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

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REPLY BRIEF OF PETITIONER-APPELLANT

ROBERT R. HENAK
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Petitioner-Appellant

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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

A. The State Courts' Assertion That The Complainant's Motive To Falsify Was Speculative Lacks Any Rational Basis

Litscher's argument, like the state courts' holdings, is based on the assertion that no motive to falsify reasonably can be inferred from evidence that the complainant previously had been beaten by her boyfriend when he believed she had been involved with another man. As the Supreme Court recognized in *Olden v. Kentucky*,

488 U.S. 227 (1988), that assertion is total nonsense.

There is nothing speculative about the fact that Smith had been physically assaulted four times by her boyfriend, Clifton Keeler, including once less than one year before this incident when Keeler beat her because he believed she was seeing another man. Smith reported these beatings to the police herself. (R12:PC Motion:Exh.A. at 4).

Given these facts, it is totally reasonable to conclude that Smith would fear another beating from Keeler if he knew or suspected that she was involved with another man. He had done it before, so Smith knew he could, and likely would, do it again.

And finally, given Smith's knowledge, a jury reasonably would believe that Smith had every reason falsely to claim that a consensual sexual encounter was a rape rather than risk another beating from Keeler. Given that her daughter had witnessed part of the encounter and had called 911, there was every reason to believe that Keeler would find out about it.

Contrary to Litscher's suggestion, Litscher's Brief at 18, someone seeking to avoid another beating from her jealous boyfriend will not necessarily limit herself to the type of fine-tuned self-defense mechanisms which someone in hindsight later may view as marginally sufficient. There is no doubt that Smith reasonably would fear Keeler's reaction once he learned that she was alone in a bedroom with another man. Although morally wrong, there is nothing irrational about falsely claiming rape under

those circumstances.

Litscher's argument and the state court decisions thus lack any possible rational basis. Far from being "speculative," it is wholly rational to conclude that one who had previously been beaten by her jealous boyfriend would have a motive to lie rather than risk another beating. *E.g.*, *Wealot v. Armontrout*, 948 F.2d 497 (8th Cir. 1991).

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

Mr. Litscher's argues that the state court's exclusion of evidence of the complainant's motive to fabricate was not contrary to the Supreme Court's decision in *Olden v. Kentucky*, 488 U.S. 227 (1988). Litscher's Brief at 12-15. Litscher is wrong. Walker's Brief at 21-22.

Litscher claims that, because a trial court "may impose reasonable limits" on inquiry into a witness' motives or bias, exclusion of evidence on such grounds cannot be contrary to controlling Supreme Court precedent as long as the state court cites the correct legal standard. Litscher Brief at 12-14.

Litscher's argument, however, overlooks the fact that the confrontation/due process analysis has two stages or prongs, not just one. He may be correct that assessment of a state court's limitations on evidence of a witness' motive to lie itself incorporates a reasonableness standard and thus generally will not be contrary to controlling Supreme Court authority. As the Court recognized in *Olden*, the trial court may "impose reasonable limits" on such evidence "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.'" 488 U.S. at 232, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

However, Litscher overlooks or ignores the first step of the analysis, which is the relevance of the proffered evidence. Even if the trial court's subsequent balancing of potential prejudice against probative value is not otherwise unreasonable if one accepts its assumptions, that court's perception that the proffered evidence has little, if any, probative value may, as here, directly conflict with controlling Supreme Court authority. *See* Walker's Brief at 21.

Smith's motive falsely to accuse Walker was substantially more probative than that at issue in *Olden*. Smith risked a beating, while the complainant in *Olden* only feared jeopardizing the relationship with her boyfriend. *See also Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001) (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).

On that holding, therefore, the state court decision is "contrary to . . . clearly established Federal law as established by the United States Supreme Court." 28 U.S.C. §2254(d)(1). The Wisconsin court "confronte[ed] facts materially indistinguishable from [those in *Olden*] and nevertheless arrive[d] at a different result." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). While the Supreme Court found such evidence to have a "strong potential to demonstrate the falsity of [the

complainant's] testimony," 488 U.S. at 232, the Wisconsin courts found such motive to be "speculative" or "minimally relevant."

Litscher claims that the state court decisions are not contrary to *Olden* because the facts here are not "virtually identical" to those in *Olden*, Litscher's Brief at 13-14, and because other evidence in the case could be viewed as corroborating parts of Smith's story, *id.* at 15. The applicable standard, however, is not whether the facts are "virtually identical" to those in a Supreme Court case, but whether the state court reached a different conclusion on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-06.

