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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REPLY BRIEF OF PETITIONER-APPELLANT

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ARGUMENT

I.

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

A. 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

Starkweather's opening brief at 23-32 explained that (1) 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 responsibility phase of the trial than the guilt phase was patently false and unreason-

able and (2) the state court of appeals' decision to the contrary thus was likewise unreasonable. In response, Warden Smith chooses not to address Starkweather's actual argument, and thereby concedes it. Instead chooses to focus on issues that are not in dispute. She argues that Starkweather "[knew] full well that the ultimate decision was his to make" and that trial counsel acted reasonably in advising him to defer testifying until Phase II. Smith's Brief at 16, 27-31. But however Smith attempts to avoid the real issue here, she cannot get around the fact that Starkweather could not knowingly and intelligently decide whether or when to testify without first being accurately advised of the relative risks and potential benefits of each choice by his attorney.

However reasonable an attorney's assessment that a client should wait to testify in the responsibility phase rather than the guilt phase (or, as in this case, that the client not testify at all (Tr123:3; Tr125:204)), the decision whether and when to testify remains the client's to make after complete and accurate advice from counsel. *E.g.*, *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (en banc). "[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).

Thus, no matter how reasonable a particular trial strategy may be, it is the defendant's decision whether to testify, not the attorney's. The defendant is entitled,

moreover, to make that decision based upon complete and accurate information from his attorney. While an attorney is free to offer his or her opinions regarding the matter, the attorney is not entitled to intentionally or unintentionally mislead the client into the attorney's desired choice.

Where, as here, counsel fails to provide the client accurate information necessary to a rational assessment of the relevant costs and benefits of testifying during Phase I, during Phase II or at both,[1] that counsel has acted unreasonably, regardless how reasonable the attorney's belief that the client should testify at one or the other, or not at all. *E.g.*, *Teague*, *supra*. Even if Attorney Gray reasonably believed Starkweather was better off not testifying at all, or only testifying in the responsibility phase, that did not justify his failure to advise Starkweather that his proposed testimony that he did not shoot Demery and only shot at Austreng, Kittleson and the police in self-defense would be relevant *only* during the guilt phase of the trial. Starkweather's Brief at 29-32.

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[1] Given that the decision whether and when to testify was properly Starkweather's to make, and not the attorney's, Smith's suggestion that a reasonable lawyer would not pursue a strategy of having Starkweather testify during both phases of the trial, Smith's Brief at 30, is irrelevant to the issues presented – that was Starkweather's decision to make, after receiving complete and accurate advice from his attorney. *E.g.*, *Teague*, 953 F.2d at 1533.

In any event, Smith's assertion that Gray somehow would be placed in an awkward position by arguing his client's innocence during Phase I, Smith's Brief at 30, overlooks both the evidence and the fact that trial counsel *did just that* at the original trial even without Starkweather's exculpatory testimony. (Tr124:82-121). Smith also vastly overstates the difficulty of reconciling a client's sincere claim of innocence during Phase I with the position that such a claim, if not credited during the guilt phase, still reflects a sincere, if unreasonable, belief during the responsibility phase. In any event, any perceived conflict between Starkweather's exonerating testimony and the responsibility analysis would remain regardless whether that testimony was provided in the guilt phase or the responsibility phase, so that deferring Starkweather's exculpatory testimony until it was no longer relevant would not solve the difficulties Smith hypothesizes.

The established constitutional requirement that counsel provide complete and accurate advice to his or her client regarding the decision whether and when to testify does not, as Smith suggests, Smith's Brief at 30-31, mean that any attorney who advises his client not to testify is somehow ineffective. Rather, the relevant question is whether the attorney giving that advice both (1) makes clear that the decision whether to testify is the defendant's to make (as was concededly done here) *and* (2) explains the facts and considerations critical to the defendant's decision (which was *not* done here). *E.g*, *Teague*, *supra*. While a strategy decision that the defendant may be better off not testifying may be immune from judicial second-guessing, counsel's failure to provide the client complete and accurate information necessary to a determination of whether to follow that advice certainly is subject to review. *E.g.*, *id*.[2]

