Docket No. USCA7 18-2540

19-7023

SUPREME COURT OF THE UNITED STATES

-ORIGINAL-

ORIGINAL

MICHEAL P. COTTON,

Petitioner-Appellant,

V.

SCOTT ECKSTEIN, Warden,

Respondent-Appellee;

On Petition for Writ of Certiorari to the Wisconsin Court of Appeals

Petition for Writ of Certiorari

Counsel: Micheal P. Cotton, Petitioner-Appellant, Pro se, 2833 Riverside Drive, Green Bay, WI 54307-9033 USA

For Scott Eckstein, Warden, Respondent-Appellee: Josh Kaul, OFFICE OF THE ATTORNEY GENERAL, Wisconsin Department of Justice, P.O. Box 7857, Madison, WI 53707-7857 USA, (608) 266-8556

Questions for Review Pursuant to SCR 14 (1) (a)

I. With all due respect, if it pleases the Court, was I denied due process of law in violation of the Fourteenth Amendment and the Wisconsin Constitution by the circumstance that my convictions were affirmed after in June 2012 the State tried me under an information charging me with two sexual assaults of a child by contact of one Shalonda between June 16, 2009 and June 15, 2010 at 611 N. 25th Street and two sexual assaults of a child by intercourse of one Kenneth between November 22, 2009 and August 30, 2010 at 611 N. 25th Street but the State did not produce evidence to support a guilty verdict beyond a reasonable doubt on sexual contact at the foregoing address during the specified time period identified in the information and as instructed to the jury as it pertained to Shalonda, and did not prove beyond a reasonable doubt that two sexual assaults took place during the specified time period as it pertained to Kenneth; and, Wisconsin has ruled favorably for the defendant under this circumstance in the past?

II. With all due respect, if it pleases the Court, was I denied of my rights to a speedy trial in violation of the Sixth and Fourteenth Amendment and the Wisconsin Constitution by the circumstance that 15 months of an 18-month delay was caused by court congestion, scheduling problems within the D.A.'s office, the State's attempt to find a non-key witness, unknown obligations that restrained the State from trying the case for over three months, and cavalier disregard toward my rights where approximately one-half of the 18-month delay was due to the State's repeated failure to provide me with exculpatory phone records; I demanded trial on at least three occasions and presented other speedy trial correspondence to the court on at least three more occasions; and, in addition to several other allegations of prejudice, the span of time between the charges and trial diminished witnesses' ability to clearly remember the alleged events?

III. With all due respect, if it pleases the Court, was I deprived of my rights to effective assistance of counsel in violation of the Sixth and Fourteenth Amendment and the Wisconsin Constitution by the circumstance that soon after the trial court established what were my impeachable convictions so I could testify on my own behalf and explained to me on record that no one could go into the nature of what they were as long as I testified truthfully as to the number of convictions, defense counsel decided to question me about the nature of those convictions, some of which the United States District Court for the Eastern District of Wisconsin said painted me as an untruthful person in a trial where credibility was crucial to my case and corroborated a key State's witnesses' testimony; and defense counsel did not object when the State told the jury during closing argument that because I had a sexual relationships with two women, my biological son's mother and the alleged victims' mother, during the same period, it showed that I had the character and propensities of a person who'd sexually assault a child?

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STATEMENT ON BASIS FOR JURISDICTION

This petition for writ of certiorari is taken from the final decision of the Wisconsin Court of Appeals entered on 8/29/2017. The Wisconsin supreme court denied discretionary review on 12/12/2017. The United States District Court for the Eastern District of Wisconsin affirmed the conviction on 6/28/2018. The district court denied my certificate of appealability. The United States Court of Appeals for the Seventh Circuit denied my suggestion for rehearing en banc on 6/5/2019. I believe that the United States Supreme Court's jurisdiction to review on a writ of certiorari the judgment in question is conferred pursuant to 28 U.S.C. §1254.

Dated at Green Bay Correctional Institution, Green Bay, Wisconsin, this 6th day of December, 2019.

Micheal P. Cotton, Pro se

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1. "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." Ex Parte Quirin, 317 U.S. 1 (1942).

2. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it were tried and as the issues were determined in the trial court." Cole V. Arkansas, 333 U.S. 196, 200, 201-202, 92 L.Ed.2d 644, 68 S.Ct. 514 (1948).

3. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." VI Amendment to the United States Constitution

4. "Upon a defendant's demand, a prosecutor must produce any exculpatory evidence within the State's possession, custody or control." Wisconsin Statute section 971.23 (1) (h) (2009-10).

5. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Wisconsin Statutes section 904.04(2).

STATEMENT OF THE CASE

I was arrested for felon in possession of a firearm and marijuana on August 30, 2010 in connection with a raid for drug sales. I was in an intimate relationship with the mother of the alleged victims for two years prior to the underlying charges and three years during our high school years. Sometime in late 2010 (several months after I had been arrested, while I sat jailed and awaiting resolution of charges in a police raid for drug activity and a firearm), I ended my relationship with the kids' mother to marry my son's mother, Maris Hopkins, (414) 699-6195. Shortly thereafter, the kids' mother falsely told the police that I sexually assaulted her children. January 6, 2011, a complaint was filed charging numerous distinct counts of first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02. A preliminary hearing was started on January 12, 2011. On January 24th the hearing was completed. I was bound over for trial. In June 2012, the first day of trial, the State filed a second amended information charging four counts of first-degree sexual assault of a child. Counts one and two alleged that between November 22, 2009 and August 30, 2010, I engaged in sexual intercourse with Kenneth, a child under 12 years, at 611 N. 25th Street in the City of Milwaukee, Milwaukee County, Wisconsin. Counts three and four alleged that between June 16, 2009 and June 15, 2010 at 611 N. 25th Street in the same city and state, I engaged in sexual contact with Shalonda, a child under 13 years. I plead not guilty while maintaining that there was evidence to show this was a set up.

