IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LEONARD DAVIS,

Petitioner,

v.

JON LITSCHER, Secretary,
Department of Corrections,

Respondent.

REPORT AND
RECOMMENDATION

01-C-245-C

REPORT

Petitioner Leonard Davis, a Wisconsin prisoner currently incarcerated in the Prairie Correctional Facility in Appleton, Minnesota, has petitioned the court for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1998 conviction and sentence in the Circuit Court for Dane County, Wisconsin, for first degree sexual assault, second degree sexual assault, battery and threats to injure. Petitioner alleges that the trial court violated his right to due process when it failed to order an in camera inspection of mental health records of the complaining witness. The state responds that the trial court's and appellate court's decisions to deny in camera review of the victim's confidential records complied with the controlling case of *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

Although this court might have decided the initial motion for inspection differently, I conclude that the Wisconsin Court of Appeals' decision affirming denial of petitioner's access to the victim's records was not an incorrect or unreasonable application of *Pennsylvania v. Ritchie*. Therefore, I am recommending that this court deny petitioner's application for a writ of habeas corpus.

Under 28 U.S.C. § 2254(e)(1), the factual findings of the state courts are presumed correct. The following facts are drawn from the Wisconsin Court of Appeals' decision, *State v. Davis*, 232 Wis. 2d 557, 608 N.W. 2d 437 (Ct. App. Dec. 16, 1999) (unpublished opinion), and from other documents in the state court record.

Facts

On November 12, 1997, the state filed an information charging petition with sexually assaulting and beating his girlfriend, Melodee Vance. Before trial, petitioner filed a motion requesting the court to conduct an *in camera* inspection of Vance's mental health records that were in the possession of various state agencies. Petitioner alleged that he had reason to believe the records contained evidence indicating that Vance was suffering from a mental condition at the time of the incident that may have impaired her ability to perceive and relate events as they truly happened. Specifically, petitioner alleged that Vance was an admitted drug addict and had repeatedly received treatment for her addiction; had admitted using cocaine and alcohol the night of the assault; had a thyroid condition that she had

neglected to treat properly which in turn may have caused her to have perception problems; was taking a prescription antidepressant at the time of the assault; and had reported to a detective that "she has seen men around her apartment that are not here."

At the motion hearing, petitioner proffered that Dr. Kent Berney, a psychologist, was prepared to testify that Vance's mental condition and drug use could impair her ability to perceive events as they happened, as could a poorly controlled thyroid condition. Further, petitioner represented that Dr. Berney would testify that a review of Vance's medical records was necessary in order to determine the exact nature of her physical and mental conditions and whether she was taking medications at the time of the alleged assault.

Although the trial court accepted petitioner's offer of proof, it denied his motion on the ground that he had failed to make an adequate showing of the materiality of the sought-after records. At trial, Vance was a primary witness against petitioner. Vance admitted on cross examination that she did not remember a number of events from the night of the alleged attack, that she had a bad memory, and that she had drunk alcohol and consumed a lot of crack that night, both of which further impaired her memory. *See* transcript of the June 23, 1998 trial, Dkt. 3, Exh. K, at 107-111. Although Vance had admitted at the October 29, 1997 preliminary examination that she did not regularly take her prescribed antidepressants and thyroid medicine, Exh. I at 25-26, no one asked her about this at trial. The jury convicted petitioner of three felony counts and one misdemeanor.

On appeal, petitioner contended that the trial court erred in denying his pretrial request for court inspection of Vance's mental health records. The court of appeals found no error. Identifying petitioner's burden as having to show that the records "are relevant and may be necessary to a fair determination of guilt or innocence," the court found that petitioner had not made this showing. *Davis*, 232 Wis. 2d 557, 608 N.W. 2d 437, attached to Response, dkt. #3, Exh. 2 at 2. Specifically, the court reviewed the claim *de novo* and found that petitioner

> did not need the records to prove that Melodee used stimulants and might not have taken her thyroid medication on the night of the incident. Nor did he need them to show that her acts and omissions that night might have affected her memory and understanding of events. Beyond that, he did not adequately explain their usefulness. He did not allege that they contained evidence of a delusional illness, nor that they reported previous incidents where Melodee confused reality. In other words, even if Davis arguably had evidence that Melodee's actions on a particular night caused her to misperceive events, he offered nothing to show that her records showed a preexisting problem of that sort unrelated to those specific acts. Consequently, the records were neither relevant nor helpful to a fair determination on the charges.

