No. 07-2777

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID ARREDONDO,

Petitioner-Appellant,

v.

PETER HUIBREGTSE,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Wisconsin

No. 05 C 559

Lynn Adelman, *Judge*.

BRIEF OF PETITIONER-APPELLANT

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Dated: January 23, 2008

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Petitioner is in the custody of Warden Peter Huibregtse at the Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin based upon a state court conviction where his constitutional right to testify was violated. At the time David Arredondo filed his federal habeas petition, he was being held at the Green Bay Correctional Institution in the Eastern District of Wisconsin under Warden William Pollard. On April 13, 2006, before the district court ruled on his petition, Petitioner was moved to Warden Gregory Grams' custody at the Columbia Correctional Institution. State correctional facilities then moved Petitioner to his present location at the WSPF on September 21, 2007 in violation of Fed. R. App. P. 23(a). The Columbia Correctional Institution and the WSPF are in the Western District of Wisconsin.

The state has a pending motion before the district court for retroactive permission to transfer Petitioner that lays out these facts regarding the transfers. SA159-72.[1] The transfers did not, however, impact the jurisdiction in this case as Petitioner was free to bring his petition in either the district where he was being held or the district of the state court where he was convicted and sentenced. 28 U.S.C. § 2241(d). While he is currently being held in the Western District of

[1] "SA__" refers to the separate appendix and "A__" refers to the required appendix.

Wisconsin, the state court that convicted and sentenced him is in the Eastern District of Wisconsin.

The district court had jurisdiction to hear Arredondo's habeas petition pursuant to 28 U.S.C. §§ 2241, 2254. The district court denied Arredondo's petition, but granted a Certificate of Appealability. This Court has jurisdiction to review the district court's final order denying Arredondo's habeas petition. 28 U.S.C. §§ 1291, 2253.

The final judgment denying David Arredondo's petition for a writ of habeas corpus was entered on May 31, 2007. His notice of appeal was timely filed on June 27, 2007.

STATEMENT OF THE ISSUES

1. Whether the Wisconsin Court of Appeals unreasonably applied, or made decisions contrary to, governing Supreme Court precedent by finding constitutional the trial court's denial of Petitioner's request to testify. Alternatively, whether the Wisconsin courts' determinations of the facts necessary for weighing the restrictions placed on Petitioner's right to testify were unreasonable.

2. Whether denial of the right to testify is subject to harmless error.

3. Whether denial of the right to testify here constituted harmless error.

STATEMENT OF THE CASE

This case involves a federal habeas petition of a state court decision filed on May 20, 2005 pursuant to 28 U.S.C. § 2254. SA4. Ten years ago, Petitioner David Arredondo was found guilty of first-degree intentional homicide and second-degree sexual assault. He was sentenced to life without parole on the homicide charge and 20 years consecutive imprisonment on the sexual assault charge. SA52. Petitioner filed a postconviction motion in state court that alleged ineffective trial counsel, but after a hearing relief was denied.

Petitioner then appealed his conviction and postconviction motion to the Wisconsin Court of Appeals on the grounds that "(1) his constitutional right to testify was violated; (2) his trial counsel was ineffective; (3) the trial court erred when it denied his postconviction motion; (4) the sentencing court relied on an improper factor; and (5) his judgment should be vacated in the interest of justice." SA60-61. On all claims, the Court of Appeals affirmed Petitioner's conviction and the denial of his postconviction motion.

In his federal habeas petition to the Eastern District of Wisconsin, Petitioner raised three claims: (1) deprivation of his constitutional right to testify, (2) ineffective trial counsel, and (3) sentencing based on an improper factor. A1. The district court denied habeas relief on all three claims, but certified for appeal the deprivation of Petitioner's constitutional right to testify.

STATEMENT OF FACTS

On January 9, 1998, a jury found David Arredondo guilty of first-degree intentional homicide and second-degree sexual assault. SA277-78. Despite his request to testify before closing arguments or jury instructions had been given, the trial court refused to let Arredondo take the stand on his own behalf. SA249. The court felt Arredondo's request to testify was "a gross attempt to manipulate the system" rather than "an honest change of heart." SA261. In the Wisconsin Court of Appeals, Arredondo challenged this denial of his constitutional right to testify. SA60-61.

A. The Facts Provided by the Appellate Court

The Wisconsin Court of Appeals summarized the facts from Petitioner's trial as follows:

> David Arredondo was charged with sexually assaulting and killing Desiree Klamann. According to witnesses, Klamann was last seen alive with Arredondo at the Cinco de Mayo festival on May 4, 1997. Her naked and beaten body was found wrapped in a comforter in a garbage dumpster on May 8, 1997. The police discovered Arredondo's semen on the comforter and found Klamann's blood on the molding of Arredondo's bedroom. The police also saw that someone had recently painted half-way up the walls of Arredondo's bedroom. They sprayed luminol, a chemical designed to detect blood that is not otherwise visible to the unaided eye, on the walls and discovered blood un-derneath the paint.[2]

---

[2] The blood found on the apartment walls belonged only to Desiree Klamann. None of the blood belonged to David Arredondo, SA315-16; nor was the blood identified as belonging to the apartment's other occupant, Thomas Garza.

> Arredondo pled not guilty and went to trial. The State called several witnesses, including Arredondo's former roommate, Thomas Garza. Garza testified that, on May 4, 1997, he got back to the apartment he shared with Arredondo around 9:30 or 9:45 p.m. While Garza was in the kitchen getting a drink, he saw Arredondo run naked from his bedroom to the bathroom. According to Garza, he laughed and asked Arredondo what was going on. Arredondo told Garza that he had to "take a leak" and could not wait. After Arredondo returned to his bedroom, Garza went to his own bedroom, watched television in bed, and fell asleep. Garza testified that he heard a woman's voice while he was sleeping, but was not sure where the voice came from because his television was still on.
>
> The State also called as a witness Arredondo's former cellmate, Kurt Moederndorfer. Moederndorfer testified that, while he shared a cell with Arredondo at the Milwaukee County Jail, Arredondo told him about the crime. According to Moederndorfer, Arredondo met a woman at the Cinco de Mayo festival. Arredondo and the woman spent the day together drinking and having a "good time." Moederndorfer testified that Arredondo convinced the woman to go home with him, took her into his bedroom, and "tried to make his moves on her." Arredondo told Moederndorfer that, when the woman resisted, he grabbed her by the throat, choked her, and forced her to have sexual intercourse with him. When Moederndorfer asked Arredondo if the police had any evidence, Arredondo replied: "'I took care of that. . . . I painted the walls in the bedroom and got rid of a mattress and some kind of old rug . . . in a dumpster.'"

SA61-62.

B. Other Facts Presented at Trial

In addition to the facts summarized by the appellate court, the state presented evidence at trial that Klamann had trace amounts of cocaine in her system when she was killed, SA185; bite-marks on Klamann's breast matched up with the Petitioner's teeth, SA229-30, SA274-75; Petitioner had previously

sexually assaulted witness Kim Strandberg, SA186-222, SA270-71; and Petitioner had told a detective escorting him to the Medical Examiner's Office for a teeth exemplar that "You guys told me I'm going to jail for the rest of my life. You don't understand that accidents happen, that drugs and drinking are going on out there. Shit happens. Accidents happen." SA225-26.