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

Starkweather's opening brief demonstrated that (1) although Deputy Craig Koser, along with other police officers, testified at trial that Demery's fatal wound appeared to be fresh when he was found shortly after the shootout between

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[2] Although Smith cites to *Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986), for the proposition that counsel may refuse to allow a client to present false testimony, Smith's Brief at 30, that decision has no rational application here. There was no suggestion that Starkweather's testimony was false beyond Smith's bald speculation that it was incredible. *See id.* However, there was nothing inherently incredible about Starkweather's testimony that he did not shoot Demery and only shot at Austreng, Kittleson, and the police in self-defense. It accordingly would be up to the jury to assess its credibility, not Smith or this Court. *E.g.*, *United States v. Turcotte*, 405 F.3d 515, 528 n.5 (7th Cir. 2005) (credibility determinations are reserved to the jury).

Starkweather and the police, he had admitted to Jean Starkweather 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); (2) Mrs. Starkweather told Attorney Gray about this conversation prior to trial (*id.*), (3) Gray knew that the timing of Demery's death was critical to the defense presented at Starkweather's trial that Demery was killed by someone else the night before Starkweather was shot and arrested (Tr124:108-17), and (4) Gray nonetheless unreasonably failed to use Koser's exculpatory admission in support of that defense. Starkweather's Brief at 32-34. That brief also demonstrated that, as the District Court found below (R40:12 n.4; App.13), the Wisconsin Court of Appeals based its denial of Starkweather's ineffectiveness claim relying on these grounds on the irrational factual assertion that Attorney Gray had presented only one defense to the homicide count at trial (i.e., that Demery was accidently shot by the police). Starkweather's Brief at 33-34. Because the Wisconsin Court of Appeals based its decision of Starkweather's claim on an unreasonable finding of fact, any deference owed the state court under the Antiterrorism and Effective Death Penalty Act ("AEDPA") accordingly is exhausted and this Court must review the claim *de novo*. *Panetti v. Quarterman*, ___ U.S. ___, 127 S.Ct. 2842, 2858-59 (2007).

Given this showing, Smith's response is at best puzzling. Following a distorted spin on the facts that carefully omits any suggestion of impeaching or exculpatory evidence, Smith's Brief at 34-37; *compare* Starkweather's Brief at 10-14, Smith inexplicably rests her entire argument regarding deficient performance on an

assertion of fact that is simply untrue. Smith's Brief at 37-39. Specifically, she asserts that

> [t]he record shows that trial attorney Gray, and probably postconviction attorney Boyle, were not made aware of this information from Starkweather's mother until after the direct appeal.

Id. at 37.

Smith bases her bizarre assertion on the fact that Jean Starkweather's affidavits reflecting this information and the fact that trial counsel knew of it before trial were not dated until after the trial and that her sworn allegations may be subject to impeachment. Smith's Brief at 37-39. However, it is the fact that Mrs. Starkweather advised trial counsel of the information before trial that is critical here, not the date of her sworn statements attesting to that fact. It is trial counsel's knowledge of the exculpatory information prior to trial, not his knowledge of a later memorialization of that information, that triggered his obligation to act on it.

Moreover, the evidence in the record establishes both that trial counsel knew of Koser's statements prior to trial and that post-conviction counsel knew prior to filing Starkweather's post-conviction motion on direct appeal that trial counsel knew it. According to the factual allegations of Starkweather's state court motion, the information in fact was given to the attorneys at a time when they could use it (R9:Exh.H:App.63 (Affidavit of Jean Starkweather (relating Koser's admission and fact she informed Attorney Gray about it prior to trial); R32:Attach.A (Attorneys Boyle and Smith likewise informed of Koser's admission and of Gray's pretrial

knowledge of it before they filed post-conviction motions)).[3]

While Smith may speculate that these allegations are untrue, this Court may not. The state had an opportunity to submit any contrary evidence in the state court proceedings but failed to do so. Instead, it chose to oppose holding an evidentiary hearing on Starkweather's claims (*e.g.* R9:Exh.J), and none was granted (R1:Attach.9; App.112-17 (affirming denial of motion without a hearing)). The state having successfully barred the presentation of any evidence supporting its position here, Smith (as the state's surrogate in this proceeding) is bound by the record as it exists.

