- it was against my wishes, but I followed his direction.
>
> I want to make sure I have my chance to say something in these proceedings. Mr. Gray has said I will be able to speak my piece before

> phase two is over. There's been a lot of accusations hurled at me back and forth, and I'm willing to stand up and be responsible for what I believe is -- for my actions.
>
> I am not afraid to do that, but what I'm afraid is I'm going to be shut out of my only chance in court. I'm terrified. I want to be able to know I'm going to be able to stand up and tell my side of the story. That's what I'm asking from the Court.

(Tr125:203).

Attorney Gray explained his advice to Starkweather on the record at trial:

> THE COURT: Please be seated everyone. Mr. Gray, is your client going to testify?
>
> MR. GRAY: Well, Your Honor, we had a talk this morning. I explained to him my opinion with respect to testifying in this phase of the case. My client has a desire to tell his story; however, it's my opinion, based on my knowledge of the case and experience, that what he has to say would be better fit in the second phase of this trial, if there is a second phase. I advised him as you advised him yesterday that he has a right not to testify. And it's my advice to him not to testify. He told me this morning, and I believe he's going to tell the court now, that he has decided not to testify in this phase of the case, knowing full well that he has an absolute right to testify and that not his lawyer or anybody else in the world could stop him from testifying.

(Tr123:3).

> MR. GRAY: For the record, I advised him at the guilt phase that I believed his testimony, if he wants to testify, which would be against my advice, but his testimony would be more appropriate for the responsibility phase.

(Tr125:204).

While Mr. Gray advised against him testifying at all, Starkweather insisted on testifying before the trial ended (Tr125:203-04). During Phase II, he explained to the jury his research and perceptions regarding what he believed to be a conspiracy to

defraud his father out of his land and the questionable circumstances of his father's death. (Tr126:56-152). He further explained that he did not shoot Demery. Rather, he found the .380 at Demery's house following Demery's death and picked it up. (*Id.*:154-56). He only shot at Austreng and Kittleson because they were armed and he feared for his life. Austreng had threatened to knock him on the head with a wrench that morning and often carried a .357 magnum. Also, when Starkweather had informed his father that morning of the evidence of fraud he had discovered, Leo responded that Austreng and Kittleson would take care of him and the cops would clean up the mess. Leo indicated that if Starkweather did not believe him, he should see Ted Demery. (*Id.*:158-166, 181, 184, 187-88). Starkweather also testified that he could not recall shooting directly at the police, and that he was surrendering with his hands in the air when the police shot him (*Id.*:171-72).

b. Interplay Between the Rights to Testify and to Present a Defense and the Right to Counsel

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 (1987).

> "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. 319,126 S.Ct. 1727, 1731 (2006). 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).

The Supreme Court has observed that "the most important witness for the defense in many criminal cases is the defendant himself," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), and that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion) (concerning right to allocution). It is thus well-established that an accused's right to testify is a personal and fundamental constitutional right. *See Rock,* 483 U.S. at 52. That right is derived from the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law, from the compulsory process clause of the Sixth Amendment, which grants a defendant the right to call witnesses in his favor, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. *Id.* at 51-53.

Defense counsel bears the primary responsibility for advising the defendant not only of his right to testify or not to testify and that it is ultimately for the defendant himself to decide, but also must advise the defendant of "the strategic implications of each choice." *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (en banc):

> [t]his advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege."

Id. (footnote omitted), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added by *Teague* court).

Counsel's failure to ensure that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary would constitute deficient performance under *Strickland*. *See Teague*, 953 F.2d at 1534. *Accord*, *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir. 1993) (finding deficient performance where record "does not support the conclusion that counsel explained the possible benefits of Foster exercising his right to testify during the penalty phase"), *rev'd on other grounds*, 39 F.3d 873 (8th Cir. 1994) (en banc) (finding no resulting prejudice where defendant did not show what his testimony would have been).

In judging the reasonableness of an attorney's advice, the Court must keep in mind the defendant's "substantial dependence upon [his] attorney to inform [him] of what [he] needs to know." *State v. Ludwig*, 124 Wis.2d 600, 369 N.W.2d 722, 727 (1985). "[I]t is the accused who must decide [whether to testify] and it is the duty of counsel to present to him the relevant information on which he may make an intelligent decision." *Poe v. United States*, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

c. Trial counsel's advice that Starkweather's exculpatory testimony better fit in the responsibility phase rather than the guilt phase of the trial was patently unreasonable

Starkweather was not given reasonable advice concerning whether he should testify during Phase I of his trial. To the contrary, counsel failed to advise him that Phase I would be his *only* chance to testify on the issues of guilt or innocence. Without that advice, Starkweather could not knowingly and intelligently decide whether to testify during that phase of the trial.

Trial counsel knew the substance of Starkweather's intended testimony, and a reasonable attorney in the circumstances would have known that assertions of self-defense on two charges and flat denial of a third are directly relevant to the issues of guilt or innocence addressed in Phase I of a trial. There can be no legitimate strategic or tactical reason for not accurately advising Starkweather, and counsel's failure to do so cannot rationally be deemed reasonable.

Contrary to what the state court and District Court assumed, the issue is not whether trial counsel acted reasonably in believing that it would be better if Starkweather either delayed testifying until Phase II or, better yet, did not testify at all (R1:Attach.2:15-16; R40:7-9; App. 8-10, 156-57). The relevant question is whether he provided Starkweather accurate and complete information so he could exercise his right to make that decision himself. *E.g.*, *Teague*, *supra*.

Thus, while advice that Starkweather should wait until Phase II to testify might have been reasonable, Gray's advice that Starkweather should not testify during Phase

I because his testimony better fit into Phase II plainly was wrong. While parts of Starkweather's testimony would have been more appropriate for the mental illness determination in Phase II, Starkweather's self-defense explanations for shooting Austreng and Kittleson, his denial of shooting Demery, and his description of the shooting involving the police fit squarely into the guilt or innocence determination of Phase I.

Trial counsel's advice that Starkweather's testimony was more appropriate for the insanity phase of the trial than the guilt phase was patently unreasonable. No rational attorney could suggest that evidence that his client (1) in fact did not shoot the person he is charged with murdering and (2) only shot in self-defense at those he is charged with attempting to murder is irrelevant to issues of guilt or innocence. "[T]he mental responsibility phase of the bifurcated trial 'is dispositional in nature and has nothing to do with whether the defendant is guilty.'" *Balsewicz v. Kingston*, 425 F.3d 1029, 1033 (7th Cir. 2005) (quoting *State v. Koput*, 142 Wis.2d 370, 418 N.W.2d 804, 812 (1988)).

Starkweather wanted to tell his side of the story to the jury, and there was no reason he could not testify in both phases. Because such evidence went directly to the issues of guilt or innocence, he was entitled to do so. Yet, Gray's faulty advice deprived him of both the opportunity to present such evidence at the appropriate time and a jury evaluation of his testimony on the issue of guilt or innocence.

While it is true that Starkweather acquiesced in his trial counsel's decision that

he not testify, he did not knowingly and intelligently waive his right to testify in Phase I. He acquiesced only because his trial counsel denied him the information necessary to a rational, informed decision on that point. Attorney Gray totally failed to advise Starkweather that his testimony that he fired at Austreng, Kittleson and the police in self-defense and that he did not shoot Demery was relevant *only* in Phase I. Under these circumstances, the decision not to testify hardly can be considered to have been knowingly and voluntarily made. *Cf. Faretta v. California*, 422 U.S. 806, 835 (1975) (for waiver of right to counsel to be knowing and voluntary, defendant must be made aware "of the dangers and disadvantages of self-representation, so that 'he knows what he is doing and his choice is made with his eyes open'" (citation omitted)).

Regardless whether counsel's strategic advice not to testify was reasonable, therefore, the decision whether to take that advice was Starkweather's to make, *based upon accurate information.* There is no reasonable basis on which to conclude that trial counsel acted reasonably in advising his client that his assertions of innocence should be withheld until they were irrelevant.