The distinctions Litscher cites, moreover, are not material to the question of relevance. They consist of other evidence or possible inferences which could be viewed as corroborating certain peripheral portions of Smith's story. Such partial corroboration, however, does not make evidence of a motive to fabricate any more or less relevant. At most, it might or might not affect the weight to be given evidence of the motive by the jury, and thus resulting prejudice. *But see* Walker's Brief at 23-26.

The distinctions cited by Litscher accordingly are not *material* to the question of relevance decided in *Olden* and the facts of that case remain "materially indistinguishable" from those here. Indeed, the only important distinction between *Olden* and this case for purposes of the relevance assessment is that the complainant in *Olden* only risked jeopardizing the relationship with her boyfriend if she did not claim to

have been raped, while Smith risked a beating. It is only this factual distinction which would alter the probative value or relevance of the proffered evidence. However, this is not a "material" distinction under *Williams* for purposes of *Olden's* relevance holding. Because the risk of a beating necessarily provides a *greater* motive to fabricate than does the risk of jeopardizing the relationship with one's boyfriend, the distinction makes the proffered evidence even *more* relevant than that deemed controlling in *Olden*. The distinction thus could not provide any rational basis on which to distinguish *Olden*.

C. The State Court Decision Was An Unreasonable Application Of Controlling Supreme Court Authority

Litscher's assertion that the state court acted reasonably in excluding evidence of Smith's motive to fabricate the charges against Walker, Litscher's Brief at 15-20, fails on a number of grounds.

First, the state courts' labeling of Smith's motive as "speculative" or "minimally relevant" was wholly irrational. Not only is that conclusion directly contrary to *Olden*; it defies commons sense for the reasons already discussed.

While Litscher again attempts to argue that other evidence and possible inferences rendered evidence of Smith's motive to lie irrelevant, Litscher's Brief at 18-19, he misconstrues the concept of relevance. The possibility that the jury might reject the evidence of motive or believe other evidence or inferences to be stronger does not render the evidence of motive irrelevant. It is up to the jury, not the court, to decide which evidence or inferences to credit. Evidence of a witness' motive to

fabricate still remains relevant, and may be highly relevant where, as here, the credibility of the person with the motive is critical to the state's case.

As the Supreme Court held in *Davis v. Alaska*, 415 U.S. 308, 317 (1974):

> [w]e 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."

(citation omitted).

Despite Litscher's claims, the trial prosecutor certainly did not share his view that evidence of motive could have no effect on the jury verdict. She used the absence of such evidence repeatedly in her closing argument in an attempt to bolster Smith's credibility. (R6:Tr. 2/25/98 at 26, 32-33, 37-38). *See* Walker's Brief at 24.

Second, Litscher overlooks the fact that the state courts' refusal to acknowledge the substantial probative value of evidence of Smith's motive to lie necessarily rendered unreasonable its application of the second step of the confrontation/due process analysis, i.e., that of balancing the probative value of the proffered evidence against perceived countervailing factors. The state courts unreasonably misperceived the proffered evidence of Smith's motive to lie as speculative or at best minimally probative while *Olden* and common sense dictate that it is in fact highly probative. One cannot reasonably measure the relative weights on two sides of a balance or scale where the perceived weight attributed to one side of the scale is as distorted as that

here. To say that the probative value of speculative or minimally relevant evidence is substantially outweighed by other considerations suggests nothing about whether the same countervailing considerations would similarly outweigh the probative value of highly relevant evidence such as that at issue here.

And finally, Litscher's attempt to detect some possible rational basis for excluding the evidence of Smith's motive, Litscher's Brief at 19, like that of the state courts, fails any objective standard of reasonableness. No reasonable jury would be confused about who really was on trial merely because of admission of such evidence, and the time needed to litigate the motive issue would have been far less than that spent arguing admission of it. *See Redmond v. Kingston*, 240 F.3d 590, 592 (7th Cir. 2001) (noting unreasonableness of Wisconsin Court of Appeals' assertion that admission of similar evidence of motive would open the door to irrelevant matters).

Litscher, moreover, seems to have forgotten that the evidence of Smith's motive to lie goes directly to "the real issue in the case," that being the relative credibility of Smith and Walker in this one-on-one swearing contest. *See* Litscher's Brief at 19. As this Court explained in *Redmond*,

> When that unexceptionable rule [Wis. Stat. §904.03] 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 ([the complainant's] credibility), the defendant's constitutional right of confrontation has been infringed.

240 F.3d at 592.

D. The Error Was Not Harmless

Litscher is technically correct that the Supreme Court in *O'Neal v. McAninch*, 513 U.S. 432 (1995), eschewed expressing its holding in terms of "burdens of proof," focusing on the court's perception of the effect of an error rather than on the state's presentation. *Id.* at 436-37; Litscher's Brief at 20-21. The fact remains, however, that it is the state, and not the petitioner, which must bear the "risk of doubt." *O'Neal*, 513 U.S. at 438. *See also Lainfiesta v. Artuz*, 253 F.3d 151, 158 (2d Cir. 2001) (burden of persuasion is on the government under *O'Neal*)..