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

Warden Smith argues in this Court that Starkweather somehow "abandoned" his ineffectiveness claim based on trial counsel's failure to use Koser's admission that Demery had been dead long before Starkweather was shot and arrested. Smith's Brief at 46-50.[4] She bases this claim on the assertions that "Starkweather presented

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[3] Smith's position on this point is especially bizarre given that her counsel made the same, factually inaccurate assertion in both his brief in the Wisconsin Court of Appeals (R9:Exh.J:24-26) and in the District Court (R26:23-24). Both times, undersigned counsel's response directed him to the exact point in the record demonstrating that his assertion was untrue (R9:Exh.K:7-8; R36:7-8). Smith's counsel even apologized in the District Court for making a related false assertion (claiming that the affidavit attesting to the fact that Starkweather's appellate counsel was told of Koser's admission and of Gray's pretrial knowledge prior to filing any postconviction motions) (R38). Yet, Smith's counsel nonetheless continues to make the same false assertion before this Court.

[4] Smith expressly abandons her claim, raised in the District Court, that Starkweather somehow procedurally defaulted his ineffectiveness claim in Section I,A,1 based on trial counsel's unreasonable failure to provide accurate advice regarding the right to testify. Smith's Brief at 18-19 n.5.

Smith also has abandoned any suggestion that Starkweather procedurally defaulted the (continued...)

essentially the same claim in his *pro se* post-conviction motion" and that he abandoned that claim when, "[r]ather than proceed on appeal with that argument, and rather than have counsel file a new brief on appeal more articulately presenting that argument, Starkweather chose to voluntarily dismiss the appeal outright." Smith's Brief at 46-47.

As with her response to the merits of Starkweather's ineffectiveness claim based on trial counsel's unreasonable failure to use Koser's admission, Smith's "procedural default" argument is based on untrue assertions of fact. Specifically, it is false to assert that Starkweather's *pro se* motion under Wis. Stat. §974.06 raised anything resembling a claim of ineffectiveness based on trial counsel's failure to use Koser's admission at trial (*See* R9:K:3-4).

Also, the suggestion that counsel could have "more articulately present[ed] that argument" had he not voluntarily dismissed Starkweather's *pro se* appeal, Smith's Brief at 46-47, is disingenuous. Because any appellate claims must be supported by facts already in the record, *see, e.g.*, *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136, 137-38 (Ct. App. 1996), such an argument would have been frivolous. As the state argued in state court, the affidavits attached to

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[4](...continued)
ineffectiveness claim regarding Koser's admissions by failing to include it in his *pro se* post-conviction motion under Wis. Stat. §974.06. Of course, any such argument would fail in any event as the Wisconsin Court of Appeals did not rely on such a default, and indeed held (albeit inaccurately) that Starkweather *had* raised the ineffectiveness claim in his *pro se* motion. (R1:Attach.9:6 n.3; App.117). *See Harris v. Reed*, 489 U.S. 255, 261-62 (1989) ("the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" (citation omitted)).

Starkweather's *pro se* §974.06 petition did not present an adequate factual basis for an ineffectiveness claim regarding either trial counsel's failure to use Koser's admission at trial (because they contained no allegation that trial counsel knew of the information during the trial) or post-conviction/appellate counsel's failure to raise that trial ineffectiveness claim on appeal (because they contained no allegation that Attorneys Boyle and Smith knew any of the relevant information). (*See* R9:Exh.J:24-26). Without the additional facts provided in undersigned counsel's §974.06 motion and supporting affidavits, there was no basis on which to argue the Koser ineffectiveness claims on the dismissed appeal even if Starkweather had not failed to raise that claim in his *pro se* §974.06 motion.

Unlike with her merits argument, moreover, Smith succeeded in barring from the habeas record those portions of the state court record necessary to rebut her "abandonment" claim. Smith's only record citations supporting her assertion that Starkweather raised this ineffectiveness claim in his *pro se* post-conviction motion are to the state's state court brief raising this assertion and the Wisconsin Court of Appeals' conclusory footnote adopting that assertion. Smith's Brief at 46-47.