Kenneth, Shalonda, and I, among others, testified. I maintained my innocence.

As to the assaults as charged in the Information, Shalonda, who was 11 at the time of the trial, testified that at some point in the night after her 10th birthday she woke up next to me in her mother's bed at 611 N. 25th Street. She sees that she and I were naked and my leg was next to hers. She got up and put on her clothes and went into the bathroom to sit and cry. She never noticed anything on her body that was unusual.[1]

To the second assault alleged at 611 N. 25th Street, Shalonda recalled waking up just as I walked out of her bedroom. When she looked down she saw her shirt unbuttoned. After I left the room she started to fall back asleep. Shalonda testified that nothing else happened after that.[2]

Kenneth, who was eight at the time of trial, testified that I began to have sexual intercourse with him when he was five.[3] Kenneth admitted to perjuring himself with his testimony of the first alleged assault during cross-examination.[4] Kenneth testified that I assaulted him 5 times but he could only remember the one that he was challenged on with the police report.[5] On redirect, Kenneth specifically described an incident when I allegedly made him put his penis in his cousin's butt. Also, Kenneth testified that the statement he'd given the officer about me putting my penis in his butt was not true.[6] Kenneth finally testified that at some point or another, I put my penis in his butt and threatened to kill him.[7]

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[1] R: 9-42:64, In. 10 through R: 9-42:65, In. 21
[2] R: 9-42:90, In. 22 through R: 9-42:91, In. 14
[3] R: 9-42:109, In. 17-20
[4] R: 9-42:109, In. 17-20, In. 5 through R: 9-43:24, In. 6
[5] R: 9-43:24-25
[6] R: 9-43:37-38
[7] R: 9-43:53, In. 3

Before I testified, the court and the parties discussed my prior convictions, and the court ruled that as long as I admitted to five prior convictions no one could delve into them.[8] After general questioning, trial counsel proceeded to list the nature of each crime.[9] After I finished testifying, explicitly denying the assaults by trying to explain that they were lies made by the children's mother, who I'd been with since high school, after I left her for my biological son's mother, who I'd met two years earlier[10], the State told the jury, "And what sort of personality would sexually assault a child? Someone who cares only about his own pleasure. That's the only sort who could commit this sort of heinous, horrible act. Someone who freely tramples on the feelings of others, someone trying to use two women for his own sexual pleasure. So we learned from Mr. Cotton a little about his personality." [11]

The case was scheduled for trial in June of 2011, six months after the filing of the criminal complaint, but was removed from the trial calendar because the State was having difficulty because it anticipated joining charges with its primary cause.[12] The trial court also referenced congestion for the postponement of the June 6, 2011 trial date.[13] Defense counsel requested delay to obtain exculpatory jailhouse tapes of phone conversations because the State refused to hand over the tapes.[14] The trial was rescheduled by the State's request for November, 2011 due to staffing changes in the D.A.'s office.[15] Defense counsel requested a delay of a few weeks, but due to the State's schedule the trial was scheduled for four months later.[16] Defense counsel requested delay because the State gave the defense the wrong set of tapes somehow.[17] The State later admitted to the trial court that even though defense counsel requested the correct set the State never sought them.[18] On January 18, 2012 the trial court addressed one of my requests for a speedy trial stating "No, he would be serving a sentence, he can't demand, there is no speedy trial right."[19] Trial counsel then stated "I would just note with regard to all the letters sent by my client they are all requests for a speedy trial."[20] I was convicted at the end of jury trial on all four counts as charged in the Information.[21] The defense asked the court to set aside the verdicts as they were not supported by the evidence presented at trial. The court denied the request.

I filed a pro se post-conviction motion with federalized arguments with regard to due process and insufficient evidence, denial of constitutional speedy trial, and ineffective assistance of counsel. [22]

I raised the due process/insufficient evidence argument by matter of asserting that (1) the State had not produced sufficient evidence of sexual contact during the specified time period at the address identified in the Information and jury instructions on counts three and four, and (2) the State failed to prove the specified time period as charged in the Information

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[8] R: 9-44:10-11
[9] R: 9-44:38, In. 14 through R: 9-44:40, In. 19
[10] R: 9-44:28
[11] R: 9-45:34, In. 14 through R: 9-45:36, In. 19
[12] R: 9-30:3
[13] R: 9-45:7-10
[14] R: 9-39:2, In. 11; R: 11- Appendix: pages 89-91
[15] R: 9-37:2, In. 16-17
[16] R: 9-36:4, In. 17-24
[17] R: 9-21:22
[18] R: 9-35:5 (Assignment of Error)
[19] R: 9-38:3, In. 23 through R: 9-38:4, In. 2-4
[20] R: 9-40:5, In. 8-10
[21] R: 9-45:58-59
[22] R: 9-18

and instructed to the jury on counts one and two. I asserted that verdict violated my rights secured under an Article of the Wisconsin Constitution. I also provided the court with a recently decided court of appeals case with an issue exactly like mine.