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

Thus, while the term "burden of proof" may be more appropriate to the determination of facts rather than the purely legal issue of assessing prejudice, *id.* at 436-37, the concept remains the same. If the state fails to persuade the Court that there was no substantial or injurious effect on the verdict, the error is harmless. Placing the "risk of doubt" on the state in such circumstances is fully consistent with prior Supreme Court authority which has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error. *Id.* at 437-44;

e.g., *United States v. Olano*, 507 U.S. 725, 741 (1993) (government bears the "burden of showing the absence of prejudice"). *See also Brecht v. Abrahamson*, 507 U.S. 619, 640-41 (1993) (Stevens, J., concurring) (noting that *Kotteakos v. United States*, 328 U.S. 750 (1946), the decision on which *Brecht* was based, "places the burden on prosecutors to explain why those errors were harmless").[1]

Exclusion of evidence of the complainant's strong motive to fabricate the charges here cannot rationally be excused as "harmless" in any event. Walker's Brief at 23-26. While Litscher mentions the considerations cited in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), Litscher's Brief at 22-23, he merely ignores the factors which show prejudice and vastly overstate the effect of other factors. *Id.* at 23-25.

For instance, the first consideration under *Van Arsdall* is the importance of the witness' testimony to the prosecution's case. While Litscher ignores this factor, the fact remains that the state's case turned entirely on Smith's credibility. As Litscher himself notes elsewhere, there were no physical indicia of any sexual assault or of injury other than the small bite mark or "hickey" on her cheek, and "[t]here was no indication that the children were aware of any sexual activity between [Smith] and Walker." Litscher Brief at 18. Proof of the critical elements of the state's case, in other words, rested entirely on Smith's testimony.

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

Litscher also ignores the fact that evidence of Smith's motive to fabricate the charges was not cumulative, the second factor cited in *Van Arsdall*. Indeed, the trial prosecutor took full advantage of that fact, repeatedly arguing in summation that there was no reason for Smith to lie about this incident (R6:Tr. 2/25/98 at 26, 32-33, 37-38). *See* Walker's Brief at 24.

While Litscher does note that certain portions of Smith's testimony were corroborated by other evidence, Litscher's Brief at 23-24, he once again ignores the facts that such corroboration concerned only peripheral matters and that such evidence was ambiguous and subject to competing reasonable inferences. Again, nothing corroborated Smith's claim of sexual assault, as Litscher himself concedes. Litscher's Brief at 18. The testimony and 911 tape of her daughter and evidence of the "bite mark" or "hickey" is at best equivocal for the reasons already stated in Walker's Brief at 24-25.

It is especially artificial to use Smith's own 911 call and the fact she sounded upset in that call to suggest that exclusion of her motive to lie was harmless. Litscher's Brief at 24. After all, evidence of Smith's motive to fabricate such claims to avoid another beating at the hands of her jealous boyfriend would have provided a reasonable explanation for that call and for why she was so upset.

Litscher also ignores the fact that, although peripheral portions of Smith's story may have been corroborated, critical elements of her testimony were directly contradicted by other evidence. While Smith claimed that Walker struck her several

times (R6:Tr. 2/23/98 at 129-32), the only physical injury detected was the small area of discoloration on her cheek (R6:Tr. 2/24/98 at 74, 76, 98). While Smith claimed that she and Walker fought over his attempt to pull up her dress (R6:Tr. 2/23/98 at 140-43), there was no evidence that the dress was damaged in any way. While Smith claimed that Walker threatened her with a hammer (*id.*:131-34), and left the hammer on the bed (*id.*:145), her daughter's 911 call said nothing about a hammer (*id.*:137-38), and that hammer was found in its usual storage place atop the refrigerator when police arrived (R6:Tr. 2/24/98 at 49-50, 57-58, 99).[2] Last, and certainly not least, Walker's own testimony directly rebutted Smith's story and easily could have been credited by the jury.

Litscher thus fails to discuss the overall weakness of the state's case, other than to raise speculative possibilities about why the jury's rejection of the state's case on intimidation charge and the "while armed" enhancer to the kidnaping charge. Litscher's Brief at 24-25. A finding of harmlessness, however, cannot be based on such speculation. The fact is that the jury rejected the state's case on those matters, and the most likely reason is that it was not totally convinced of Smith's credibility even absent evidence of her motive to lie.

Litscher also ignores the trial prosecutor's own assessment of the effect evidence of Smith's motive would have on her case. *See* Walker's Brief at 25-26.