C. The Facts David Arredondo Would Have Presented at Trial

If allowed to exercise his right to testify, Petitioner would have given the jury reason to consider the facts presented above in a different light. In particular, Arredondo would have testified that 1) he and Klamann had consensual sexual relations; 2) he did not remember biting her on the breast or any other place, but he and Klamann were very drunk, so he could have; 3) Thomas Garza came home while Arredondo and Klamann were having sex on the couch and watched them through peepholes in his room; 4) when Arredondo and Klamann were done having sex, Garza asked if they wanted to party with cocaine; 5) Garza did cocaine about five or six days per week and kept his cocaine in his room; 6) Garza gave Arredondo $20 to get cocaine; 7) Arredondo left Klamann with Garza and went searching for cocaine at two bars, but found none; 8) Arredondo did not do cocaine with Desiree Klamann or see her do any cocaine; 9) Arredondo returned to Garza's apartment between 90 minutes and

two hours later, but Garza would not let him inside; and 10) Garza told Arredondo that Klamann had already left. SA91-97.

Arredondo would further have testified that: 1) he talked to Moederndorfer about the complaint against him and the discovery in his case, but Moederndorfer lied on the stand when he claimed Arredondo confessed to sexually assaulting and killing Klamann; 2) Arredondo did not have keys to Garza's apartment; 3) Klamann "appeared healthy and normal" when Arredondo left her at Garza's apartment; 4) Joe Quilles saw Arredondo at the Corona Bar after he left Garza's apartment to look for cocaine; 5) the comment Arredondo made that "'shit happens'" when drugs and drinking are involved "meant that Thomas Garza must have killed the victim" and was made after police told him many times during interrogation that he should tell them he knew Garza killed the victim and he just "helped dump the body"; and 6) Arredondo did not sexually assault Kim Strandberg as she claimed on the stand.[3] SA88-90.

But David Arredondo was not allowed to testify to any of these things.

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[3] Arredondo was acquitted of sexually assaulting Strandberg at an earlier jury trial presided over by the same trial judge who heard the murder case here. *State v. Arredondo*, Milwaukee County Circuit Court Case No. F-953554.

D. The Conditional Waiver of Petitioner's Right to Testify

On the last day of evidence in Petitioner's jury trial, after the state had rested and before the defense presented its two witnesses, the trial court excused the jury and engaged Petitioner's counsel in a discussion of whether Arredondo would testify on his own behalf:[4]

> THE COURT: . . . It is my understanding the defense has two very brief witnesses to present before lunch and then the defendant will at that time make a decision about testifying. Is that right?
>
> MR. SCHATZ: That's correct.
>
> THE COURT: Has any preliminary decision been made in that regard?
>
> MR. WILLIAMS: Let's make the record before lunch if we can.
>
> THE COURT: I'd like to so we know what we're doing over the lunch break, so the decision should be made before the lunch break. It is my understanding the defendant has elected not to testify although wants to reserve the right to change after these two witnesses testify. Is that right?
>
> MR. SCHATZ: The defendant's elected not to testify, Your Honor.
>
> THE COURT: And that's a definite decision?
>
> MR. SCHATZ: That's a definite decision. I would say 99 percent definite. I don't expect anything from these two witnesses that would change his mind, but you never know.
>
> THE COURT: *We can address it again after the witnesses testify*, but let me just confirm with you, Mr. Schatz, that you have discussed the defendant's options with him in that regard.

[4] In these excerpts, Mr. Schatz was Petitioner's attorney and Mr. Williams was the state's attorney.

MR. SCHATZ: I have, Your Honor.

SA233-34 (emphasis added).

The court then turned to Petitioner and engaged in an extended waiver colloquy to confirm that he understood the consequences of waiver and indeed intended to waive his right to testify. SA234-35. Petitioner explained at his postconviction hearing that he waived his right to testify in the colloquy with the trial court, but he thought the waiver meant he would "wait to see" the evidence presented by his defense witnesses "and then . . . testify." SA289.

E. Petitioner Invokes His Right to Testify

After the colloquy between the trial court and Petitioner, two witnesses testified for Petitioner. A4. Defense counsel then rested and the state offered no rebuttal testimony. SA236-37. The court then told the jury "the evidentiary phase of the trial is now finished" and jury instructions would follow in the next phase of the trial. SA237.

The court did not revisit whether Petitioner sought to testify, as it said it would. The court addressed Petitioner only to ask if he wished to waive his right to a lesser included offense instruction and Petitioner responded that he wished to discuss it with his attorney, which the court suggested be done over lunch. SA239-40. With the jury gone, the court discussed a few jury instructions and then recessed for lunch. SA238-40.

Upon returning from lunch, Petitioner immediately sought to exercise his right to testify:

> THE DEFENDANT: [interrupting the court as proceedings reopened] Your Honor, excuse me, Your honor. I did not understand very well about when you were asking me the questions. My attorney advised me to say yes, but I didn't understand the question that I was yes-ing to when we ended about an hour or two hours ago.
>
> THE COURT: Are you talking about the lesser included issue?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Have you had a chance to talk about that since then with your counsel?
>
> THE DEFENDANT: No, I left then and I was thinking about it. The only person that could defend David Arredondo is David Arredondo, if I could --
>
> THE COURT: You're changing your mind about your decision to testify?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: So this doesn't have to do with a lesser included offense issue. This has to do with your decision not to testify.
>
> THE DEFENDANT: Yes, I did not understand. When you were asking me about the rights or whatever about testifying--
>
> THE COURT: Right.
>
> THE DEFENDANT: I did not understand. And I need to take that back, the yes answer that I gave you and tell you no, I do need to testify because the only one that can defend David Arredondo today is David Arredondo.
>
> THE COURT: Have you talked to your attorney about this?

THE DEFENDANT: I told him and he said no, I could not, but we had an argument earlier this afternoon when I was telling him about it, and he said he didn't give a shit what I did at this point, and I took it as he was not letting me understand what he was coming from.

THE COURT: All right. Mr. Schatz.

MR. SCHATZ: Your Honor, that's entirely false. Since the end of court and, of course, I can't discuss whatever Mr. Arredondo and I discussed in confidence. We have discussed quite a bit about whether he would take the stand and testify or not. I told him what the ramifications would be. We discussed it quite a bit this morning in closed quarters even during the trial. All I can say is Mr. Arredondo made the decision not to testify. I concur in that decision --

THE DEFENDANT: With his help, Your honor. He told me you're not testifying and I was confused. I did not know -- I did not understand, ma'am.

THE COURT: I don't want to get involved or in the middle of a dispute between attorney and client, but I need to make a record of what has transpired. Evidently you have changed your mind at this point in your decision not to testify in this case. Evidently that's also against advice of counsel apparently, and I don't know if the state has a position on that.

MR. WILLIAMS: They rested.

THE COURT: True.

MR. SCHATZ: That's right. And all I can say is, Your Honor, I rendered my advice, my professional advice to Mr. Arredondo not to testify. This is not something that just came about this morning. This is something which has been -- which we have discussed -- which we have discussed throughout my representation with him and throughout the day and throughout yesterday.

Regarding Mr. Arredondo not understanding or that he never saw me again after, your bailiffs can certainly -- your bailiffs can certainly attest to the fact that after we broke this morning, I was in

the back with Mr. Arredondo while he was in the bullpen. We met back there this morning after we broke for maybe 20 minutes, half an hour. I fully explained everything to him at that point as far as whatever questions he may have. I believe I've answered all the questions.