Id. at 3.

The Supreme Court denied petitioner's petition for review on April 26, 2000.

Analysis

I. Standard of Review

The Antiterrorism and Effective Death Penalty Act provides, in relevant part, that habeas relief may be granted only if the adjudication of the claim by the state court "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). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court expounded on this standard, asserting that a state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Id.* at 405; *see also Anderson v. Cowan*, 227 F.3d 893, 896 (7th Cir. 2000).

The Court then interpreted the "unreasonable application" prong of the statute to encompass situations where "the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

The Court held that determining whether the state court unreasonably applied clearly established federal law involved an objective inquiry. *Id.* at 409-10. Acknowledging that the term "unreasonable" defies easy definition, the Court emphasized that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Id.* at 410

(emphasis in original). The Court explained that under § 2254(d)(1)'s "unreasonable application" clause, "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.* at 411. Put another way, a federal court cannot substitute its independent judgment as to the correct outcome. *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000). A federal court must determine that a state court decision was both incorrect *and* unreasonable before it can issue a writ of habeas corpus. *Matheney v. Anderson*, 253 F.3d 1025, ____ (7th Cir. 2001). With due abhorrence of litotes, *see Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc.*, 3 F.3d 208, 209 (7th Cir. 1993), it is enough if a state court decision is "not unreasonable," which might not be the same as "reasonable."

II. *Pennsylvania v. Ritchie*

Petitioner claims that the state courts unreasonably applied *Pennsylvania v. Ritchie*, 480 U.S. 39, in which the Supreme Court established the procedure to be followed when a defendant contends that confidential records in the possession of state agencies may contain information material to his defense. Determining the merits of petitioner's claim requires a close look at *Ritchie*.

In *Ritchie,* respondent George Ritchie was charged with committing various sex offenses against his 13-year-old daughter. The victim claimed that Ritchie had assaulted her

two or three times per week during the previous four years. She reported these incidents to the police, who referred the matter to Children and Youth Services (CYS).

During pretrial discovery, Ritchie served CYS with a subpoena seeking access to the records concerning the daughter. He sought disclosure of the file related to the immediate charges as well as certain records that he contended the agency had compiled in 1978 when it had investigated a separate report by an unidentified source who alleged that Ritchie's children were being abused. After CYS refused to comply with the subpoena on the ground that the records were privileged under Pennsylvania law, Ritchie moved for sanctions. At a hearing before the court, Ritchie argued that he was entitled to the information "because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." *Ritchie*, 480 U.S. at 44. After reviewing some but not all of the files, the trial court denied the motion and refused to order CYS to disclose the files.

At trial, Ritchie's daughter was the main witness against him. The trial court placed no limitation on the scope of cross-examination aside from routine evidentiary rulings. The jury convicted Ritchie of all counts.

Ritchie appealed his conviction in the state courts, arguing that the failure to disclose the contents of the CYS files violated the Confrontation Clause of the Sixth Amendment. The case eventually made its way to the United States Supreme Court, which analyzed the issue in terms of the government's obligation "to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Id.* at 57. After

concluding that state law did not grant CYS the authority to protect its files from disclosure under any circumstances, the Court held that the case should be remanded to the trial court so that it could review the CYS file "to determine whether it contains information that probably would have changed the outcome of [Ritchie's] trial." *Id.* at 58.

In a footnote, the Court addressed the Commonwealth's argument that Ritchie was not entitled to disclosure because "he did not make a particularized showing of what information he was seeking or how it would be material." *Id.* at n.15. The Court stated that

> Ritchie, of course, may not require the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) ("He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense"). Although the obligation to disclose exculpatory material does not depend on the presence of a specific request, we note that the degree of specificity of Ritchie's request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure. See *United States. v. Bagley*, 473 U.S. 667, 682-683 (1985) (opinion of Blackmun, J.).

Id. The Court noted that the process could be multi-staged, with the burden on Ritchie to make additional showings of materiality that would prompt additional in camera review by the court. *Id.* at 60.

III. The State Court of Appeals' Application of *Ritchie*

Petitioner contends that the Wisconsin courts unreasonably applied Supreme Court precedent by requiring him to make a greater showing than that required by the Supreme Court in *Ritchie* for obtaining an in camera review of the victim's mental health records.

