

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 05-1009
(Case No. 01-C-605 (E.D. Wis.))

DAVID E. WALKER,

Petitioner-Appellant,

v.

JON E. LITSCHER,

Respondent-Appellee.

**Appeal From A Final Judgment Denying
Petition For Writ Of Habeas Corpus and the Order
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable Charles N. Clevert, Jr., Presiding**

**BRIEF AND APPENDIX
OF PETITIONER-APPELLANT**

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Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

David Walker appeals from the final judgement entered by the district court on September 3, 2003, denying his Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The district court had jurisdiction over this federal habeas action under 28 U.S.C. §§2241 & 2254. The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§1291 & 2253.

On September 11, 2003, Walker filed a timely motion for relief from the judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b). By Order entered July 28, 2004, the District Court denied relief from the judgment.

Walker filed his notice of appeal with the district court on August 24, 2004.

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

This is a collateral attack on Mr. Walker's criminal conviction in Wisconsin state court. Mr. Walker's current place of confinement is the Kettle Moraine Correctional Institution, W9071 Forest Drive, P.O. Box 31, Plymouth, WI 53073-0031. The Warden at that institution is Jane E. Gamble.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court violated Walker's rights to confrontation and due process by excluding evidence reflecting the complainant's motive falsely to claim lack of consent in order to avoid another beating from her jealous boyfriend.

2. Whether trial counsel's failure to present exculpatory evidence that the state crime lab found no semen on the complainant's dress or underwear deprived Walker of the effective assistance of counsel.

STATEMENT OF THE CASE

On February 23, 1998, jury trial began before the Hon. Diane S. Sykes in the Milwaukee County Circuit Court on an information charging David Walker with kidnapping while using a dangerous weapon as a habitual offender, Wis. Stat. §§940.31(1)(b) & 939.63(1)(a)(2) (Count 1), first degree sexual assault while armed, Wis. Stat. §940.225(1)(b) (Count 2), and Intimidation of a Victim, Wis. Stat. §§940.44 & 940.45(3) (Count 3). (R6:Tr. 2/23/98 at 3-6; R6:Tr. 2/25/98 at 10-18).¹

¹ Throughout this brief, several abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the District Court docket sheet number as "R___";

The charges related to the claim that, on September 26 1997, Walker sexually assaulted Lorinda Smith, the step-sister of his girlfriend, Chiquita Lewis.

On February 25, the jury returned verdicts of guilty on the kidnapping count, although without a weapon, and guilty of first degree sexual assault with a weapon (The jury was not instructed on sexual assault without a weapon). It found Walker not guilty on the intimidation charge. (R6:Tr. 2/25/98 at 61-62).

On June 23, 1998, the circuit court, Hon. Diane S. Sykes, presiding, sentenced Walker to imprisonment of 35 years on each of counts 1 and 2, consecutive to each other and to the time Walker then had to serve in another case, and entered judgment. (R6:Judgment of Conviction).

Walker sought post-conviction relief based, *inter alia* on (1) the exclusion of evidence that the complaining witness had a motive falsely to accuse Walker, and (2) ineffective assistance of counsel, based upon trial counsel's failure to proffer Crime Lab results which corroborated Walker's testimony and tended to undermine the complainant's story. (R12:PC Motion).

On April 28, 1999, the circuit court, Hon. Jeffrey Wagner presiding, entered its decision and order denying Walker's post-conviction motion without a hearing. The court declined to address the confrontation issue beyond summarily affirming

the following “: ___” reference denotes the page number of the document.

Those portions of the state court record reproduced as part of the state's answer (R6) are not indexed. They accordingly are identified by reference to the abbreviated title of the document or the date of the transcript.

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

Judge Sykes' rulings at trial. Judge Wagner also held that Walker was not prejudiced by trial counsel's failure to present the omitted Crime Lab evidence. (R6:Walker's Ct. App. Brf:App.1-6).

By decision dated July 21, 2000, the Wisconsin Court of Appeals affirmed. (R1:Ct. App. Decision; App. 108-23). The Wisconsin Supreme Court denied review on September 12, 2000 (R1:S.Ct. Order; App. 107).

On June 15, 2001, Mr. Walker filed his *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the District Court for the Eastern District of Wisconsin (R1). Walker also sought leave to proceed *in forma pauperis* and requested appointment of counsel (R2; R3).

By Order dated July 2, 2001, the district court, Hon. Charles N. Clevert granted Walker's petition to proceed in forma pauperis and directed the respondent to file an answer. However, the court denied Walker's request for appointment of counsel without prejudice. (R4).

The state filed its answer and limited portions of the state court record on July 25, 2001 (R6).

On September 2, 2003, without first entering an order directing or allowing briefing by the parties, the district court entered an Order denying Walker's habeas petition (R9), and a judgment dismissing the petition (R10; App. 1-2). The court then entered an amended Order denying the petition on September 3, 2003 (R11; App. 3-7).

Addressing Walker's due process/confrontation claim, the court appears to have construed Walker's challenge as being to the reasonableness of the state court factfinding under 28 U.S.C. §2254(d)(2). Finding that "a rational jury could have found Walker guilty of sexual assault and kidnapping based on the evidence presented at trial," the court denied that claim. (R11:2-3; App. 4-5). Regarding the ineffectiveness claim, the court held that "it appears that Walker's counsel made a tactical decision that the second crime lab report was insignificant to Walker's defense," and that "Walker has failed to demonstrate that a reasonable jury would have ruled differently if it had known that the Wisconsin State Crime Lab was unable to find semen on Smith's dress or underwear." (R11:3-4; App. 5-6).

