UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 07-1243
(Case No. 03-C-1279 (E.D. Wis.))

STANLEY A. SAMUEL,

Petitioner-Appellant,

v.

MATTHEW J. FRANK,

Respondent-Appellee.

Appeal From A Final Judgment Dismissing Petition For Writ Of Habeas Corpus and the Order Entered In The United States District Court For The Eastern District of Wisconsin, Hon. Lynn Adelman, Presiding

---

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Rules and Statutes

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 07-1243
(Case No. 03-C-1279 (E.D. Wis.))

STANLEY A. SAMUEL,

Petitioner-Appellant,

v.

MATTHEW J. FRANK,

Respondent-Appellee.

REPLY BRIEF OF PETITIONER-APPELLANT

ARGUMENT

ADMISSION OF TISHA'S STATEMENTS TO STATE AGENTS VIOLATED SAMUEL'S RIGHT TO DUE PROCESS AND JUSTIFIES HABEAS RELIEF

A. The Wisconsin Supreme Court Acted Unreasonably In Holding That Admission of Tisha's Coerced and Involuntary Statements Did Not Violate Due Process

1. The Wisconsin Court's standard is itself unreasonable in light of controlling Supreme Court authority

Samuel's opening Brief at 18-27 demonstrated that, although the Wisconsin Supreme Court correctly recognized that a criminal defendant has a due process right to exclusion of coerced witness statements, its suggested standard makes no sense in

light of controlling Supreme Court precedent. For instance, it is irrational to allow admission of an involuntary witness statement resulting from state coercion unless that statement results from police misconduct so "egregious" that "it produces statements that are unreliable as a matter of law" (R9:Exh.L:2; App. 112) in light of the United State's Supreme Court's recognition that statements coerced under the traditional voluntariness standard are themselves inherently unreliable. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 433 (2000) ("The roots of this [voluntariness] test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy"); *Spano v. New York*, 360 U.S. 315, 320 (1959).[1]

Although Frank is correct that reference to other state or lower court cases can influence the Court's assessment of reasonableness, Frank's Brief at 25, *see Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003), such an analysis reaches a result contrary to that urged by Frank.

Not one decision cited by Frank, Frank's Brief at 15, 25-26, or found by Samuel upheld admission as substantive evidence of coerced witness statements which would be involuntary under traditional standards merely because they resulted from a "non-egregious" level of state coercion. Rather, the cases cited by Frank either

---

[1] Frank's citations to *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961), and *Lego v. Twomey*, 404 U.S. 477, 484-85 (1972), for the proposition that "involuntary confessions must be suppressed without regard for the truth or falsity of the confession," Frank's Brief at 23-24, overlook the fact that accuracy is not the same thing a reliability. A coerced confession may in fact be true, but the fact of coercion still renders it untrustworthy. *E.g.*, *Dickerson*, 530 U.S. at 433.

ordered suppression where there was in fact torture, *see Bradford v. Johnson*, 354 F. Supp. 1331 (E.D. Mich. 1972), did not even involve admission of a coerced witness statement, *United States v. Chiavola*, 744 F.2d 1271 (7th Cir. 1984); *People v. Bell*, 548 N.E.2d 397 (Ill. App. 1989), or involved a witness who voluntarily testified at trial consistent with an allegedly coerced prior statement, *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985); *United States v. Fredericks*, 586 F.2d 470 (5th Cir. 1978).[2]

The availability of the oath and the court's protection of the witness from further police coercion explains the different result in the latter type of case when the state seeks admission, not of a coerced out-of-court statement itself, but the live, incriminating testimony of a witness who previously was subjected to police coercion. So long as the witness' incriminating testimony is not itself coerced, its admission does not violate due process. *People v. Badgett*, 895 P.2d 877, 884 (Cal. 1995) (defendant has standing to challenge witness testimony on "continuing coercion" grounds). *Compare Bradford*, 354 F. Supp. at 1336 (admission of testimony violates due process where witness subject to continued coercion while testifying), *with Merkt*, 764 F.2d at 274 (no due process violation where incriminating testimony itself not coerced); *Fredericks*, *supra* (same).

Frank's reliance on *Badgett* thus is misplaced as well. Frank's Brief at 15, 25.

---

[2] The only case found by Samuel that superficially supports the state court's conclusion is *Johnson v. Washington*, 119 F.3d 513 (7th Cir. 1997). The Court there upheld admission of a witness' prior coerced statements as substantive evidence, noting that "Johnson has not identified any law that entitles him to relief." *Id.* at 521. In so holding, however, the Court overlooked the ample and consistent authority holding to the contrary, including its own prior decision in *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), as well as the legal analysis applied in those cases.

The *Badgett* Court neither held nor even suggested that due process allowed admission of coerced, extra-judicial witness statements. *See* 895 P.2d at 884 ("[W]hen the evidence produced at trial is subject to coercion ... defendant's due process rights [are] implicated and the exclusionary rule ... [is] applied"). Rather, *Badgett* merely holds that a witness' voluntary trial testimony may not be suppressed on "fruit of the poisonous tree" grounds. It is only when the coerced evidence itself is admitted at trial, as here, that violation of the defendant's own due process rights occurs and can be challenged. 895 P.2d at 884-87.

2. *Carey v. Musladin* did not overrule existing standards for assessing whether a state court decision involved an unreasonable application of clearly established federal law.

"An 'unreasonable application' of Supreme Court precedent occurs when 'the state court identifies the correct governing legal rule... but unreasonably applies it to the facts of the particular state prisoner's case' or 'if the state court either unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Dixon v. Snyder,* 266 F.3d 693, 700 (7th Cir.2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)).

Seeking to overturn these established standards for assessing when a state court decision "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. §2254(d)(1), Frank vastly overstates the effect of the Supreme Court's recent decision in *Carey v.*

Musladin, ___ U.S. ___, 127 S.Ct. 649 (2006). Frank's Brief at 27-31.

The Court in *Musladin* neither held nor suggested that "a refusal to extend Supreme Court principles to a new context can never be an unreasonable application of clearly established federal law . . .." *Id.* at 31. The Court there neither cited to the "unreasonable application" standard from *Williams v. Taylor*, sought to distinguish it, nor purported to overrule it. *Musladin* accordingly should be read as consistent with *Williams v. Taylor* if possible. Given the *Musladin* Court's rationale, it easily can be read as such.

In *Musladin*, the defendant had been convicted of murder at a trial at which members of the victim's family were permitted to sit in the front row of the gallery wearing buttons displaying the victim's image. The state court upheld the conviction on the grounds that Musladin had failed to show actual or inherent resulting prejudice on the buttons claim. The Ninth Circuit Court of Appeals, however, granted federal habeas relief on the grounds that the state court decision was an unreasonable application of clearly established federal law as determined by the Supreme Court in *Estelle v. Williams*, 425 U.S.501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). *See Musladin v. LaMarque*, 427 F.3d 653 (9th Cir. 2005).

The Supreme Court reversed, holding that the state court decision defining what constitutes inherent prejudice was neither contrary to nor an unreasonable application of clearly established federal law under §2254(d)(1). 127 S.Ct. at 652-54. Emphasizing its prior comments that "clearly established Federal law" in §2254(d)(1)

"'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision,'" 127 S.Ct. at 653 (quoting *Williams v. Taylor*, 529 U.S. at 412), the Court observed that, although language in both *Estelle v. Williams* and *Flynn* acknowledged that some practices are so inherently prejudicial as to deny due process, neither decision actually held that the facts presented met that standard. Specifically, *Estelle v. Williams* found the issue of whether requiring the defendant to wear prison clothing at trial was waived, while the presence of additional law enforcement at Flynn's trial was found insufficiently prejudicial to have denied him a fair trial. 127 S.Ct. at 653.