Given that trial counsel's advice to Starkweather was materially inaccurate, the state Court of Appeals' decision on his direct appeal that "the record conclusively demonstrates that [Starkweather] is not entitled to relief because it shows that his counsel's recommendation was not deficient performance" and that Starkweather waived his right to testify in Phase I voluntarily (R1:Attach.2:15-16; App. 156-57) is patently unreasonable. Because the Wisconsin court's assertion that trial counsel

reasonably advised Starkweather to refrain from presenting evidence of his innocence until Phase II when it no longer would be relevant fails any objective standard of reasonableness and was not even close to the "'range of defensible positions,'" *Taylor v. Bradley*, 448 F.3d 942, 948 (7th Cir. 2006), the AEDPA does not bar relief.

2. Trial counsel's failure to use exculpatory evidence that Demery had been dead for some time before the Starkweather's shooting spree

On the evening of Starkweather's arrest, Jean Starkweather spoke with Investigator Koser. She specifically asked him to describe what Ted Demery's body looked like. In response, Investigator Koser told her that, from the color of the body, Demery had been dead for quite some time when the police found him (R9:Exh.H:App.63). Although Ms. Starkweather told Attorney Gray about this conversation prior to trial (*id.*), Gray did not present this evidence at trial.

Trial counsel knew that, contrary to the state Court of Appeals' assumption (R1:Attach.9:5-6; App. 116-17), the timing of Demery's death was central to Starkweather's defense that Demery was killed by someone else the night before (Tr124:116-17 (Defense closing)). It was in furtherance of that defense that he presented evidence that argument and a gunshot were heard near Demery's trailer around midnight the night before the shootings here and Starkweather's arrest (Tr118:88-89, 110-12, 127-28, Tr121:4-5), that the medical examiner was denied access to the body and no photographs were taken of it until more than 12 hours after the arrest (Tr119:33-36, 48-49; Tr122:76-80), that neither the bullet that allegedly

killed Demery nor the casing was found until after the initial search of the trailer, and that there was no blood or other trace evidence on the bullet (Tr119:183-90, 199-207, Tr120:23-26; Tr121:123-24); and that, according to the autopsy, the death could have occurred the night before Starkweather's arrest (Tr120:140, 160-63, 173).

An exculpatory admission on that point by the lead investigator could have had a substantial effect on the jury. The state trial court agreed. Although ultimately finding counsel's error not to be prejudicial, that court concluded that the error likely constituted deficient performance:

> Additionally, the defense asserts that the post-conviction counsel was ineffective for not arguing that the trial counsel was ineffective for not presenting the testimony of Jean Starkweather regarding Investigatory Koser's statement. . . . This statement very likely would have had some exculpatory value if presented to the jury and it is unlikely that its omission was part of the defense counsel's strategy, since it would have helped bolster the argument that Mr. Demery had been killed much earlier than the defendant's shooting spree. Therefore, in this regard, the post-conviction counsel may have been deficient for not asserting that trial counsel had been ineffective for not asserting this evidence at trial.

(R1:Attach.8:8; *see id.*:14).

The state Court of Appeals' decision to the contrary is based on the irrational factual assumption that Attorney Gray had presented only one defense to the homicide count at trial (i.e., that Demery was accidently shot by the police) and that the investigator's admission would somehow conflict with Starkweather's trial strategy:

> ¶8 The record conclusively shows that Starkweather is not entitled to relief based on his trial counsel's failure to present Jean Starkweather's testimony that an investigator told her Demery was shot at an earlier time. Starkweather's theory of defense was that Demery

> was inadvertently shot by the police during the shootout and the police attempted to cover up their own mistake by framing Starkweather. Any evidence that Demery was killed hours before the police arrived would have negated that defense. Attorney Gray's failure to present evidence that would have contradicted the defense cannot be characterized as deficient performance. The defense Gray presented, although unsuccessful, stood a better chance of persuading the jury than Starkweather's bizarre story that he happened upon the scene of another murder during his shooting spree.

(R1:Attach.9:5-6; App. 116-17).

The District Court conceded that there was no apparent basis for the Court of Appeals' decision on this claim (R40:12 n.4; App.13). Where, as here, the last court to address the merits of the claim acts unreasonably, the deference owed that court under the AEDPA is exhausted and the federal court is obliged to decide the claim *de novo*. *Panetti v. Quarterman*, ___ U.S. ___, 127 S.Ct. 2842, 2858-59 (2007).

Reviewing the deficient performance prong *de novo*, it is clear that the state circuit court was correct. As that court acknowledged, "the timing of Demery's death was a central issue in the trial," and Koser's admission regarding the timing of Demery's death "would have helped bolster the argument that Mr. Demery had been killed much earlier than the defendant's shooting spree" (R1:Attach.8:8). The record also is clear that Ms. Starkweather informed Attorney Gray about Koser's admission prior to trial (Exh.H:App.63 (Affidavit of Jean Starkweather)). There accordingly was no apparent rational basis for trial counsel's failure to use that information.

3. Starkweather did not procedurally default his claim of ineffectiveness based on trial counsel's failure to use exculpatory evidence

Smith argued below that Starkweather somehow procedurally defaulted his ineffectiveness claim regarding trial counsel's failure to use exculpatory evidence on the timing of Demery's death. According to Smith, he did so "by abandoning the issue when he chose to voluntarily dismiss the appeal in which he had raised the issue" (R7:3; *see* R26:33-36). The Wisconsin Court of Appeals in fact made such a finding in a conclusory footnote to its opinion affirming denial of undersigned counsel's §974.06 petition on the merits:

> Jean Starkweather's proffered testimony was recited in Starkweather's pro se postconviction motion. This issue is also procedurally barred because it was raised in the pro se motion and, with the advice of counsel, the appeal from the order denying that motion was voluntarily dismissed.

(R1:Attach.9:6 n.5). Smith's argument nonetheless is meritless.

a. Procedural default does not apply here

The independent and adequate state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). Here, however, the state court did in fact address and decide Starkweather's federal claim on its merits, while limiting its conclusory suggestion that the claim was procedurally barred to a footnote. Given that Wisconsin law is clear that arguments relegated to footnotes need not be considered seriously,

e.g., *State v. Santana-Lopez*, 2000 WI App. 122, ¶6 n.4, 237 Wis.2d 332, 613 N.W.2d 918, 922 n.4 ("'We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review'" (citations omitted)), the state court's relegation of its conclusory assertion to a footnote should not be sufficient to overcome the presumption that a state court decision is based primarily on federal law. *Michigan v. Long,* 463 U.S. 1032 (1983). Under these circumstances, the state court has not stated "clearly and expressly that [its decision] is ... based on bona fide separate, adequate, and independent grounds." *Id.* at 1041.

b. Smith forfeited any procedural default argument by refusing to include in the record the documents necessary to a fair assessment of that defense

Smith's procedural default argument also must fail because she refused to provide the District Court the portions of the record necessary to fairly assess that claim. A "'state-court procedural default ... is an affirmative defense,' and ... the state is 'obligated to raise procedural default as a defense or lose the right to assert the defense thereafter.' " *Hooks v. Ward*, 184 F.3d 1206, 1216 (10th Cir.1999) (quoting *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996)).

Starkweather moved the District Court to expand the record to include, *inter alia*, the *pro se* pleadings that Smith and the state Court of Appeals allegedly relied upon in concluding that Starkweather had raised the Koser argument in his *pro se* §974.06 motion such that he abandoned it when he voluntarily dismissed his *pro se* appeal from the denial of that motion (R18). That motion expressly noted that Smith

could not meet her burden to establish her procedural default defense without producing the documents on which she based that defense (R18:5).[5]

Smith nonetheless "vehemently oppose[d]" (R25:1; App.104) the motion, arguing in relevant part that, "[a]bsent any showing of relevance, the respondent is not about to waste valuable resources and this court's time by filing a 358-page document that may never be considered" (R20:6). Based on Smith's response, the District Court denied expansion of the record (R25; App.104-05).

After filing her response brief, Smith apparently recognized her mistake and filed her own request to expand the record to include carefully chosen excerpts of the very documents she previously succeeded in having excluded from the record as irrelevant (R28). Starkweather opposed Smith's attempt to supplement the record with a severely expurgated version of the documents while still excluding other document that would rebut her claims or place her desired excerpts in the proper context. Instead, Starkweather renewed his motion to include in the record *all* documents necessary for a fair assessment of Smith's procedural default argument (R34).