On September 11, 2003, Walker, by undersigned counsel appearing *pro bono*, filed his motion for relief from the judgment (R12). Walker there objected that the court had denied his petition without ordering or permitting briefs and that the decision was made on an incomplete and defective record. Walker also argued that the court had applied the wrong standard for assessing Walker's due-process/confrontation claim and for assessing resulting prejudice on the ineffectiveness claim. Walker also explained that the court's assumption that trial counsel had made a tactical decision not to offer the exculpatory crime lab results was contrary to the state court record. (R12).

By Order dated July 28, 2004, the district court denied Walker's motion for relief from the judgment (R17; App. 8-20). The court found Walker's case to be

distinguishable from controlling Supreme Court decisions on the confrontation issue, viewing the connection between the complainant's prior report of jealous violence by her boyfriend and a possible motive for her to lie about a consensual rendezvous with Walker "speculative." (R17:7-8; App. 14-15). The Court further deemed any error to have been harmless (R17:9; App. 16).

On the ineffectiveness claim, the district court conceded that the record does not support the finding that trial counsel made a tactical decision not to present exculpatory evidence that no semen was found on the complainant's dress or underwear. (R17:10; App. 17). However, the court concluded that admission of that evidence would not have created a reasonable probability of a different result. (R17:10-12; App. 17-19).

Walker filed his notice of appeal to this Court and his docketing statement on August 24, 2004 (R18; R19). By Order dated December 29, 2004, the district court granted Walker a certificate of appealability on the two issues raised in this brief. (R22; App. 101-05).

STATEMENT OF FACTS

The trial testimony of Lorinda Smith and David Walker presented two, diametrically opposed versions of what happened on September 26, 1997.

Ms. Smith testified that she was at home on that date with her four children when David Walker arrived unannounced at approximately 4:00 p.m. She knew Walker through her step-sister Chiquita. (R6:Tr. 2/23/98 at 127-28). She claimed

that Walker almost immediately grabbed her, started pushing and hitting her, and then grabbed a hammer and threatened her with it (*id.* at 129-32). He bit her on the face and then started pushing her into the bedroom, where he exposed himself and demanded oral sex (*id.* at 132-34, 139). When she declined, he hit her again, got on top of her and fought with her to pull up her dress. He attempted to pull her panties to one side and to enter her vagina. (*Id.* at 140-43). He was unable to do so, however, so he simply rubbed his penis against her until he ejaculated, at which point he left (*id.* at 143-44).²

After Walker left, Smith learned that her daughter had succeeded in calling 911, at which time Smith called 911 again and then called her fiance at work (*id.* at 144).

Smith claimed that, after this incident, Walker came to her house and subsequently called and threatened to “spray her house” if she did not get the police off his back (*id.* at 157-58).

Smith's eight-year old daughter, Shontaya Brown, testified that she was at home with her mother and siblings when Walker came to the house (R6:Tr. 2/23/98 at 104-05). At trial, she claimed that Walker hit her mother, kept pushing on her, and picked up a hammer and threatened her mother with it, at which time Shontaya went

² Smith's actual testimony was that Walker rubbed his penis against her leg and vagina until he “put his stuff” on her (R6:Tr. 2/23/98 at 143-44). The Wisconsin Court of Appeals questioned whether Smith claimed Walker ejaculated (R1:Ct. App. Decision at 14-15; App. 122-23). However, the state trial prosecutor construed the evidence as showing that Walker had ejaculated on her (R6:Tr. 2/25/98 at 36-37), and there is no reason to believe that the jury thought otherwise.

upstairs and called 911 (*id.* at 107-09). However, the tape of her 911 call says nothing about a hammer, and during the call she described the contact between Walker and her mother only as “bumping” and stated that she did not know what was going on (*id.* at 137-38). Only when the operator directly asked if she thought the man was hitting her mother did Shontaya agree to that characterization (*id.*).

Despite Smith's claim that Walker hit her several times, the only physical injury noted by hospital personnel was a single, small area of discoloration on her cheek (R6:Tr. 2/24/98 at 74, 76). The investigating officer likewise saw no other physical injuries (*id.* at 98), saw no blood in the house, and saw nothing on the bed that could have been semen (*id.* at 104). Neither Smith, Shontaya, nor Smith's fiancé, Clifton Keeler testified to any other physical injuries.

David Walker testified that, at about 1:30 on the afternoon of September 26, 1997, Ms. Smith called his house looking for her step-sister, Chiquita Lewis. After a brief discussion, Ms. Smith invited Walker over to her house for sex. (R6:Tr. 2/24/98 at 127-28). When he arrived, her kids were there. Smith herded them upstairs, and the two then had consensual sex. (*Id.* at 29-31). Afterwards, he called his employer at Popeye's Chicken and then left (*id.* at 132). He testified that the small mark on her cheek was a kind of “hickey” he gave her after the sexual encounter (*id.* at 137-39).

SUMMARY OF ARGUMENT

The District Court erred in concluding that Walker is not entitled to habeas relief due to the trial court's exclusion of relevant, exculpatory evidence of the complainant's motive to falsify her claims against Walker and trial counsel's unreasonable failure to present evidence consistent with Walker's consent defense and contrary to the state's theory of guilt. The state court decisions on these points were not merely wrong, but unreasonably so.

The confrontation violation here closely parallels that in *Olden v. Kentucky*, 488 U.S. 227, 231-32 (1988) (*per curiam*), in which the Court held that a defendant charged with sexual assault was constitutionally entitled to present evidence that the complainant was living with another man to demonstrate that her fear of jeopardizing that relationship provided a motive for her falsely to claim that the sexual encounter with the defendant was not voluntary, and that concerns of juror prejudice due to the multi-racial nature of that relationship was insufficient to permit exclusion. Likewise here, evidence that the complainant had been subjected to violence less than a year prior to this incident due to her fiance's jealousy would have provided ample motive for her to claim that her consensual conduct with Walker was actually an assault, and there existed no significant countervailing interests supporting exclusion..