The circuit court passed on my due process and insufficient evidence argument by saying that:

> "Although the jury instructions referenced 611 N.25th St. as the location of the sexual assaults with S.E., this was a clerical error only. The jury verdicts did not refer to the specific addresses; the verdicts referred specifically to the facts set forth in the information, which contained the correct addresses for all counts, including counts three and four. The verdicts confirmed precisely to the fats set forth in the information as did the testimony at trial for S.E.
>
> The defendant also contends that the information set forth the period of sexual abuse in counts one and two as between November 22, 2009 and August 30, 2010, but that K.R.J.'s birthday was November 22, 2003, and thus, he could not have been five years old between November 22, 2009 and August 30, 2919 as he testified. The issue was really whether he was a child under the age of 12 when these incidents occurred. Even if the information did not include the year he was five years of age, sec. 971.29 (2), Wis. Stats., allows the court to amend it. After verdict, in accordance with the statute, the pleading (information) 'shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.'" [23]

I raised the constitutional speedy trial argument by matter of asserting that I submitted demand after demand for speedy; that the cause of the delay was a cavalier disregard of my speedy trial rights brought on primarily because of the trial court's view that I didn't have a speedy trial right. I asserted, among other things, minimal prejudice due to anxiety and concern over the seriousness of the charges and the time they carry, minimal prejudice because no one on my witness list attended trial after the 18-month delay; and a far greater prejudice because the "passage of time" hampered witnesses' ability to clearly remember the events surrounding my being charged and they testified at trial inconsistently with their earlier statements.

The circuit court passed on my speedy trial argument be agreeing that the 18-month delay triggered review of the other three Barker factors, and by stating that it was

> "cognizant of the reasons for the delay, which must be considered under Barker, but also considers that trial counsel did not pursue a speedy trial because the defendant was already incarcerated in another case. Although the defendant did not see eye to eye on this issue, the fact remains that the defendant was represented by counsel and counsel, not the defendant, was the one responsible for making the decisions. The court cannot find that any prejudice attached to the defendant's case as he was the sole defense witness. Further, no prejudice attached because, as indicated by counsel, the defendant was already in custody in connection with another matter. The court acknowledges that he probably had anxiety while incarcerated during the pending charges, but this occurs in practically every criminal case, which has caused Wisconsin courts to view any prejudice to the defendant as minimal in this regard. Trial counsel was not ineffective for failing to make a speedy trial demand." [24]

I raised the constitutional right to effective assistance of counsel argument by matter of asserting that after the trial court read the rules for impeachment by evidence of conviction of a crime, Wisconsin Statute 906.09, trial counsel volunteered the nature of my prior convictions to the jury. I asserted that the evidence corroborated Kenneth's testimony and was a direct hit to my credibility because it showed that I'd been convicted on deception before. The evidence tainted the jury's verdict.

The circuit court passed on this argument by saying that:

> "It was clear to the court that trial counsel did this to show the jury that the defendant had never been convicted of a sexual assault of any kind previously. It was so clearly a point of strategy that the court finds a Machner hearing is not necessary. The defendant's five prior convictions may have caused the jury to believe that he had engaged in similar behavior with children in the past. Although the defendant argues that such conduct on part of counsel was deficient, the court finds that it was not prejudicial. The two children who testified were more credible than the defendant was, and there is not a reasonable probability the outcome of the trial would have been any different had trial counsel not gone into the specifics of his prior offenses." [25]

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[23] R: 9-19:8-9
[24] R: 9-19:7-8
[25] R: 9-19:9, P2

I next asserted that my trial counsel was ineffective when he failed to object to the persecutor's closing arguments that urged the jury to make an improper inference when he stated, in part: "And what sort of personality would sexually assault a child... someone's who's trying to use two women for his own sexual pleasure. So we learned from Mr. Cotton a little about his personality." I asserted that the prosecutor used my testimony that I dated my son's mother and the alleged victims' mother at the same time for a purpose expressly prohibited by § 904.04 (2), Wis. Stats. and that this was an impermissible comment upon my bad character and propensity to sexually assault children. I asserted that the trial court's instructions before closing arguments couldn't have cured the error since it was given before the statement was made and didn't alert the jury to the prohibited reference.

The circuit court passed on this argument by saying that:

> "The defendant asserts that the State's closing arguments consisted of other acts evidence to which trial counsel should have objected. Closing argument is not evidence, and the jurors were so instructed. The State's argument was fair game based on the evidence adduced, and since it didn't constitute evidence, it did not, and could not, constitute 'other acts' evidence." [26]

On June 16, 2016, in a written decision and order, the circuit court denied my post-conviction motion without a hearing. On June 17, 2016, I filed my notice of appeal to the Wisconsin court of appeals, then on October 28, 2016. I was able to file an appellant's brief where I argued the same issues in my post-conviction motion.[27] The State, on December 27, 2016, responded. In January 17, 2017, I filed my reply brief.

I asserted that the jury was instructed to deliberate only the evidentiary facts presented during trial and that a criminal defendant is entitled to procedural due process, requiring that a conviction rest upon a charge made before trial and not after.

The Wisconsin court of appeals passed on all my arguments by adopting the State's brief and the circuit court's decision. On August 29, 2017, the Wisconsin court of appeals, in a written decision and order, affirmed the judgment and orders of the circuit court for Milwaukee County.[28] My conviction was reaffirmed on Remittitur on December 12, 2017 and my petition for review was denied by the Wisconsin supreme court on the same date, December 12, 2017.[29]

On January 5, 2018, I filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Wisconsin, raising the same constitutional rights.[30] On June 29, 2018, in a written decision and order, the district court passed on my arguments by deferring its decision to the findings of the Wisconsin court of appeals and the jury's verdict, and denied my writ of habeas corpus and certificate of appealability. [31]

On July 16, 2018, I filed a notice of appeal under U.S.C. § 2254 and an application for a certificate of appealability with the United States Court of Appeals for the Seventh Circuit.[32] The court denied my certificate of appealability on March 20, 2019. I filed a petition for rehearing on April 29, 2019, the court denied my petition for rehearing and rehearing en banc on June 5, 2019. With all due respect, I now petition the Supreme Court of the United States for a writ of certiorari.