The District Court ultimately chose to address the merits of Starkweather's claims and did not rule on either Smith's procedural default argument or the competing motions to supplement the record (R40: App. 2-17).

By refusing to provide those portions of the record (and particularly,

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[5] The motion also noted that the documents in fact rebutted Smith's allegations and the state Court of Appeals' assertions (R18:5).

Starkweather's *pro se* §974.06 petition) that allegedly gave rise to the default, Smith thus failed to meet her burden of proving procedural default, denied Starkweather a fair opportunity to rebut the allegation, and accordingly must be deemed to have forfeited that defense.

c. Smith's procedural default claim is meritless on the facts

Smith's procedural default argument fails for another reason as well. Her assertion (and the state court's implicit finding) that Starkweather raised the ineffectiveness challenge to trial counsel's failure to use Inv. Koser's admission to Starkweather's mother in his *pro se* motion is based on an objectively unreasonable finding of fact. "A procedural ground is not adequate . . . unless it is applied in a 'consistent and principled way'; it cannot be employed 'infrequently, unexpectedly, or freakishly.'" *Braun v. Powell*, 227 F.3d 908, 913 (7th Cir. 2000) (citations omitted). A procedural bar based on unreasonable findings of fact is not applied in a "consistent and principled way."

As Starkweather's brief argued below, he attached affidavits to his *pro se* motion establishing some of the relevant facts, his motion never suggested an ineffectiveness claim based on counsel's failure to use that information. Rather, the evidence was used to support claims that (1) the state acted in bad faith by allowing Demery's body to be cremated without a defense autopsy, thus destroying exculpatory evidence, and (2) the police failed to conduct a reasonable investigation of exculpatory evidence concerning an argument and a shot heard near Demery's trailer the night

before his body was found (R15:32 (citing to his *pro se* §974.06 motion at 28, 30-38, 42, 51-52)). As the state argued in state court, moreover, the affidavits attached to Starkweather's *pro se* §974.06 petition did not fully present the factual basis for either ineffectiveness of trial counsel (because they contained no allegation that trial counsel knew of the information during the trial) or ineffectiveness of post-conviction/appellate counsel (because they contained no allegation that Boyle and Smith knew any of the relevant information). (*See* R9:Exh.J:24-26). Without the additional facts provided in undersigned counsel's motion, there was no basis on which to argue the Koser ineffectiveness claim on the dismissed appeal.

Because the state court's premise is wrong (i.e., Starkweather did not raise the ineffectiveness issue regarding Koser's admission in his *pro se* motion and the factual allegations in that motion would not support such a claim), its conclusion that voluntary dismissal of the appeal from denial of that motion constitutes an abandonment of such a claim necessarily fails as well. *See also Wirth v. Ehly*, 93 Wis.2d 433, 443, 287 N.W.2d 140 (1980) (issues not raised in circuit court may not be raised as of right on appeal).

Starkweather accordingly did not procedurally default his ineffectiveness claim by voluntarily dismissing an appeal that did not raise such a claim.

C. Starkweather's Defense was Prejudiced by Trial Counsels' Errors

Because the state court of appeals rested its decision on the erroneous view that trial counsel's performance was not deficient, it did not address the prejudice prong

of the ineffectiveness analysis on either of Starkweather's claims. This Court accordingly owes no deference to that court's decision on this issue. *Dixon*, 266 F.3d at 701, 702.[6]

There can be no reasonable dispute but that trial counsel's failures to adequately and accurately advise Starkweather regarding his right to testify during Phase I of the trial and present Jean Starkweather's testimony regarding Inv. Koser's admission prejudiced Starkweather's rights to a fair trial and that, but for those errors, there exists a reasonable probability of a different result in this case. While either of counsels' errors alone resulted in sufficient prejudice for reversal, ineffectiveness of counsel must be assessed under the totality of the circumstances. It is thus the cumulative effect of counsel's errors which is controlling. *E.g.*, *Alvarez,* 225 F.3d at 824; *Washington*, 219 F.3d at 634-35.

Regarding both Starkweather's own testimony and the evidence of Inv. Koser's admission that Demery was dead long before the police arrived, the District Court appears to have overlooked the fact that it is for the jury, and not the prosecutor or this Court, to decide whether to credit testimony which is not inherently incredible. *E.g.*, *United States v. Turcotte,* 405 F.3d 515, 528 n. 5 (7th Cir. 2005) (noting that "weighing contradictory evidence and making credibility determinations are functions

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[6] The District Court based its denial of Starkweather's "exculpatory evidence" claim on its view that, although the Wisconsin Court of Appeals' decision that trial counsel acted reasonably was based on unsupportable assertions of fact, the state *circuit* court's decision on resulting prejudice was not unreasonable (R40:12-14; App.13-15). The District Court, however, applied the wrong legal standard. A federal habeas 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). Here, that was the Wisconsin Court of Appeals.

generally reserved for the jury"). Despite the prior courts' attempts to arrogate to themselves the role of assessing witness credibility, Starkweather's testimony, as finally presented during Phase II of the trial, was not inherently incredible and a reasonable jury accordingly could have credited that testimony as giving rise to a reasonable doubt concerning his guilt.

There was nothing inherently incredible about Starkweather's testimony that he did not shoot Demery and that he shot at Austreng, Kittleson and the police only in self-defense. *E.g.*, *Rohl v. State*, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974) (jury entitled to believe evidence unless it is inherently incredible, i.e, "in conflict with ... nature or with fully established or conceded facts"). Indeed, the trial court considered the evidence sufficient for lesser-included-offense instructions on the Kittleson and Austrung charges and a self-defense instruction regarding one police charge even without Starkweather's testimony (Tr123:24-41; Tr124:2-48).

Nor are Jean Starkweather's sworn allegations regarding Inv. Koser's admissions inherently incredible. Indeed, although Smith argued below that any testimony from her would be biased in favor of her son (R26:25), and the District Court bought into that assertion (R40:13; App. 14), the state itself relied upon other testimony from her at trial (Tr121:207-14).

Far from a "preposterous theory" (R26:25), moreover, evidence of Inv. Koser's admission that Demery had been dead for quite some time prior to arrival of the police would have substantially corroborated other evidence of that fact already in the

record, as well as Starkweather's own testimony that Demery already was dead when he arrived. The timing of Demery's death was a central issue at trial. Because there were no eye-witnesses to the shooting of Demery, the state's case on the homicide count was entirely circumstantial. The state suggested that Starkweather shot Demery the morning of his arrest, but other evidence indicated that he could have been shot the night before. While the police carefully avoided collecting any evidence which would indicate when Demery was shot, and even avoided removal of the body for an autopsy until several hours after they found it, they were allowed to testify that the blood "looked fresh" when they arrived. Inv. Koser's statement to Jean Starkweather directly refuted that claim and the state's theory regarding Demery's death, thus creating a reasonable probability of a different result. Especially when combined with Starkweather's own testimony that he did not shoot Demery, this evidence could have been decisive to the issue of reasonable doubt on that charge.

Because Starkweather's testimony could have resulted in acquittal or mitigation of one or all of the charges against him, and because Jean Starkweather's testimony concerning Investigator Koser's admissions regarding the condition of Demery's body could have provided reason for acquittal on the homicide count, there exists a reasonable probability of a different result but for trial counsel's errors.

II.

HABEAS RELIEF IS APPROPRIATE BECAUSE STARKWEATHER WAS DENIED THE EFFECTIVE ASSISTANCE OF POST-CONVICTION/APPELLATE COUNSEL

Starkweather was denied the effective assistance of post-conviction/appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The specific instances of ineffectiveness consist of the failure of Attorneys Boyle and Smith properly to seek reversal on grounds of

1. ineffectiveness of trial counsel's advice regarding Starkweather's right to testify, for the reasons stated *supra*.

2. ineffectiveness of trial counsel for not using exculpatory evidence that Demery had been dead for some time before the morning shootout, and

3. denial of a lesser-included offense instruction on the homicide count.

