
**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.*

REPLY BRIEF OF PETITIONER-APPELLANT

DAVID ARREDONDO

J. Bishop Grewell
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606-4637
Telephone: (312) 701-8608
Attorney for Petitioner-Appellant

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ORAL ARGUMENT REQUESTED

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ARGUMENT

This case is about *Rock v. Arkansas*, 483 U.S. 44 (1987), and what constitutes a reasonable application of its holding. *Rock* provided the constitutional analysis that a state must apply to limit a defendant's right to testify. In essence, it dictated the due process requirements for removing the right to testify from a defendant. An unreasonable application of *Rock*'s holding warrants granting petitioner's habeas request. See 28 U.S.C. § 2254(d). By failing to consider the value of David Arredondo's testimony as part of *Rock*'s required constitutional analysis, the Wisconsin courts unreasonably applied *Rock* and denied him the process required to strip his right to testify. He should be granted habeas relief.

I. Wisconsin Courts Did Not Evaluate Whether Denial of Testimony Was Disproportionate to Interests Served by the Denial

Restrictions on the right to testify are valid only if they are not "arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 56. "[A] State *must evaluate* whether the interests served . . . justify the limitation imposed." *Id.* (emphasis added). These rules of *Rock* comprise "the constitutional analysis that is necessary when a defendant's right to testify is at stake." *Id.* at 58. A state court that does not comply with the constitutional analysis set out by *Rock*, because it has ignored whether a restriction is proportionate, has unreasonably applied *Rock*.

An unreasonable application occurs when a state court “‘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) (alteration in original). In the present case, the Wisconsin Court of Appeals correctly identified *Rock* and its relevant legal rules. Citing a First Circuit application of *Rock*, the Wisconsin Court of Appeals wrote, “A trial court must consider ‘whether the likely value of the defendant’s testimony outweighs the potential for disruption or prejudice in the proceedings, and if so whether the defendant has a reasonable excuse for failing to present the testimony during his case-in-chief.’” SA 68 (quoting *United States v. Peterson*, 233 F.3d 101, 106 (1st Cir. 2000)) (emphasis added). But after identifying the rules of *Rock*, the Wisconsin Court of Appeals failed to apply them to the facts of Arredondo’s case in a reasonable manner: neither the appellate court nor the trial court ever weighed the value of Arredondo’s testimony.

The state¹ suggests “[i]t is clear that the trial court weighed Arredondo’s right to testify against the disruption to the trial . . . and the prejudice to the state.” Resp. Br. at 16. This is not true. There is no evidence anywhere in the

¹ Given the changing wardens involved in this case before the district court and on appeal, Arredondo referred to the opposition as the state in his opening brief. For simplicity, he continues that convention here, while acknowledging that his current custodian is Peter Huibregtse.

The state’s brief is referred to as Resp. Br. throughout this brief. Petitioner David Arredondo’s brief is referred to as Pet’r. Br.

record of the trial or the analysis of the Wisconsin Court of Appeals that suggests Arredondo's right to testify was weighed. The state trial court certainly weighed the disruption to the trial and the prejudice to the state, but it failed to weigh Arredondo's right to testify. There are two sides to every set of scales: the trial court placed items on one side without considering any items for placement on the other.

David Arredondo would be in a different position if the trial court or the Wisconsin Court of Appeals had considered the value of his potential testimony and then found that the prejudice to the state and the disruption outweighed that potential testimony. Neither court did this. They both weighed the prejudice to the state and the disruption and determined that these outweighed any testimony Arredondo might offer without considering what his testimony or its metaphysical weight might be. This analysis is not a reasonable application of *Rock's* requirement that the trial court "must evaluate" whether eliminating David Arredondo's testimony was justified by the interests served in so restricting his right to testify.