Although petitioner attacks the decisions of both the trial court and the court of appeals, the court of appeals reviewed the issue *de novo.* Accordingly, the court of appeals' decision stands as the operative state court decision to which this court must apply § 2254(d). *See, e.g.*, *Williams*, 529 U.S. at 413-14 (applying § 2254(d) to Virginia Supreme Court's decision).

Petitioner argues that his offer of proof regarding the likelihood that mental health records concerning Vance would contain evidence material to his defense was "far more detailed and pointed" than that found to require an *in camera* inspection in *Ritchie*. All Ritchie showed, argues petitioner, was that the records "might" contain the names of witnesses as well as "unspecified" exculpatory evidence. Petitioner contrasts this with the information he presented, which included his knowledge that Vance suffered from a mental disorder, was a cocaine or crack user, that she took medications and that these conditions, depending on the circumstances, could have combined to impair her ability to perceive and describe reality on the night in question. At the least, petitioner argues, he certainly made a "plausible showing" that the records would include material evidence.

At the outset, I note that it is not clear from the Court's opinion in *Ritchie* whether it concluded that Ritchie *already* had made the showing necessary to obtain an in camera review of the CYS files. Although the language in the body of the opinion implies that the court was remanding the case for such a review, footnote 15, quoted above, indicates that the Court was allowing the trial court first to determine whether Ritchie had made a showing adequate to warrant such a review. That said, even if this court accepts petitioner's

argument and assume that the Court did find that Ritchie's showing was adequate, it does not follow that the Wisconsin Court of Appeals unreasonably applied *Ritchie* when it found that petitioner had not adequately shown how the records he sought would be relevant and material to his defense.

Determining whether a defendant has made a plausible showing that sought-after evidence is material is a fact-specific inquiry. On these facts, the court of appeals did not apply *Ritchie* unreasonably when it determined that petitioner's showing did not entitle him to an in camera review of Vance's records.

As the court of appeals noted, petitioner did not allege that Vance suffered from any sort of pre-existing mental impairment that caused delusions or affected her ability to perceive or describe reality. Petitioner simply alleged that Vance had been treated for depression and a thyroid condition and had been prescribed medication for both. Although petitioner made an offer of proof in which he indicated that a psychologist would testify that a poorly controlled thyroid condition could affect Vance's ability to perceive and relate events, the court of appeals recognized that the records would not show that Vance's behavior on the night in question was a result of her thyroid condition. As the court of appeals observed, petitioner knew from Vance's testimony at the preliminary hearing that she might not have taken her thyroid medication on the night of the incident. Further, petitioner knew that Vance had consumed significant quantities of crack cocaine and alcohol that might have affected her memory and understanding of events. Connecting the dots, it

is clear that the court of appeals concluded that petitioner already possessed the facts material to impeaching Vance and that a review of Vance's medical records would add nothing genuinely useful. While this is not the only conclusion the court could have reached, on these facts, it was not an unreasonable conclusion.

Importantly, petitioner did not allege that Vance's records would contain reports from Vance about the alleged attack. In this respect, petitioner's showing differs significantly from that made in *Ritchie*. The files Ritchie sought from the child protection agency were specifically related to the child abuse charges made against him by his daughter and by a third party a year earlier. Thus, the likelihood that they would contain evidence material to his defense was high since they were likely to contain his daughter's statements (or lack thereof) about the alleged abuse. No such direct connection existed between petitioner's proffer regarding Vance's medical and psychological records and the charges against petitioner.

Undoubtedly it would have been more prudent for the trial court to review Vance's records, if only to prevent exactly this sort of a post-trial issue. But prudence is not the standard, unreasonableness is. Petitioner simply cannot show that the court of appeals applied *Ritchie* unreasonably when it denied his request for an in camera review of Vance's medical records. Although the court did not couch its finding in terms of a "plausible showing," on these facts, it was not unreasonable for the court to conclude that petitioner had failed to show that an in camera review would reveal material evidence. For this court

to grant a writ because the state courts did not phrase their denial properly would glorify form over substance. Petitioner has not shown that he is in custody in violation of the laws or Constitution of the United States. Accordingly, I recommend that this court deny petitioner's request for a writ of habeas corpus.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that this court deny petitioner Leonard Davis's petition for a writ of habeas corpus.

Dated this 10th day of August, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge