

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 07-4079
(Case No. 07-C-397 (W.D. Wis.))

CHAS SIMONSON,

Petitioner-Appellant,

v.

RANDALL HEPP, Warden,
Jackson Correctional Institution,

Respondent-Appellee.

**Appeal From A Final Judgment Denying
Petition For Writ Of Habeas Corpus Entered In The
United States District Court For The Western District
of Wisconsin, Honorable Barbara B. Crabb, Presiding**

**REPLY BRIEF
OF PETITIONER-APPELLANT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT CONCERNING ORAL ARGUMENT 1

ARGUMENT 2

 I. BARRING CRITICAL EVIDENCE OF A POSSIBLE
 ALTERNATIVE CAUSE FOR THE ALLEGED DAMAGE
 TO D.S.'S HYMEN DENIED SIMONSON THE RIGHT
 TO PRESENT A DEFENSE AND JUSTIFIES
 HABEAS RELIEF 2

 II. THE SENTENCING COURT'S RELIANCE UPON
 INACCURATE INFORMATION VIOLATED
 SIMONSON'S RIGHTS TO DUE PROCESS AND
 JUSTIFIES HABEAS RELIEF 3

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Lechner v. Frank, 341 F.3d 635 (7 th Cir. 2003)	7
Panetti v. Quarterman, ___ U.S. ___, 127 S.Ct. 2842 (2007)	4
Roberts v. United States, 445 U.S. 552 (1980)	7
Townsend v. Burke, 334 U.S. 736 (1948).	4, 6, 7
United States ex rel. Welch v. Lane, 738 F.2d 863 (7 th Cir. 1984)	7
United States v. Giovannetti, 928 F.2d 225 (7 th Cir. 1991)	3
United States v. Tucker, 404 U.S. 443 (1972)	4, 6-8

Constitution, Rules and Statutes

28 U.S.C. §2254(d)	4
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STATEMENT CONCERNING ORAL ARGUMENT

Contrary to Warden Hepp's assertion, Hepp's Brief at 2, oral argument is appropriate in this case. Oral argument is appropriate due to the confusion reflected both in Hepp's brief and in the previous court decisions regarding application of controlling legal precedent to the facts of this case. The prior courts' decisions addressing Simonson's "right to present a defense" claim have demonstrated special confusion, producing a number of different and evolving theories, none of which is legally valid. Oral argument also is appropriate on the sentencing issue as Hepp's entire argument focuses on a claimed inaccuracy not raised by Simonson.

ARGUMENT

I.

BARRING CRITICAL EVIDENCE OF A POSSIBLE ALTERNATIVE CAUSE FOR THE ALLEGED DAMAGE TO D.S.’S HYMEN DENIED SIMONSON THE RIGHT TO PRESENT A DEFENSE AND JUSTIFIES HABEAS RELIEF

In his opening brief, Chas Simonson explained exactly why the state courts’ exclusion of relevant, exculpatory evidence demonstrating a viable alternative cause of the alleged damage to D.S.’s hymen denied him the due process right to present a defense and why the state Court of Appeals’ decision on that point was not only wrong, but patently unreasonable. Simonson’s Brief at 10-31. Simonson addressed each of the various rationales to the contrary presented by the state and lower federal courts and demonstrated why they made no sense. *Id.*

In his response, Warden Hepp chose not to address or rebut Simonson’s showing. Instead, he does little more than quote the prior decisions and assert in conclusory terms that they were correct. Hepp’s Brief at 4-16.

Hepp’s argument assists the analysis somewhat, however, by limiting what is actually in dispute. For instance, Hepp does not seek to justify the District Court’s misplaced suggestion that Simonson’s evidence of the rectal manipulation may have been untrue. (*See* R11:2-3; App. 3-4). Hepp likewise does not suggest, as did the Magistrate Judge (R9:9-11; App. 117-19), that the state Court of Appeals decision upholding exclusion of the exculpatory evidence was based on some perceived failure to “lay a proper foundation” under some unidentified state procedure. Rather, Hepp

concedes, as Simonson has alleged all along, that the question is squarely one of relevance. Hepp's Brief at 9-10. Hepp also does not dispute, and thus concedes, that any error in the exclusion of the alternative causation evidence would be prejudicial. *See United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991). *See generally* Simonson's Brief at 26-31.