On the ineffectiveness claim, Walker's trial counsel failed to present evidence that no semen was found on the complainant's dress or underwear, even though one reasonably would have expected semen to be found there if the complainant's account

was accurate. Trial counsel conceded that he had no tactical reason for not proffering the evidence, so the only issue in dispute concerned resulting prejudice.

Based upon speculation regarding what the jury might have believed, the state court found no reasonable probability that trial counsel's error could have changed the result here. That court was wrong.

The state court's decisions on these issues are so unreasonable as to justify habeas relief even under the Antiterrorism and Effective Death Penalty Act of 1996.

STANDARD OF REVIEW

Whether exclusion of evidence violates a defendant's rights to due process and confrontation is an issue of law reviewed *de novo*. *United States v. Castelan*, 219 F.3d 690, 694 (7th Cir.2000). Whether trial counsel's omissions deprived the defendant the right to the effective assistance of counsel likewise is an issue of law reviewed *de novo*. *E.g., Hall v. United States*, 371 F.3d 969, 973 (7th Cir.2004).

The question of whether a constitutional violation mandates or permits habeas relief is controlled by 28 U.S.C. §2254(d). As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), §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).

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).

ARGUMENT

I.

EXCLUSION OF EVIDENCE OF THE COMPLAINANT'S MOTIVE FALSELY TO ACCUSE WALKER TO AVOID ANOTHER BEATING BY HER JEALOUS BOYFRIEND DENIED WALKER HIS RIGHTS TO CONFRONTATION AND DUE PROCESS

The defense sought to introduce evidence at trial that the complainant's boyfriend, Clifton Keeler, previously had assaulted her on at least four occasions. At least one of those assaults, one which took place less than a year prior to the offense alleged here, occurred because Keeler was jealous and believed Smith was seeing another man. The purpose of the proffered evidence was to demonstrate Smith's motive falsely to claim that her consensual encounter with Walker was instead a sexual assault. The trial court's exclusion of evidence of this prototypical form of bias denied Walker his right to confrontation and to present a defense.

A. Background.

Prior to trial, Walker's counsel notified the state of his intent to offer at trial

evidence, including police reports, showing that Ms. Smith's boyfriend, Clifton Keeler, had previously assaulted her on at least four occasions. The police report of the most recent assault (less than a year prior to this claimed offense) indicates that Keeler

began to argue with SMITH because of phone calls she was receiving from friends. [Smith] [s]tates KEELER became upset/jealous thinking she was involved with another man. Stated KEELER called her, SMITH, a 'BITCH,' then grabbed SMITH around her neck with both hands, shoved SMITH to the floor while pulling SMITH's hair and kicking SMITH in her upper torso causing pain, redness, and injury to SMITH's body without her consent.

(R12:PC Motion:Exh. A. at 4). The state objected to that evidence prior to opening statements and arguments were held without the jury present. (R6:Tr.2/23/98 at 6-7, 72-81, 93-101; App. 124-43).

Defense counsel explained that the evidence demonstrated a possible motive for Smith falsely to accuse Walker of sexual assault. Because Keeler had a history of violence against her and previously had assaulted her when he believed she had been with another man, and because it was likely that he would find out about her encounter with Walker, she had reason to protect herself from Keeler by claiming that the encounter was an assault rather than consensual. (*See* R6:Tr. 2/23/98 at 6-7, 72-81, 93-101; App. 124-43).

Viewing the evidence as going only to the credibility of the witness, however, the trial court excluded any extrinsic evidence of the prior assaults under Wis. Stat. §906.08(2). The court further held that the evidence was irrelevant and inadmissible

under §906.08 even on cross-examination because there was no evidence Smith was lying and portions of her claims were corroborated by other evidence. The court deemed the connection between evidence of the prior beating by the complainant's fiancé and a motive to lie here too speculative to make the evidence relevant. (R6:Tr. 2/23/98 at 74-75, 80-81, 96, 99-101; App. 127-28, 133-34, 138, 141-43).

Freed of any evidence of the complainant's motive to fabricate the sexual assault claim, the prosecutor was able to argue to the jury that Walker's defense required it to believe that Smith suddenly turned on him and railroaded him for no reason (R6:Tr. 2/25/98 at 26, 32-33), that Smith's voice on the 911 tape was fearful, and that there was no reason for her to be fearful if there was no sexual assault (*id.*:32-33), and that there was no reason for Smith to lie (*id.*:37-38).

The Wisconsin Court of Appeals affirmed. While acknowledging that a witnesses' bias is not a collateral issue and thus may be proven by extrinsic evidence, the court noted that such evidence still must be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. (R1:Ct. App. Decision at 7-8; App. 114-15). Based on the state's evidence in support of the charges, the court found reasonable the trial court's assertion that evidence of the complainant's motive to fabricate the charges would be "speculative." The court further held that admission of the evidence could cause the jury to speculate that the complainant in fact was previously involved with another man, thereby prejudicing the state's case. Concluding that this chance of unfair prejudice substantially

outweighed what it viewed as the minimal probative value of the motives evidence, the court upheld its exclusion. (R1:Ct. App. Decision at 8-10; App. 115-17).

Denying Walker's motion for relief from the judgment denying his habeas petition, the district court echoed the state courts' "speculation" argument. (R17:5-8; App. 12-15). It also went beyond the state court holdings, finding that any confrontation error was harmless in any event (*Id.*:9; App. 16).

B. The Trial Court Denied Walker His Rights to Due Process and to Confrontation in Excluding Evidence of the Complainant's Motive to Lie.

