No. 09-2560

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSEPH STOCK,	)	Appeal from the United States
	)	District Court for the Northern
Petitioner-Appellant,	)	District of Illinois, Eastern Division
	)	
v.	)	No. 06 C 448
	)	
DONALD GAETZ, Warden,	)	The Honorable
	)	David H. Coar,
Respondent-Appellee.	)	Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

Petitioner-Appellant's jurisdictional statement is not complete and correct. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 2241, and 2254. Petitioner-Appellant, Joseph Stock (petitioner), filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1).[1] Petitioner was then, and is now, an inmate at the Menard Correctional Center, located in Menard, Illinois. Alan Uchtman was the Warden at Menard when petitioner filed his petition. Respondent-Appellee, Donald Gaetz, is currently the Warden at Menard and now appears as respondent on this Court's docket.

This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. By memorandum opinion and order dated and entered on March 31, 2009, the district court denied the petition. (Doc. 53) (A2-27). The district court entered judgment against petitioner in an order dated and entered March 31, 2009. (Doc. 52) (A1). Although no separate judgment on Form AO 450 was entered, the clerk's docket entry order (A1) constituted the final judgment. It is self-contained, complete, and unqualifiedly denied petitioner's petition for a writ of habeas corpus. *See Am. Nat'l Bank & Trust Co. of Chicago v. Sec'y of Housing & Urban Dev. of Washington, D.C.*, 946 F.2d 1286, 1289 (7th Cir. 1991). Consequently, the judgment order's reference to the district court's "Memorandum Opinion and Order" (A1) does not make it a non-final order. *Paganis v. Blonstein*, 3 F.3d 1067, 1071 (7th Cir.

[1] "Doc." refers to the District Court docket; "A" refers to petitioner-appellant's attached Appendix; "SA" refers to petitioner-appellant's Separate Appendix; and "Def. Br." refers to petitioner-appellant's opening brief.

1993) ("The fact that the district court's judgment entry included the phrase 'pursuant to memorandum opinion and order' does not turn a self-contained final judgment into a non-final order."); *see also Hope v. United States*, 43 F.3d 1140, 1142 (7th Cir. 1994) (where clerk did not complete Form AO 450 in § 2255 application, treating minute order form as separate document constituting judgment).

The judgment disposed of all parties' claims. No motion to alter or amend the judgment was filed. On April 12, 2009, petitioner moved for a certificate of appealability (CA), and on April 29, 2009, timely filed a notice of appeal. (Docs. 54, 55) (A28-29). The appeal was docketed on June 19, 2009. The District Court granted petitioner's CA request on June 18, 2009. (Doc. 58) (A30-31).

ISSUES PRESENTED FOR REVIEW

1. Whether the state court's application of the Supreme Court's general and fact-specific Confrontation Clause standard was objectively unreasonable where petitioner had the opportunity for extensive cross-examination, including the opportunity to challenge the witness's credibility, but was prevented from introducing self-serving exculpatory hearsay as part of that cross-examination?

2. Whether any error was harmless?

STATEMENT OF THE CASE

On September 13, 2002, in the Circuit Court of Cook County, petitioner was convicted of first degree murder for stabbing his ex-girlfriend to death. (Doc. 23, Exh. A, Common Law Record in *People v. Stock*, 01 CR-9983, Vol. 1 of 2 at C-6, C-

10). On November 1, 2002, that court sentenced petitioner to ninety years of imprisonment. (*Id.* at C-7).

On June 30, 2004, the Illinois Appellate Court, First District, affirmed the circuit court's judgment. (SA62). Petitioner then filed a petition for leave to appeal (PLA) (SA63-116), which the Illinois Supreme Court denied on March 30, 2005. (Doc. 23, Exh. E, *People v. Stock*, 829 N.E.2d 793 (Table) (Ill. Jan. 26, 2005)). Petitioner filed no state court postconviction petition.

On January 25, 2006, petitioner filed the instant federal habeas petition in the United States District Court for the Northern District of Illinois. The petition raised one claim: that petitioner's Confrontation Clause rights were violated when the trial court prevented him from confronting State's witness Alfonso Najera with evidence of a telephone conversation in which petitioner exclaimed his innocence to Najera. (Doc. 1; A32-42). The State answered on August 28, 2006. (Doc. 23). On March 31, 2009 the district court denied the petition. (Docs. 52, 53; A1-27).

On April 12, 2009, petitioner filed a notice of appeal and requested a CA. (Docs. 54, 55) (A28-29). On June 18, 2009, the district court granted a CA. (A30-31).

STATEMENT OF FACTS

All determinations of fact made by a state court are presumed to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. §2254(e)(1). Petitioner has not attempted to rebut the state court's findings of fact set forth below.