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[2] Although Keeler claimed at trial that he had moved the hammer to the refrigerator because "it was just chaotic at the time" (R6:Tr. 2/24/98 at 49-50), a reasonable jury easily could have found that explanation to be less than credible. He told a police officer the day of the incident that he could not recall how the hammer had gotten to the top of the refrigerator (*id.*:99).

Given all of these factors, there can be no doubt but that the exclusion of evidence of Smith's motive to fabricate these charges had a substantial and injurious effect on the jury's verdict. The error was not harmless.

II.

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

Litscher does not dispute that trial counsel acted unreasonably in failing to submit evidence that no semen was found on Smith's dress or underwear. He only asserts that the state courts acted reasonably in finding no resulting prejudice. Litscher's Brief at 25-30. He is wrong. Walker's Brief at 28-31.

Litscher's assertion that the jury would have known that no semen was found on Smith's dress or underwear, like the state courts' assertions on this point, is pure speculation. Litscher's Brief at 28. Because no evidence was presented on this point, it is at most possible that the jury would have inferred the absence of semen. To do so, however, would have required it to speculate, something it was expressly instructed not to do (R6:Tr. 2/25/98 at 19).

Litscher's suggestion that Walker misstated the facts likewise is meritless. Litscher's Brief at 28-29. Selectively quoting from a different portion of the record does not support Litscher's assertion. Smith's testimony fully demonstrates her claim that, while Walker tried pulling up the front of her dress, she was trying to pull it down (R6:Tr. 2/23/98 at 140-42). Nor can Litscher rationally dispute the fact that she

claimed that Walker had tried to pull her underwear to one side and tried to enter her vagina but was unsuccessful in doing so (*id.*:142-44).

> Well, I didn't – because I had my panties on, all he was able to do – he wasn't able to go up in because I wouldn't – 'cuz I had on some hanging panties, and they are big like bloomers like, so all he was able to do is put – he touched me and put his stuff on me, but it see he just got on me and started going like this and started moving in the motion like he was doing something, but he wasn't able to get in me, penetrate me.

(*id.*:144).

As Litscher seems to recognize, the reason this is important is that it is extremely unlikely that the incident could have taken place as claimed by Smith and result in no semen being found on her underwear or dress. The evidence indicates this was "kind of a long dress" (R6:Tr. 2/23/98 at 142), and the underwear were "big like bloomers" (*id.*:144). While she claimed the underwear was pulled to one side, it essentially remained in place on her body.

If, as Smith claimed and the state argued, Walker rubbed his penis against her leg until he ejaculated, it is therefore highly unlikely that *no* semen would end up on either the dress or the underwear. Even if semen did not immediately land on either the dress or the underwear, it would have been virtually impossible for her to have gotten up from the bed without *some* semen coming into contact with her clothing.

Litscher, however, reprises the claim that evidence that Walker ejaculated is "ambiguous." Litscher's Brief at 29-30. He asserts that Smith's testimony that that Walker rubbed his penis against her leg and vagina until he "put his stuff" on her

could be a reference to his penis rather than semen. Although that may be true, it is unlikely. She told Detective Braunreiter that, after Walker got frustrated with trying to get her underwear off, he "began pushing his penis up against her vagina" for a couple of minutes until "[h]e was done." (R6:Tr. 2/24/98 at 97). While such language again does not remove all ambiguity, it suggests rather strongly that Smith claimed he ejaculated. Although ignored by Litscher and the state courts, that is exactly the inference the trial prosecutor drew from the evidence (R6:Tr. 2/25/98 at 36-37).

Because a reasonable jury, like the trial prosecutor here, could construe Smith's claim as being that Walker ejaculated, the possibility that the evidence might be construed otherwise is not relevant to the issue of prejudice. The state's position was that he did, and the evidence that no semen was found on her dress or underwear directly rebutted that assertion and thus would have given the jury reason to discredit the remainder of Smith's story. Especially when combined with the exclusion of evidence of Smith's substantial motive to fabricate these charges, there cannot help but be a reasonable probability of a different result but for trial counsel's failure to present this evidence. Litscher's assertion to the contrary, like the state courts' decisions, is wholly unreasonable.

CONCLUSION

For these reasons, as well as for those in his opening brief, Mr. Walker respectfully asks that the Court reverse the judgment below and grant the requested

writ of habeas corpus.

Dated at Milwaukee, Wisconsin, April 25, 2005.

Respectfully submitted,

DAVID E. WALKER, Petitioner-Appellant

HENAK LAW OFFICE, S.C.

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

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 3,836 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 25th day of April, 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 Warren D. Weinstein, P.O. Box 7857, Madison, WI 53707-7857.

Robert R. Henak
State Bar No. 1016803