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[26] R: 9-19:9, P3
[27] R: 9-20
[28] R: 9-23:1
[29] R: 9-25
[30] R: 1
[31] R: 14
[32] R: 16

Concise Argument

Q1: Due Process/ Insufficient Evidence

P1. With all due respect, if it pleases the Court, in June 2012, the State filed a second amended information charging me with four counts, with two distinct sexual assaults by contact with Shalonda between June 16, 2009 and June 15, 2010 at 611 N. 25th St. in the City of Milwaukee, Milwaukee County, Wisconsin, and two distinct sexual assaults by intercourse with Kenneth between November 22, 2009 and August 30, 2010 at 611 N. 25th St. in the City of Milwaukee, Milwaukee County, Wisconsin. [33]

P2. The jury was instructed in part where it pertains to Shalonda that "'sexual contact' means an intentional touching of the vagina, either directly or through the clothing, by any part of the body or by any object, or intentionally causing or allowing someone to touch one's penis, either directly or through the clothing." [34]

P3. The jury was instructed in part where it pertains to Kenneth that "'sexual intercourse' means any intrusion, however slight, by any part of a person's body or by any object, into the genital or anal opening of another... 'sexual intercourse' includes felation.'" [35]

P4. The charges were pursuant to Wisconsin Statutes, section 948.02 (1) (b) and 948.02 (1) (e).

P5. In addition, if it pleases the Court, the instructions further focused the jury on the elements the State had to prove beyond a reasonable doubt by separately explaining that "If you find that the offense charged was committed by the defendant, it is not necessary for the State to prove that the offense was committed on a specific date. If the evidence shows beyond a reasonable doubt that the offense was committed during the time period alleged in the Information, that is sufficient. In reaching your verdict, examine the evidence with care and caution." [36]

P6. If it pleases the Court, more relevant jury instructions were:

> "It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, your must base your verdict on the law I give you in these instructions. Apply

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[33] R: 9-2, 3; Appendix Exh. #5
[34] R: 9-45:11
[35] R: 9-45:9
[36] R: 9-45:13, In. 2-8

that law to the facts in the case which have been properly proven by evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason, and best judgment, reach your verdict." [37]

P7. Pertaining to Shalonda, who was 11 years old when she testified, testified to two alleged events at 611 N. 25th St. during the applicable time period, during direct and cross examination. [38]

P8. With all due respect, in one of the incidents, she testified that sometime in the night after her 10th birthday[39] she allegedly woke up next to me in her mother's bed[40] at 611 N. 25th St. She allegedly sees that she and I were naked and my leg was next to hers.[41] Shalonda gets up and puts on her clothes.[42] After getting dressed, she went into the bathroom to sit down and cry.[43] She testified that she never noticed anything on her body that was unusual. [44]

P9. If it pleases the Court, in her further testimony, I allegedly walked out of her bedroom just as she awoke and opened her eyes.[45] When she looked down she saw her shirt unbuttoned.[46] She alleged that after I left the room she laid there for a second then asked her sister could she lay by the wall and started to fall asleep. [47] Shalonda testified that nothing else happened after that. [48]

P10. Examinations at the hospital revealed nothing indicating that she'd suffered any sexual assaults. [49]

P11. At the conclusion of evidence, the trial judge instructed, to two distinct charges, that "The information in this case charges that between June 16, 2009 and June 15, 2010 at 611 N. 25th Street in the City of Milwaukee, Milwaukee County, Wisconsin, the defendant, Micheal Cotton, did have sexual contact with Shalonda...To these counts the defendant has entered pleas of not guilty, which means the state must prove every element of each offense charged beyond a reasonable doubt." [50]

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[37] R: 9-45:6, In. 21
[38] R: 9-42:53, In. 14 through R: 9-42:65 and R: 9-42:90, In. 10 through R: 9-42:93
[39] R: 9-42:65, In. 18-21
[40] 9-42:64, In. 10-11
[41] Id. at In. 11-12 and In. 23-25
[42] Id. at In. 12-13
[43] Id. at In. 13-14
[44] R: 9-42:65, In. 1-2
[45] R: 9-42:90, In. 22-23
[46] Id. at In. 24-25 and R: 9-42:91, In. 13-14
[47] R: 9-42:91, In. 2-5
[48] Id. at In. 5-9
[49] R: 9-43:129
[50] R: 9-45:10, In. 6-17

P12. Shalonda's testimony included no evidence of vaginal touching, penile touching, touching of the breasts or of the butt as charged in the information and instructed to the jury (i.e., at the identified address, during the applicable time period [51]). The only testimony presented to the jury was that 1) when Shalonda awoke on some night after her 10th birthday, June 19, 2010, at 611 N. 25th St., she allegedly became aware of her and my nakedness, my leg was next to hers, and 2) she allegedly awoke to the sight of me walking out the room and her shirt was unbuttoned.