Given that both *Estelle v. Williams* and *Flynn* dealt with government-sponsored practices, as opposed to the spectator conduct, moreover, and the wide divergence of treatment of such questions by the lower courts resulting from the Supreme Court's lack of guidance, the Court concluded that the state court's actions in Musladin's case could not be viewed as unreasonable. 127 S.Ct. at 654. The Court further held that, because "[n]o holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here," the state court's decision was not contrary to established federal law.

Contrary to Frank's assertions, therefore, *Musladin* did not overrule the "unreasonable application" standard from *Williams v. Taylor*. Rather, that decision must be read, consistent with its rationale, as merely holding that (1) there can be no "clearly established Federal law" when the Supreme Court language relied upon is not

necessary to the Court's holding and (2) a state court decision cannot be deemed an unreasonable application of such law when the Supreme Court's relevant holdings fail to provide sufficient guidance on a particular issue to render a state court decision unreasonable.

3. The Wisconsin Court's decision was based on unreasonable findings of fact

Frank's argument that the Wisconsin Supreme Court's decision was not based on unreasonable findings of fact, Frank's Brief at 31-38, addresses the wrong question. Frank assumes that the state court resolved factual disputes, applied the facts to its new legal standard, and concluded that Samuel's due process rights were not violated. If that was what the Court actually did, then Samuel's argument would stand on shaky ground indeed. Even though the Wisconsin Supreme Court does not have the authority to resolve factual disputes, *Wurtz v. Fleischman*, 97 Wis.2d 100, 293 N.W.2d 155, 159 (1980), Frank is correct that this restriction is a matter of state law and that "the presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact." *Sumner v. Mater*, 455 U.S. 591, 592-93 (1982).

What Frank overlooks, however, is that the Wisconsin Supreme Court did not purport to find the ultimate facts of what happened at the time that Tisha's child was taken from her pending her "cooperation" with the police. That Court was well-aware of the limitations on its authority to resolve factual disputes. Rather, it refused to

remand the case for an evidentiary hearing where those factual disputes could be resolved, basing that decision on its conclusion that "[n]o reasonable view of the evidence can support the conclusion that Tisha's statements were coerced by egregious methods that produced statements unreliable as a matter of law." (R9:Exh.L:19; App. 129). It is this factual finding, that necessarily presumes that Samuel's factual allegations and those of his witnesses are true, that was objectively unreasonable and requires, at the least, remand for a hearing.

Frank's assertion that Tisha was not *expressly* coached on what to say, Frank's Brief at 33-34, ignores (as did the state court) the fact that sex assault investigator Schraufnagel had relayed a message to her through her father that the required "cooperation" included an account of a sexual relationship with Samuel before they left Wisconsin and a statement that she wanted to come home. (R9:Exh.Q:27-28, 38). It is therefore irrational to suggestion that Tisha was not told what she would have to say in order to have her child returned to her.

Contrary to Frank's suggestion, Frank's Brief at 34-35, Samuel does not claim that the issue of whether Tisha was coached is irrelevant. Clearly, it is and she was. Rather, as discussed in his opening brief at 34-35, the point is that the state court's assertion that there was no evidence of coaching was patently unreasonable unless, by an exercise of semantics, the Court meant only that Tisha was not coached *directly* by the officers. Because the difference between direct coaching and the type of indirect coaching conducted through Peter is irrelevant to the state court's standard,

however, we must assume that the Court failed to make that distinction and instead simply made an unreasonable finding that there was no evidence of coaching at all.

As demonstrated in Samuel's Brief at 35-37, the state agents made amply clear to Tisha, even if they did not do so expressly, that the return of her child turned on her "cooperation," not with social workers whose main concern was the well-being of her child, but with sex abuse investigator Schraufnagel and police officer Sagmeister, who sought a statement supporting a criminal prosecution of Samuel. Again relying on semantics, Frank suggests that this evidence is necessarily nullified by the fact that the threats were implicit rather than explicit. Frank's Brief at 35-37. There is no conflict, however, between the existence of implicit threats, as here, and the absence of explicit threats. The very meaning of implicit is that the threats are not expressed.