While the extent and scope of cross-examination generally rest within the sound exercise of trial court discretion, *Rogers v. State*, 93 Wis.2d 682, 287 N.W.2d 774, 777 (1980), such limitations may deny the defendant his rights to due process and confrontation where, as in this case, they have the effect of concealing relevant, exculpatory evidence from the jury. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

The Supreme Court has noted that "[t]here are few subjects, perhaps, upon which the [federal courts] have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). Violation of a defendant's right to confrontation is not limited to those circumstances involving denial of all rights to cross-examine. *See, e.g., Davis v. Alaska*, 415 U.S. 308 (1974); *Smith v. Illinois*, 390

U.S. 129, 131 (1968). The right of confrontation involves not merely *some* cross-examination, but rather requires the opportunity for *effective* cross-examination. *Davis*, 415 U.S. at 318; *United States v. DeGudino*, 722 F.2d 1351, 1354 (7th Cir. 1983). As the court observed in *DeGudino*,

[i]n order for a cross-examination to be effective, defense counsel must be permitted to expose the facts from which the fact-finder can draw inferences relating to the reliability of the witness. Counsel must be able to make a record from which to argue why the witness might be biased ... [W]hen reviewing the adequacy of a cross-examination, the question is whether the jury had sufficient information to make a discriminating appraisal of the witness's motives and bias.

722 F.2d at 1354 (citations and footnote omitted).

According to the Supreme Court:

a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby “to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.”

Van Arsdall, 475 U.S. at 680, *quoting Davis*, 415 U.S. at 318.

“[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 678-79. In order to test the truth of a witness's testimony, defense counsel thus is entitled not only to elicit answers to questions *whether* a witness is biased, prejudiced, possessed ulterior motives or “otherwise lacked that degree of impartiality expected of a witness at trial,” but rather, must be allowed to “make a record from which to argue *why*” any or all of these factors may exist. *Davis*, 415 U.S. at 318 (emphasis in original). 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*, 415 U.S.

at 317 (citation omitted).

Contrary to the state trial court's apparent belief, it is well-settled that “[t]he bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely.” *State v. Williamson*, 84 Wis.2d 370, 267 N.W.2d 337, 343 (1978);³ *Redmond v. Kingston*, 240 F.3d 590, 593 (7th Cir. 2001). The state court of appeals so held (R1:Ct. App. Decision:7; App.114).

Both the trial court and the state court of appeals, however, took an unreasonably narrow view of relevant evidence regarding a witness’ motive to lie. A motive to fabricate is relevant even in the absence of other evidence that the witness is lying. The motive to fabricate alone has a tendency to make the truth of the witness’ allegations less probable. *See* Wis. Stat. §904.01.⁴ *See State v. Vonesh*, 135 Wis.2d 477, 401 N.W.2d 170, 177 (Ct. App. 1986):

Evidence tending to show a complaining witness has a motive to falsify a charge of sexual assault is relevant. The credibility of a witness is always relevant when the facts are in dispute.

The significance of evidence that the complainant has reason to fear the consequences should she not falsely accuse the defendant, and the defendant's right to present the evidence in such circumstances, is well-established. In *Davis v. Alaska*, 415 U.S. 308, 311 (1974), for instance, the Court recognized that the witness’ fear of jeopardizing his probationary status furnished a strong motive to lie, so that exclusion of evidence of that status was constitutionally impermissible).

Olden v. Kentucky, 488 U.S. 227, 231-32 (1988) (*per curiam*), is even more

³ A different portion of *Williamson* was disapproved in *Manson v. State*, 101 Wis.2d 413, 304 N.W.2d 729 (1981).

⁴ In any event, there was evidence here that Smith was not being truthful: Walker's testimony. Walker testified that the encounter was consensual; Smith testified to the contrary; and it was for the jury to determine the relative credibility of these witnesses in light of all the relevant evidence. In making that assessment, the jury must decide whether either party had a motive to lie. By excluding the evidence of Smith's possible motive, the court denied the jury important evidence that the complainant in fact did have reason falsely to accuse Mr. Walker.

directly on point. The sexual assault defendant in that case sought to present evidence that the complainant was living with another man to support his argument that her fear of jeopardizing that relationship provided a motive for her falsely to claim that the sexual encounter with the defendant was not voluntary. The state courts upheld exclusion of the evidence on the ground that, while clearly relevant, the probative value of the evidence was outweighed by the risk that the complainant's multi-racial cohabitation would prejudice the jury against her.

The Supreme Court, in a *per curiam* opinion, found this evidence to be highly probative, deeming it “plain . . . that ‘[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.’” 488 U.S. at 232, quoting *Van Arsdall*, 475 U.S. at 680.

The state court here did not even cite to *Olden*, let alone attempt to distinguish it. Rather, it merely concluded that any connection between the prior assault on the complainant by her jealous fiancé and a motive falsely to accuse Walker of rape was too “speculative” to permit admission, and upheld that exclusion even though the state prosecutor emphasized in summation the absence of any apparent motive for the complainant to lie.

Given *Olden* this was plainly incorrect. Smith's motive falsely to accuse Walker was much greater than that requiring reversal in *Olden*. In contrast to Smith's reasonable fear of physical violence from her jealous fiancé, the only motive at issue in *Olden* was the fear of jeopardizing the complainant's relationship with her live-in boyfriend. *See also Redmond, supra* (finding unreasonable exclusion of evidence of the 15-year old sex assault complainant's prior false allegation of rape made to get her mother's attention).

The in *Wealot v. Armontrout*, 948 F.2d 497 (8th Cir. 1991), also demonstrates the state court's error, granting habeas relief under circumstances virtually indistinguishable from those here. *Wealot* was charged with rape and at trial sought to elicit

the fact that the complainant's husband was jealous and abusive, thus providing her with a motive falsely to accuse Wealot. 948 F.2d at 498. The state court excluded the evidence and Wealot was convicted.

The federal district court granted habeas relief and the Eight Circuit affirmed, holding that “[a] reasonable jury might have received a significantly different impression of the credibility of [the complainant], as well as that of [her husband], had defense counsel been permitted to show [the complainant] had a strong motive for falsely accusing Wealot.” 948 F.2d at 500.