P13. Pertaining to Kenneth, who was eight years old when he took the stand, testified that I had sexual intercourse with him when he was five at 611 N. 25th St. [52]

P14. If it pleases the Court, after a rather lengthy testimony about a first assault, Kenneth admitted to perjuring himself with this testimony of the first alleged assault.[53] Kenneth then testified that I assaulted him 5 times but he could only remember the one that he was challenged on with the police report.[54] Later, he specifically described an incident when I allegedly made him put his penis in his cousin's butt. He testified that the statement he'd given the officer about me pulling down his pants, telling him to lay on the bed, and putting my penis in his butt was not true.[55] Then Kenneth said that there were no other times. [56] He alleged that this happened over two weeks. [57]

P15. Examinations at the hospital revealed nothing indicating that he'd suffered any sexual assaults. [58]

P16. At the conclusion of evidence, the trial judge instructed the jury twice, for the two distinct charges, that "The information in this case charges that between November 22, 2009 and August 30, 2010 at 611 N.25th Street in the City of Milwaukee, Milwaukee County, Wisconsin, the defendant, Micheal Cotton, did have sexual intercourse with Kenneth, D.O.B. 11/22/2003...To these counts the defendant has entered pleas of not guilty, which means that the state must prove every element of each offense charged beyond a reasonable doubt." [59]

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[51] R: 9-42:63, In. 14 through R: 9-42:65 and R: 9-42:90, In. 10 through R: 9-42:93
[52] R: 9-42:109, In. 17
[53] R: 9-42:110, In. 5-9
[54] R: 9-43:24-25
[55] R: 9-43:37-38
[56] R: 9-43:53, In. 3-8
[57] R: 9-42:114, In. 16-18
[58] R: 9-43:126, In. 19-22
[59] R: 9-45:7, In. 14

P17. Kenneth's testimony was insufficient to prove that any of the alleged assaults took place between November 22, 2009 and August 30, 2010, specifically, as charged in the information and instructed. The Information and instruction presented to the jury that, when he was six years old, between November 22, 2009 and August 30, 2010 at 611 N. 25th Street, I allegedly had sexual intercourse with him. But Kenneth testified that over 2 weeks when he was five years old I had sexual intercourse with him, between November 22, 2008 and November 21, 2009.

P18. With all due respect, if it pleases the Court, the jury returned 4 general verdicts finding me guilty as charged in the information. The general verdict forms reads: "We the jury, find the defendant, Micheal Cotton, guilty of first-degree sexual assault of a child, [Shalonda and Kenneth] as charged in Count [1-4] of the Information." [60] The Wisconsin supreme court in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988), ruled that "a general jury verdict can be sustained only if the trial testimony was sufficient to sustain the conviction under any and all theories submitted to the jury."

P19. The Wisconsin court of appeals in my case decided my federal due process and insufficient evidence claims in a way that conflicts with decision after decision of Wisconsin courts of last resort pursuant to SCR 10 (b). In my case it was ruled:

> "The discrepancies between the testimony and the facts alleged in the information do not render the evidence insufficient to support the verdicts because the exact date and precise location of an assault is not a material element of the crime of sexual assault of a child. See State v. Hurley, 2015 WI 35, ¶ 34, 361 Wis.2d 529, 861 N.W.2d 174 (time is not a material element of the crime of child sexual assault). Moreover, "[a]fter verdict, the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial." WIS. STAT. § 971.29 (2)."

P20. With all due respect, if it pleases the Court, whereas the lower court in my case cited State v. Hurley[61], Hurley deals only with the sufficiency of the complaint, and tells the appellate courts to restrict its analysis to the charging documents. It says "the date an assault was committed need not be precisely alleged in a criminal complaint." This is completely irrelevant and nonresponsive to my argument.

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[60] R: 9-45:58-59; Appendix Exh. #6
[61] Appendix Exh. #7

P21. I never argued that the State hadn't alleged the dates or locations of the offenses in the complaint with sufficient precision nor that the criminal charges weren't sufficiently stated.

P22. Instead, if it pleases the Court, I have always argued that the State had already made allegations of four single acts of sexual assault using the years and location particularized by Kenneth and Shalonda. The complaint reflected these allegations, which were then reflected in the information. Then the jury instructions that were presented reflected the information.

P23. With all due respect, if it pleases the Court, the first case I cite that conflicts with the decision in my case properly deals with the issues. In State v. Petrie, 2012 WI App. 106, 344 Wis.2d 299, 821 N.W.2d 413 (2012 Wisc. App)[62], the Wisconsin court of appeals reversed the conviction because the evidence of the following facts were insufficient to prove at least three assaults of the victim took place between January 1 and August 31, 2001, specifically, as identified in the information. It said " To prevail on this claim, Petrie must show that "'the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonable, could have found guilt beyond a reasonable doubt.'" State v. Poellinger, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1989)."

P24. The victim testified "that Petrie started to have sexual contact with her when she and her sister "'were...eight or nine.'" [The victim] testified that in 2001 ten or eleven incidents of sexual contact took place between herself and Petrie. She specifically described three of these incidents. Additionally, [the victim's sister] testified that she saw Petrie having sexual intercourse with [the victim] in a bedroom of the family home in May of 2001." The court explained:

> "At the conclusion of evidence, the judge instructed the jury that the state "'has to show beyond a reasonable doubt that at least three sexual assaults took place within a specified period of time. The specified period of time is from January 1, 2001 through August 31, 2001.'" The state concedes that it failed to prove this element and that the conviction on count one...should be reversed." Petrie, 2012 WI App. 106, 3.

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[62] Appendix Exh. #8

P25. The State in Petrie conceded that it failed to prove beyond a reasonable doubt that the defendant committed at least three sexual assaults within a specific time period and in effect conceded that the jury sometimes ignores those elements in the information and instructions.