A. Applicable Legal Standards

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence, Wis. Const. art. I, §21, and to the effective assistance of counsel on his first appeal as of right in the state courts, *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985). As noted in Section I,A, *supra*, the test for ineffectiveness is two-pronged. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *See, e.g.*, *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The same standard has been applied, with appropriate modifications, to assess the constitutional effectiveness of post-conviction or appellate counsel. *Smith v. Robbins*, 528 U.S. 259 (2000). As

explained by this Court:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient . . . and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (state appellate attorney's failure to raise preserved hearsay issue constituted ineffective assistance of appellate counsel, mandating federal habeas relief); *see, e.g.*, *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either claim, instead raising weaker claims . . .. No tactical reason--no reason other than oversight or incompetence--has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had"); *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (finding deficient performance "when ignored issues are clearly stronger than those presented"), cited with approval in *Smith*, 528 U.S. at 288.

B. Relevant Facts

The state circuit court summarily denied Starkweather's post-conviction motion submitted by Attorneys Gerald Boyle and Jonathan S. Smith, on the grounds that Boyle and Smith had failed to state sufficient facts to warrant a hearing on their ineffectiveness claims (R9:Exh.H:App.19).

Starkweather's direct appeal, also submitted by Attorneys Boyle and Smith, similarly was rejected. (R1:Attach.2; App. 142-59). The Wisconsin Court of Appeals summarily rejected four of the seven claims of ineffective assistance of counsel

because Boyle and Smith failed to support them with argument or citation to authority. (R1:Attach.9 n.8; App. 150). That court rejected the remaining three ineffectiveness claims based on similar defects in appellate counsels' arguments (R1:Attach.2:11-16; App.152-57). As found by that Court, counsels' allegations were "conclusory," they "fail[ed] to provide any evidence showing" the alleged violations, they "offer[ed] no proper argument and no legal authority," they "offer[ed] no legal analysis" regarding application of at least one authority cited, and they presented only "subjective, bare-bones conclusions" in the hope of supplementing them at a *Machner* hearing (*Id*.) Appellate counsel's allegations, in short, were "so speculative and conclusory that a *Machner* hearing was not required." (R1:Attach.2:16; App.157). The court likewise concluded that appellate counsels' sufficiency challenges consisted of little more than arguments over the weight and credibility of evidence rather than sufficiency (R1:Attach.2:5-9; App.146-50). The court promptly rejected the remaining claim that the circuit court imposed an excessive sentence (R1:Attach.2:17-18).

In response to prior counsels' petition for review to the Supreme Court, the Assistant Attorney General here referred to the "Statement of Criteria" in that petition as "virtually unintelligible," and noted that "[t]he level of appellate advocacy reflected in the petition is only consistent with the low level of advocacy in the court of appeals." (*See* R15:35 (quoting *State v. Jay A. Starkweather*, Appeal No. 98-0880-

CR, Response in Opposition to Petition for Review at 1)).[7]

Starkweather challenged the effectiveness of post-conviction and appellate counsel both in his *Knight* Petition to the Wisconsin Court of Appeal (R9:Exh.H) and in undersigned counsel's petition to the circuit court under Wis. Stat. §974.06 (R9:Exh.H:App.32-63). As relevant here, the Court of Appeals denied the *Knight* Petition on the grounds that "no reasonable view of the evidence" supported giving the lesser-included offense instruction, that counsel accordingly was not ineffective for failing to raise that claim, and that Starkweather's claim related to trial counsel's unreasonable advice was properly considered in his §974.06 motion (R1:Attach.6:2-3; App. 135-36).

As noted *supra*, the circuit court denied Starkweather's ineffectiveness claims and thus denied his related post-conviction ineffectiveness claims as well (R1:Attach.8; App.118-32). The Wisconsin Court of Appeals affirmed, although it identified and addressed only the underlying trial ineffectiveness claims (R1:Attach.9; App.112-17). As noted *supra*, the Court held that (1) it already had decided the right to testify and related ineffectiveness claim against Starkweather,[8] and (2) trial counsel necessarily acted reasonably in not using the evidence that Demery was dead long

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[7] Although Smith refused to include Starkweather's petitions for review or the state's responses in the habeas record (R20; *see* R18 (Starkweather's Motion to Expand Record)), she did not dispute her counsel's assessment of Boyle and Smith's efforts on the direct appeal.

[8] Although meaningless given its conclusion that it had already decided Starkweather's claims on the merits on his direct appeal, that court also concluded that he could not again raise the claims again under §974.06 absent a showing of "sufficient reason." (R1:Attach.9:5; App. 116).

before the morning shootout because that evidence "contradicted the defense" at trial. (R1:Attach.9:4-6; App.115-17).

The District Court below took the position that there was no underlying ineffectiveness of trial counsel and, accordingly, no ineffectiveness of post-conviction or appellate counsel for not raising those claims (R40:14; App.15). That court also held that the state Court of Appeals acted reasonably in concluding that there was no reasonable factual basis for a lesser offense instruction on the homicide count (R40:15; App.16).

C. Post-Conviction/Appellate Counsels' Unreasonable Failures Denied Starkweather the Effective Assistance of Counsel and Entitle Him to Habeas Relief

Attorneys Boyle and Smith asserted a number of claims of ineffectiveness of trial counsel but either failed to raise or inadequately raised the specific claims presented here. They argued that trial counsel improperly waived Starkweather's right to testify during Phase I, but never addressed the real problem, which was that trial counsel's inaccurate advice, as reflected in the trial record, misled Starkweather to waive that right and that he accordingly did not knowingly and intelligently waive the right to testify. *See* Section I,B,1, *supra*. They chose weak or non-existent claims over challenging trial counsel's inexplicable failure to use exculpatory evidence that went to the heart of the homicide conviction and would have bolstered the trial defense to that charge. *See* Section I,B,2, *supra*. And finally, they raised several frivolous or near-frivolous claims, but overlooked the obvious and fully preserved

claim regarding trial court's denial of a lesser-included offense instruction on the homicide count. *See* Section II,C,3, *infra*.

Starkweather can imagine no possible rational grounds for raising the claims Boyle and Smith did raise, which are for the most part rebutted by the record, but not those presented here, which are squarely confirmed by the record. Rather, it appears that prior counsel simply did not see the issues, and that their failure to raise them in post-conviction motions and on direct appeal was due to oversight and not a strategic choice. The deficiency prong of the *Strickland* test is met when, as here, counsel's performance was the result of oversight rather than a reasoned defense strategy. *See, e.g., Wiggins*, *supra*; *Fagan*, *supra*.

Because the omitted issues "'may have resulted in a reversal of the conviction, or an order for a new trial,'" *Mason*, 97 F.3d at 893 (citation omitted), moreover, Starkweather was prejudiced by counsel's failure to raise these claims on his direct appeal. The error in denying Starkweather's request for a lesser-included offense instruction on the homicide count and the ineffectiveness of trial counsel in not accurately advising him on the exercise of that right are manifest from the record, mandating grant of a new trial.

The state court of appeals' denial of Starkweather's ineffectiveness of post-conviction/appellate counsel claims apparently was based on the erroneous belief that there was no underlying error, such that counsel had no obligation to raise the claims (R1:Attachs.6 & 9; App. 112-17, 134-36). For the reasons discussed in Section I,

supra, the state court's beliefs either involved an unreasonable application of controlling United States Supreme Court authority or rested on unreasonable findings of fact. Accordingly, relief is not barred by the AEDPA. *See* 28 U.S.C. §2254(d); *Panetti*, 127 S.Ct. at 2858-59.

1. Failure to adequately raise right to testify ineffectiveness claim

The state Court of Appeals did not find that Boyle and Smith failed to adequately raise the ineffectiveness claims raised here regarding trial counsel's inaccurate advice. Instead, it simply held that it had already ruled on the merits of that claim (R1:Attach.9:4-5; App.115-16). Accordingly, there should be no reason to address the effectiveness of their actions in raising that claim. Should this Court find otherwise, however, then post-conviction/appellate counsels' failure reasonably to argue Starkweather's claim deprived both Starkweather and the state court of the type of advocacy necessary for a fair and accurate assessment of the claim.