Regarding lesser included offenses, as was stated earlier, I don't believe there is anything in the record to justify --

THE COURT: I don't think that's the issue at this point.

THE DEFENDANT: I did not understand --

MR. WILLIAMS: What maybe I would ask is we take a break and Mr. Schatz and Mr. Arredondo go back and see if they can resolve their difference.

THE COURT: That's what I would suggest. Why don't you have a brief conversation in the bullpen about this issue, and counsel and I will talk about the change in this turn of events. We'll be in recess.

SA240-44.

F. The Court Considers Arredondo's Request to Testify

After a long recess, the court returned to the record. The Petitioner confirmed his intention to testify and the court laid out the factors before it in considering whether to allow him to do so:

THE COURT: All right. We're back on the record in State of Wisconsin versus David Arredondo. Everyone is present and accounted for except for the jury. The jury remains in the jury room. I need to confirm with you, Mr. Arredondo, whether it is still your intention to attempt to revoke your previously made decision to not testify in this case. Is that still your intention at this time?

THE DEFENDANT: It is my intention to testify, yes, Your Honor.

THE COURT: All right. And you discussed this further during this recess with your counsel, Mr. Schatz; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Mr. Schatz, is that correct, you discussed that with your client?

MR. SCHATZ: Yes, it is, Your Honor. He did express his desire to me to essentially reopen the defense case and be allowed to testify.

THE COURT: All right. I need to inquire about certain things, first of all. I have during this recess attempted to find some Wisconsin case law on this situation, and I have not been successful in doing so. I haven't found any case law that governs an attempt to revoke a previously made decision not to testify, and I don't believe there is any Wisconsin case law on that point based on my limited and brief search over the course of the last 45 minutes or so. In any event, it seems to me to be controlled by a couple different factors.

Number one, whether the defendant's previously announced decision was knowing and voluntary and was a knowing and voluntary waiver of the constitutional right to testify.

And number two, what prejudice there would be to the state and the system if allowing the defendant -- if the court allowed the defendant to revoke that decision. So it depends on those various factors.

I have also had the court reporter transcribe the discussion and colloquy on the record that I had with the defendant concerning his right to testify or not to testify in this case, and I have also taken the liberty of consulting the previous transcript of the trial in the Kim Strandberg episode at which the defendant elected to testify, and I had practically the same discussion and colloquy on the record with the defendant at that time.

During the course of this trial when I did elicit from the defendant his decision in this regard, he made an unequivocal decision that it was his decision not to testify in this case and that he made it in consultation with counsel, but it was, nonetheless, his decision, and he understood what his options were in that regard. There was a qualifier put on that by counsel having to do with this

being a 99 percent decision, that he might change his mind after the two defense witnesses testify, but that wasn't anticipated.

The record should reflect that I observed a conversation between attorney and client after the two defense witnesses testified which appeared to be a conversation concerning the defendant's previously made decision not to testify and whether that was still the case, and then the record reflects that the defense rested. I need to confirm, Mr. Schatz, that that is indeed what was occurring during that very brief off the record consultation between you and Mr. Arredondo before you rested your case. Is that correct?

MR. SCHATZ: Before I answer that, Your Honor, the brief conversation Mr. Arredondo and I did have was still governed at that point by attorney-client privilege, so I can, if that privilege, if that privilege for that very limited perhaps 15, 20 second discussion or whatever it was is waived, I can state for the record what it was about.

THE COURT: Mr. Arredondo? Well, I would construe the present situation to constitute a per se waiver of the attorney-client privilege for this limited purpose. The defendant is maintaining at this time that he didn't know what he was doing when he waived his right to testify in this case, and so in that sense we are in almost a postconviction type posture in which a waiver of the attorney-client privilege for the limited purpose of inquiring into what transpired between attorney and client is deemed made by the defendant, so that is the situation I will find that we are in and ask you to confirm or deny, whichever is the case, that that is indeed what was discussed.

MR. SCHATZ: I will consider that to be a court order. Yes, after the last defense witness testified, and I believe that was Mr. Erwine, and he left the witness stand just before resting, I did make a final confirmation with Mr. Arredondo. I asked him this is the last chance, are you sure you do not want to testify. He said, "I don't want to testify." At that point we rested.

THE COURT: All right. With that supplementation of the record, I need to know, Mr. Williams, what your situation is as far as prejudice to the state by the defense attempt or the defendant's

attempt to reopen his case and take the witness stand in his own defense in this case.

MR. WILLIAMS: The witnesses were released, and whether they can be relocated or not, I believe they probably could. I don't know what difficulty there would be. I know we've relocated some of the witnesses, but that's basically the posture we're in. We released the witnesses at noon.

THE COURT: So at this point not all of the potential rebuttal witnesses have been relocated.

MR. WILLIAMS: All of them have not been relocated at this point.

THE COURT: All right. And it was my understanding that there would be upwards of 10, perhaps as many as 15 rebuttal witnesses.

MR. WILLIAMS: The possibility exists of about 10 rebuttal witnesses.

SA244-48.

G. The Court Denies Petitioner His Right to Testify

The court then denied Petitioner his right to testify with the following:

THE COURT: All right. It also should be noted that we have a sequestered jury in this case which now has been kept waiting in the jury room for the totality of the afternoon so for almost three and a half hours while these issues were discussed and while we were preparing jury instructions to proceed to the final phase of the case, so that's also a significant factor.

Based on my review of the transcript of this proceeding and what the defendant indicated to me in a very unequivocal fashion was his decision and his firm decision not to testify in this case made in consultation with counsel and with the full awareness of all his options in that regard, and based on my review of the transcript of his prior trial where he made a different sort of decision but based on similar consultation with counsel and a similar colloquy with me concerning that issue, and based on what has just been made as a

> supplementation of the record by Mr. Schatz as to what transpired between attorney and client before the defense finally rested its case in this matter, I will find the defendant made a knowing and voluntary and irrevocable decision not to testify in this case, and his request to reopen his case in order to take the witness stand and testify in his own defense is denied. This is also based on the substantial prejudice that would exist to the state and the system and the sequestered jury in order to reopen the case at this time. I think the defendant knew full well what he was doing –
>
> THE DEFENDANT: You're wrong, Your Honor. I did not know.
>
> THE COURT: His decision to testify or not to testify in this case, that decision is not capable of being revoked, so your request, Mr. Arredondo, in this regard is denied. It is, however, too late in the day to proceed with closing arguments, so we will recess until 9 o'clock tomorrow morning at which time we will proceed with instructions and closings.

SA249-50.

Before recessing for the day, a lengthy argument between defense counsel and Petitioner occurred where Petitioner said his counsel was lying and contended counsel told him, rather than advised him, not to testify. SA250-53.

H. The Court Supplements the Record

The next day before the jury was brought in for presentation of the jury instructions and closing arguments, the court revisited the discussion from the day before. Petitioner's attorney restated his assertions that he had met with Petitioner and discussed Petitioner's right to testify numerous times. He also asserted that prior to resting, he had conferred with Petitioner to let him know

that it was his last chance to testify and asked whether Petitioner wished to do so. Petitioner, in turn, claimed his counsel was lying. SA254-58.