Based on Smith's allegation of procedural default (and the state court's acceptance of that argument), Starkweather moved the District Court to include the *pro se* state court documents that Smith claimed (and claims here) presented the ineffectiveness claim he raises here regarding Koser's exculpatory admission (R18). Smith "vehemently oppose[d]" expanding the record to include those documents on

the grounds they were irrelevant and the District Court refused to do so. (R20:6; R25; App.104-05). When Smith herself subsequently sought to expand the record with carefully expurgated portions of those very same documents as necessary to her procedural default argument (R28), Starkweather again requested that complete copies of all documents from the state court record necessary to a fair assessment of her claim be included in the record (R32). Smith again responded that the documents were irrelevant (R34). Rather than deciding the supplemental motions to expand the record, the District Court merely decided Starkweather's claims on the merits (R40; App. 2-17).

It is the respondent's obligation to provide the necessary portions of the record relevant to the petition. *See Bundy v. Wainwright*, 808 F.2d 1410, 1414-15 (11th Cir. 1987) ("Petitioner is not required by statute or Rules to attach to his petition or to file a state court record in order to avoid a dismissal for facial insufficiency..."; "[t]he obligation to come forward with the state court record is squarely upon the respondent").

Smith fails to respond to Starkweather's argument that, by succeeding in excluding from the habeas record those documents necessary for a fair assessment of her procedural default argument, she has forfeited that argument. *See* Starkweather's Brief at 36-38. As such, she should be deemed to have conceded the point. *See United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (government's failure properly to argue harmlessness constitutes waiver).

Even if this Court should deem it appropriate to consider Smith's procedural default argument, however, remand would be necessary with directions to expand the record to include complete copies of those documents from the state court record that Smith claims produced the default. *E.g.*, *Dalton v. Battaglia*, 402 F.3d 729, 734 (7th Cir. 2005) (where appeal record inadequate for reasonable review of issue in dispute, remand appropriate to complete the record). Without those documents, it is impossible to assess the truth or falsity of Smith's claim.

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

Ignoring controlling authority that resulting prejudice must be assessed cumulatively, *e.g.*, *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000); *see Strickland v. Washington*, 466 U.S. 668, 695 (1984) (court must consider the totality of the circumstances when assessing prejudice), Smith attempts to mitigate the damage done to Starkweather's defense by trial counsel's errors by addressing each in isolation. Smith's Brief 31-33, 39-41. The attempt is futile, however, as either of counsels' errors alone resulted in sufficient prejudice for reversal. Starkweather's Brief at 39-42.

Likewise ignoring controlling authority that the restrictions of the AEDPA do not apply where, as here, the state court did not address or decide resulting prejudice, *e.g.*, *Dixon v. Snyder*, 266 F.3d 693, 701, 702 (7th Cir. 2001), Smith also erroneously suggests that Starkweather must meet those standards on the issue of prejudice here. Smith's Brief at 22, 27, 42. While Starkweather must show resulting prejudice, he

need not *also* show that the state appellate court's nonexistent prejudice holding was unreasonable. *Dixon*, *supra*.[5] *De novo* review also is required because, the state Court of Appeals having based its deficiency rulings on unreasonable applications of the law or the facts, the deference owed that court under the AEDPA already has been expended. *Panetti*, 127 S.Ct. at 2858-59.

Smith does not address Starkweather's showing that, because neither Starkweather's testimony that he did not shoot Demery and only shot at Austren, Kittleson, and the police in self-defense nor Jean Starkweather's sworn allegation that Deputy Koser admitted to her that Demery had been dead long before the police arrived was inherently incredible, a reasonable jury could have credited that testimony as giving rise to a reasonable doubt as to his guilt. *See* Starkweather's Brief at 39-42. Such evidence was corroborated by other evidence already in the record, such as Starkweather's admission in the hospital to having shot only two people (Tr122:199-201, 209), and Jolene Johnson's testimony that she had heard what she believed to be a gunshot the night before this incident (Tr118:88-89, 110-12, 127-28; Tr121:4-5), as well as significant reasons to doubt the state's evidence. For instance, although the