Far from “speculation,” therefore, a reasonable jury easily could determine that the evidence at issue here provided a strong motive for Smith falsely to accuse Walker. Evidence of prior assaults under similar circumstances demonstrated that Smith had good reason to fear Keeler's reaction should he learn that she had sex with another man. Nor was it speculation that he would indeed find out. The combination of the “hickey” mark on her cheek and the fact that her daughter knew about Walker’s visit and had called 911, virtually guaranteed that Keeler would discover her rendezvous with Walker. She therefore had to do something to avoid Keeler's likely rage and to preserve her relationship with him.

While the excluded evidence of Smith's motive to avoid a beating thus would have been highly relevant there were no legitimate countervailing interests which would support exclusion under Wis. Stat. §904.03. Assuming Smith told the truth about the prior assaults, presenting this evidence to the jury would have taken only a few questions, and likely far less time than was spent arguing the point. Even if she lied about the prior incidents, it would have taken but one witness and very little time to present the truth to the jury in the form of her prior statements to police.

Jurors are not so ignorant as to be confused by the limited evidence necessary to present this issue to the jury. There is no reasonable possibility they would be confused about who was on trial in this case. Exclusion, on the other hand, permitted the state to mislead the jury by claiming the Smith had no motive to lie. (R6:Tr.

2/25/98 at 26, 32-33, 37-38).

Nor was there any reasonable basis for concern that the jury would conclude from the excluded motive evidence that prior consent equals consent in this case. Smith never claimed that there in fact was any prior involvement with another man. Keeler beat her because he *believed* she was so involved based on a few telephone conversations. Whether she in fact was so involved was irrelevant to him and likewise irrelevant to establishing Smith's motive to lie; she reasonably could believe he would respond violently if he thought she was involved with someone else, regardless whether that was true. In any event, a proper limiting instruction would have avoided any possible danger without depriving Walker of important evidence of Smith's motive to lie. *See Redmond*, 240 F.3d at 592 (finding unreasonable Wisconsin Court of Appeals' assumption that admission of relevant evidence of bias would open door to irrelevant, collateral allegations).

Thus, no reasonable interpretation of the Constitution permits exclusion of evidence so crucial to a reliable jury determination as that at issue here. As this Court explained when granting habeas relief in a similar case in which the Wisconsin Court of Appeals upheld exclusion of evidence of the complainant's motive under Wis. Stat. §904.03:

The only basis for the court's ruling was the general principle of the law of evidence, which is codified for federal trials in Fed.R.Evid. 403 but is equally a principle of Wisconsin's law of evidence, see Wis. Stat. §904.03, that relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial (confusing, or cumulative) effect. When that unexceptionable rule is applied as it was here to exclude highly probative, noncumulative, nonconfusing, nonprejudicial evidence tendered by a criminal defendant that is vital to the central issue in the case (Heather's credibility), the defendant's constitutional right of confrontation has been infringed.

Redmond, 240 F.3d at 592 (citations omitted).

Finally, in assessing the validity of countervailing interests presented by the state to exclude evidence of a witness' motive to falsify, it is helpful to consider those

interests rejected as insufficient by the Supreme Court. In *Davis*, for instance, the Court acknowledged the legitimacy of the state's interest in protecting the anonymity of juvenile offenders, but deemed it insufficient to justify exclusion of critical evidence of the witness' motive to fabricate. 415 U.S. at 319. Similarly, in *Olden* the state had a valid interest in avoiding unfair prejudice to the complainant resulting from jury bias given her multi-racial relationship. Again, it was not enough:

While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant," *Delaware v. Van Arsdall*, *supra*, at 679, . . ., the limitation here was beyond reason. Speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Matthews' testimony.

488 U.S. at 232.

Here, as in *Olden*, *Davis*, and *Redmond*, the state courts excluded powerful evidence of the complainant's motive to fabricate the charges. Indeed, the motive here, the fear of violence, was far stronger than the need to protect a relationship in *Olden* or the desire to attract a parent's attention in *Redmond*. Here, as in those cases, the excluded evidence was highly probative of the credibility of the witness most critical to the conviction. Unlike in *Olden* and *Davis*, however, there was no reasonably legitimate countervailing state interest furthered by exclusion.

The case for finding violation of Walker's right to confrontation thus is, if anything, far stronger than in the Supreme Court's decisions in *Olden* and *Davis*, and this Court's decision in *Redmond*.

C. The AEDPA Does Not Bar Relief

Nothing in the AEDPA or §2254(d) justifies the denial of relief to Walker. The Wisconsin Court of Appeals' finding that Walker's confrontation rights were not violated was both contrary to controlling Supreme Court authority and an unreason-

able application of that authority.

1. The state court decision was contrary to controlling Supreme Court authority

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

Under the "contrary to" clause of §2254(d)(1), [a court] could grant a writ of habeas corpus . . . where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result.

Id. See *Boss v. Pierce*, 263 F.3d 734, 739 (7th Cir. 2001).

The Wisconsin Court of Appeals' decision on the confrontation issue is contrary to the Supreme Court's decision in *Olden*, *supra*, because it "confront[ed] facts materially indistinguishable from [those in *Olden*] and nevertheless arrive[d] at a different result." *Williams*, 529 U.S. at 405-06.

The Wisconsin Court of Appeals deemed the probative value of evidence that the complainant previously had been physically assaulted by her jealous boyfriend to be "minimal." The Supreme Court in *Olden*, however, deemed a much less powerful fear, that of jeopardizing one's relationship, to be more than adequate to give the jury a different impression of the witness' credibility. The Wisconsin Court of Appeals further deemed sufficient to justify exclusion the possibility that the jury would be exposed to irrelevant speculation that Smith previously had consensual sex with another man than her fiancé. *Olden*, however, held that even a far more legitimate and likely risk of prejudice would not justify exclusion.