After asking the state if it wished to make any record on the matter and being told no, the court added its own thoughts:

> THE COURT: I think the record should be very clear, to the extent it wasn't made clear yesterday, that I regard Mr. Arredondo's conduct yesterday afternoon on this issue of whether to testify or not to testify simply another attempt to manipulate rather than any change of heart or any misunderstanding.
>
> There is no support for your claim, Mr. Arredondo, that you misunderstood, and there is no support for your claim that you were doing what your attorney told you and not what you wanted to do. The record fully supports my conclusions in this regard. You told me directly and in an unequivocal fashion that you did not wish to testify.
>
> THE DEFENDANT: Let me prove my opinions to –
>
> THE COURT: Mr. Arredondo, you may not interrupt me nor anyone else in this courtroom or I will have to eject you from the courtroom if you continue with this behavior. Is that clear?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: There was no honest change of heart in this case. This is an attempt to manipulate the justice system.
>
> THE DEFENDANT: No.
>
> THE COURT: I'm not through. If you interrupt again, I will eject you from the courtroom.
>
> The defendant was fully advised of his rights in this regard both by me and by his counsel. He was advised of the same rights in the prior trial involving Kim Strandberg who testified in this case. He represented in the prior trial a full understanding of his rights to testify or not to testify in that matter. His attorney represented on the record in that matter that he fully understood his right and

> options in that regard, and I am fully satisfied that the defendant understands what the situation was, understood what the situation was, made an informed, knowing and voluntary decision in that regard, which under the circumstance can lead only to the conclusion that this is theatrics and that this is playing for the cameras, perhaps, and that this is a gross attempt to manipulate the system and I cannot allow it under the circumstances. This is not simply an honest change of heart under any stretch of the imagination.
>
> So the record should be very clear on that point for any future appellate purposes.

SA259-61.

SUMMARY OF THE ARGUMENT

David Arredondo was denied his constitutional right to testify by the state trial court. The Wisconsin Court of Appeals failed to indulge every reasonable presumption against waiver of that right in finding Arredondo's waiver was not conditioned upon the impending testimony presented by his defense witnesses. It also neglected to reasonably apply governing Supreme Court precedent when it 1) found Petitioner's waiver to be knowing and intelligent and 2) upheld the trial court's failure to consider the important interests of Petitioner's right to testify. Since Petitioner thought the trial court would address his right to testify once more, his waiver was not knowing and intelligent. As the last known witness to see the victim alive, and as the defendant, Arredondo's testimony was entitled to significant weight. Allowing his testimony would have created little, if any, prejudice to the state's case or to the trial court's procedures. In these

circumstances, prohibiting Arredondo's testimony was a disproportionate measure for preserving fairness to the state and an orderly presentation to the jury.

In addition, as the trial court failed to develop the prejudicial impact to the state of allowing Petitioner's testimony and did not even consider the prejudice to Petitioner of disallowing the same testimony, it was unreasonable in its determination of the facts necessary to ascertain whether the restrictions placed on Petitioner's right to testify were proportionate to the purposes they were designed to serve. In upholding the trial court, the Wisconsin Court of Appeals was equally unreasonable in determining the necessary facts.

The denial of Petitioner's constitutional right to testify prevented him from offering evidence that only he could provide. As Petitioner sagely stated to the trial court, "I do need to testify because the only one that can defend David Arredondo today is David Arredondo." Whether or not Arredondo's testimony would have ultimately swayed the jury is impossible to gauge, but as every piece of evidence relied upon by the district court in its harmless error determination would have been altered by a jury giving credence to Arredondo's testimony, denying his right to testify was not harmless error. Moreover, it does not matter if the error was harmless or not because the state waived its harmless error argument by not presenting it to the district court.

STANDARD OF REVIEW

Denial of a habeas petition is reviewed *de novo* while findings of fact are reviewed for clear error. *Barrow v. Uchtman*, 398 F.3d 597, 602 (7th Cir. 2005).

As David Arredondo filed his habeas petition in May of 2005, his petition is subject to the amended provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, habeas relief may be granted to a state prisoner held "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Relief is appropriate where a state court decision "was contrary to, or 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).

A state court has acted *contrary to* clearly established federal law for habeas purposes when it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). An *unreasonable application* of clearly established federal law has occurred when a state court:

1) "'identifies the correct governing legal rule from [Supreme Court precedent] but unreasonably applies it to the facts of the particular state prisoner's case,'" *Malinowski v. Smith*, 509 F.3d 328, 335 (7th Cir. 2007),

2) "'unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or,'" *id.*,

3) "'unreasonably refuses to extend that principle to a new context where it should apply.'" *Id.*

Deference is not due the state court's determinations under AEDPA; rather, federal courts are limited to granting relief in situations where the state court decisions were unreasonable. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997). Thus, a reviewing federal court interprets the governing Supreme Court precedent *de novo*, but grants relief only if the state court decision falls outside the bounds of a reasonable application of that precedent. Whether the state court decision was reasonable is a question for this Court, which is reviewed on a "case-by-case basis." *Schaff v. Snyder*, 190 F.3d 513, 522 n.7 (7th Cir. 1999).

Habeas relief is also appropriate where the state court decision "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)(2). Where a state court's factual findings are not supported by substantial evidence, or where no factual findings are made at all, an unreasonable determination of the facts has occurred. *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (citing *Ward v. Sternes*, 334 F.3d

696, 705-08 (7th Cir. 2003) and *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999)).

ARGUMENT

I. The State Denied Petitioner's Constitutional Right to Testify

In *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987), the Supreme Court recognized a defendant's right to testify as a constitutional right grounded in the Fifth, Sixth, and Fourteenth Amendments. The Court recognized the right to testify as "[e]ven more fundamental to a personal defense than the right of self-representation." *Id.* at 52. The right to testify on one's own behalf is "essential to our adversary system." *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring).

In *Rock*, the Court acknowledged that the right to present relevant testimony from witnesses could be limited "'in appropriate cases'" but noted any restrictions placed on the defendant's right to testify "may not be arbitrary or disproportionate to the purposes they are designed to serve." 483 U.S. at 55-56. The Court explained a decade later that the defendant's interest in testifying is "particularly significant," which is why "a defendant ought to be allowed to present his own version of events in his own words." *United States v. Scheffer*, 523 U.S. 303, 315-16 (1998) (internal quotation marks omitted) (explaining the significance of *Rock*).

Rock set out the terms of its own application. For a reasonable application of *Rock*, "a State must evaluate whether the interests served [in restricting defendant's testimony] justify the limitation imposed on the defendant's constitutional right to testify." 483 U.S. at 56. Because the Wisconsin state courts denied Petitioner his constitutional right to testify based on rulings contrary to governing Supreme Court precedents or unreasonably applied those precedents, Petitioner is entitled to habeas relief.

A. Petitioner's Waiver of His Right to Testify Was Not Knowing and Intelligent

The right to testify is considered a personal right that the defendant must choose to exercise or waive, not counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The waiver of a constitutional right must be voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 748 (1970). The waiver must be "done with sufficient awareness of the relevant circumstances and likely consequences" of the waiver. *Id.* When reviewing the waiver of a fundamental, constitutional right, "'courts indulge every reasonable presumption against waiver.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "'[A]cquiescence in the loss of fundamental rights'" is not presumed. *Id.*

The appellate court failed to indulge every reasonable presumption against a complete waiver of Petitioner's constitutional right to testify contrary to the holding of *Zerbst*. It is clear from the facts presented in the record that

Petitioner's waiver was not knowing and intelligent because he did not understand the relevant circumstances of his waiver as required by *Brady*. In finding otherwise, the Wisconsin Court of Appeals unreasonably applied *Brady* to the facts presented.

Petitioner's colloquy with the trial court would have been adequate for a knowing waiver of his right to testify if the colloquy's context had not confused Petitioner about what he was waiving. In particular, Petitioner thought his waiver was conditioned upon the testimony offered by the remaining witnesses. It would appear the trial court thought the same.

Just before engaging in the waiver colloquy with Petitioner, the trial court asked Petitioner's attorney whether the decision to waive was "definite" because the trial court understood "defendant has elected not to testify although [he] wants to reserve the right to change that after these two witnesses testify." SA234. Petitioner's counsel answered, "I would say 99 percent definite. I don't expect anything from these two witnesses that would change his mind, but you never know." *Id.* The court responded, "We can address it again after the witnesses testify . . . ." *Id.* The court then engaged Petitioner in the waiver colloquy. With the predicate condition in his mind that the waiver would be addressed again with the court after the upcoming testimony, Petitioner waived the right to testify. *Id*. Such a waiver could not be considered a knowing waiver

of the right when Petitioner thought the court would revisit the waiver question with him.

In reviewing Petitioner's habeas request, the district court correctly stated that the Supreme Court has never held a trial court must "engage in a personal colloquy with a defendant about whether he wishes to testify or elicit a formal waiver of the right to testify" and the Seventh Circuit has held neither is required. A16 (citing *United States v. Brimberry*, 961 F.2d 1286, 1289-90 (7th Cir. 1992)). S*ua sponte* colloquies regarding a defendant's right to testify are not required for fear of "'intruding inappropriately on the attorney-client relationship'" by inserting trial judges "'into a sensitive aspect of trial strategy,'" the decision about whether to testify or not. *United States v. Stark*, 507 F.3d 512, 516 (7th Cir. 2007) (quoting *United States v. Manjarrez*, 258 F.3d 618, 624 (7th Cir. 2001)). To that end, where there is "no indication that the defendant's desire to testify was at issue," a court has no duty to inquire into defendant's decision. *Id.* at 518. But where there is "something concrete" on which to find waiver was not knowingly or voluntarily made, as indicated by the facts here, an inquiry is needed. *Id.* While the Supreme Court does not require a colloquy about the right to testify, it does require a waiver be knowing and voluntary. *Brady*, 397 U.S. at 748. The waiver here did not meet that standard as there is explicit evidence Petitioner did not understand his waiver to be unconditional.

The record is replete with indications that the trial court 1) knew Petitioner's right to testify was at issue and 2) was intimately involved in the process of determining whether defendant was waiving that constitutional right. But instead of ensuring that Petitioner had waived his right to testify in a knowing and intelligent manner as required by *Brady*, the trial court ultimately confused Petitioner into thinking he would have the opportunity to address the matter directly with the court after his final witnesses testified. When it became clear that he would not, Petitioner immediately raised the issue at his next opportunity and conveyed that he had misunderstood what it was he "was yes-ing to" during the earlier waiver colloquy. SA240. The Wisconsin courts were correct that David Arredondo had been advised by his attorney and understood his right to testify —the things he in fact thought he "was yes-ing to"— but they were unreasonable in finding that he also understood the court would not directly "address . . . again" the waiver of his right to testify. He attempted to explain the misunderstanding once more when trial resumed the next morning, before jury instructions or closing arguments had been given. He pleaded with the court, "Let me prove my opinions to [you]," but the court would not allow him to speak. SA260. Without a knowing and intelligent waiver of his fundamental right to testify, the Wisconsin Court of Appeals unreasonably applied *Brady* to Petitioner's waiver.

The Court of Appeals identified the knowing and voluntary requirements of waiver and identified waiver as a mixed question of fact and law. SA64. The Court of Appeals also correctly found, based on Petitioner's lone waiver colloquy with the trial court, that he was "aware of his right to testify." SA66. But the Court of Appeals was unreasonable in concluding that Petitioner's waiver was knowing and voluntary based on the facts before it.

The Court of Appeals relied upon three findings to determine if Petitioner's waiver was knowing and voluntary: 1) trial counsel's confirmation during trial that he asked his client about testifying and the client said, "'I don't want to testify'"; 2) the trial court's finding that defendant was fully advised of his right to testify and understood that right and the attending consequences of waiver based on proceedings against him in a prior trial; and 3) trial counsel's testimony at the postconviction hearing that defendant did not tell counsel he wished to testify before the defense rested. SA66-68.

None of these facts undermines the clear indications that Petitioner understood his waiver to be conditional and understood the trial court would address his waiver again. Given his strong disagreements with trial counsel as represented in the record regarding his right to testify, Petitioner had to count on addressing his right to testify with the court as promised rather than addressing it through his attorney. It is not surprising, then, that Petitioner chose not to

argue with counsel about testifying, saying he did not want to testify, and choosing instead to wait until the direct colloquy the court intimated was forthcoming to invoke the right to testify. When it became clear such a colloquy was not forthcoming, Petitioner notified the court of his intention to testify at the first opportunity. As the right to testify is a personal one to be waived by the defendant, *see Barnes*, 463 U.S. at 751, he was correct in expecting another opportunity to discuss his waiver with the court after it promised to address the issue again.

Only the trial court's finding regarding Petitioner's prior trial remains to support the Court of Appeals' determination that a knowing and voluntary waiver occurred and that finding cannot bear the weight required of it. No one disputes Petitioner understood his right to testify based on a prior trial, the trial court's colloquy with Petitioner, and the advice of his attorney. What is disputed is whether Petitioner understood that his waiver was not conditioned upon the waiver being revisited by the trial court after the two defense witnesses testified. No evidence suggests that he understood his waiver to be unconditional; the strong evidence already presented indicates that he did not.

To find Petitioner's waiver was knowing, intelligent, and "done with sufficient awareness of the relevant circumstances" is an unreasonable

application of *Brady*'s requirements when faced with the facts before the Wisconsin Court of Appeals.[5]

B. Petitioner Revoked His Waiver and Invoked His Right to Testify

Even if this Court finds Petitioner's waiver of his right to testify was knowing and intelligent, Petitioner clearly changed his mind and decided to testify before jury instructions had been given or closing arguments had occurred. In so doing, he revoked the waiver and invoked his right to testify. If the right to testify is a personal right that must be waived by the defendant, the decision to revoke that waiver must similarly lie with the defendant and not his counsel. To deny that request to testify, the Wisconsin courts needed to follow the procedure laid out in *Rock.* As the district court explained, "*Rock* establishes a methodology for reviewing a decision denying a defendant's request to testify." A18.

"[R]estrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55-56. To apply *Rock*, the Wisconsin courts needed to ask whether the "interests served" by restricting Petitioner's testimony "justif[ied] the limitation imposed on [his] constitutional right to testify." *Id.* at 56.

[5] The district court did not address this issue in depth, noting only that it presumed the Wisconsin Court of Appeals' "findings of fact" correct and that they were not unreasonable. A17.

In its review, the Wisconsin Court of Appeals ruled a defendant must exercise his right to testify during the evidence-taking stage. SA68 (quoting *United States v. Jones*, 880 F.2d 55, 59 (8th Cir. 1989)). The appellate court added that reopening the evidence-taking stage lies in the discretion of the trial court. *Id.* It identified the interests served by limiting testimony under these rules as avoiding prejudice or potential disruption of the proceedings and noted, mostly in line with *Rock*'s holding, that those interests must be weighed against the value of the defendant's testimony.[6] *Id.* (quoting *United States v. Peterson*, 233 F.3d 101, 106 (1st Cir. 2000)). But in weighing the facts before it, the Court of Appeals acted unreasonably.

As earlier noted, whether an application of the law to the facts is unreasonable is reviewed by this Court on a "case-by-case" basis. This Court does not defer to the state court rulings, but if it finds those rulings reasonable, it may not provide habeas relief. The Wisconsin Court of Appeals acted unreasonably in two ways. First, under 28 U.S.C. § 2254(d)(1), the Court of Appeals unreasonably applied *Rock* in not finding the restrictions imposed on Petitioner's right to testify disproportionate to the interests served by those restrictions. Second, under 28 U.S.C. § 2254(d)(2), the Wisconsin courts were

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[6] These interests parallel the concerns about "'prejudice [to] the prosecution'" and "'interfere[nce] with the orderly flow of the trial'" articulated by this Court in *Ortega v. O'Leary*, 843 F.2d 258, 262 n.4 (7th Cir. 1998) and cited by the district court. A18-19.

unreasonable in their determination of the facts necessary to apply *Rock* appropriately.

1. Wisconsin Court of Appeals Unreasonably Applied *Rock*

"The term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). The task of determining whether a decision is unreasonable or not is left to this Court, so while only Supreme Court precedents (and not Seventh Circuit precedents) are authoritative in defining "clearly established Federal law" under AEDPA, *see Young v. Walls*, 311 F.3d 846, 851 (7th Cir. 2002), Seventh Circuit opinions do provide authority for defining the reasonableness of an application of Supreme Court precedent.

a. Ortega v. O'Leary *requires a finding of unreasonable application.*

An abuse of discretion is unreasonable by definition. *Greviskes v. Universities Research Ass'n*, 417 F.3d 752, 758 (7th Cir. 2005) ("Abuse of discretion exists only where the result is not one that could have been reached by a reasonable jurist or where the decision of the trial court strikes us as fundamentally wrong or is clearly unreasonable, arbitrary, or fanciful.") (internal quotation marks omitted). In *Ortega v. O'Leary*, 843 F.2d 258 (7th Cir. 1988), this Court found an abuse of discretion under *Rock* in circumstances nearly identical

to those that occurred in this case. *Id.* at 262 ("we . . . view the trial judge's refusal to reopen the evidence to include Ortega's testimony as an abuse of discretion"). According to this Court then, the circumstances here are the very definition of an unreasonable application.

Daniel Ortega was convicted on two counts of indecent liberties with a child and received concurring sentences of nine years each. *Id.* at 259. He was not a sympathetic or respectful defendant. This Court described his behavior as "contumacious" and noted "[t]he record reveals disruptive behavior on Ortega's behalf as well as hostility between Ortega and the prosecutor, a situation which made the proceedings more difficult." *Id.* at 261. Like David Arredondo, Ortega was denied the right to testify after his attorney rested and the court adjourned for lunch. *Id.* at 259-60. Like David Arredondo, Ortega interrupted the proceedings and invoked his right to testify when the trial court returned from lunch. *Id.* In fact, Ortega waited longer than Arredondo, as the jury had reentered the courtroom and the judge had informed the jury that closing arguments would soon begin. *Id.* Like David Arredondo, Ortega attempted to interrupt again and was silenced by the judge. *Id.* at 260. Finally, like David Arredondo, when the court questioned counsel, Ortega's attorney said that he and his client had decided Ortega would not testify to which Ortega protested and said his attorney was lying. *Id.* Ortega's attorney said that in all his years as a public

defender, "he had never refused a defendant who wished to exercise the right to testify." *Id.*

Ortega also claimed he thought he could still testify after a lunch break and after his attorney "'rested.'" *Id.* at 260. Ortega claimed confusion about what "'rested'" meant because Spanish was his native language, *id.*, but there is no reason to think anyone without legal training, let alone a person of David Arredondo's education level,[7] would understand specific formalities that accompany the term either.

This Court found Ortega's request to testify after the defense had rested, but before closing arguments, "could not have been more timely made." *Id.* at 262 n.4. It decided the district court's refusal to reopen the proceedings and let Ortega testify was an abuse of discretion, i.e., an unreasonable decision. *Id.* at 262. Denial of the right to testify was an unreasonable application of *Rock* in *Ortega* and so it must remain unreasonable on essentially the same facts here.

b. The Wisconsin Court of Appeals failed to consider the value of Petitioner's testimony.

According to the federal district court, the Wisconsin Court of Appeals relied upon three bases in finding the trial court need not reopen the trial to let Petitioner testify. A18. First, the Court of Appeals noted that the decision to

[7] The Wisconsin Department of Corrections lists David Arredondo's reading level as 1.1. SA169. The state equates 1.1 to a first-grade reading level.

reopen was discretionary. SA68. The district court discounted this reason. It explained while it is generally true that reopening the evidentiary stage of trial is discretionary, that discretion is subject to *Rock*. A18-19. Employing *Ortega*'s application of *Rock* it found the trial court's failure to reopen here analogous to the abuse of discretion in *Ortega*. *Id.* Second, the Court of Appeals relied upon Petitioner's waiver as well as the trial court's characterization of Petitioner's request to testify as nothing more than an attempt to "'manipulate the system.'" SA68-69. In discounting this explanation, the district court cited *Ortega* again, finding the "contumacious" nature of the defendant irrelevant in weighing his right to testify and recognizing that waiver remains subject to *Rock*'s calculus. A19. As such, the district court found the difference between invoking one's right before resting "a formality, really," and after resting, not a "reasonable ground upon which to deny the right to testify." A18-19. Finally, the Court of Appeals weighed the value of Petitioner's testimony against the prejudice to the state, the "'system,'" and the jury. SA68-69. The district court found the Court of Appeals erred by considering the value of Petitioner's testimony, but decided the Court of Appeals properly considered the prejudice to the prosecution and the jury. A20. Although it questioned the weight given by the Court of Appeals to this prejudice, the district court decided it could not find these grounds unreasonable for denying Petitioner's right to testify. *Id.*

The problem with finding this last ground reasonable for upholding the Wisconsin Court of Appeals is that *Rock* requires the restrictions placed on a defendant's testimony be proportionate such that the "interests served" by the restrictions must "justify the limitation imposed on the defendant's constitutional right to testify." 483 U.S. at 56. Without evaluating the potential value of Petitioner's testimony, it is impossible to ascertain whether the limitations on his testimony were disproportionate or justified. Contrary to the district court, the Court of Appeals was correct that it needed to consider the value of Petitioner's testimony, in addition to considering the fundamental nature of the right. Where the Court of Appeals was unreasonable was in failing to do that precise evaluation.