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[5] Smith confuses the deficient performance and prejudice prongs of the *Strickland* analysis in suggesting that the Wisconsin Court of Appeals' somehow held that trial counsel's failure to use Koser's exculpatory admission was not prejudicial. Smith's Brief at 41. The court of appeals there expressly decided (albeit based on an unreasonable view of the facts) only the deficient performance prong. (R1:Attach.9:5-6; App. 116-17 (Attorney Gray's failure to present evidence that would have contradicted the defense cannot be characterized as deficient performance")). Of course, even if that discussion could be viewed as a decision that Starkweather suffered no prejudice, it fails the test of reasonableness because, once again, it is based on the unreasonable factual finding that Starkweather did not defend against the homicide charge based on evidence that Demery could have been killed long before Starkweather was shot and arrested. *See* Starkweather's Brief at 32-34..

officers claimed at trial that Demery's wound was fresh, they refused to allow the medical examiner to examine or remove the body until several hours later (Tr118:182-85, 192, 257; Tr119:33-36, 48-49; Tr122:65, 76-80). Also, neither the bullet nor the matching shell casing that the state claims resulted in Demery's death was found until sometime after the initial search of Demery's trailer and no blood or other trace evidence was found on the bullet (Tr119:183-90, 199-207; Tr120:23-26; Tr121:123-24).

Given this corroborating evidence, Starkweather's direct testimony that Demery was already dead when he found him (R126:155-56, 163-64) easily could have raised a reasonable doubt on that charge. Adding to this conclusion is the jury's knowledge that Starkweather 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 (R118:178-79). Indeed, the *only* time that weapon is alleged to have been fired is when Demery was shot.

Although overlooked by Smith, the relevant question is not whether Starkweather necessarily, or even more likely than not, would have been acquitted but for counsel's errors. *Strickland*, 466 U.S. at 693; *see Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, there need only be "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.

Having failed to address the facts actually demonstrating a reasonable probability of a different result, Smith focuses instead on other matters. She argues, for instance, that Starkweather's exculpatory testimony and Koser's exculpatory admission would not produce a different result during the first, guilt phase of the trial because the jury would hold that evidence against Starkweather in the later, responsibility phase of the trial. Smith's Brief at 31. That argument makes no sense. Because the evidence strengthens Starkweather's case on the issue of guilt or innocence, giving rise to a reasonable probability of guilt at that phase, the fact that it may not help produce a better result at a subsequent phase of the trial is irrelevant. *If Starkweather were acquitted, there never would be a responsibility phase.*

Smith's argument that there is no requirement of an "on the record" waiver of the right to testify is misplaced here. Smith's Brief at 32. The issue is whether trial counsel's failure to provide Starkweather accurate and complete advice necessary to a knowing and voluntary waiver of the right to testify during the guilt phase of the trial was deficient performance. As already demonstrated, it was. Whether or not there may be some *additional* defect is not at issue here.

Smith's argument that a self-defense claim would not be permitted here is just bizarre. Smith's Brief at 32-33. Starkweather has never claimed that he shot Demery in self-defense; rather, he never shot Demery at all (R126:155-56, 163-64). As for

the other charges, Smith asserts that "no one threatened him, none of the three victims was armed." Smith's Brief at 32. Once again, Smith merely cites to evidence supporting her perceptions while ignoring both contrary evidence and the controlling legal standards.

Under Wisconsin law, a self-defense instruction is required whenever it is supported by a reasonable view of the evidence when viewed most favorably to the defendant. *State v. Head*, 2002 WI 99, ¶113, 255 Wis.2d 194, 648 N.W.2d 413; *State v. Peters*, 2002 WI App 243. ¶¶21-22, 258 Wis.2d 148, 653 N.W.2d 300. Here, Starkweather expressly testified that Austreng and Kittleson did have guns the day of the shooting and reached for them when Austrung threw something at Starkweather (Tr126:158-60, 166, 187), that he previously had received written death threats (*id*.:165), that his father told him that morning that Kittleson and Austrung would "take care of [his] ass" and that, if he didn't believe it, "go see Ted," (*id*.:163), and that Austrung that morning had threatened to kill him (*id*.:166).