While the obligation to weigh the value of Arredondo's testimony was on the Wisconsin courts, the record makes clear Arredondo tried more than once to explain the value of his testimony. When he first invoked his right to testify, Arredondo stated "The only person that could defend David Arredondo is David

Arredondo, if I could --" SA241. The trial court cut him off. It turned its focus to whether Arredondo had consulted his attorney in this matter, without letting him explain the value of his testimony. SA241-44. But discussion with Arredondo's attorney was irrelevant as the right to testify is personal to the defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). David Arredondo made a second attempt to explain the value of his testimony: "Let me prove my opinions to --" SA260. The court cut him off again and told him that if he interrupted further, he would be ejected from the courtroom. *Id.* Arredondo asks this Court to look at the record and determine for itself whether the Wisconsin courts allowed him to offer up his potential testimony for weighing against the restrictions imposed upon it.

Failure to consider the value of Arredondo's testimony constituted an unreasonable application of *Rock*.

II. *Ortega* Guides the Reasonableness Inquiry Here

Reasonableness is the second of two steps involved in determining 1) unreasonable applications of 2) "'clearly established Federal law.'" See *Williams v. Taylor*, 529 U.S. 362, 409-12 (2000) (O'Connor, J., concurring) (analyzing "'unreasonable application'" and "'clearly established Federal law'" as separate questions). For the first step, the Supreme Court precedent representing "'clearly established Federal law'" is identified. Only Supreme Court precedents

represent “clearly established Federal law.” Seventh Circuit precedents do not. *Young v. Walls*, 311 F.3d 846, 851 (7th Cir. 2002). The Supreme Court precedent offered by David Arredondo is *Rock v. Arkansas*, 483 U.S. 44 (1987).

The second step asks whether the challenged state court decision *reasonably* applied the identified Supreme Court precedent. In conducting the reasonableness inquiry, this Court may look to its own precedents. *Schaff v. Snyder*, 190 F.3d 513, 522 n.7 (7th Cir. 1999). AEDPA does not limit the reasonableness inquiry to Supreme Court precedent.

It is for the reasonableness inquiry that Arredondo relies upon *Ortega v. O’Leary*, 843 F.2d 258, 261 (7th Cir. 1988). *Ortega* is a pre-AEDPA habeas case in which this Court reviewed a state court decision to determine, among other things, whether the state court had properly applied *Rock’s* governing precedent in restricting the defendant’s right to testify. This Court found that the state court had not only applied *Rock* erroneously, but had also *unreasonably* applied *Rock* by failing to carry out the constitutional analysis demanded by the rules of *Rock*.

“[C]ourts should carefully consider a defendant’s request to exercise his or her constitutional rights, particularly the right to testify.” *Id.* at 261. The trial court in *Ortega* did not do so. It never inquired into Ortega’s potential testimony; instead, it directed him to remain silent after he interrupted twice to assert his

right to testify, *id.* at 260, just as the trial court here did to David Arredondo. By not inquiring into Ortega's testimony, the trial court had no basis for determining whether denial of his testimony was justified or proportionate.

This Court found that restricting the defendant's testimony without considering its possible content reflected an abuse of discretion. *Id.* at 262 ("we may view the trial judge's refusal to reopen the evidence to include Ortega's testimony as an abuse of discretion"). As this Court has made clear, "[a]buse 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.*'" *Greviskes v. Universities Research Ass'n*, 417 F.3d 752, 758 (7th Cir. 2005) (emphasis added). The *Rock* analysis undertaken by the trial court in *Ortega*, and the analysis undertaken in Arredondo's case, were unreasonable by definition. Even if we accept the state's position that "*Rock* clearly establishes that a state court may not 'arbitrarily exclude[] material portions' (or all) of a criminal defendant's testimony," Resp. Br. at 10, the standard is met. Whether one refers to a decision as unreasonable, arbitrary, or fanciful, abuse of discretion encompasses all three. *Greviskes*, 417 F.3d at 758.

The state courts here made the same mistake as the state court in *Ortega*. They unreasonably applied *Rock* by denying Arredondo's right to testify without

weighing his testimony against the restrictions placed upon it to determine whether the restrictions were disproportionate.