P26. These elemental safeguards have been in place long before me. In Gutenkunst v. State, 218 Wis. 96, 259 N.W. 610 (1935), for example, he was charged by information with committing an act of sodomy with one "B", a minor, between the 1st and 30th days of June. The Wisconsin supreme court stated in relevant part:

> "The informality and lack of definiteness in the second count of the information is not prejudicial to the defendant. If the act occurred, as alleged, on any day between June 1st and June 30th, the defendant may properly be found guilty thereof." Gutenkunst, 218 Wis. at 104. See also Robin v. State, 143 Wis. 205, 205, 126 N.W. 750 (1910).

P27. And logically, with all due respect, if it pleases the Court, the address in the information and instructions is held to the same standard. If the acts didn't occur within any room at 611 N. 25th St., as alleged, then my argument holds merit, as the assaults didn't occur at the address charged in the information and instruction. With all due respect, in State v. Mitchell, 253 Wis. 626, 4 (1948), the supreme court of Wisconsin stated

> "Upon review of the entire record it is evident that it was fully within the province of the jury to consider Shirley's testimony credible and sufficient to establish that on the occasions charged in the information the defendant did commit the criminal acts testified to by her, even though she could not remember the exact date of each occasion or the particular room." Id. at 4.

P28. With all due respect, I am not arguing an exact date or particular room, I am arguing the time period and address in the information and instructions to the jury.

P29. "The general rule is that allegations and proof must correspond [.]" Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 631, 79 L.Ed.2d 1314 (1935). "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it were tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 201-202, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

P30. If it pleases the Court, in two cases decided by the Wisconsin supreme court, the court ruled that:

> "Once the jury has been properly instructed on the principles it must apply to find the defendant guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." State v. Poellinger, 153 Wis.2d 493, 508, 451 N.W.2d 752 (1990).
>
> "To allow such a conviction based on evidence that is unrelated to the jury instructions violates the fundamental right to trial by jury in two ways: 1) it makes the jury instructions defining the offense superfluous and 2) it violates the defendant's right to a unanimous verdict...The right to a unanimous verdict is secured under Article 1, sections 5 and 7 of the Wisconsin Constitution." State v. Wulff, 207 Wis.2d 143, 557 N.W.2d 813 (1997).

P31. And with all due respect, if it pleases the Court, WIS. STAT. § 971.29 (2) doesn't deem the pleading amended to conform to the proof as a matter of course as the Wisconsin court of appeals suggested in my case.

P32. With all due respect, if it pleases the Court, the properly stated rule of law, section 971.29 (2), actually provides:

> "(2) At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial."

P33. With all due respect, if it pleases the Court, as per the statute, the State didn't move for amendment to the information, so there was no motion for the court to rule on and therefore allow. State v. Duda, 60 Wis.2d 431, 439-40, 210 N.W.2d 763, 767, further clarifies, stating:

> "Furthermore, in this case it would be impossible for the defendant to raise any objection to such an amendment of the charge because the state advances the argument for the first time on this appeal. As we understand the argument of the state, such an amendment could be made as a matter of course. If the reasoning of the state is viable, then the defendant would have no right to object to such an amendment until after the respondent's brief raising the issue is filed on appeal. Such is not the law."

P34. With all due respect, if it pleases the Court, the § 971.29 (2) amendment argument was advanced when my post-conviction motion was denied, but not even the Judgment of Conviction reflects an amended pleading. [63]

P35. A criminal defendant is entitled to notice of a specific charge, Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948), and procedural due process requires that a conviction rest upon a charge made before the trial and not after. Presnell v. Georgia, 439 U.S. 14, 16, 99 S.Ct. 235, 58 L.Ed.2d 507 (1978).

P36. The jury was legally adequately instructed[64], and given that, the question becomes whether the State met its burden. A jury is presumed to follow its instruction. Richardson v. Marsh, 481 U.S. 200, 211, 95 L.Ed.2d 176, 107 S.Ct. 1702 (1987). The State has the burden of developing and presenting a theory of the crime to the jury. State v. Velez, 224 Wis.2d 1, 15-16, 589 N.W.2d 9 (1999). The State cannot second-guess its theory or theories after trial, Chiarella v. United States, 445 U.S. 222, 236, 63 L.Ed.2d 348, 100 S.Ct. 1108 (1980), and jury instructions must be expected to control jurors' deliberations.

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[63] Appendix Exh. #9
[64] R: 9-44:90-61 and R: 9-41:2-3

P37. The Wisconsin jury instructions are persuasive authority for interpreting statutes. State v. Rardon, 185 Wis.2d 701, 518 N.W.2d 330 (Ct. App. 1994). Supported by the fact that , with all due respect, (1) the trial court repeatedly instructed the jury that the State had the burden of proving each element of the offenses charged beyond a reasonable doubt; (2) the trial judge used the words "beyond a reasonable doubt" in the instructions on approximately seventeen different occasions; and (3) the trial court never mentioned any lesser standard of proof in the course of giving the instructions, as I've argued, with all due respect, the instructions further focused the jury on the elements the State had to prove beyond a reasonable doubt by separately explaining that "If you find that the offense charged was committed by the defendant, it is not necessary for the state to prove that the offense was committed on a specific date. If the evidence shows beyond a reasonable doubt that the offense was committed during the time period alleged in the Information, that is sufficient. In reaching your verdict, examine the evidence with care and caution."

P38. With all due respect, if it pleases the Court, "beyond a reasonable doubt" proves the time element an essential element and focused the jury's attention on the location and time elements in the Information and instructions.

P39. "To sustain a conviction on grounds not charged in the Information and which the jury had no opportunity to pass upon, deprives the defendant of a fair trial and a trial by jury, and denies that due process of law guaranteed by the 14th Amendment to the United States Constitution." Cole v. Arkansas, 333 U.S. 196, 200. The "[c]onstitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." Ex Parte Quirin, 317 U.S. 1 (1942).

Q2: Constitutional Speedy Trial

P40. The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

P41. If it pleases the Court, as applied to the state, Article 1, Section 7 of the Wisconsin Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right...in prosecutions by indictment, or information, to a speedy public trial." Borhegyi, 222 Wis.2d at 509.

P42. If it pleases the Court, the Seventh Circuit recently restated the well-established Barker standard:

"We weigh four factors to determine whether a defendant's constitutional right to a speedy trial has been violated: the length of the delay (even time which may be excluded under the [Speedy Trial] Act, whether the government or the defendant is more to blame for the delay, whether the defendant asserted his speedy trial rights, and whether there was prejudice because of the delay. Doggett v. United States, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992); United States v. Wanigansinghe, 545 F.3d 595, 597 (7th Cir. 2007)." United States v. Fuller, 306 Fed. Appx 297, 2009 U.S. App. LEXIS 27 (7th Cir. 2009) (unpublished).

P43. The right to a speedy trial must be considered based upon the totality of circumstances that exist in any specific case. Borhegyi, 222 Wis.2d at 510 (citing Barker, 407 U.S. at 530-31 footnote omitted)).

P44. The Wisconsin court of appeals in my case decided my constitutional speedy trial claim in a way which I've already shown conflicts with decision after decision of Wisconsin's courts of last resort, United States courts of appeals, and relevant decisions of this Court pursuant to SCR 10 (b) and SCR 10 (c). In my case it was ruled:

"We begin with a presumption that Cotton's right to a speedy trial was violated because there was an eighteen-month delay between Cotton's charging and the trial. See State v. Urdahl, 2005 WI App. 191, 286 Wis.2d 476, P11, 704 N.W.2d 324, ¶12 (when the length of the delay approaches a year, it is presumptively prejudicial, triggering a closer examination of the circumstances surrounding the claim). As for the reasons for the delay, the State and the defense jointly requested the first trial adjournment. Cotton's lawyer requested a postponement of the second trial date on the ground that he needed more time to prepare. After the third trial date was set, the State requested a three-week delay for scheduling reasons. Most of the delays were thus attributable to Cotton. Id., ¶26 (delays caused by the defendant are not counted). And the delays attributable to the State were reasonably made, and were thus not weighed heavily in the Barker analysis, especially in light of the fact that the circuit court was informed on several occasions that there was no speedy trial request pending because Cotton was serving time on another charge. See Urdahl, 286 Wis.2d 476, ¶26 ("A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or over-crowded courts' though still counted, are weighted less heavily.").

Turning to whether Cotton asserted his speedy trial right, Cotton did not make a speedy trial request through counsel, although Cotton argues on appeal that he attempted to file a speedy trial request pro se. As for prejudice to Cotton from the delay, it "should be assessed in the light of the interests of defendant which the speedy trial right was designed to protect." Barker, 407 U.S. at 532. The right to a speedy trial was designed: (1) "to prevent oppressive pretrial incarceration;" (2) "to minimize the anxiety and concern of the accused;" and (3) "to limit the possibility the defense will be impaired." Id. Here, Cotton was serving time on another case during the pretrial period, so he cannot claim that the circuit court's failure to more promptly conduct the trial subjected him to unwarranted pretrial incarceration. While Cotton may have experienced anxiety waiting for his trial, he does not assert that his defense to these charges was impaired although he contends that he suffered other inconveniences. On the whole, the lack of prejudice to Cotton weighs strongly in favor of a conclusion that his right to a speedy trial was not violated."

P45. With all due respect, if it pleases the Court, because the Wisconsin court of appeals' decision was a wholesale adoption of the State's brief, it failed, on the SECOND FACTOR, to engage the particular facts of my case by challenging my categorizations of the delays. But the test weighs, not a barebones analysis, but the totality of the circumstances that exist in any specific case. Borhegyi, 222 Wis.2d at 510 (citing Barker, 407 U.S. at 530-31).

P46. Who is more to blame for the delay, which, if it pleases the Court, the circuit court assigned the blame to the State[65], involved first the trial court's referencing congestion for the delaying of my June 6, 2011 trial date[66] making my trial date "down on the totem pole anyway." In State v. Allen, 1982 Wisc. App. LEXIS 3734, the Wisconsin court of appeals quoted the Wisconsin supreme court in Ziegenhagen (which cited to Barker, page 531), that:

> "While delay occasioned by negligence or overcrowded courts is not to be weighed heavily against the government as an intentional effort to hamper the defense, the responsibility must nevertheless rest with the State. State v. Ziegenhagen, 73 Wis.2d at 667, 245 N.W.2d at 661."