Because a reasonable jury could have credited this evidence, it clearly would have supported a self-defense instruction, requiring the state to disprove self-defense beyond a reasonable doubt. *Head*, ¶106; *Peters*, ¶22. Moreover, even if the jury ultimately were to determine that Starkweather's belief in the need to defend himself was unreasonable, he still would have had a defense to the charges of attempted first-degree intentional homicide. *See Head*, *supra* (1987 homicide statute revisions require that state's failure to disprove "imperfect self-defense," i.e., that defendant

had actual but unreasonable belief in the need to act in self-defense, reduces first-degree intentional homicide to second degree intentional homicide).[6]

Also, although Smith ignores Starkweather's testimony that he only shot at the police in self-defense (Tr126:187-88), the fact remains that the state trial court believed there was sufficient evidence to support a self-defense instruction regarding one officer even without Starkweather's testimony (Tr123:33-41).

Indeed, Smith's theory of inevitability ignores the fact that the trial court deemed the state's evidence questionable enough to also require lesser-included offense instructions on the charges involving Austreng, Kittleson and most of the police even without Starkweather's exculpatory testimony (Tr123:24-4l; Tr124:2-48). Such instructions would have been inappropriate if, as Smith suggests here, there was no possibility the jury could have acquitted on the charged offenses. *State v. Wilson*, 149 Wis.2d 878, 440 N.W.2d 534, 542 (1989) (lesser included offense instruction appropriate only "when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense").

Smith's final argument parrots the Wisconsin Court of Appeals' mistaken

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[6] Smith notes that, at the time of Starkweather's trial, the Wisconsin courts had misconstrued imperfect self-defense as requiring that the defendant reasonably believe in the need to act in self-defense. Smith's Brief at 33. In *Head*, however, the Wisconsin Supreme Court relied on the statutory language and the purpose behind the homicide statutes as enacted in 1987 to overrule the prior, mistaken interpretation of the relevant statutes and to define what the statutes had required since their enactment. *Head*, 648 N.W.2d at 433-37.

The fact that the Wisconsin Supreme Court subsequently refused to apply retroactively a separate requirement of *Head* that the jury be properly instructed on the defense, *see State v. Anou Lo*, 2003 WI 107, ¶¶78, 82-85, 264 Wis.2d 1, 665 N.W.2d 756, does not, as Smith suggests, Smith's Brief at 33, prevent Starkweather from raising "imperfect self-defense" as properly defined in *Head*.

assertion that the only defense to the Demery homicide that Starkweather raised at trial was the suggestion that Demery was accidently killed by the police while shooting at Starkweather. Smith's Brief at 39-41. While that certainly was *one* theory of defense, Smith once again simply ignores inconvenient facts contrary to her position. She ignores, for instance, the fact that trial counsel argued in closing that Demery was killed by someone else the night before this incident (Tr124:108-17 (Defense closing)). Smith also ignores the fact that trial counsel presented substantial evidence in support of that theory: Starkweather admitted in the hospital that he had only shot two people (i.e., Austreng and Kittleson) (Tr122:199-201, 209). Argument and a gunshot were heard near Demery's trailer around midnight the night before the shootings here (Tr118:88-89, 110-12, 127-28, Tr121:4-5). 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). Neither the bullet that allegedly killed Demery nor the casing was found until after the initial search of the trailer, and there was no blood or other trace evidence on the bullet (Tr119:183-90, 199-207, Tr120:23-26; Tr121:123-24). And, according to the autopsy, the death could have occurred the night before Starkweather's arrest (Tr120:140, 160-63, 173).

Given the evidence already presented in support of that defense theory, it is patently irrational to suggest that the defense would be harmed by additional evidence supporting that theory in the form of (1) evidence that a critical prosecution witness, who claimed at trial that Demery's wounds were fresh, previously had admitted that

Demery had been dead long before the police arrived, and (2) Starkweather own testimony that he in fact did not shoot Demery but found him dead when he arrived at the trailer.

Because Starkweather's testimony that he did not shoot Demery and only shot at Austreng, Kittleson and the police in self-defense and evidence of Koser's admission that Demery had been dead long before the police arrived could have been credited by a reasonable jury, thereby raising grounds for acquittal or mitigation of the charges against Starkweather, and because nothing in Smith's arguments reasonably suggests otherwise, there exists a reasonable probability of a different result.

II.