Trial

The evidence at trial showed that:

> On June 20, 1997, the victim, Connie Wagner, was found stabbed to death in the Wagner home at 1943 Jamestown Drive, Palatine, Illinois. [Petitioner] and the victim had dated since February 1997. By June 1997 the relationship had deteriorated. On the evening before the murder the victim told [petitioner] she was moving to Texas, [petitioner] got angry and told her she would never make it to Texas. On June 24, 1997 [petitioner] told his friend Alfonso Najera that he killed Wagner because he was angry. [Petitioner] did not testify. [Petitioner's] father and mother testified in his defense. In the defense case, Alan Rabagliati, a neighbor of the victim, testified that on the morning of the murder he noticed a young Hispanic male driving slowly down the street. [Petitioner] also offered evidence that the day after the murder he cooperated with the police and the clothes he gave to the police tested negative for blood. [Petitioner's] experts testified that the hair found under the victim's fingernail did not belong to the [petitioner] and there were no signs that the hair had been removed by force.
>
> * * *
>
> Michael Pope, a friend of Wagner's, listened in on a telephone conversation between Wagner and [petitioner] the afternoon before the murder. He testified that [petitioner] and the victim had a heated, half-hour argument over the phone. When the victim told [petitioner] she was moving to Texas, [petitioner] replied that she would never make it there.
>
> * * *
>
> It is not disputed that [petitioner's] fingerprints were not found at the crime scene. It is not disputed that the hair found under the victim's fingernail did not come from [petitioner]. It was clearly demonstrated by the defense that [petitioner] went to the Palatine Police Station the day after the crime and cooperated with police. The clothing his family supplied as having been worn by him on the day of the murder tested negative for blood. The victim was stabbed 186 times and [petitioner] did not have a scratch anywhere on his body. The State's pathologist confirmed that there was a major struggle. The defense argued that the crime scene reflected blood not only where the victim was found, but on two upper floors, suggesting that the victim battled her attacker

> while at least one other offender moved throughout the house cutting phone wires and leaving blood in other parts of the house.
>
> * * *
>
> Four days after the murder, [petitioner] confessed to his childhood friend, Alfonso Najera. The jury heard and evaluated Najera's testimony. Najera testified that [petitioner] described murdering the victim by making stabbing motions. [Petitioner] said he murdered the victim because he was angry, but Najera said that [petitioner] was expressing no emotion as he confessed. Najera did not immediately come forward with this information, rather, the police spoke to him between June and September of 1997. On September 4, 1997, Najera voluntarily accompanied the police from where he was working. Najera was at the police station several hours from September 4, 1997, until approximately 1 a.m. on September 5, 1997. At that time, Najera signed a statement which was written by a prosecutor and which contained statements Najera said [petitioner] made to him about the murder. The defense attacked the credibility of that statement by demonstrating that after the police obtained that information from Najera, [petitioner] was not arrested until February 22, 2001, over three years later.
>
> * * *
>
> The jury also heard and evaluated the credibility of State witnesses Julie Buscaglia, Julie Roth, and Bartek Trzbunia. These witnesses all waited years before recalling events that implicated [petitioner] in the murder. It also was not disputed that in the months immediately before her murder, the victim and Michael Pope were spending large amounts of money on drugs. The victim was in debt to her drug suppliers and pawned her personal possessions to pay her drug debts.

(A.44-47).

The appellate court added detail regarding Najera's testimony, and a recorded phone conversation with which petitioner wished to impeach him:

> According to Najera's testimony, [petitioner] confessed to Najera that he murdered the victim and Najera eventually reported that confession to the police. With Najera's consent, the police taped a telephone conversation between Najera and [petitioner] during which Najera agreed he would attempt to get [petitioner] to repeat the confession.

During the taped conversation Najera did not directly mention the confession, but made reference to it. [Petitioner] responded with exculpatory remarks and Najera said nothing to contradict the exculpatory reaction by [petitioner]. The following conversation reflects the exculpatory reaction by [petitioner], which was not contradicted by Najera.

> "[Petitioner]: It's a bunch of shit man. They ain't got nothing. I didn't do nothing – you know that.
>
> [Najera]: Yeah I know.
>
> [Petitioner]: It's just a bunch of shit. You know and I know that – what do you call it? – my ass would have been in jail a long time if I was guilty. You know what I'm saying.
>
> [Najera]: It's just bullshit man, you know. I got to miss work and shit."

* * *

Similarly, a few minutes later the following exchange ensued:

> "[Petitioner]: All it comes down to is you know and I know I didn't do this. You know and I know that I don't know who did or have any knowledge about the whole damn thing and they just want to make a bust on somebody to make themselves look good. You know. All they're going to try and do is intimidate you and all that kind of bullshit [phone cuts out for a second or two].
>
> [Najera]: Hello.
>
> [Petitioner]: You know?
>
> [Najera]: Yeah."

* * *

At other times during the conversation, [petitioner] stated that he did not commit the murder, that he does not know who did, and that Najera has no truthful information that would incriminate [petitioner]. Najera failed to respond that these assertions are false or contrary to [petitioner's] alleged confession. For example:

> "[Petitioner]: But then that is going to turn into a whole another thing because first off you'd be lying if you said what do you call it, any kind of negative thing regarding me – you know what I mean. Because I didn't do nothing and I don't know who did. So.
>
> [Najera]: Hey man, I got to get back to work dude.

> [Petitioner]: And look at it that way. It's been over a year. I haven't run. I got nothing to run from. I didn't move. I didn't all of a sudden disappear. You know what I mean? If I was guilty, my ass would have took off. And I'm just sitting here waiting for them to find out what the deal is, cause I want to know who's responsible myself. Do you think I don't want to know. That's it.
>
> [Najera]: Well I have to get back to business you know."

(SA47-49). The jury convicted petitioner of first degree murder, and petitioner was sentenced to 90 years in prison. (SA43).

Proceedings Regarding Najera's Testimony

Prior to trial, the People moved to exclude the taped conversation between petitioner and Najera as hearsay. (Doc. 23, Exh. A at Vol. 1, C-189). The People argued that there was no precedent in Illinois where a criminal defendant's self-serving, out-of-court statements were allowed to be used to impeach a State's witness. (SA132-33). Petitioner argued that Najera's failure to explicitly mention the confession, and his affirmation when petitioner protested his innocence were important to impeach Najera. (SA134-36).

The trial court held that petitioner's statements during the phone call were hearsay and inadmissible. (SA137). But the court held that petitioner could "ask [Najera] questions about [the telephone] conversation with [petitioner], and in fact that he never brought up the fact to [petitioner] that he previously confessed on a specific date." (SA139). The trial court also held that if Najera "open[ed] the door by denying that he did not confront [petitioner] about a previous statement, then I believe now the sum and substance of that transmission becomes relevant for the

purposes of impeachment." (*Id.*). However, "to allow the defense to bring [in] the actual conversation, would be pure hearsay." (*Id.*; SA142-44).

At trial, but before Najera testified, the People filed a motion to clarify the trial court's ruling regarding the taped conversation. (Doc. 23, Exh. F at C.256-57). They argued that when Najera asked petitioner whether he had "told anyone else," he was referencing the previous conversation, in other words, the People argued that Najera did bring up petitioner's confession. (SA147-48). During the hearing on the State's motion, the trial court appeared to hold that the State could introduce Najera's own statements from the tape during re-direct, if petitioner attempted to impeach Najera by implying that he had never brought up the prior confession. (SA149-50).

Defense counsel then argued that petitioner should be allowed to introduce his exculpatory response – "tell anybody what" – to Najera's statement. (SA152-53). The trial court held that defense counsel could not bring in petitioner's response. (SA155). It held that the words "Tell anybody what?" were just as exculpatory as any other statement by petitioner on the tape, and thus inadmissible self-serving hearsay. (*Id.*). In sum, petitioner could confront Najera with the assertion that even having been instructed by police to raise petitioner's previous confession during the phone conversation, Najera did not do so. The State could then introduce Najera's question from the recorded conversation whether petitioner had told anybody else. However, petitioner still could not introduce petitioner's recorded response: "Tell anybody what?" Petitioner's counsel elected not to cross-

examine Najera about whether he mentioned petitioner's confession during the phone conversation.

Direct Appeal

Petitioner appealed, arguing:

(1) the evidence was insufficient to support his conviction;

(2) the State's closing argument denied him a fair trial;

(3) admission of evidence that petitioner had on a previous occasion tied the victim's hands with a cord unfairly prejudiced petitioner; and

(4) petitioner's confrontation clause rights were violated by limitations on:

(A) the cross-examination of Najera, and

(B) evidence that the victim's former boyfriend was a possible perpetrator.

(SA43). The state appellate court affirmed petitioner's conviction, rejecting each of his claims, and holding in relevant part:

> Based on our review of the record, we conclude that the trial judge did not abuse his discretion in limiting the impeachment of Najera by excluding introduction of the [petitioner's] exculpatory statement. The record reflects an extensive cross-examination by trial counsel, including 46 pages of cross-examination followed by six pages of re-cross-examination. Moreover, limiting defense counsel's impeachment by omission of Najera by laying a foundation with [petitioner's] exculpatory statement, if error, was harmless beyond a reasonable doubt. The record reflects an adequate opportunity for defense counsel to conduct an effective cross-examination of Najera. We cannot conclude such impeachment would have been outcome determinative. For the reasons previously discussed, [petitioner's] constitutional right to confrontation was not violated.

(SA51-52). Petitioner filed a PLA, arguing the same grounds raised in the appellate court (SA63-116), which the Illinois Supreme Court denied. (Doc. 23, Exh. E, *People v. Stock*, 829 N.E.2d 793 (Table) (Ill. 2005)).

Federal Habeas Petition

On June 29, 2007, petitioner filed the instant habeas petition, arguing that his Confrontation Clause rights were violated when the trial court prevented him from confronting Najera with evidence of the telephone conversation in which petitioner exclaimed his innocence to Najera. (Doc. 1; A32-42). Petitioner claimed that the appellate court's decision rejecting this contention was an unreasonable application of Supreme Court precedent, conceding that "the [appellate] court correctly identified the governing Confrontation Clause precedent." (Doc. 44 at 4-5). Respondent answered that petitioner's confrontation clause claim failed because the state court's rejection of it was not objectively unreasonable, and that to the extent petitioner challenged the trial court's decision regarding the admissibility of his exculpatory statements pursuant to Illinois evidentiary law, that challenge was not cognizable on federal habeas review. (Doc. 23). Additionally, respondent argued that any error was harmless. (*Id.*). The district court denied the petition, holding that the state court's rejection of petitioner's claim was neither contrary to, nor an unreasonable application of, Supreme Court precedent. (A2-27).

Petitioner filed a notice of appeal and a CA motion (Docs. 54, 55) (A28-29), which the district court granted on June 18, 2009. (Doc. 58) (A30-31).

SUMMARY OF ARGUMENT

The state court held that petitioner's "constitutional right to confrontation was not violated." (SA52). This holding is reviewed under the Antiterrorism and Effective Death-Penalty Act (AEDPA), and thus habeas relief should not be granted unless the state court's adjudication "resulted in a decision that 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). This Court should deny habeas relief because the state court's rejection of petitioner's claim was neither contrary to, nor an unreasonable application of, Supreme Court precedent, and because any error was harmless in any event.

In the district court, petitioner conceded that the state appellate court correctly identified the general principle governing the case. (Doc. 44 at 4-5). Petitioner was right, the state court recognized that the Confrontation Clause guarantees defendants an opportunity for effective cross-examination. (SA51, citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). In an about face, petitioner now contends that the state court applied the incorrect Supreme Court standard, and should have applied language found in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and *Davis v. Alaska*, 415 U.S. 308 (1974). (Def. Br. 38-39). First, petitioner affirmatively waived this argument by conceding the point in the district court. *See, e.g.*, *Allan v. Chandler*, 555 F.3d 596, 601 (7th Cir. 2009) (holding petitioner waived "contrary to" prong of § 2254 by failing to raise argument in district court). Furthermore, the claim is without merit. The state court's failure to cite *Van*

Arsdall or *Davis* does not make its decision contrary to Supreme Court precedent. AEDPA "does not require citation of [Supreme Court] cases – indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (emphasis in original); *see, e.g.*, *Gonzalez v. Mize*, 565 F.3d 373, 384 n.8 (7th Cir. 2009) (holding that state court decision was not contrary to Supreme Court precedent where state court failed to identify relevant Supreme Court test, but state court's *conclusion* was consistent with Supreme Court precedent). Because the state court's ruling did not contradict these, or any other Supreme Court decisions, petitioner is not entitled to relief under the "contrary to" clause of § 2254.

Nor was the state court's application of Supreme Court precedent objectively unreasonable. Confrontation Clause standards are general, and rulings in this area are therefore fact-specific. *Walker v. Litscher*, 421 F.3d 549, 557 (7th Cir. 2005). The more general a rule, the more leeway state courts have in reaching reasonable outcomes in an individual case. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Given the substantial deference a federal habeas court owes to a state court's application of a general constitutional rule, the state court's application of the Confrontation Clause standard was not objectively unreasonable here. *Cf. Williamson v. United States*, 512 U.S. 594, 600-01 (1994) (Rule 864(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory").

Finally, any constitutional error in this case – and there was none – was harmless. The state court's conclusion that any error was harmless under the standard in *Chapman v. California*, 386 U.S. 18 (1967), was a reasonable one, and the same conclusion can also be reached by this Court under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which applies on federal habeas review. Given the compelling evidence against petitioner, an ex-boyfriend of the victim, including his statement to a friend and coworker a few weeks before the murder that he wanted to kill the victim; another witness's testimony that petitioner argued with and threatened the victim; petitioner's statement to his mother the evening after the murder that "he hurt someone badly"; and petitioner's confession to Najera (Exh. F, Vol. 1 at 232, 235-39, Vol. 2 at 370-71, 461-66), the state court reasonably concluded that the error was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24. Furthermore, any error cannot be said to have had a substantial and injurious effect or influence on the verdict resulting in actual prejudice to petitioner. *See Brecht*, 507 U.S. at 637. Therefore, any error was harmless, and petitioner is not entitled to habeas relief.

ARGUMENT

I. The Section 2254(d) Standard And The Standard of Review

The Confrontation Clause claim involving petitioner's exculpatory statements was fairly presented and adjudicated on the merits by the Illinois Appellate Court. The state court judgment rejecting this claim is therefore governed by 28 U.S.C. §2254(d)(1)-(2), which limits habeas relief to determinations on the merits by a

state reviewing court that are either "contrary to" or an "unreasonable application of" United States Supreme Court precedent, or premised on an unreasonable determination of facts. The burden of proof falls squarely on petitioner to show that he is entitled to relief under one of these theories. *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). Furthermore, federal habeas courts must presume that state courts know and follow the rules of federal constitutional law. *Id.* at 24.

A state court's decision is "contrary to" clearly established federal law only "if the state court arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law; [or] if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the United States Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). This Court must deny habeas relief under the "contrary to" clause even if the state reviewing court's decision is not an exemplar of good legal drafting: "[a]voiding these pitfalls does not require citation of [Supreme Court] cases – indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early*, 537 U.S. at 8; *see*, *e.g.*, *Gonzalez*, 565 F.3d at 384 n.8 (holding that state court decision was not contrary to Supreme Court precedent where state court failed to identify relevant Supreme Court test, but state court's *conclusion* was consistent with Supreme Court precedent).

With respect to the "unreasonable application" prong, "a federal habeas court . . . should ask whether the state court's application of clearly established federal

law was objectively unreasonable." *Williams*, 529 U.S. at 409. The Court has cautioned that "an unreasonable application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). Thus, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* Furthermore, all determinations of fact made by a state court are presumed correct unless the petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

This Court reviews de novo the district court's holding that the Illinois Appellate Court's resolution of petitioner's Confrontation Clause claim satisfied the standards set forth in section 2254(d). *See Barrow v. Uchtman,* 398 F.3d 597, 602 (7th Cir. 2005).

II. The Illinois Appellate Court's Rejection Of Petitioner's Claim — That He Should Have Been Allowed To Cross-Examine Alfonso Najera With Self-Serving Exculpatory Hearsay — Was Neither Contrary To, Nor An Unreasonable Application Of, United States Supreme Court Precedent.

The Illinois Appellate Court's holding that petitioner's "constitutional right to confrontation was not violated" constitutes a decision on the merits of his claim (SA52), and it was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent. 28 U.S.C. §2254(d)(1). Accordingly, this Court should deny petitioner habeas relief.

Petitioner initially claims that the state court decision was contrary to Supreme Court precedent because it cited only *Fensterer*, when it should have cited *Davis* and *Van Arsdall*. (Def. Br. 38). First, petitioner waived this claim by conceding in the district court that "the [trial] court correctly identified the governing Confrontation Clause precedent." (Doc. 44 at 4-5); *see Allan*, 555 F.3d at 601 (holding petitioner waived "contrary to" prong of § 2254 by failing to raise argument in district court).

Second, this claim is without merit. The state appellate court's failure to cite *Davis*, *Chambers*, or *Van Arsdell* does not make its decision contrary to their decisions. *Early*, 537 U.S. at 8 ("Avoiding these pitfalls does not require citation of [Supreme Court] cases – indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."); *see also*, *Gonzalez*, 565 F.3d at 384 n.8 (holding that state court decision was not contrary to Supreme Court precedent where state court failed to identify relevant Supreme Court test, but state court's *conclusion* was consistent with Supreme Court precedent). The state appellate court's conclusion was consistent with Supreme Court precedent.

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. Defendants have the right to cross-examine the witness about his or her story, "to test the witness' perceptions and memory" and also "to impeach, *i.e.*, discredit, the witness." *Davis*, 415 U.S. at 318. But this right is not unlimited.

Fensterer, 474 U.S. at 19-20. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Fensterer*, 474 U.S. at 20 (emphasis in original); *see Van Ardsall*, 475 U.S. at 679 (trial courts have "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on" cross-examination due to concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"); *Litscher*, 421 F.3d at 557 (citing *Van Ardsall* to note that trial courts have discretion to limit scope of cross-examination). *Fensterer* further noted that the Confrontation Clause is generally satisfied when "the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused." 474 U.S. at 20. Further, trial courts may properly limit the scope of cross-examination through the application of procedural and evidentiary rules. *See Chambers v. Miss.*, 410 U.S. 284, 295, 302 (1973) (the "accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence"). While the *Chambers* Court held that state court restrictions on cross-examination violated that defendant's Confrontation Clause right, the Court was careful to point out that its conclusion was fact-specific and not intended to "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.* at 302.

The state appellate court's inquiry here was consistent with this standard. The court was mindful that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (SA51, citing *Fensterer*, 474 U.S. at 20 (emphasis in original)). While the standard is from *Fensterer*, it is consistent with the requirement in *Chambers*, *Davis*, and *Van Arsdall* that a defendant have an opportunity for cross-examination, but that trial judges retain "wide latitude" to impose reasonable limits based on traditional evidentiary concerns. *See Dunlap v. Hepp*, 436 F.3d 739, 741-42 (7th Cir. 2006). Neither *Davis* nor *Chambers* compels an outcome in petitioner's favor. *Davis* held that the Confrontation Clause was violated where application of a state law prevented the defendant from inquiring into the witness's motivation to lie. *Davis*, 415 U.S. at 310-21. *Chambers* held that application of a state law violated the Confrontation Clause where it prevented the defendant from pointing to a plausible alternative culprit. *Chambers*, 410 U.S. at 294. Neither applies here. Defendant was allowed extensive cross-examination, including on his phone conversation with Najera and whether Najera explicitly mentioned petitioner's confession. Because the state court's conclusion did not contradict Supreme Court precedent, its decision was not contrary to clearly established federal law. *Early*, 537 U.S. at 8; *see also*, *Gonzalez*, 565 F.3d at 384 n.8.

Because the state appellate court was asking the right question and its holding was not contrary to a decision of the Supreme Court on either a question of

law or a set of materially indistinguishable facts, the issue is whether the state court was objectively unreasonable in concluding that petitioner's rights were not violated. *See Dunlap*, 436 F.3d at 742. The appellate court held: "[t]he record reflects an extensive cross-examination by trial counsel, including 46 pages of cross-examination followed by six pages of re-cross-examination. . . . The record reflects an adequate opportunity for defense counsel to conduct an effective cross-examination of Najera." (SA51-52). This conclusion was entirely reasonable.

The trial court barred petitioner from using exculpatory statements he made during the recorded phone conversation. (SA139). But the trial court also held that petitioner could "ask [Najera] questions about a subsequent [i.e., the recorded telephone] conversation with [petitioner], and in fact that he never brought up the fact to the defendant that he previously confessed on a specific date." (*Id.*). The trial court also stated that if Najera "opens the door by denying that he did not confront the defendant about a previous statement, then I believe now the sum and substance of that transmission becomes relevant for the purposes of impeachment, but "the actual conversation" would be "pure hearsay, and in my opinion, it is a prior consistent statement." (*Id.*). The trial court concluded that this compromise was "a fair way of doing it." (*Id.*). Following the State's motion to clarify, the trial court held that if petitioner cross-examined Najera with the assertion that he did not mention petitioner's prior confession, then the People could introduce Najera's statements from the tape: "And you didn't tell anybody else, you know what I'm saying? Cause they come to court and then I look like, you know." (SA147, 149).

But the trial court correctly held that petitioner's response ("Tell anybody what?") would not be admissible on re-direct because its only value is as a self-serving exculpatory statement. (SA156-57).

At trial, petitioner cross-examined Najera extensively. (Doc. 23, Exh. F, Vol. 2 at 472-500, Vol. 3 at 501-18, 520-25). With regard to the current issue, petitioner cross-examined Najera as follows:

Q: Were you asked to make a recorded telephone call to Joe Stock?
A: Yes, I was.
Q: Before that, on August 7, 1998, you had met separately with Detective Cruz to talk about this, correct?
A: I believe so.
Q: You had to sign some documents, right?
A: I believe so.
Q: And the plans were made to make this purported phone conversation, weren't they?
A: Right.
Q: And you agreed to do that, right?
A: Right.
Q: Now, had you talked to Joe much before August 7th of –
A: No, not really.
Q: And at the time of this – on August 10th, how – it was supposed to work that you were going to page Joe, correct?
A: Yes.
Q: And he was going to call back, that was the plan, right?
A: Right . . .
Q: And prior to that, you were told by the police to bring up this supposed confession in this phone call, yes or no?
A: Yes.
Q: And you listened very careful to what the police said, right? You wanted to do what they were telling you to do, correct?
A: I believe so. I can't recall.
Q: Let me ask you this much. Did you place that call?
A: Yes, I did. I paged him.
Q: And did Joe call you back?
A: Yes.
Q: And did you have a conversation with him?
A: Yes, I did.
Q: And how long was that conversation, do you remember?

A: Five, ten minutes. I'm not sure.
Q: Do you know what time it began and what time it ended?
A: No, I don't.
Q: But there was a lot of talk back and forth, wasn't there?
A: Mostly he was talking.
Q: Right. He was doing a lot of talking, right?
A: Yes.
Q: And you were mostly asking questions, right?
A: Not really. He was just mostly talking.
Q: He was doing a lot of talking?
A: Right.
Q: After this phone conversation was concluded, the police talked to you, did they not?
A: Right.
Q: And you knew that the call was recorded, right?
A: Right.

(Doc. 23, Exh. F, Vol. 3 at 501-04). Petitioner never elicited the impeaching fact allowed by the trial court's ruling — that during their conversation, Najera failed to mention the confession to petitioner explicitly, even though the police had asked him to do so.

This resolution of the issue, affirmed by the state appellate court, did not violate petitioner's Confrontation Clause rights. When, as here, the standard being used is general and requires fact-dependent application, state courts have significant leeway in applying it to a specific case. *Yarborough*, 541 U.S. at 664 (holding the more general a rule, the more leeway courts have in reaching reasonable outcomes); *Litscher*, 421 F.3d at 557 (recognizing Confrontation Clause standards are very general, and rulings are very fact-specific); *Mendiola v. Schomig*, 224 F.3d 589, 591-92 (7th Cir. 2000) (federal court required to deny habeas petition when state court takes flexible rule seriously and produces answer within defensible range). Here, the appellate court's conclusion that petitioner was

afforded an opportunity to cross-examine Najera effectively was entirely reasonable. Though the appellate court did not analyze this issue extensively, what matters is not the extent of the state court's reasoning, but whether its result is reasonable. *See Malinowski v. Smith*, 509 F.3d 328, 332-33 (7th Cir. 2007). As noted above, the confrontation clause does not give criminal defendants absolute freedom to conduct any sort of cross-examination. *See Dunlap*, 436 F.3d at 741-42. The clause guarantees an opportunity for cross-examination, not the unlimited right to cross-examine a witness on any subject. *Id.* In fact, a criminal defendant's confrontation rights may be properly limited by state procedural and evidentiary rules, although the "hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

The trial court's decision excluding the exculpatory statement was a standard application of an Illinois evidentiary rule, a rule applied by the Supreme Court in *Williamson v. United States*, and shared by many other jurisdictions. *See United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993) ("[o]rdinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible"); *State v. Barger*, 810 P.2d 191, 193-95 (Ariz. Ct. App. 1990) (holding inadmissible defendant's self-serving, exculpatory statements); *People v. Clay*, 153 Cal. App. 3d 433, 457 (1984) ("[s]elf-serving extrajudicial declarations by criminal defendants are inadmissible to prove the truth of what was said"); *State v. Baldwin*, 412 S.E.2d 31, 37-38 (N.C. 1996) (psychological expert not allowed to testify regarding substance of any self-serving, exculpatory statements made by defendant during interviews

unless or until defendant testifies regarding matters relating to those statements); *Crane v. State*, 786 S.W.2d 338, 353 n.5, 354 (Tex. Crim. App. 1990) (statements made by defendant proclaiming innocence after his arrest were "self-serving" hearsay that lacked "fundamental trustworthiness"); *State v. Larry*, 34 P.3d 241, 250 (Wash. Ct. App. 2001) (quoting *Haddad* for premise that "a defendant's self-serving, exculpatory, out of court statements" are generally inadmissible). But the trial court sought to give petitioner the most leeway possible to conduct his cross-examination by allowing him to cross-examine Najera about the latter's failure to mention petitioner's previous confession explicitly during the phone conversation. (SA139). Petitioner still had the opportunity to ask Najera about the conversation, including that: Najera agreed to let the police record the conversation, the police told Najera that he was supposed to bring up the prior confession, and that Najera never specifically mentioned petitioner's prior confession despite numerous chances to do so. (*Id.* at 129-35). Thus, the trial court's ruling gave petitioner the chance to cross-examine Najera on a key and impeachable point — that he and petitioner discussed the case, that Najera was supposed to, and had the opportunity to, bring up petitioner's prior confession, but never explicitly did so.