Because Simonson's opening brief already demonstrated why the Wisconsin Court of Appeals relevancy decision conflicted with or unreasonably applied controlling Supreme Court precedent defining relevance, and because nothing in Hepp's conclusory assertions about the supposed correctness of that decision in any way rebuts that showing, Simonson will not waste the Court's time with further argument on the point.

II.

THE SENTENCING COURT'S RELIANCE UPON INACCURATE INFORMATION VIOLATED SIMONSON'S RIGHTS TO DUE PROCESS AND JUSTIFIES HABEAS RELIEF

Simonson's opening brief demonstrated that the sentencing court violated his due process rights by placing substantial reliance upon factually inaccurate assumptions about the applicable recidivism rates of child sex offenders in deciding that Simonson presented a significant risk to the public and thus deserved the lengthy prison sentence he received. Simonson's Brief at 31-44. That brief further demonstrated that the circuit court effectively conceded both that the assumptions were inaccurate and that it in fact had relied upon them when imposing Simonson's

sentence. *Id.* at 34-36.

Finally, Simonson demonstrated that the Wisconsin Court of Appeals' decision on this claim was both factually and legally unreasonable. The Court of Appeals representation of what the sentencing court did and said directly conflicts with the lower court's true actions as reflected in the record and its own findings when deciding Simonson's post-conviction motion. The Court of Appeals' implicit "harmless error" analysis also conflicts with the controlling standards set forth in decisions such as *United States v. Tucker*, 404 U.S. 443, 447 (1972), and *Townsend v. Burke*, 334 U.S. 736 (1948). See Simonson's Brief at 36-40. Either of that court's unreasonable determinations (whether of fact or of application of the law) exhausts the deference otherwise owed under the AEDPA. 28 U.S.C. §2254(d); see *Panetti v. Quarterman*, ___ U.S. ___, 127 S.Ct. 2842, 2858-59 (2007).

Hepp's argument to the contrary is based on two fundamental errors. Hepp's Brief at 17-22. The first is in identification of the inaccurate information that forms the basis of Simonson's right to relief. According to Hepp, Simonson is claiming that the inaccurate information consisted of the sentencing court's conclusion that he is highly likely to reoffend. Hepp's Brief at 17-19, 21. Hepp is wrong.

The sentencing court's view of Simonson's risk of recidivism in the future, like its ultimate conclusion that the sentence imposed was justified, is an opinion, not a fact. As such, although Simonson strongly disagrees with that opinion, it is not subject to due process review as being "inaccurate." Hepp is correct that a judge

reasonably could ignore the ample evidence to the contrary and reach the ultimate conclusion here that Simonson is a risk.

Contrary to Hepp's assertion, the inaccurate information that justifies relief here consists, not of the sentencing court's general opinion of Simonson's risk of recidivism, but of one of the primary factors cited by the sentencing court as leading to that perception (and thus the ultimate sentence): its belief that, because child sex offenders in general are highly likely to reoffend, Simonson in particular thus is a significant danger to reoffend as well:

But above and beyond that, based on my experience, individuals who undertake this type of behavior typically do it more than once with more than one victim, unlike charges like homicide where statistically the likelihood is they're never going to do it again. But in these kinds of cases, if it happened once, it's very likely going to happen again. Or at least the temptation to do it again is going to be there. So I see a very, very high need to protect the public.

(R5:Exh.K:31; App. 152).

The sentencing court's generalization is inaccurate because, as demonstrated in Simonson's post-conviction motion and not disputed by the state courts, whatever high rate of recidivism may be attributable to child sex offenders in general does not apply to incest offenders as Simonson is alleged to be. The court effectively is saying that Simonson is a risk and therefore must receive a greater sentence because he falls within a class of offenders with a high level of recidivism. The facts demonstrate, however, that he does not. To the contrary, both the meta-analysis of existing recidivism studies and the U.S. Department of Justice's own study on recidivism

among sex offenders recognize that recidivism among incest offenders is both substantially lower than that for other child sex offenders and very low on an absolute scale. (R7:Exh.3:2-41).

Properly identifying the inaccurate information forming the basis for Simonson's claim nullifies much of Hepp's argument here. Whatever assertions may be made seeking to justify the sentencing court's opinion of Simonson's risk of reoffense as reasonable carry no weight when assessing the validity of that court's underlying generalizations about sex offenders that are demonstrably inapplicable, and therefore inaccurate when applied to Simonson.