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

A. Post-Conviction/Appellate Counsels' Unreasonable Failure to Challenge Trial Counsel's Ineffectiveness Denied Starkweather the Effective Assistance of Counsel and Entitle Him to Habeas Relief

Beyond arguing that Starkweather's underlying claims of ineffectiveness of trial counsel lack merit, Smith makes no effort to address Starkweather's arguments that he was denied the right to the effective assistance of post-conviction/appellate counsel for failing properly to raise those claims. *See* Starkweather's Brief at 43-50. She accordingly has waived any additional challenge to Starkweather's appellate ineffectiveness claims. Because Smith's arguments on the underlying ineffectiveness claims are meritless, *see supra*, Starkweather need not respond further on those

claims.

B. Post-Conviction/Appellate Counsels' Unreasonable Failure to Challenge the Denial of a Proper Lesser-Included Offense Instruction Denied Starkweather the Effective Assistance of Counsel and Entitle Him to Habeas Relief

Starkweather's opening brief demonstrated that, given the evidence presented at trial, including the fact that no one actually witnessed the shooting of Demery, a reasonable jury could conclude that there were reasonable grounds both for acquittal on the intentional homicide charge and conviction on the lesser-included offense of reckless homicide. Given those facts, the Wisconsin Court of Appeals' summary assertion 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), makes no sense factually. Because the state court's decision rested on unreasonable findings of fact, moreover, the deference owed that court under the AEDPA is exhausted. *Panetti*, 127 S.Ct. at 2858-59. Starkweather's Brief at 50-54.

Smith's conclusory assertion that the Court of Appeals' factual conclusion was somehow rational, Smith's Brief at 42-43, fails for the same reasons already stated in Starkweather's Brief at 50-54. It also overlooks the fact that the trial prosecutor admitted that the court would not err by giving the lesser-offense instruction (Tr123:24). Smith's reliance upon settled authority that habeas may not be used to challenge a state court's interpretation of its own law, Smith's Brief at 43-44, likewise fails because it is the Court of Appeals' irrational findings of *fact*, rather than its

interpretation of state law, that is in dispute.

The parties and the Wisconsin Court of Appeals all agree that a lesser-included offense instruction is required under Wisconsin law "when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." *State v. Wilson,* 149 Wis.2d 878, 440 N.W.2d 534, 542 (1989). *See* Smith's Brief at 43 (R1:Attach.6:2; App.135). The issue in dispute is the state court's fact-findings. Since there is a reasonable view of the facts that casts reasonable doubt on the first-degree intentional homicide conviction but supports a guilty verdict for first-degree reckless homicide, *see* Starkweather's Brief at 50-54, the Court of Appeals' factual finding to the contrary is patently unreasonable, thus supporting habeas relief despite the AEDPA. 28 U.S.C. §2254(d)(2); *see Panetti*, *supra*.

Also irrelevant is the fact that erroneous denial of a lesser-included offense instruction in a non-capital case will not alone permit habeas relief, *see* Smith's Brief at 43-44. The constitutional issue here is whether Starkweather was denied the effective assistance of appellate counsel, which clearly is cognizable on federal habeas review. *E.g.*, *Smith v. Robbins*, 528 U.S. 259 (2000). It is well-established that habeas review of ineffectiveness claims is appropriate even where the alleged deficiency concerns issues not independently subject to habeas review. *E.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 375-377 (1986) (holding in *Stone v. Powell*, 428 U.S. 465 (1976), that denial of Fourth Amendment claim generally is not cognizable on federal habeas review does not bar such review of claim of ineffective

assistance of counsel based on counsel's failure to file a timely suppression motion); *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).

The issue is whether appellate counsel failed to raise "'a significant and obvious issue,'" that "'may have resulted in a reversal of the conviction, or an order for a new trial.'" *Mason*, 97 F.3d at 893 (citation omitted); *see Smith*, 528 U.S. at 288. Both prongs of that standard have been met here. Starkweather's Brief at 43-54.

CONCLUSION

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

Dated at Milwaukee, Wisconsin, August 21, 2008.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a reply brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 5,575 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2008, I caused 15 hard copies of the Reply Brief 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 and one copy of the brief 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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Starkweather Consol. Reply.wpd