Finally, the fact that state authorities had some legitimate reasons for questioning Tisha on topics related to her child does not change the fact that the return of Tisha's child turned, not on her cooperation with social workers in assessing her ability to care for her baby, but on her "cooperation" with a sex abuse investigator and a police officer by providing an account of a sexual relationship with Samuel in Wisconsin. The state court's conclusion that no reasonable view of the evidence would support a finding that any legitimate purpose for originally questioning Tisha was transformed into a pretext for criminal investigation thus was patently unreasonable.

B. The erroneous admission of Tisha's coerced statements was not harmless

Because the state court did not acknowledge the constitutional violation, it did not address whether that violation was harmless. Samuel accordingly need not show that the state court's evaluation of harmlessness was contrary to or an unreasonable application of controlling Supreme Court authority under the AEDPA. *Dixon v. Snyder*, 266 F.3d 693, 701, 702 (7th Cir. 2001). He does not dispute, however, that the applicable standard for prejudice is that contained in *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)). *See Fry v. Pliler*, ___ U.S. ___, ___ S.Ct. ___, 2007 WL 1661463 (June 11, 2007).[3]

In light of the obvious damage to Samuel's defense at trial caused by the coerced statements, *see* Samuel's Brief at 42-44, Frank understandably makes little more than a *pro forma* objection that the constitutional violation here was harmless. Frank's Brief at 38-43. It is, after all, absurd to suggest that three improperly admitted prior statements claiming that Samuel committed a sexual assault could have

[3] Frank does not apply *Brecht*, however. Instead, and without explanation, he seeks to apply a different standard asking whether admission of the evidence rendered Samuel's trial "fundamentally unfair." Frank's Brief at 17, 40, 41. Given that the *Brecht* standard is well-settled and focuses on the effect of the constitutional violation on the verdict rather than on some abstract inquiry into the "fairness" of the trial, *see, e.g.*, *O'Neal v. McAninch*, 513 U.S. 432 (1995), Frank's proposed new standard is misplaced. Frank's argument also is misplaced because he is, in effect, merely again disputing that admission of the coerced witness statement violated due process rather than providing a rational basis for concluding that this violation was not prejudicial. *See* Frank's Brief at 17 (arguing that there was no resulting prejudice "because it is not fundamentally unfair to submit whether an involuntary witness statement is reliable to the jury with all of the facts surrounding the taking of the statement.").

no effect on the verdict when the alleged victim swore under oath that he did not sexually assault her and virtually the state's entire case consisted of the improper evidence. Whatever minimal corroboration for those statements that may have been provided by the state's other evidence was thoroughly impeached. *See* Samuel's Brief at 42-43.

Although Frank does not seek to differentiate between the sexual assault conviction that was based directly upon the improperly-admitted statements and the other counts of conviction, admission of those statements prejudiced Samuel's defense to those counts as well. Samuel's Brief at 43-44.

CONCLUSION

For these reasons, as well as for those in his opening brief, Stanley A. Samuel respectfully asks that the Court reverse the judgment below and grant the requested writ of habeas corpus. Should the Court decline to grant such relief, Samuel asks that the Court reverse the judgment below and remand the case for an evidentiary hearing on his due process claim.

Dated at Milwaukee, Wisconsin, June 25, 2007.

Respectfully submitted,

STANLEY A. SAMUEL, 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

Samuel Consol. Reply.wpd

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 2,796 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 June, 2007, I caused 15 hard copies of the Reply Brief of Petitioner-Appellant Stanley A. Samuel 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 Warren D. Weinstein, P.O. Box 7857, Madison, WI 53707-7857.

Robert R. Henak
State Bar No. 1016803

Samuel Consol. Reply.wpd