Petitioner did cross-examine Najera extensively for forty-six pages, and for six more pages on recross-examination. (SA51; Doc. 23, Exh. F, Vol. 2 at 472-500, Vol. 3 at 501-18, 520-25). Petitioner questioned Najera on the discrepancies between Najera's statement to the police and his testimony in court and to the grand jury, Najera's reluctance to get involved in the case, Najera's criminal record,

Najera's poor academic record, Najera's failure to tell other people about the confession, and Najera's extensive involvement with the police. (Doc. 23, Exh. F, Vol. 2 at 472-500, Vol. 3 at 501-18, 520-25). Even without his self-serving exculpatory statements, petitioner had an extensive opportunity to cross-examine Najera, thus satisfying the Confrontation Clause. The balance struck by the trial court was appropriate given the facts of the case, and the tension between petitioner's confrontation rights and the evidentiary rule against introducing a defendant's out-of-court, self-serving statements. The trial court's decision was a proper limitation of petitioner's confrontation rights, and the appellate court's judgment affirming that decision was not objectively unreasonable. Therefore, petitioner was properly denied habeas relief. 28 U.S.C. § 2254(d)(1).

III. Petitioner's Challenges To The Illinois Appellate Court's Decision Regarding The Admissibility Of Out-Of-Court Exculpatory Statements Under State Evidentiary Law Are Not Cognizable On Federal Habeas Review.

Much of petitioner's argument attacks the state court's holding that the excluded statements were inadmissible exculpatory hearsay. (Def. Br. 30-37). But a claim of error by the state court in the application of state evidentiary law is not cognizable on federal habeas. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("[F]ederal habeas corpus relief does not lie for errors of state law."). A federal habeas court may only consider such a claim if it resulted in fundamental unfairness in violation of due process. *Id.* at 67-68; *see also Rivera v. Ill.*, __ U.S. __, 129 S.Ct. 1446, 1454 (2009) ("The Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a

criminal trial."). In other words, when a habeas petitioner alleges a state-law error, "habeas relief is appropriate only" if the "rulings were so prejudicial that they compromised the petitioner's due process right to a fundamentally fair trial. This means that the error must have produced a significant likelihood that an innocent person has been convicted." *Anderson v. Sternes*, 243 F.3d 1049, 1053 (7th Cir. 2001). In this case, petitioner does not even argue a violation of due process, and petitioner's claim does not state such a violation.

The trial court crafted a workable compromise under Illinois evidentiary law that respected petitioner's right to cross-examine Najera thoroughly. Well established Illinois evidentiary rules provide that "self-serving statements by an accused are inadmissible hearsay." *People v. Patterson*, 610 N.E.2d 16, 33 (Ill. 1992). Petitioner's excluded statements, such as "I didn't do nothing – you know that," were plainly self-serving. Petitioner contends that the statements should have been admitted under the state law hearsay exception for statements that test the credibility of testimony. (Def. Br. 35). In so arguing, petitioner relies on *People v. Britz*, 493 N.E.2d 575 (Ill. 1986). But the issue in *Britz* was whether the exculpatory statements satisfied Illinois's state of mind exception to the hearsay rule. *Id.* at 577-78. That case is inapposite. In *People v. Hosty*, 497 N.E.2d 334 (Ill.App. 1986), as here, the defendant wanted to use his own out-of-court exculpatory statements for the alleged purpose of testing the credibility of a state's witness, and *Hosty* distinguished *Britz* as follows:

> The instant situation is inapposite to that in *Britz*. Here, the defendant's line of questioning was not directed to the issue of the

> effect of [witness's] questioning on defendant. Neither are we convinced from a review of the record that defendant's sole aim in questioning Wolf about the tape recordings was to impeach Wolf's credibility. Rather, defendant's emphasis on the allegedly exculpatory nature of the two statements he believes should have been admitted, evidences a focus on the content of what he said in the conversations.

Hosty, 497 N.E.2d at 339. As in *Hosty*, the statements that petitioner wished to introduce did not relate to Najera's bias, motive, or interest. *See id.* And, as in *Hosty*, the record does not support any contention that petitioner's sole purpose in seeking to introduce the challenged statements was to impeach Najera. As mentioned, the trial court gave petitioner the chance to cross-examine Najera on the fact that he and petitioner discussed the case, and that Najera was supposed to, and had the opportunity to, bring up petitioner's prior confession, but never did so explicitly. That petitioner passed on this opportunity to impeach Najera, and on appeal focuses instead on the exclusion of the exculpatory statements, evidences a desire to have juries hear the content of those statements. Thus, the appellate court's holding was correct as a matter of state law. And although petitioner does not allege a due process violation, the trial court's evidentiary decision did not cause petitioner to have an unfair trial, and thus did not violate due process.