As demonstrated in Section I,B,1, *supra*, the right to testify ineffectiveness claim was significant and obvious. The omission of that issue in favor of the frivolous and near-frivolous issues raised on direct appeal reasonably can be attributed to nothing but oversight. For the reasons demonstrated in Section I, *supra*, moreover, preserving this issue would have created a substantial likelihood of reversal and a new trial.

2. Failure to raise ineffectiveness regarding trial counsel's failure to use exculpatory evidence

For the reasons stated in Section I,B,2, *supra*, trial counsel's failure to use the exculpatory evidence that Demery had been dead for some time before the morning of June 6, 1995, constituted ineffective assistance of counsel. Attorneys Boyle and Smith knew about the exculpatory evidence and about trial counsel's failure to use it (R32:Attach.A),[9] yet failed to raise that claim in favor of underdeveloped, frivolous and near-frivolous allegations. Because this failure can only be attributed to oversight, it was deficient performance. *Wiggins*, *supra*. Because properly raising the underlying ineffectiveness claim would have created a substantial likelihood of a new trial, *see* Section I,C, *supra*, the failure also was prejudicial.

3. Failure to raise denial of lesser-included offense instruction

Although Starkweather's entitlement to a lesser-included offense instruction on the homicide charge was fully preserved in the record, Boyle and Smith failed to raise that issue on appeal. Their failure to do was was patently unreasonable.

At the jury instructions conference, defense counsel requested an instruction on First Degree Reckless Homicide as a lesser-included offense of the homicide charge, noting that no one witnessed the shooting and the jury just as easily could find the shooting to have been reckless as intentional. The trial court, however, denied the request (Tr123:14-24). That court was wrong.

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[9] Although Smith initially claimed that this affidavit was not part of the state court record (R34:2), she subsequently conceded that Starkweather was correct (R38).

The Wisconsin Supreme Court held in *State v. Wilson,* 149 Wis.2d 878, 440 N.W.2d 534 (1989), that an instruction on a proper lesser-included offense must be given "when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." *Id.*, 440 N.W.2d at 542. If such grounds do not exist, however, then instructions on the lesser offense are not appropriate. *Id.*

Where the defendant presents wholly exculpatory evidence as to the charged offense but requests a lesser-included offense instruction which is contrary to the defendant's version of the facts, the court must view the evidence in the most favorable light it will reasonably admit from the standpoint of the accused, and therefore must take into account the fact that the jury could reasonably disbelieve the defendant's version of the facts. *Id*. Consequently, "a defendant or the state may request and receive a lesser-included offense instruction, even when the defendant has given exculpatory testimony, if a reasonable but different view of the record, the evidence, and any testimony other than part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge." *Id.*

Consistent with *Wilson,* therefore, assessment of Starkweather's entitlement to the reckless homicide instruction requires evaluating whether a reasonable view of the evidence, excluding the wholly exculpatory evidence he offered, would have supported acquittal on the greater offense and conviction on the lesser. *See id.* This

determination is *de novo*, without deference to the trial court's decision. *Id.* at 541.

Applying these standards, the trial court clearly erred. There is no dispute that first degree reckless homicide is a lesser-included offense of first degree intentional homicide. Wis. Stat. §939.66(2).

Nor, contrary to the state appellate court's conclusory assertion, is there any rational dispute that a reasonable jury could have concluded that Starkweather did not act with the intent to kill, but nonetheless acted recklessly, with "utter disregard for human life," Wis. Stat. §941.30(1). According to the Wisconsin Court of Appeals, "[n]o reasonable view of the evidence as a whole casts reasonable doubt on the first-degree intentional homicide conviction, nor supports a guilty verdict for first-degree reckless homicide." (R1:Attach.6:2; App.135). This conclusion is based on an unreasonable view of the facts.

The evidence demonstrates that there were ample grounds for acquittal on the intentional homicide charge due to weak, if not insufficient, evidence that Starkweather *intentionally* fired at Demery.

An essential element of the offense of first degree intentional homicide is that the defendant's act in causing the death of another human being was intentional as opposed to accidental or merely reckless. *See, e.g.*, *State v. Watkins*, 2002 WI 101 ¶41, 255 Wis.2d 265, 647 N.W.2d 244 ("If a person kills another by accident, the killing could not have been intentional"). While the state courts have held that intent to kill may be inferred from a defendant's act of intentionally firing a weapon at a

vital area of another, *e.g.*, *State v. Morgan*, 195 Wis.2d 388, 536 N.W.2d 425, 445 (Ct. App. 1995), the fact remains that the shooting itself must be intentional. *See State v. Kramar*, 149 Wis.2d 767, 440 N.W.2d 317, 328 (1989) ("[W]hen one *intentionally points* a loaded gun at a vital part of the body of another and discharges it, it cannot be said that [the person] did not intend the natural, usual, and ordinary consequences" (emphasis added)).

No one witnessed Demery's shooting and the prosecutor thus properly conceded that neither he nor anyone else knew what actually happened at Demery's trailer (Tr124:66, 76). The jury did know, however, that Demery was Starkweather's friend, that he had no motive to shoot Demery, and that, although Starkweather was plainly upset that morning, he did not shoot at either the men who were moving the trailer, his father, or Rebecca Wheelock. The jury also knew that, although Starkweather possessed the .380 which allegedly caused Demery's death at the time of the gunfight with the police, he did not fire it at that time. Indeed, the *only* time that weapon is alleged to have been fired is when Demery was shot.

For similar reasons, the jury reasonably could have convicted on the lesser charge of reckless homicide based on the conclusion that Starkweather's actions in running around while angry, pointing guns at people (including a gun in his non-dominant hand over which he would have less control), were reckless under the totality of the circumstances, even if it found that the shooting itself could not be deemed intentional beyond a reasonable doubt.

This claim was fully preserved by trial counsel's objection during the instructions conference, *see* Wis. Stat. §805.13(3), obvious from the record, and far stronger than any raised on direct appeal. Whether by oversight or by unreasonable assessment of the merits, therefore, appellate counsels' failure to raise this claim plainly was deficient. *Mason*, *supra*. Because a reasonable jury could have acquitted of the greater charge while convicting of the lesser, moreover, there exists a reasonable probability of a different result but for appellate counsel's error.

Given the facts in this case, it is therefore irrational to suggest, as the state court of appeals did in denying Starweather's *Knight* Petition, that "[n]o reasonable view of the evidence as a whole casts reasonable doubt on the first-degree intentional homicide conviction, nor supports a guilty verdict for first-degree reckless homicide." (R1:Attach.6:2; App.135). Because the state court's decision rested on unreasonable findings of fact, no deference is owed that decision under the AEDPA. 28 U.S.C. §2254(d)(2); *see Panetti*, 127 S.Ct. at 2858-59.

CONCLUSION

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

Dated at Milwaukee, Wisconsin, July __, 2008.

Respectfully submitted,

JAY A. STARKWEATHER,
Petitioner-Appellant

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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 13,821 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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 Mr. Starkweather's appendix are not available in non-scanned PDF format that he has the technical capability to include in the digital copy of his appendix.

_____

Robert R. Henak

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

United States District Court

EASTERN DISTRICT OF WISCONSIN

JAY A. STARKWEATHER,

Petitioner,

v.

WARDEN JUDY P. SMITH,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. 07-C-513

☐ **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 before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the petition is DISMISSED.

Approved: s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

Dated: April 29, 2008.

JON W. SANFILIPPO
Clerk of Court

s/ Mary E. Conard
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAY STARKWEATHER,

Petitioner

v. Case No. 07-C-513

JUDY SMITH,

Respondent.

DECISION AND ORDER

Petitioner Jay Starkweather was convicted in Dunn County Circuit Court of first degree intentional homicide, four counts of attempted first degree intentional homicide, and reckless endangerment. He was sentenced to life imprisonment plus five years and is currently incarcerated at Oshkosh Correctional Institution. He brought this habeas petition under 28 U.S.C. § 2254, asserting that his state court conviction was in violation of the Constitution. Following some disputes about the proper scope of the record, the case is before me for resolution.