The record makes clear that the trial court never asked Petitioner what he would testify to, which makes it impossible to weigh the value of his testimony. The Wisconsin Court of Appeals explained in a footnote: "Arredondo did not present any evidence from which the trial court could evaluate the likely value of his testimony. He simply told the court that he wanted to testify because 'the only one that can defend David Arredondo is David Arredondo.'" SA69. But the record makes clear Arredondo never presented any evidence because the court neither asked him to do so nor gave him an opportunity to do so. The trial court thought it only needed to consider prejudice to the state, not prejudice to

Petitioner, so it only investigated the former prejudice before making its ruling. SA245-50.

If the trial court or the Court of Appeals had considered Petitioner's potential testimony, it is difficult to imagine not finding great prejudice to Petitioner. In *Malinowski v. Smith*, 509 F.3d 328, 336 (7th Cir. 2007), this Court recently engaged in an AEDPA review of the *Rock* precedent to determine whether the denial of a witness's testimony by the state court "was disproportionate to the purpose the exclusion was designed to serve" and found it significant that 1) the excluded testimony in *Rock* was that of the defendant rather than another witness, and 2) the defendant in *Rock* was the only one who could testify about certain important evidence, namely the event of the murder. Both of these factors suggest that Petitioner's testimony carried substantial importance in this case, such that the interests served by restricting his testimony needed to be quite important to avoid being disproportionate to the restrictions placed on his testimony.

Moreover, the restrictions placed on Petitioner's testimony were far greater than those placed on Vickie Rock's testimony. The trial court here did not limit Arredondo's right to testify — it eliminated the right. The state courts overturned by *Rock* did not go so far. The *Rock* trial court allowed Vickie Rock to testify, but limited her testimony "to matters remembered and stated to the examiner prior

to being placed under hypnosis." 483 U.S. at 47 (internal quotation marks omitted). In *Rock*, the content of testimony was limited, but the fundamental right to testify was not eliminated.

c. The prejudice to the state and jury were minimal.

Rather than overturning the trial court for failing to consider, determine, or even raise the value of Petitioner's testimony, the Wisconsin Court of Appeals looked to only one half of the equation and relied upon the trial court's perfunctory ruling that substantial prejudice would be done to the state and the jury by reopening the case to allow the testimony. The prejudice identified by the trial court and relied upon by the Court of Appeals was minimal. The trial court offered two items of factual support for its ruling of prejudice: 1) some of the state's rebuttal witnesses could not be immediately retrieved, and 2) the jury had been sequestered for over three days and had been waiting for more than three hours while the right to testify was being sorted out. SA245, SA248-49.

But the state itself did not claim that reopening the evidence to allow Petitioner's testimony would prejudice it. The state explained the rebuttal witnesses had been excused, but noted it had already relocated some of the witnesses and "believe[d it] probably could" locate the rest. SA248. At the postconviction hearing, the state further clarified that any out-of-town rebuttal

witness had been recovered. SA297-303. The remaining witnesses were locals. SA300-03. The state did not claim prejudice because it was not prejudiced.

Had Arredondo exercised his right to testify before the defense rested and before the lunch break, the state would have found itself in largely the same position. After the lunch break, the court found only enough time to debate Arredondo's right to testify before recessing for the day without beginning the jury instruction phase. If Arredondo had exercised his right to testify before the lunch break, then upon returning from that break, his testimony would have taken most of the remaining day. All of the rebuttal witnesses could not have testified that afternoon. Thus, if the court had reopened the evidentiary stage, the state could have presented the rebuttal witnesses on hand after Petitioner's testimony and then presented the remaining rebuttal witnesses the next day after they had been relocated. The prejudice to the state was too minimal to assert.

The prejudice to the jury was also minimal. The jury had been told prior to trial that they could be sequestered well into the weekend and possibly the start of the following week. SA174-82. Allowing Petitioner to testify would have fit into this promised time frame. As for confusion, the jury had been told the jury instructions would be the next phase of the trial, SA237, but it is unlikely the jury would have been confused if the court had simply explained that a change had occurred and Petitioner would be testifying. As this Court explained in *Ortega*,

invocation of the right to testify after the defense had rested and after the lunch break, but before the jury instructions, "could not have been more timely made." 843 F.2d at 262, n.4. Petitioner understands the invocation of the right to testify can be a tricky matter because *post hoc* posturing can occur after trial. *Cf. Underwood v. Clark,* 939 F.2d 473, 475-76 (7th Cir. 1991). But Petitioner engaged in no *post hoc* shenanigans; rather, he invoked his right to testify before the case was handed over to the jury. He should have been heard.

2. Wisconsin Courts Were Unreasonable in Determining Facts Necessary to Apply *Rock*

The Wisconsin Court of Appeals acted unreasonably *beyond* applying *Rock* unreasonably. By failing to gather the evidence necessary to consider the value of Petitioner's testimony, the trial court (and the Court of Appeals in its approval) was also unreasonable in determining the facts necessary to apply *Rock.* Where state courts fail to gather the evidence necessary to engage in the analysis demanded by Supreme Court precedent, habeas is appropriate under 28 U.S.C. § 2254(d)(2). *Taylor*, 366 F.3d at 999. If reasonableness is reviewed under § 2254(d)(1) on a "case-by-case" basis, the same analysis is appropriate here. As already explained in Subpart I-B(1)(b) of this argument, the Wisconsin courts failed to gather facts necessary to engage in a reasonable analysis of the value of Petitioner's testimony. Therefore, habeas could be granted under § 2254(d)(2).

* * * * * * *

Mr. Arredondo may not have been a sympathetic, model defendant. The problem is that rather than enforcing the system's safeguards and allowing Arredondo to testify, thereby undermining the attempts at manipulation claimed by the court, the trial court let its altered perception of Petitioner's actions manipulate it into going outside those safeguards and denying Petitioner's fundamental right to testify on his own behalf. For the reasons stated above, habeas relief is appropriate even under the stringent requirements of AEDPA.

II. The Harmless Error Doctrine Is Inapplicable Here

The district court relied upon harmless error to shore up its analysis, something that was not relied upon by the state appellate court.[8] As the state did not raise harmless error in response to Petitioner's habeas petition, the argument was waived under the law of this Circuit and the district court should not have engaged in harmless error analysis *sua sponte*. Furthermore, the law of this Circuit appears to be in flux as to whether or not the right to testify can be subject to harmless error.

A. The State Waived Harmless Error

When the state fails to argue harmless error to the district court, the argument is waived. *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005)

[8] While the state raised harmless error in response to Petitioner's appeal in the state courts, SA56-59, it abandoned that argument on federal habeas review. SA98 (documenting no harmless error argument made by the state).

("Respondent did not make th[e harmless error] argument in the district court, so it is waived"); 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 31.2a (5th ed. 2005) ("Like other defenses to habeas corpus relief, the 'harmless error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense."). Waiver may be forgiven "when the 'harmlessness of the error or errors found is certain' and 'a reversal would result in protracted, costly, and ultimately futile proceedings" in the courts below. *Sanders*, 398 F.3d at 582 (quoting *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991)). As demonstrated in Part III of this argument, harmlessness is far from certain in this case, so the state's waiver of the issue should not be forgiven.