Under these circumstances, therefore, the Wisconsin Court of Appeals' decision was contrary to the Supreme Court's in *Olden*. While there are factual distinctions between the two cases, they are not material distinctions for purposes of

the right to confrontation. Indeed, each distinction renders the constitutional violation here even more apparent than in *Olden*.

2. The state court decision was an unreasonable application of controlling Supreme Court authority

Even if the Wisconsin Court of Appeals' confrontation decision were not contrary to the Supreme Court's decision in *Olden*, the state court decision here was a wholly unreasonable application of that decision and the constitutional principles established in *Davis, supra*, and *Van Arsdal, supra*, as well.

The "unreasonable application" clause is broader than the "contrary to" clause, and "allows a federal habeas court to grant habeas relief whenever the state court 'unreasonably applied [a clearly established] principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 529 U.S. at 413).

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.

Hall v. Washington, 106 F.3d 742, 748-49 (7th Cir.), *cert. denied*, 522 U.S. 907 (1997). "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).

For the same reasons discussed *supra*, the Wisconsin Court of Appeals' rejection of Walker's confrontation claim cannot rationally be harmonized with the Supreme Court's precedents. The motive which the state court here deemed "speculative" is far more powerful than that deemed controlling in either *Olden* or *Redmond*, 240 F.3d at 591-92 (complainant's prior false charge of rape to get her mother's attention "supplied a powerful reason for disbelieving her testimony eleven

months later about having sex with another man, by showing that she had a motive for what would otherwise be an unusual fabrication” (citations omitted); Wisconsin courts’ holdings to contrary unreasonable). Also, while the state in *Olden* had a legitimate reason to fear racial prejudice against the complainant in a multi-racial relationship, the state here had no legitimate countervailing interest requiring exclusion of the motives evidence. *See Redmond*, 240 F.3d at 592 (finding Wisconsin courts’ assertion of countervailing interest in exclusion to be unreasonable).

Given that the need for the excluded evidence in this matter was just as critical as that in *Olden*, that the probative value of the excluded evidence here was at least as high as that in *Olden* and actually much higher, and that the countervailing interest asserted by the state but deemed insufficient for exclusion in *Olden* was legitimate and much stronger, while the state’s interests asserted here are chimerical at best, the state court exclusion of the evidence here was wholly unreasonable.

D. The Error Was Not Harmless.

Because it erroneously concluded that evidence of Smith’s motive to fabricate the allegations against Walker were not admissible, the Wisconsin Court of Appeals did not address whether exclusion of that evidence was harmless. This Court accordingly owes no deference to that court on this issue. *Dixon v. Snyder*, 266 F.3d 693, 701, 702 (7th Cir. 2001).

Also, while the standard for resulting prejudice is slightly more forgiving of state errors on habeas, *see Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (error is harmless if it had no “substantial and injurious effect or influence in determining the jury's verdict” (citations omitted)), the burden remains on the state to disprove prejudice, *O’Neal v. McAninch*, 513 U.S. 432, 438-39 (1995). The state cannot meet that burden here.

Evidence of Smith's motive to lie was highly relevant. Indeed, the prosecutor used the absence of such evidence extensively in her closing argument. She argued,

for instance, that Walker's defense required the jury to believe that Smith suddenly turned on him and railroaded him for no reason (R6:Tr. 2/25/98 at 26, 32-33), that Smith's voice on the 911 tape was fearful, and that there was no reason for her to be fearful if there was no sexual assault (*id.* at 32-33), and that there was no reason for Smith to lie (*id.* at 37-38). Of course, those arguments were patently false. Smith had every reason to lie in order to avoid a beating by Keeler, but the evidence of that motive was concealed from the jury.

The evidence was far from overwhelming. Indeed, the jury acquitted Walker on the “while armed” enhancer for the kidnapping and on the intimidation charge (R6:Tr. 2/25/98 at 61-62), thus demonstrating that it was not totally convinced of Smith's veracity even without having heard the evidence of Smith's motive to fabricate this entire story.

The fact that Smith's 8-year old daughter corroborated a small portion of her testimony neither rendered evidence of Smith's motive inadmissible nor made exclusion of that evidence harmless. The jury found Smith less than fully credible and had good reason not to believe much of Shontaya's testimony as well. *Cf. Olden*, 488 U.S. at 484 (discounting impartiality of complainant’s live-in boyfriend). Again, the jury rejected the “while armed” enhancer to the kidnapping, thus rejecting Shontaya’s testimony that Walker used the hammer.

As her mother, moreover, Smith was in a position to influence what Shontaya “remembered” and said. It is well recognized that the manner of questioning a young child can have a direct effect on what the child “remembers” about an event. *See, e.g., Montoya, Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 Ariz. L. Rev. 927, 933 (1993); Coleman and Clancy, *False Allegations of Child Sexual Abuse: Why Is It Happening? What Can We Do?*, *Criminal Justice*, Fall 1990, at 14, 46; Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash.

L. Rev. 705, 721 (1987).⁵ A jury reasonably could conclude, moreover, that the likelihood of Smith's attempting and succeeding in exercising such influence over her young child is enhanced by the strength of her motive to do so.

As important, the transcript of her 911 call is consistent with a young girl being confused and overreacting to her mother's sexual conduct with a strange man. Shontaya referred to "bumping," not hitting (until she accepted the 911 operator's characterization), and never even mentioned a hammer in that call (R6:Tr. 2/23/98 at 137-38). Such allegations came into play only after her mother learned she had called the police.⁶

There was no physical evidence inconsistent with a consensual sexual encounter as attested to by Walker. Despite the alleged struggle over them, neither the underwear nor the dress was damaged and, despite the complainant's allegations that she was both beaten and choked, no one observed any physical injuries other than the single, hickey-type bruise on her cheek.