I. BACKGROUND

This case arises out of a shooting spree that occurred on June 6, 1995. The jury concluded that Starkweather shot two of his friends – Marty Austreng and Wayne Kittleson – and then shot and killed Ted Demery, also a friend, before he was shot and wounded by two police officers, whom he had also attempted to shoot. The jury found Starkweather guilty of the six separate charges arising out of the shootings in Phase I of his trial and rejected the defense that he was not responsible for his actions by reason of mental disease or defect in Phase II. The shootings

evidently arose out of a property dispute – or perceived dispute – Starkweather was having at the time. In particular, the petitioner lived in an apartment in a Dunn County building on lake property, known as Pick-Nick Point, owned by his father. Starkweather believed the property consisted of some fourteen acres. Apparently, he had plans for developing the property and began researching the extent of his father's property rights. He soon discovered what he thought was a large conspiracy to take the land and, according to Starkweather himself, he became paranoid and thought he was in great danger. On the day of the shootings, Starkweather was very agitated and made unusual remarks to his friend Marty Austreng, the gist of which was that Austreng could have some of the property at issue. Austreng then came to Starkweather's apartment and threw down the keys to the property, stating that he did not want it. Starkweather then pulled a gun on Austreng and shot him; he also shot Wayne Kittleson, who had been sitting in Starkweather's kitchen.

Austreng ran away and Starkweather pursued him. During the pursuit, he entered the house of the Wheelock family, who rented a house on the property. Rebecca Wheelock testified that Starkweather was wielding two guns and looked "insane." After he left, she heard a single gun shot from the direction of Ted Demery's trailer. The police soon arrived and a gunfight ensued. Starkweather was injured and subdued in the shootout, and police soon discovered Ted Demery's dead body with a single shot to the face at very close range. Additional facts pertinent to the trial itself are set forth below.

II. ANALYSIS

Starkweather asserts four claims. Three of the claims are that his attorneys were ineffective for failing to introduce evidence; failing to allow/advise Starkweather to testify during Phase I of

his trial; and failing to argue that the trial judge should have given a lesser-included offense instruction. Starkweather's fourth claim challenges the sufficiency of the evidence underlying his conviction.

The parties agree that Starkweather's petition is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. Under AEDPA, if a state court adjudicated a constitutional claim on the merits, a federal court may grant habeas relief only if the state court decision was contrary to, or involved an unreasonable application of, Supreme Court precedent or if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding. 28 U.S.C. § 2254(d); *see also Williams v. Taylor,* 529 U.S. 362, 376-77 (2000). The petitioner bears the burden of proving that the state courts' application of federal law was unreasonable, and the "unreasonable application" prong of § 2254(d) "is a difficult standard to meet." *Jackson v. Frank,* 348 F.3d 658, 662 (7th Cir.2003).

A. Failure to Testify During Phase I

1. The Nature of the Claim

The first claim asserts that trial counsel's advice to Starkweather that he not testify during phase I of the trial was "wrong" and "inaccurate." This advice led to Starkweather's unknowing waiver of his right to testify.

In any case involving more than ten years of appeals and post-conviction proceedings, it is perhaps inevitable that there are now more disputes about what has been argued *since* the trial than about what happened at the trial itself. One of these disputes involves petitioner's first claim. The claim is partially clothed in the language of ineffective assistance, but it actually seems Starkweather is attempting to assert that his waiver of the right to testify was not knowing and voluntary. In other

words, Starkweather is not exactly asserting ineffective assistance of counsel so much as a claim based on an involuntary waiver of the right to testify *based* on the ineffective assistance of counsel.

The respondent protests that Starkweather presented the argument differently to the state courts. In particular, the issue of waiving the right to testify was presented solely as an ineffective assistance of counsel claim, and that is how the state courts treated it. Because Starkweather never presented any independent "involuntary waiver" claim to the state courts, the claim is not properly exhausted. (Resp. Br. at 14 n.4.)

Regardless of how it was presented to the state courts, however, it seems clear that the claim is, in its essence, an ineffective assistance claim. *Winfield v. Roper,* 460 F.3d 1026, 1035 (8th Cir. 2006) ("Winfield seems to argue that the asserted failure of counsel to allow him to testify was a due process violation, but such claims are more properly framed as ineffective assistance claims to be evaluated under *Strickland*.") Starkweather does not assert that counsel lied or otherwise prohibited his client from testifying, nor does he assert that some other impediment existed that prevented his testimony. Indeed, the record reflects that the trial court had a colloquy with Starkweather outside the presence of the jury to insure that he understood his right to testify and that his waiver was voluntary. Starkweather acknowledged that he understood his right to testify and stated "I waive my right." (Pet. Br. Attach. 2 at 14-16.) To the extent his waiver of the right to testify may have been an unknowing one, the only thing that renders it so is counsel's allegedly bad legal advice. The ineffective assistance of counsel claim is thus the *sine qua non* of the involuntary waiver claim, and it therefore makes sense that when a defendant asserts that his counsel interfered with his right to testify, "[t]he appropriate vehicle for such claims is a claim of ineffective assistance of counsel under *Strickland*." *United States v. Brown,* 217 F.3d 247, 258-59 (5th Cir. 2000).

In *Barrow v. Uchtman,* 398 F.3d 597, 608 (7th Cir. 2005), the habeas petitioner claimed that "his decision not to testify, based on his lawyer's 'ridiculous' advice, was not intelligent or informed and thus constituted a violation of his constitutional right to present testimony." Nevertheless, despite the petitioner's attempt to clothe the claim in terms of his due process right to present testimony, the Seventh Circuit addressed the claim solely in terms of ineffective assistance. Importantly, the court applied both of *Strickland*'s prongs (see below) and found that any deficient performance regarding testimony did not impact the outcome of the trial. "Here, it is clear that Barrow elected not to testify based on his lawyer's admittedly mistaken legal advice. However, as discussed above, it also seems clear that Barrow's claims regarding counsel's failure to call him as a witness do not entitle him to relief, even under de novo review." *Id.*[1] Accordingly, based on the above, I will address the claim as an ineffective assistance claim and apply the familiar *Strickland* framework.

2. Ineffective Assistance for Advising Petitioner not to Testify

Claims of ineffective assistance of counsel are evaluated under a familiar two-prong analysis announced in *Strickland v. Washington*. 466 U.S. 668 (1984). Under *Strickland*, "a claimant must prove (1) that his attorney's performance fell below an objective standard of reasonableness and (2) that the attorney's deficient performance prejudiced the defendant such that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *McDowell v. Kingston,* 497 F.3d 757, 761 (7th Cir. 2007) (quoting *Strickland,* 466 U.S. at 694).

[1] That court further suggested that prejudice could not be demonstrated merely by showing that the defendant was precluded from testifying. Instead, the *outcome* of the trial is what counts. *Id.* at n.12.

The *Strickland* analysis itself presumes that counsel performed adequately, and courts thus exercise a certain degree of deference to the on-the-ground decisions made by trial and appellate attorneys. In addition, as noted earlier, AEDPA provides an additional level of deference – federal habeas courts under AEDPA are instructed to defer to the state courts' resolution of ineffective assistance challenges. *See United States v. Pierson,* 267 F.3d 544, 557 (7th Cir.2001) (noting "element of deference to counsel's choices in conducting the litigation" in combination with the "layer of respect" added by 28 U.S.C. § 2254(d)(1)).

The petitioner's first ineffective assistance claim asserts that his attorney wrongly convinced him not to testify in Phase I, even though his testimony that he fired at Austreng, Kittleson and the police in self-defense was only relevant to that phase of the trial. As such, because the self-defense testimony had no bearing on Phase II, Starkweather had secured no strategic advantage by waiving the right to testify during Phase I.

The trial court essentially reviewed this claim twice. First, following the trial, the court summarily rejected the claim of ineffective assistance of counsel. It concluded that counsel was "very professional" and "excellent." (Answer, Ex. H at App. 19.)[2] Several years later, the trial court found appellate counsel was not ineffective for failing to raise the claim of ineffective assistance of trial counsel.