Hepp's second fundamental error is his attempt to shoehorn the state courts' implicit "harmless error" analysis into the controlling standards established in *Tucker* and *Townsend*. Hepp's Brief at 19-22. Much, if not all, of Hepp's argument on this point is rendered meaningless when one applies it to the actual inaccuracy at issue here rather than the straw-man argument identified by Hepp. After all, the sentencing court's mistaken belief that Simonson's offense placed him in a category of offender that is highly likely to reoffend was, by its own terms, "above and beyond" other considerations in its conclusion that he presents a serious risk to the public and thus should receive a correspondingly lengthy sentence. (R5:Exh.K:31; App. 152). That mistaken belief thus was central to the court's decision. Under any reasonable standard, therefore, that factual error was "misinformation of constitutional magnitude." *E.g., Tucker*, 404 U.S. at 447 (sentence "founded at least in part upon

misinformation of constitutional magnitude,” and thus violating due process, where sentencing court “gave specific consideration” to prior convictions it erroneously believed to have been valid).

Hepp’s attempt to transform the Supreme Court’s “misinformation of constitutional magnitude” language into an opening for the type of back-door “harmless error” analysis suggested by the state Court of Appeals is misplaced in any event.¹ As this Court explained in *United States ex rel. Welch v. Lane*, 738 F.2d 863, 867 (7th Cir. 1984), the Supreme Court in *Tucker* rejected exactly such an attempt. The government there asserted that other facts in the case made it “highly unlikely” that the new, untainted sentence would be any different, *Tucker*, 404 U.S. at 446. In response, the Court held that, given the sentencing court’s specific reliance upon the inaccurate information, it would be inappropriate and “callous to assume” that it would have imposed the same sentence based upon the true facts. 404 U.S. at 448-49 & n.8. The Supreme Court in *Townsend* reached a similar conclusion on similar facts:

We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is

¹ Although not critical to the decision here, it should be noted that the Supreme Court has never held that its reference to “misinformation of constitutional magnitude” in *Tucker*, 404 U.S. at 447, somehow requires a showing beyond proof that the court actually relied upon inaccurate information as part of the basis for a sentence. The Supreme Court used that language in *Tucker*, and in subsequent *dicta*, see *Roberts v. United States*, 445 U.S. 552, 556 (1980), merely to describe the nature of the specific misinformation at issue in *Tucker*, i.e., the sentencing court’s erroneous belief that two prior convictions were constitutionally valid when they in fact were obtained without the assistance of counsel, rather than adding some unidentified level of magnitude that erroneous sentencing information must surmount before violating due process. Actual reliance upon erroneous information at least in part as the basis for a sentence violates due process and thus constitutes “misinformation of constitutional magnitude.” *Tucker, supra; Lechner v. Frank*, 341 F.3d 635, 639 (7th Cir. 2003), citing *Tucker, supra; United States ex rel. Welch v. Lane*, 738 F.2d 863, 865 (7th Cir. 1984).

now serving.

334 U.S. at 740.

Finally, Hepp, like the Wisconsin Court of Appeals and the lower federal courts, once again raises the canard that Simonson had improper contact with a 13-year-old girl as somehow curing the due process violation here. Hepp's Brief at 21. As explained in Simonson's Brief at 39-40, Simonson disputed those allegations before the sentencing court (R5:Exh.K:19-20), that court expressly held that their impact was "negligible at best" ((R5:Exh.K:24, 30; App. 150, 152), and the state Court of Appeal's suggestion that the sentencing court based its sentence in any way upon those allegations was thus patently unreasonable.

Because the sentencing court's view of Simonson's risk of reoffense, and thus his lengthy sentence, were based explicitly and primarily upon that court's erroneous generalizations about child sex offenders, the resulting sentence denied Simonson due process. *E.g., Tucker, supra*. Because the state Court of Appeals' conclusion to the contrary was based upon patently irrational factual assertions and its unstated legal rationale was either contrary to or an unreasonable application of controlling Supreme Court precedent, habeas relief is appropriate here.

CONCLUSION

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

Dated at Milwaukee, Wisconsin, April 30, 2008.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a reply brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 1,943 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 30th day of April, 2008, I caused 15 hard copies of the Reply Brief of Petitioner-Appellant Chas Simonson 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 Gregory M. Weber, P.O. Box 7857, Madison, WI 53707-7857.

Robert R. Henak