IV. Any Error Was Harmless.

In any event, any violation of clearly established Supreme Court law in this case (and there was none), was harmless. If, as here, the state court has conducted a harmless error analysis, the federal court first must decide whether the state court reasonably applied *Chapman*. *See Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009). An error is harmless under *Chapman* when the reviewing court

concludes beyond a reasonable doubt that the error did not contribute to the finding of guilt. 368 U.S. at 24. If the state court's conclusion that the error was harmless under *Chapman* is a reasonable one, then no habeas relief may be granted. *Johnson*, 572 F.3d at 404.

If the state court has failed to conduct a harmless error analysis or applied *Chapman* unreasonably, then this Court must apply the *Brecht* standard. *Johnson*, 572 F.3d at 404. To determine whether a constitutional error was harmless under *Brecht*, a habeas court asks whether "the error had a substantial and injurious effect or influence on the verdict," resulting in actual prejudice to the petitioner. 507 U.S. at 637. Only if the court is in grave doubt as to the harmlessness of the error must the conviction be reversed. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995). Here, given the substantial evidence against petitioner, the state appellate court reasonably determined that any error was harmless beyond a reasonable doubt. *See Chapman*, 368 U.S. at 24. And even if this conclusion were unreasonable, the error cannot be said to have had a substantial and injurious effect or influence on the verdict. *See Brecht*, 507 U.S. at 637. Therefore, any error was harmless, and petitioner should be denied habeas relief.

The state court applied the proper standard when it found that any error was harmless. *See People v. Jimerson*, 652 N.E.2d 278, 287 (Ill. 1995) (requiring state to prove that error was harmless beyond a reasonable doubt); (SA51 (the trial court's decision, "if error, was harmless beyond a reasonable doubt")). And the state court's conclusion that the error was harmless was reasonable. Petitioner extensively

cross-examined Najera. (Doc. 23, Exh. F, Vol. 2 at 472-500, Vol. 3 at 501-18, 520-25). The trial court allowed petitioner to cross-examine Najera about his failure to explicitly mention petitioner's prior confession during the recorded phone call, but petitioner chose not to ask this question. In addition, petitioner's use of his self-serving exculpatory hearsay statements would not have meaningfully impeached Najera. There are many reasons why Najera might not have mentioned the confession explicitly during his conversation with petitioner. For example, Najera was reluctant to assist the police further (*see* Doc. 23, Exh. F, Vol. 3 at 504-05); he might have been frightened of petitioner, or he might have been worried that mentioning the confession explicitly would reveal his involvement with the police. And, if petitioner had impeached Najera with this conversation, the State could have asked Najera on redirect about his statement – "And you didn't tell anybody else, you know what I'm saying?" – that seems to reference petitioner's confession, further mitigating any potential "impeachment" effect.

Furthermore, the State presented strong evidence of petitioner's guilt. The victim was found in the basement of her family's home, her hands bound with a telephone cord; she had been stabbed 186 times. (Doc. 23, Exh. F, Vol. 2 at 334, Vol. 3 at 558-60). Petitioner, an ex-boyfriend of the victim (Doc. 23, Exh. F, Vol. 1 at 232), had told a friend and coworker a few weeks earlier that he wanted to kill her, at which point he pulled out a knife and made a stabbing motion with it. (Doc. 23, Exh. F, Vol. 2 at 393). The day before the murder, another witness heard petitioner argue with and threaten the victim, telling her that she would end up

like an abused woman on television, and responding to her plan to move to Texas with the warning that she would never make it there. (Doc. 23, Exh. F, Vol. 1 at 235-39). And after murdering the victim in the morning, petitioner told his mother that evening that "he hurt someone badly." (Doc. 23, Exh. F, Vol. 2 at 370-71). Then several days after the murder, he confessed to Najera, a childhood friend, describing the murder and, once again, making stabbing motions. (*Id.* at 461-62). Petitioner detailed to Najera how the victim was sleeping when he entered the house, how he "cleaned up" afterwards, and how he had made copies of the victim's house and car keys, used them to enter her locked home, and then took the victim's car afterwards. (*Id.* at 462, 465-66). These details were corroborated by physical evidence: there were no signs of forced entry at the house, a set of clothes was missing from the victim's brother's bedroom, and her car was missing. (Doc. 23, Exh. F, Vol. 2 at 273-74, 305, Vol. 3 at 766-67). The car was found undamaged in a different area, and petitioner's fingerprints were found inside. (Doc. 23, Exh. F, Vol. 2 at 273-75, Vol. 3 at 598-604). Given the powerful evidence of petitioner's guilt, and the thorough cross-examination that petitioner conducted, the state court applied *Chapman* reasonably, and in any event any error was harmless under *Brecht*.

CONCLUSION

For the foregoing reasons, respondent-appellee Marcus Hardy respectfully requests that this Court affirm the district court's judgment denying habeas relief.

February 3, 2010

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,902 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count of the WordPerfect X4 word-processing system used to prepare this brief.

_____

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RULE 31(E)(1) CERTIFICATION

I hereby certify that I have caused to be filed a disk containing a digital version of this brief.

_____

GARSON S. FISCHER
Assistant Attorney General

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF SERVICE

The undersigned deposes and states that two copies of the foregoing **Brief of Respondent-Appellee** and one copy of the Brief on computer disk were served upon the below-named party on February 3, 2010, by depositing the same in the United States mail at 100 West Randolph Street, Chicago, Illinois, 60601, in an envelope bearing sufficient first-class postage:

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SUBSCRIBED and SWORN to before me
on February 3, 2010.

_____
Notary Public