Also highly relevant to the issue of prejudice is the prosecutor's own evaluation of the potential damage of this evidence of motive to its case. Walker's trial counsel misunderstood the Court's exclusionary order as applying only to submission of extrinsic evidence, and accordingly attempted to cross-examine Smith regarding the prior assaults by Keeler (R6:Tr. 2/24/98 at 21). The jury was excused, and the prosecutor went on at length concerning the "tremendous damage" caused to the state's case by evidence of the complainant's motive (*id.* at 30-32). If the prosecutor believed the evidence of motive could effect the jury's verdict, the jury reasonably could believe so as well. *See Kyles v. Whitley*, 514 U.S. 419, 448 (1995) ("If a police

⁵ Even with adult witnesses, the courts have recognized the danger that the mode of questioning may supply a false memory for the witness, and that the suggestive nature of the question may take any of several forms. *See State v. Barnes*, 203 Wis.2d 132, 552 N.W.2d 857, 859-60 (Ct. App. 1996) (quoting 3 *Weinstein's Evidence* ¶611-77, 78 (1995).

⁶ While Smith claimed that she told Shontaya to call 911 while Walker was at the house (R6:Tr. 2/23/98 at 134), and Shontaya at first went along with that story (*id.* at 108), she admitted on cross-examination that her mother had *not* told her to call the police (*id.* at 117-18).

officer thought so, a juror would have, too”).

* * *

Because the state courts deprived the defense of relevant, exculpatory evidence exposing a possible motive for the most critical prosecution witness to lie, they denied Walker his rights to due process and confrontation. *E.g., Olden, supra*. Because the state court’s decision in upholding that deprivation was contrary to the decision in *Olden* and patently unreasonable in light of controlling Supreme Court authority, moreover, Walker is entitled to habeas relief.

II.

TRIAL COUNSEL’S UNREASONABLE FAILURE TO PRESENT EXCULPATORY EVIDENCE DENIED WALKER THE EFFECTIVE ASSISTANCE OF COUNSEL

Mr. Walker is being held in violation of the Constitution of the United States because his conviction in Wisconsin state court resulted from the violation of his right to due process and the effective assistance of trial counsel. Specifically, Walker’s trial counsel, David S. Berman, failed to present important, exculpatory Crime Lab evidence to the jury, evidence which would have supported Walker’s account of a consensual encounter while contradicting the complainant’s account of a forcible sexual assault.

The state court’s decision to the contrary that the omitted evidence could have had no possible effect on the jury, moreover, is so unreasonable as to justify habeas relief even under the restrictive standards of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 (“AEDPA”).

A. Standard of Review

The substantive legal standards are settled. A defendant alleging ineffective

assistance 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. Cronin*, 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. A counsel’s performance prejudices the defense when the “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 "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 effected 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.

Both prongs under *Strickland* are reviewed *de novo*. *E.g.*, *Hall v. United States*, 371 F.3d 969, 973 (7th Cir.2004).

B. Trial Counsel's Failure to Present Evidence of the Exculpatory Lab Report Denied Walker the Effective Assistance of Counsel

During the trial, the parties entered into evidence a stipulation regarding the State Crime Laboratory's findings that a small amount of semen was found on the complainant's cervical and vaginal swabs and the Woods light swabs of her leg, but that it was insufficient for further serological analysis (R6:Tr. 2/24/98 at 62-63, 66-67). However, no stipulation or evidence was presented concerning the further Crime Lab finding to the effect that no semen was found on the complainant's dress or underwear. Copies of the stipulation and the crime lab report were attached to Walker's post-conviction motion (R12:PC Motion:Exhs E & F).

The additional evidence contained in the crime lab report would have been

extremely helpful to Walker's defense of consent and could not have hurt that defense. According to the complainant, Walker forcibly pulled up her dress and unsuccessfully tried to pull her underwear to one side, at which point he simply rubbed his penis against her leg and vagina until he "put his stuff" on her (R6:Tr. 2/23/98 at 143-44). It was the state's position, based on the stipulation, that Walker had ejaculated on her (*see* R6:Tr. 2/25/98 at 36-37).

If this theory were accurate, one reasonably would expect that there would be semen on both the dress and the underwear, as well as on her leg. After all, Smith claimed that she kept pulling down her dress and never removed her underwear. The crime lab report, however, shows that there was only a small amount of semen on her leg and none on her clothing.

While inconsistent with the state's theory of prosecution and the complainant's story, the absence of semen on the underwear and dress and its presence on the complainant's thigh is fully consistent with the defense of consensual sex as testified to by Walker. The dress and underwear would have been removed in such a case, and the presence of a small amount of semen on the complainant's thigh is consistent with a slightly spilled condom.⁷

The state courts apparently held, however, that the jury could assume from the absence of any reference to testing of the clothing in the stipulation offered into evidence that such testing in fact (1) was scientifically possible, (2) was undertaken in this case, and (3) was negative for semen. (R1:Ct. App. Decision at 15; App. 122). The fact is, however, that the stipulation neither referred to the clothing nor provided a factual basis for any of these assumptions, let alone the speculative conclusion.

In the absence of evidence on this point, the jury *might* assume that the clothing was analyzed for semen and none was found. Much more likely, however,

⁷ While there is no direct evidence in the record that a condom was used, that is the most reasonable explanation for the absence of semen on Smith's dress and underwear and the minimal amount of semen actually found on her body. A reasonable jury, in other words, easily could make that inference from the evidence.

is that the jury would conclude from the lack of any evidence one way or the other on that point that there simply was no evidence on which they could rely regarding whether any semen was on the panties and dress. The jury was instructed not to speculate, after all (R6:Tr. 2/25/98 at 19), and is presumed to have followed such instructions. *State v. Lukensmeyer*, 140 Wis.2d 92, 409 N.W.2d 395, 403 (Ct. App. 1987).