The state is confused about *Ortega's* applicability because it conflates 1) the reasonableness inquiry with 2) the identification of the relevant Supreme Court precedent that stands for “clearly established Federal law.” The state correctly identifies that Arredondo is relying on *Rock*, Resp. Br. at 8, but then mistakenly suggests Arredondo is claiming the Wisconsin Court of Appeals unreasonably applied *Ortega*. Resp. Br. at 16. This is incorrect. Arredondo is arguing the Wisconsin Court of Appeals unreasonably applied *Rock*. He is only using *Ortega* to establish the unreasonableness of *Rock's* application in this case, not to establish “clearly established Federal law.” This Court determines reasonableness for itself. *Ortega's* determination that an identical state court ruling was unreasonable in applying *Rock* is therefore controlling here.

Because Arredondo is using *Ortega* for the reasonableness inquiry, the state's concern that *Ortega* is a pre-AEDPA case, Resp. Br. at 17, is irrelevant. When Justice O'Connor wrote that unreasonable “is a common term in the legal world and, accordingly, federal judges are familiar with its meaning,” *Williams*, 529 U.S. at 410, she surely did not mean that it became common with the passage of AEDPA. The Supreme Court and AEDPA expect federal courts to rely on the

institutional knowledge expressed by their circuit precedents when determining reasonableness.

Because *Ortega* found an identical application of *Rock* to be an abuse of discretion,² it did not reach “a different result in a similar case [thereby] demonstrat[ing] another reasonable outcome.” Resp. Br. at 18. Rather, it found the analysis done in *Ortega*, and therefore here, unreasonable.

III. The State Focuses Its Analysis on Two Inapposite Supreme Court Decisions

The state’s brief spends much of its analysis on two inapposite Supreme Court decisions. Resp. Br. at 11–15. In *Carey v. Musladin*, 127 S. Ct. 649 (2006), and *Wright v. Van Patten*, 128 S. Ct. 743 (2008), the Supreme Court focused on whether the lower courts had identified the correct governing Supreme Court precedent. Unlike *Musladin* and *Van Patten*, there is no dispute that *Rock* is the governing precedent here. The Wisconsin Court of Appeals properly relied on holdings applying *Rock*, the district court identified *Rock* as the governing precedent, and the state’s brief concedes that *Rock* governs. The question here is

² The state is confused about the importance of an abuse of discretion here as it incorrectly suggests Arredondo offers abuse of discretion “the federal law *Rock* clearly establishes.” Resp. Br. at 10. This is not what Arredondo is suggesting. But even if it were, the state goes too far in saying that *Rock*’s holding does not address discretion. *Id.* (“*Rock*’s holding does not address the exercise of discretion”). *Rock* does not use the word “discretion,” but its holding clearly limits the discretion afforded a court in restricting a defendant’s right to testify. The restrictions “may not be arbitrary or disproportionate.” *Rock*, 483 U.S. at 55–56.

whether the Wisconsin Court of Appeals reasonably applied *Rock*'s rules of analysis for limiting the right to testify. *Musladin* and *Van Patten* do not help answer that question.

In *Musladin*, the 9th Circuit applied “test . . . stated in *Williams and Flynn*” for determining the prejudicial effect of state-sponsored courtroom practices in order to determine the prejudicial effect of privately-sponsored courtroom practices. 127 S. Ct. at 651–52 (referring to test from *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986)). The Supreme Court reversed. It found no Supreme Court holding “required the [state court] to apply the test of *Williams and Flynn* to the spectators’ conduct here.” *Id.* at 654. Absent governing Supreme Court precedent on the question, the Court noted that the state court decision was neither contrary to nor an unreasonable application of clearly established federal law. *Id.*

Similarly, in *Van Patten*, the Supreme Court overturned a 7th Circuit decision that the state courts had applied the wrong Supreme Court precedent. In *Van Patten*, the state court applied the test from *Strickland v. Washington*, 466 U.S. 668 (1984) for ineffective assistance of counsel and found no prejudice. 128 S. Ct. at 744. The 7th Circuit, however, felt the state court should have applied the test from *United States v. Cronin*, 466 U.S. 648 (1984). *Id.* at 745. *Van Patten*, 128 S. Ct. at 745. The Supreme Court disagreed. “No decision of this Court . . .