Waiver of the harmless error argument is appropriate here for at least three reasons. First, Petitioner cannot and should not be forced to anticipate the state's defenses or raise those defenses for it. "Procedural rules apply to the government as well as to defendants." *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (state "forfeited what would have been its best argument"). Petitioner was accorded no procedural favors in this case as the district court properly found his sentencing claim had been procedurally waived. A24-25. The state should be similarly treated. Second, by raising harmless error *sua sponte*, the district court deprived Petitioner of the opportunity to explain why denial of his

right to testify was not harmless. Absent briefing on the matter, the district court is more likely to err in its analysis, as Part III demonstrates it did here. Third, a failure to uphold waiver provides the state with two bites at the apple. Without a waiver here, the state could have presented its merits argument at the initial hearing and then moved for rehearing on the harmless error issue if the initial ruling was not in its favor. *Giovannetti*, 928 F.2d at 226. This Court employs waiver to prevent such tactics. *Id.*

B. Harmless Error Should Not Apply to the Right to Testify

In *Ortega v. O'Leary*, 843 F.2d 258, 262-63 (1988), this Court found denial of the right to testify subject to a harmless error analysis. This Court has questioned, however, whether that standard is correct. *Underwood*, 939 F.2d at 475 ("The argument against is that there comes a point at which the desire to spare the courts superfluous proceedings because if conducted properly they can have but one result must yield to the right of an accused not to be condemned without some minimum forms of law."). Subsequent decisions have suggested that "Seventh Circuit precedent *seems* to support" the use of harmless error analysis in evaluating denials of the right to testify. *Barrow v. Uchtman*, 398 F.3d 597, 608 n.12 (7th Cir. 2005). To the extent the matter remains an open question, Petitioner urges a harmless error analysis not be applied to the denial of his right to testify.

The right of an accused "to present his own version of events in his own words" is "[e]ven more fundamental to a personal defense than the right of self-representation." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). If the right to self-representation is not subject to harmless error analysis, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984), it stands to reason the right to testify should also avoid harmless error. The importance of "affirm[ing] the accused's individual dignity and autonomy," which is the reason "the right to appear *pro se* exists," *id.* at 178, is no less of a concern in allowing a defendant to testify on his own behalf. "[T]he right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others." *Id.* at 177.

III. Denial of Petitioner's Right to Testify Did Not Constitute Harmless Error

When reviewing for harmless error, "the standard for determining whether habeas relief must be granted is whether the . . . error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)(internal quotation marks omitted). On appeal, Petitioner does not assert that the state appellate court or the district court clearly erred in their representations of the facts presented at trial. Rather, he suggests the facts that he was not allowed to present at trial in the form of his own testimony had a substantially injurious effect on the jury's verdict, as his testimony would have 1) directly contradicted certain testimony presented at

trial and 2) placed many facts from the trial in a different light so the jury may have found different inferences to draw from those facts.

It is impossible to see how harmless error could have occurred here, given every fact relied upon by the district court's harmless error analysis would have been contradicted or placed in a different light by Petitioner's testimony. Specifically, the district court found harmless error because the evidence suggested: 1) the victim was "last seen alive . . . in the company of [P]etitioner," and she and Petitioner were headed to Petitioner's home; 2) the victim was killed in Petitioner's room; 3) "the victim's body was found in a dumpster next to [P]etitioner's house, wrapped in a blanket . . . contain[ing] traces of [P]etitioner's semen"; 4) Petitioner acknowledged to a police officer that when drinking and drugs are involved, "accidents happen"; 5) Kim Strandberg testified to a similar assault by Petitioner; 6) the jailhouse snitch Kurt Moedendorfer claimed Arredondo admitted the sexual assault to him; and 7) Petitioner's bite marks were found on the breast of the victim. A21-22. With the exception of the jailhouse snitch's testimony,[9] all of this evidence is consistent with Arredondo's story that he had consensual, though rough, sex with the victim before going in search of cocaine to use in continued partying with Garza and the victim, and

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[9] The alleged assault on Kim Strandberg, of which Petitioner was acquitted, *supra* note 3, is not inconsistent with Arredondo's innocence in this case. Her testimony does raise an inference that Arredondo may have committed the crime here, but Petitioner's testimony —if allowed— would have challenged the truth of Strandberg's allegations.

that when Arredondo returned, Garza told him the victim had left, thereby suggesting Garza may have killed the victim as Arredondo, SA88-97, and a lie detector test taken by Garza suggested. SA311-12. David Arredondo was not allowed to tell that story. The jury never got to determine whether they believed Arredondo or Moedendorfer, a criminal whose several run-ins with the law included a case that was pending during Arredondo's trial. SA34. The jury never heard Arredondo's testimony placing Thomas Garza as the last person in the victim's company before she died and explaining that he meant Garza must have killed the victim when he told a detective "'shit happens.'" SA88.

The jury certainly may not have believed David Arredondo had he testified. But his testimony would have placed in doubt the meaning of all the evidence that the district court found in support of harmless error and left good reason to believe that Thomas Garza was actually involved in the murder, not Arredondo. Had David Arredondo testified, the state's rebuttal witnesses might have given the jury reason to question his credibility. But it was for the jury to decide whether they found Arredondo's testimony credible, and they were denied that testimony. The district court cannot claim, as it did, that the denial of Arredondo's right to testify on his own behalf was harmless error.

Only in this harmless error analysis does Petitioner's trial differ substantially from that of Daniel Ortega. In *Ortega v. O'Leary*, 843 F.2d 258, 262

(7th Cir. 1988), even though the denial of the defendant's right to testify was a constitutional violation, this Court found Ortega's testimony did not have a substantial and injurious effect on the jury because his testimony predominately added cumulative evidence. The only new evidence neither contradicted the evidence presented by the state nor substantially changed the inferences that could have been drawn from it, so denying Ortega the right to testify was harmless error. *Id.* at 263. It is clear from his proffer and affidavit, the facts David Arredondo would have testified to were neither cumulative nor inconsequential. As such, the denial of his right to testify was not harmless error.

CONCLUSION

For the reasons stated above, Petitioner David Arredondo requests this Court 1) issue a writ of habeas corpus relieving him of the unconstitutional adjudications of the Wisconsin state courts or issue an order directing the district court to issue such a writ, and 2) grant any other such relief the court finds appropriate. As Petitioner has been transferred to custody in the Western District of Wisconsin, he requests the order granting his relief be entered in the records of that district court in accord with 28 U.S.C. § 2241(a), as well as the Eastern District of Wisconsin where his petition was first filed.

Dated: January 23, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for Petitioner David Arredondo certifies that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and contains 11,682 exclusive of the table of contents, table of authorities, bound appendix, and certificates of counsel.

Dated: January 23, 2008

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J. Bishop Grewell

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned counsel of record for Petitioner David Arredondo hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), a version of the brief and all of the appendix items that appear to be available electronically in non-scanned, searchable PDF format.

Dated: January 23, 2008

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J. Bishop Grewell

CIRCUIT RULE 30(d) CERTIFICATION

Pursuant to Circuit Rule 30(d), counsel of record for Petitioner David Arredondo hereby certifies that all materials required by Circuit Rules 30(a) and (b) are included in the Appendices.

Dated: January 23, 2008

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J. Bishop Grewell

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that I served on the counsel listed below by U.S. mail, postage prepaid, on January 23, 2008, two copies of the Brief and Required Appendix of Petitioner-Appellant David Arredondo, one copy of the Separate Appendix of Petitioner-Appellant David Arredondo, and an electronic version of the Brief and those parts of the Appendix that I have filed pursuant to Circuit Rule 31(e):

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Dated: January 23, 2008

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