State v. Glass, 170 Wis.2d 146, 488 N.W.2d 432 (Ct. App. 1992), is instructive here. The Court there found that the defendant was denied the effective assistance of counsel when trial counsel relied upon stipulation that a Crime Lab test for semen was “inconclusive” when, in fact, it was negative:

A “negative” test result is far different from an “inconclusive” one. Defense counsel's explanation for stipulating away such potentially exculpatory evidence is unsatisfactory and implausible. Whether or not the strength of that evidence later might have been diminished, *Glass* was entitled to have the jury hear it.

Id. at 434.

Omission of the crime lab evidence accordingly prejudiced Walker's defense at trial. Such evidence, which would both rebut important parts of the complainant's story and corroborate the defendant's account of what happened could not help but create a reasonable probability of a different result on retrial.

The speculative and weak negative inferences relied upon by the state courts simply cannot equal direct, affirmative evidence that the Crime Lab in fact tested the clothing and that those results were negative for semen. The evidence given the jury was, in effect, inconclusive on the matter. As in *Glass*, direct evidence of a negative Crime Lab finding is far different from a speculative inference from the absence of evidence one way or the other.

The omission of this evidence also meets the deficiency prong. Mr. Berman did not make a conscious decision to omit the exculpatory crime lab evidence and concedes that he had no tactical or strategic reason for not presenting that evidence

in support of Walker's consent defense (R12:PC Motion:Affidavit of Attorney Robert R. Henak). 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 Wiggins*, 539 U.S. at 534 ; *Dixon*, 266 F.3d at 703.

C. The AEDPA Does Not Bar Relief

For the same reasons, the state court's decision that Walker was not denied the effective assistance of counsel is not merely wrong, but "involved an unreasonable application of" federal law as reflected in *Strickland* and other Supreme Court decisions. 28 U.S.C. §2254(d)(1). As this Court has held, reasonableness review must be taken seriously because, "[i]n the absence of *some* review, trial courts would be able to disregard even the most powerful evidence with impunity." *Hall*, 106 F.3d at 752.

First, however, since the Wisconsin Court of Appeals did not address the deficiency prong of the *Strickland* analysis, no deference is owed that court on that issue. *E.g.*, *Dixon*, 266 F.3d at 701, 702.

Regarding the prejudice prong of that analysis, the Wisconsin Court of Appeals decision is patently unreasonable for the reasons already stated. Speculation that the jury will ignore its obligations under the instructions cannot rationally be equated with affirmative, undisputable evidence contradicting the state's case. As the Supreme Court explained in *Davis*,

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act."

415 U.S. at 317 (citation omitted).

This is not a case, in other words, in which the state court decision "addressed

with care all of [petitioner's] points,” so that “[r]easonable judges could find its analysis persuasive.” *Compare Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997). Rather, this is exactly the type of decision to which this Court referred when holding that, even under the AEDPA, “[s]ome 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.” *Hall*, 106 F.3d at 748-49.

The state court decision on Walker’s ineffectiveness claim was not “one of several equally plausible outcomes.” *Hall*, 106 F.3d at 748-49. Rather, that decision was, at best, seriously at tension with governing Supreme Court precedents, inadequately supported by the record, and arbitrary, thus mandating issuance of the writ despite the AEDPA amendments. *Id.* at 749.

III.

THE COMBINED PREJUDICIAL EFFECT OF THE IDENTIFIED ERRORS JUSTIFIES HABEAS RELIEF EVEN IF NEITHER DOES SO INDEPENDENTLY

In assessing resulting prejudice, the Court is obligated to consider the combined effect of all constitutional errors, not merely the effect of each error in isolation. *See Washington*, 219 F.3d at 634-35:

Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess ‘the totality of the omitted evidence under *Strickland* rather than the individual errors. *See Williams*, 120 S.Ct. at 1515. Considering the “totality of the evidence before the . . . jury,” *Strickland*, 466 U.S. at 695 . . ., [trial counsel’s] unprofessional errors were prejudicial to Washington.

Because it refused to acknowledge the confrontation violation here, the Wisconsin Court of Appeals failed to address whether the combined effect of the confrontation violation and trial counsel’s deficient performance prejudiced Walker’s right to a fair trial. This Court’s assessment of the combined prejudicial effects of the

two errors thus owes no deference to the state court under the AEDPA. *E.g., Dixon*, 266 F.3d at 701, 702.

As already discussed, the state's case against Walker was not overwhelming even absent the identified errors. The jury rejected the claims of Smith and her daughter that a hammer was used and rejected Smith's assertions that she subsequently was intimidated by Walker. Still, the exclusion of Smith's motive falsely to accuse Walker left the prosecutor free falsely to argue that her allegations nonetheless should be believed because she had no motive to lie (R6:Tr. 2/25/98 at 26, 32-33, 37-38).

Evidence of Smith's motive to avoid another beating at the hands of her jealous fiancé, especially when combined with the physical evidence that no semen was found where one would expect to find it on her dress and underwear if her account were true, could have done serious damage to the state's case.

Whereas the prosecutor was able to argue at the trial that Smith had no motive falsely to accuse Walker, the truth is that she did. Whereas the omission of evidence that no semen was found on Smith's dress and underwear left the jury without physical evidence rendering it unlikely that the alleged assault could have taken place in the manner Smith alleged, such evidence would have provided reason to question Smith's account.

The synergistic effect of the two errors combined thus exceeds the prejudice from either alone. The omitted evidence would have provided the jury substantial reason to find, not only that Smith had a strong motive to fabricate the charges in this case, but physical evidence that she in fact did so.

CONCLUSION

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

Dated at Milwaukee, Wisconsin, February 22, 2005.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 9,820 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

Robert R. Henak

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CIRCUIT RULE 30(c) STATEMENT

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2005, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant David E. Walker, to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the Brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG Thomas J. Balistreri, P.O. Box 7857, Madison, WI 53707-7857.

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