clearly establishes that *Cronic* should replace *Strickland* in this novel factual context.” *Id.* at 746. Because the 7th Circuit itself had conceded “[u]nder *Strickland*, it seems clear Van Patten would have no viable claim” and the Supreme Court decided *Strickland* should apply, the Court determined “it cannot be said that the state court “unreasonabl[y] appli[ed] clearly established Federal law.”” *Id.* at 746–47 (alterations in original). Once again, the circuit court had erred in identifying the governing precedent and attending test that represented clearly established federal law. The question of clearly established federal law is not in dispute here.

In this case, the state does not deny that the test from *Rock* is the appropriate one to apply, nor could it. *Rock* establishes the test for all restrictions on a defendant’s right to testify. Therefore, *Musladin* and *Van Patten* are inapposite because the state and Arredondo agree that the Wisconsin Court of Appeals identified the correct test. The disagreement is whether the Wisconsin Court of Appeals applied that test reasonably.

The state’s suggestion that “[a]s in *Musladin* and *Van Patten*, this case presents a novel fact situation,” Resp. Br. at 15, is an act of legerdemain. Every case is a novel fact situation. The novelty of the facts is irrelevant. What mattered in *Van Patten* was that the case “present[ed] [a] novel . . . question.” 128 S. Ct. at 745 (emphasis added) (first alternation not in original). *Van Patten*’s

facts were relevant only because they made it unclear whether the case fell under the purview of the test from *Strickland* or the test from *Cronic*. Finding *Strickland* to be the default test for ineffectiveness of counsel, *id.* at 745–46, the Supreme Court could not fault the state court for applying it rather than *Cronic*.

Unlike *Van Patten*, the facts here clearly fall under a specific Supreme Court precedent. *Rock* provides the default test for determining when a defendant’s right to testify may be restricted. Unless *Rock*’s holding is unduly narrowed to situations involving evidentiary rules about hypnosis, David Arredondo’s case presents no novel question but rather calls for a straightforward application of *Rock*. *Rock* offered a broad holding regarding the analysis required when the right to testify is restricted, a point which the state has conceded: “*Rock* clearly establishes that a state court may not ‘arbitrarily exclude[] material portions’ (or all) of a criminal defendant’s testimony.” Resp. Br. at 10 (alteration in original). As *Rock* covers the situation here, the only question is whether the state court applied its holding reasonably. *Van Patten* and *Musladin* offer no insights to that inquiry.

If the novelty of the facts (rather than the question presented) controlled the inquiry, a general rule such as *Rock*’s could never be applied unreasonably. But that is not the case. “That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not ‘require state and federal

courts to wait for some nearly identical factual pattern before a legal rule must be applied.” *Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007) (quoting *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring)). A federal court may find the application of a principle unreasonable even when it involves facts “different from those of the case in which the principle was announced.” *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

Ineffective assistance of counsel claims may be the clearest exposition that general rules can be applied unreasonably. In the seminal AEDPA case of *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000), the Supreme Court found the state courts had unreasonably applied *Strickland*’s general test requiring a showing of deficient performance that prejudiced the defense. In *Wiggins v. Smith*, 539 U.S. 510, 527–28 (2003), the Court also applied *Strickland*’s general test and found that because the court of appeals “merely assumed that [defense counsel’s] investigation was adequate” rather than following the analysis required by *Strickland* and “conduct[ing] an assessment” of whether defense counsel had been effective, the state court of appeals had unreasonably applied *Strickland*’s general test.

IV. Petitioner’s Waiver of His Right to Testify Was Not Knowing

Whether or not Arredondo waived his right to testify is irrelevant, because he revoked the alleged waiver and invoked his right to testify before closing

arguments. His invocation “could not have been more timely.” *Ortega*, 843 F.2d at 262, n.4. With his right to testify invoked, the Wisconsin Court of Appeals had to weigh the right against the restriction imposed upon it. No where in its brief does the state address Arredondo’s contention that he revoked waiver and invoked his right to testify.

The district court certified for appeal “whether the Wisconsin Court of Appeals unreasonably applied *Rock v. Arkansas*, 483 U.S. 44, 55–59 (1987), when it found that petitioner’s right to testify was not violated when the trial court denied petitioner’s right to reopen his case and testify.” SA158. For the reasons stated above, to the extent this Court finds the validity of Arredondo’s alleged waiver irrelevant to answering the questions presented, Arredondo has no objections to the state’s suggestion (Resp. Br. at 4–5) that the issue of waiver is not properly before the court. But if waiver is relevant to the certified question, then it is part and parcel of the question granted in the certificate of appealability (COA) and we would ask the Court to find Arredondo did not knowingly waive his right to testify.³

³ Contrary to the state’s assertion, Resp. Br. at 4–5, the Wisconsin courts’ unreasonable determination of the facts necessary to reasonably apply *Rock* is part and parcel of the question presented on review here as well. An unreasonable application involves a mixed question of law and fact. The state has taken an unduly narrow view of the issues encompassed by the question certified on appeal. Arredondo would ask the Court to address the issues

The state suggests that if he needed to, Arredondo could not meet § 2253(c)(2)'s standard for issuing a COA on whether or not his waiver was voluntary. Resp. Br. at 5. This is an odd statement because Arredondo has never suggested the purported waiver was not voluntary. Instead, Arredondo focused on whether the waiver was *knowing*, a position for which he has made more than a substantial showing, Pet'r. Br. at 23-29,⁴ and a position for which the state has provided no answer. The state apparently would like to take Arredondo's waiver colloquy with the trial court out of its context and have this Court forget the colloquy was prefaced by the trial court's promise to address the issue of waiver again after the defense presented its two witnesses. See Pet'r. Br. at 24-25. The state can argue that Arredondo knowingly and voluntarily provided a *conditional* waiver with predicate conditions that were never met, but it cannot honestly suggest that he knowingly provided an unconditional waiver.

V. Harmless Error Was Waived

The state admits that it waived harmless error. Resp. Br. at 20. But it suggests that "it makes no sense that this court consider only Arredondo's view that the district court's finding of harmless error was wrong." *Id.* at 20-21.

briefed to the extent they are necessary to determine whether the Wisconsin Court of Appeals unreasonably applied *Rock*.

⁴ At several points, Arredondo's opening brief did indeed claim that his waiver was not knowing and voluntary. Pet'r. Br. at 27-28. But the context makes clear that Arredondo was only suggesting the waiver was not knowing and, therefore, could not be construed as knowing *and* voluntary.

Arredondo agrees. This Court should consider neither Arredondo's argument that the finding of harmless error was wrong, nor the state's argument that the finding was correct. Instead, the Court should find harmless error waived by the state and therefore an illegitimate ground for the district court to rely upon in denying Arredondo's habeas petition.

The state would like this Court to review harmless error and suggests *Simer v. Rios*, 661 F.2d 655, 671 n.28 (7th Cir. 1981), allows a court to review issues not briefed or argued. Resp. Br. at 21. But *Simer* dealt with an issue not briefed or argued by the parties on appeal, rather than issues which were neither briefed nor argued before the district court. *Simer* also acknowledged that "courts ordinarily should not discuss those issues not briefed or argued by the parties." 661 F.2d at 671 n.28.

An exception to the waiver rule on harmless error should not be granted here for precisely the reasons previously briefed by Arredondo. Pet'r. Br. at 40-42. Equity suggests the state should not be given two bites at the apple by allowing it to try to win on the merits while holding the harmless error defense in reserve should it fail. In *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990), this Court found the state of Illinois had waived its harmless error argument by not raising it in relation to the defendant's habeas petition. The Court wrote, "[the state] has forfeited what would have been its best argument. If as a result a

violent offender goes free, the Attorney General . . . must understand where the responsibility lies.” *Id.* The responsibility for arguing harmless error was the state’s. It did not meet that responsibility.

Of perhaps greater concern than equity, the district court’s *sua sponte* analysis of harmless error is likely to lead to mistakes of the sort that occurred here when the district court failed to consider facts and/or factors which most certainly would have arisen through adversarial briefing and which would have impacted its analysis of the harmless error question. The district court completely failed to consider how Arredondo’s testimony would have shed different light on the facts upon which it based its harmless error finding. Trial counsel would certainly have briefed the issue if raised, as he did before the Wisconsin Court of Appeals. *See* Docket 5, Ex. D at 12–13.

VI. The Error Was Not Harmless

Arredondo reiterates his opening brief arguments that the error here was not harmless. *See* Pet’r. Br. at 43–46. The denial of Arredondo’s testimony had a “substantial and injurious effect . . . [in determining] the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (internal quotation marks omitted). Unlike *Ortega*, the evidence that Arredondo would have offered was not cumulative. The state’s need to rely upon additional facts not offered at trial in order to argue harmless error demonstrates that preventing Arredondo from testifying was not

harmless. *See* Resp. Br. at 28–29 (offering evidence provided at Arredondo’s postconviction hearing). All of the back-and-forth between Arredondo’s facts and the state’s facts suggests these were matters for a jury, not for argument in appellate briefs. Arredondo and his jury were denied the opportunity to address those facts in the Wisconsin courtroom where Arredondo was convicted.

Whether or not “Arredondo’s testimony smacks of a story manufactured to explain away the state’s evidence,” Resp. Br. at 29, was something for the jury to decide. The Wisconsin courts never allowed it to do so.

CONCLUSION

The question here is whether the Wisconsin Court of Appeals’ analysis was reasonable in light of *Rock*. David Arredondo argues the Wisconsin courts unreasonably applied *Rock* by denying his right to testify without evaluating whether such a restriction on that right was disproportionate to the interests served by denying it. Whether or not he waived the right to testify is ultimately irrelevant to this question because he revoked that waiver and invoked his right to testify in a timely manner.

Discussing the implications of *Rock v. Arkansas*, 483 U.S. 44 (1987), in another AEDPA case, this Court explained that “[i]f [petitioner] had been prohibited from testifying entirely, the Wisconsin Court of Appeals would certainly have ordered a new trial.” *Morgan v. Krenke*, 232 F.3d 562, 570 (7th Cir.

2000). The Court added, "If by some chance the case got to us before some other court corrected the error, we would waste no time finding that a decision upholding [petitioner's] conviction was 'contrary to' established Supreme Court precedent." *Id.*

David Arredondo was prohibited from testifying entirely, but the Wisconsin Court of Appeals did not order a new trial. The denial of Arredondo's right to testify was placed squarely before the court, but it did not correct the error. "[B]y some chance" the case has arrived in the Seventh Circuit "before some other court corrected the error." David Arredondo only requests that this Court "waste no time" in granting his habeas petition.

For the foregoing reasons, Petitioner David Arredondo repeats the request for habeas relief made in his opening brief. Pet'r. Br. at 46.

Dated: March 31, 2008

Respectfully submitted,

J. Bishop Grewell
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606-4637
Telephone: (312) 701-8608
Attorney for Petitioner-Appellant

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)(ii) and contains 4,338 words exclusive of the table of contents, table of authorities, and certificates of counsel.

Dated: March 31, 2008

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 reply brief.

Dated: March 31, 2008

J. Bishop Grewell

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that I served on the counsel listed below by certified mail on March 31, 2008, two hard copies and one electronic copy of the Reply Brief of Petitioner-Appellant David Arredondo:

Warren D. Weinstein
Office of the Attorney General
Wisconsin Department of Justice
17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857

Dated: March 31, 2008

J. Bishop Grewell