> There is sufficient reason to believe, based on the record, that the trial counsel had explained to the defendant that it would be important for him not to testify in order to preserve the mental defect defense. Furthermore, even if the defendant had

[2] Most of the relevant state court opinions are attached to the petition itself, although they are not numbered as exhibits. Herein, the original November 3, 1998 decision on appeal is referred to as exhibit 1; exhibit 3 is the February, 12, 2003 decision of the court of appeals; trial court's denial of the § 974.06 motion is called exhibit 7; and the court of appeals' February 13, 2007 affirmance of that decision is exhibit 8.

> testified in phase I, it is unlikely that his largely uncorroborated testimony would have created reasonable doubt in the minds of the jurors given the evidence against him.

(Petition, Ex. 7 at 9.)

On direct appeal, the court of appeals concurred, concluding that "Starkweather's counsel made a strategic decision to wait until the second phase to testify, and this recommendation had a reasonable basis." (Petition, Ex. 1 at 16.) In the appeal from the trial court's denial of the § 974.06 motion, the court of appeals viewed Starkweather's argument as procedurally barred. That court viewed his claim that his waiver of the right to testify was unknowing and involuntary due to his trial counsel's ineffectiveness as "nothing more than an artful rephrasing of the issue that has already been decided [on direct appeal]." (Petition, Ex. 8 at 5.)

As noted, Starkweather believes his testimony that he shot Austreng and Kittleson in self-defense was testimony relevant *only* to Phase I of the trial. Evidence of self-defense could exonerate Starkweather of the crimes, but counsel could easily have believed that the jury would have disregarded his testimony altogether, given the crime scene and strong evidence against him. In that event, counsel could also have believed that Starkweather's exonerating testimony would at least partially undermine the jury's confidence in the defendant's truthfulness, and counsel could have preferred that the jury see a "fresh" defendant in Phase II rather than one whose testimony it had already found incredible. Moreover, it should be noted that the exonerating self-defense testimony would not be completely consistent with the Phase II testimony. The self-defense testimony, if believed, would cause a jury to conclude that Starkweather was reasonably in danger for his own life. In contrast, the responsibility analysis in Phase II would require the jury to find that Starkweather could not appreciate the wrongfulness of his conduct or conform his conduct to the

requirements of the law. Wis. Stat. § 971.15(1). If Starkweather were to successfully persuade the jury that he could not appreciate the nature of his actions, it would be difficult for him to do so after already attempting to persuade them that his actions *were* reasonably justified by a legitimate need for self-defense. Put another way, in Phase I Starkweather would be arguing his conduct was not wrong, while in Phase II he would have to argue that it was wrong, but he either did not appreciate its wrongfulness or could not control himself.

More importantly, counsel's decision to encourage Starkweather to waive his right to testify in Phase I can only be viewed with reference to what Starkweather would actually testify to in Phase II. He testified that he believed there was a conspiracy to deprive his father of his land and that he feared Austreng and Kittleson. Counsel could have believed that even if there was no reasonable basis for Starkweather to shoot Austreng and Kittleson, Starkweather may have *perceived* such a basis, given his mental state at the time. With that in mind, it made sense for counsel to forego having Starkweather testify that he *actually* shot them in self-defense and attempt to explain to the jury why he *thought* he was defending himself. As the state courts found, this was a reasonable strategy.

Similarly, counsel could have chosen to have Starkweather wait until the responsibility phase to testify that he did not shoot Demery. As set forth more fully below, the evidence with respect to Demery was quite damning. Counsel could reasonably have preferred to have Starkweather hold off on testifying that he wasn't involved with Demery's murder and instead try to convince the jury that he was suffering from a mental defect that relieved him of criminal responsibility for the act. As the state notes, and as the state courts have found, it is highly unlikely that any jury would have believed Starkweather if he testified that he: (1) shot two people in self-

defense; and then (2) happened upon a murder scene in which he was completely uninvolved. It is not surprising that counsel chose to fight the case on the mental state issue rather than having Starkweather deny involvement as to one crime and claiming that the other two crimes were justified by self-defense. Denying responsibility under the facts presented would have been futile and could have turned the jury against Starkweather even more. In sum, in concluding that counsel's performance was not deficient, the state courts applied *Strickland* reasonably.[3]

B. Sufficiency of the Evidence

Starkweather's second claim asserts that there was insufficient evidence to allow the jury to conclude that he had intentionally shot Ted Demery. Any sufficiency of the evidence challenge involves significant deference to the jury's verdict, and the conviction may not be overturned unless no rational jury could have found all of the essential elements of the crime. *Jackson v Virginia,* 443 U.S. 307, 319 (1979). In making such a determination, the reviewing court views the evidence in the light most favorable to the prosecution. *Id.*

On federal habeas review, the level of deference is arguably even stronger. The question is not left to this court's independent judgment to determine whether the jury got it right; instead, the question is "whether the Wisconsin Court of Appeals' decision . . . that a rational jury could have convicted [the defendant] based on this record resulted from an objectively unreasonable application of *Jackson*." *Piaskowski v. Bett,* 256 F.3d 687, 691 (7th Cir. 2001).

Starkweather's insufficiency claim is based on the fact that there were no witnesses to the murder and no apparent motive for Starkweather to shoot Demery, his friend. To conclude that

[3] The same result would hold true, of course, even if there were an independent right-to-testify claim before me. Because counsel's advice was sound, it did not render Starkweather's waiver unknowing.

Starkweather had intentionally killed Demery, he claims, the jury would have had nothing to go on but mere speculation.

Starkweather's insufficiency claim is barely plausible on its face, but it fails utterly when the evidence is considered in the context of the facts the jury was presented with. The context is crucial. It was not as though Demery were killed with no witnesses while the two friends were away together on an otherwise peaceful hunting trip. Instead, Demery was killed while Starkweather was in the middle of shooting rampage. He had already shot two people, supposedly his friends, and was in the process of hunting for one of them. He had entered his father's house in a rage, wielding his gun and making threats, and he took his father's gun and ammunition when he left. An officer who had arrived on the scene heard a shot, and gunfire with Starkweather soon ensued. When Starkweather was wounded and subdued, the police found Demery, shot in the face, lying in a pool of fresh blood in his own trailer. The evidence showed that he had been shot with the .380 gun found at Starkweather's feet.

Starkweather essentially concedes that the jury could have found that he shot Demery, but believes they had no basis for finding that he *intentionally* shot Demery. That is simply not true. It is obviously within the bounds of reasonableness for a jury to discern intent when a victim is shot in the head at close range by another man in the midst of a shooting spree. The fact that they may have been friends is only a piece of evidence in Starkweather's favor – it does not somehow undermine the rationality of the jury's reasonable conclusion. In Starkweather's view, a criminal defendant would be entitled to a presumption that any unwitnessed killing should be presumed to be accidental, but that is not what the law requires. Accordingly, viewing the facts in the light most favorable to the prosecution, it is not difficult to conclude that the court of appeals correctly applied *Jackson* in denying relief on this claim.

C. Ineffective Assistance of Trial Counsel

Starkweather alleges his trial counsel was ineffective because he failed to properly advise him to testify during Phase I of the trial. This claim was discussed above. Starkweather also asserts that trial counsel was ineffective for failing to use evidence that Demery had been dead for several hours by the time the police arrived on the scene. This particular claim is based on information he obtained from his mother Jean Starkweather. Ms. Starkweather claims that an investigator named Koser told her he saw Demery's body after her son's arrest and thought, from the color of the body, that it looked like Demery had been dead for some time. She passed the information on to trial counsel, but he failed to present it.

Starkweather believes trial counsel should have presented Koser's testimony at the trial to contradict the testimony of police witnesses, who all said Demery's blood looked fresh. If the jury had reason to believe Demery might have been killed earlier, it could have believed Starkweather's theory that Demery had been shot the night before. The trial court, in reviewing Starkweather's claim that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective, found that Jean Starkweather's testimony on the point "very likely would have had some exculpatory value if presented to the jury . . . since it would have helped bolster the argument that Mr. Demery had been killed much earlier than the defendant's shooting spree." (Petition, Ex. 7 at 7-8.) The trial court concluded that trial counsel's failure to present Jean Starkweather's testimony to the jury "may constitute deficient conduct." (*Id.* at 14.)

The trial court found no prejudice, however, either from trial counsel's failure to introduce the evidence or from appellate counsel's failure to impugn trial counsel's performance on that same point.

> While the statement from Inspector Koser may have some exculpatory value, it is vague, the credibility of the witness, Mrs. Starkweather, is questionable, and it was contradicted by an overwhelming amount of evidence. It is unlikely that presenting this testimony would result in a reasonable probability that the confidence in the outcome of the trial would be undermined; therefore, no prejudice.

(*Id.* at 9.)

The court of appeals affirmed, and took it a step further. That court concluded that such evidence would have been useless to Starkweather, or even contradictory. In that court's view, the time of Demery's death was not a legitimate issue because Starkweather's principal defense was that Demery was shot by the police in the shootout, and that the police then covered up the shooting. As such, the time of Demery's death could not have been the night before, as Starkweather now claims, and evidence that Demery had died earlier would directly undercut his theory that the police shot Demery. (Petition, Ex. 8 at ¶ 8.)

Starkweather castigates the decision of the court of appeals as "irrational" because he asserts his defense at trial was not limited to a claim that the police had shot Demery. As such, the evidence about Demery's time of death would conceivably have been material to Starkweather's defense (as the trial court found) that Demery had been shot by someone else the night before.[4] Even accepting this criticism of the appellate court's conclusion, the fact remains that the trial court

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[4] At this stage of the proceedings, this court is extremely far-removed from what Starkweather's defense actually was on this point. The petitioner takes the court of appeals to task for its conclusion, and indeed it is not clear how the court of appeals reached that conclusion. The trial court, after all, did not think the evidence was completely inapplicable. The respondent cites the court of appeals decision without explaining how that court determined what Starkweather's defense theory was, and it provides no independent basis for this court to conclude that the court of appeals viewed the evidence correctly. As set forth herein, it seems more prudent to resolve the claim on the basis that the state trial court set forth – that the evidence might have been relevant but its absence was not prejudicial – rather than attempt to reconstruct Starkweather's trial defense on the basis of the bare record.

– the court that presided over Starkweather's trial – found no prejudice from the failure to introduce Jean Starkweather's evidence. That decision was not an unreasonable application of *Strickland*'s prejudice prong, and it is that decision to which I will defer under § 2254(d). *Edwards v. Lamarque,* 475 F.3d 1121, 1135 (9th Cir. 2007) ("When a state trial court reaches a reasoned conclusion that the appellate court subsequently does not address, traditionally we have treated the trial court's determination as the last reasoned decision.")

As noted, the state trial court found no prejudice because the evidence was overwhelming, the witness – the defendant's mother – was biased, and the proffered testimony itself was exceptionally vague. Taking the last point first, it was not unreasonable for the trial court to conclude that the proffered testimony was vague. Assuming the obvious hearsay objection could be overcome, the investigator merely stated, assuming Ms. Starkweather's statement would be believed, that the victim's color looked like he had been there awhile. In the face of the testimony of the officers who arrived on the scene and testified that the victim's blood was fresh, the investigator's bare statement about the victim's "color" was hardly compelling evidence.[5] Without any foundation to believe the investigator had some knowledge or experience about such matters, even its admissibility is questionable. Similarly, the evidence was indeed overwhelmingly against Starkweather's theory of the case. As the court of appeals noted, the theory his counsel offered would have been far superior to the theory that Starkweather – a man in the midst of a shooting spree – just happened to stumble upon *another* murder scene on the property and found his friend murdered by an unknown assailant. The victim, moreover, was killed by the very weapon

[5] Jean Starkweather's affidavit to this effect is found in the Answer, Ex. H at App. 63. (Dkt. # 9.)

Starkweather had just taken from his father's house, which was found at Starkweather's feet. Thus, even if the evidence would have been introduced, it would only have supported a very bizarre version of events that a jury would not reasonably have believed. The state court's conclusion is thus not an unreasonable application of *Strickland*.

D. Ineffective Assistance of Post-Conviction Counsel

Petitioner's current counsel can envision "no possible rational grounds" for the decisions made by Starkweather's two appellate lawyers. (Petitioner Br. at 37.) Apparently, just like every other lawyer or judge who has addressed Starkweather's claims in the last ten years, his appellate lawyers "simply did not see the issues." (*Id.*)[6] The issues they should have seen are primarily the ones I have addressed above: ineffective assistance of trial counsel for his failure to have petitioner testify in Phase I and failure to introduce Jean Starkweather's testimony. Appellate counsel was also allegedly ineffective for failing to raise the insufficiency of the evidence argument.

In addition to the claims I have already implicitly rejected, petitioner claims appellate counsel was ineffective for failing to argue that Starkweather should have received a lesser-included offense instruction. The question of how Wisconsin courts treat lesser-included offenses is not, on

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[6] The nature of proceedings like this lends itself to criticisms of prior counsel's performance as well as criticisms of all of the other judges who have addressed the petitioner's case. Petitioner's criticisms seem excessive, however, and needlessly distract from the issues presented. For instance, it is one thing to argue that a court erred, but to claim repeatedly that a state court of appeals was "irrational" is needless hyperbole. Petitioner has also leveled sharp criticisms at the state attorney general's office throughout. The harshness of the critiques has resulted in some irony, however. Specifically, in the ten years of appeals, it seems the only other time any judge or attorney (other than petitioner's current counsel) has been *correct* is when that lawyer or judge criticized the performance of another attorney in a way that aids petitioner's current petition. That is, according to the petitioner, the court of appeals has always got it wrong in this case, *except* when it was criticizing appellate counsel's performance. And the state AG's office has been atrocious, petitioner believes, but he nevertheless proudly quotes the AAG's brief in the court of appeals when the brief criticizes appellate counsel's performance.

its own, a matter of federal or constitutional law. But petitioner is basing his claim on ineffective assistance of counsel, and that does raise Sixth Amendment principles even though the allegation of ineffectiveness rests on a matter of state law. *Perry v. McCaughtry,* 308 F.3d 682, 688 (7th Cir. 2002).

Petitioner's claim is weak. He asserts that the trial judge should have allowed the jury to consider the lesser-included offense of reckless homicide of Demery in addition the charge of intentional homicide. Because his two appellate lawyers failed to argue this on appeal, their performance was allegedly deficient. Under state law, an instruction on a lesser-included offense should be given when there are reasonable grounds in the evidence both for acquittal of the greater charge and conviction on the lesser one. *State v. Wilson,* 149 Wis.2d 878, 440 N.W.2d 534, 542 (1989).

As noted above, Starkweather's defense to the First Degree Intentional Homicide charge was that he did not shoot Demery, not that he accidentally shot him. And of course, the shooting occurred in the midst of a shooting rampage when he was searching for his other friend to finish him off. To argue that the shooting of Demery was merely reckless, rather than intentional, would have been difficult. It also would have required a fantastical leap of speculation. Moreover, the evidence showed that Demery was shot in the face at extremely close range (less than a few feet). Not surprisingly, in reviewing petitioner's ineffective assistance claims, the court of appeals concluded that there was no reasonable view of the evidence that would support a guilty verdict for a reckless homicide charge and cast reasonable doubt on a first-degree intentional homicide charge. (Petition, Ex. 2 at 2; Ex. 5 at 2.) This conclusion was not an unreasonable application of *Strickland*.

III. CONCLUSION

For the reasons given above, I conclude that the state courts' resolution of the issues presented did not involve an unreasonable application of any controlling Supreme Court precedent, nor did it involve an unreasonable determination of any facts. 28 U.S.C. § 2254(d). Given my ruling above, I need not address the issue of procedural default and thus the motion to expand the record is **DENIED** as moot. The petition is **DISMISSED**.

SO ORDERED this 29th day of April, 2008.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2008, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant Jay A. Starkweather, and 10 hard copies of the Separate Appendix of Petitioner-Appellant Jay A. Starkweather 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 Daniel J. O'Brien, P.O. Box 7857, Madison, WI 53707-7857.

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Robert R. Henak
State Bar No. 1016803