P47. With all due respect, the State also requested delay to contemplate the adding of charges under Wisconsin Statute section 971.12 (1) after Kenneth and Shalonda's mother, Cora, alleged to have "discovered" child pornography in a locked closet some 10 months after I'd been involved in a raid regarding drugs and a gun. [67] State v. Allen, 1982 Wisc. App. LEXIS 3734 states "Where the government's reasons for delaying a trial are extrinsic to the case, the reasons must be chargeable in toto to the State.". The District Attorney's Office had knowledge Cora said that she didn't recognize any of the people in the videos[68] and she alleged to have "discovered" the DVD's in a closet some 10 months after I'd been arrested regarding drugs and six months after she'd accused me of sexually assaulting Kenneth and Shalonda. [69] Because the "discovered" child pornography and sexual assault charges were based on separate acts with no overlapping evidence, the State wasn't required to prosecute both offenses in the same trial; the State knowing that joining this cause with the others for trial may result in delay, not only in the actual trial itself, but also in the starting of trial. [70]

P48. With all due respect, if it pleases the Court, defense counsel was then required to request delay to obtain exculpatory jailhouse tapes of phone conversations because as he stated in his motion to the trial court and on record[71] "...counsel for the defendant has made a request of the Assistant District Attorney Aaron Hall to provide written permission to the Sheriff's Department for the release of the phone records, but was informed by Attorney Hall that he would not give the aforementioned permission." "The lack of an attempt to keep the trial on track evinced a "'cavalier disregard'" for a defendant's constitutional right." State v. Benz, 2011 Wisc. App. LEXIS 326, 5-6, 2011 WI

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[65] R: 9-19:8
[66] R: 9-29:4, In: 14-25
[67] R: 9-24:55; Appendix Exh. # 11 and Appendix Exh. #14
[68] Id.
[69] Id.
[70] R: 9-33:3, In. 17-22
[71] R: 9-39:2, In, 11; R: 11-Appendix pages 89-91

App. 75, 334 Wis.2d 146, 799 N.W.2d 928. "A cavalier disregard of the defendant's right is to be weighed heavily against the State. Green v. State, 75 Wis.2d 631, 638, 250 N.W.2d 305 (1977)." Benz, 2011 Wisc. App. LEXIS 326, 5-6.

P49. With all due respect, if it pleases the Court, defense counsel later reasonably requested a few weeks of delay to prepare for trial[72] due to three of his full-time employees quitting, without giving notice, which caused a severe strain on his office's ability to function properly.[73] The State countered that "I am not available to try until next year."[74] If it pleases the Court, because of this the trial was unreasonably scheduled from November 4, 2011 to February 21, 2012. Thus the lengthy delay was not due to defense counsel, but to the State for the delay's four months. "The government as an institution is charged with the duty of assuring a defendant a speedy trial. It is irrelevant whether a delay occurred in the clerk's office, the prosecutor's office, or the judiciary. The delay in the circumstances of this case is to be charged against the state of Wisconsin." State v. Ziegenhagen, 73 Wis.2d at 667 (citing Barker, at page 531). The "State's failure to even offer an explanation for such a substantial delay exceeds negligence and evinces a cavalier disregard of the speedy trial right." Borhegyi, 222 Wis.2d at 513-514.

P50. If it pleases the Court, the State then, again, asked for a three-week delay, this time due to staffing changes in the D.A.'s office that resulted in a scheduling problem for the prosecutor assigned to try my case.[75] "It is within the power of the state to provide prosecutorial staffs to afford the defendant and the public speedy trials, and it is the state's duty to do so." Green v. State, 75 Wis.2d 631, 250 N.W.2d 305.

P51. With all due respect, with respect to the last delay request forced upon trial counsel by the State, the State conceded that it provided defense counsel with the wrong set of tapes and was working to get defense counsel the correct set, thus making the last delay request necessary.[76] However, these tapes were not produced in time for trial- over one year after the initial request. The calls showed Kenneth and Shalonda's mother threatening me with retaliation for my breaking up with her for my own child's mother, approximately one-half a week before she falsely alleged I sexually assaulted Kenneth and Shalonda. Defense counsel made a formal "open records" request for these

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[72] R: 9-36:4, In. 17
[73] R: 9-3
[74] Id.
[75] R: 9-37:2, In. 16-17
[76] R: 9-21:22

phone records to agents of the State. After much delay, the agents of the State informed defense counsel and his private investigator they would only release the records upon court order or written permission from the prosecutor's office. Defense counsel took the request to the prosecutor, who told defense counsel that he wouldn't give the permission to its agents to release the tapes to the defense.[77] Defense counsel compelled release of the call recordings and because of the exculpatory nature of the recordings the court ordered the prosecutor's office to turn over the tapes. Several months later the counsels were back in court, because, according to the transcripts, the State gave defense counsel the wrong tapes. Several months after that, counsels were back in court, the prosecutor admitted that even though the defense counsel had requested the correct tapes, the prosecutor's office never sought them.[78] He then personally apologized on behalf of the D.A.'s office. He said, "Our office did drop the ball here."[79] The court said, "Right, it sounds like it [.]" [80]

P52. With all due respect, if it pleases the Court, the State is more to blame for the delay. And the State's discovery violations for its failure to produce exculpatory evidence showed a cavalier disregard of my rights. State v. Benz, 2011 Wisc. App. LEXIS 326, P12. "Upon a defendant's demand:

> the prosecutor must produce any exculpatory evidence within the State's possession, custody or control. WIS. STAT. § 971.23 (1) (h) (2009-10). Due process imposes a similar obligation of disclosure "'where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution.'" Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To establish a Brady violation, a defendant must show that the State suppressed evidence in its possession; that the evidence was favorable to him or her; and that the evidence was material to his or her guilt or punishment. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if there is a reasonable probability that its disclosure would have led to a different result in the proceeding. See State v. Garrity, 161 Wis.2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991)." Benz, 2011 Wisc. App. LEXIS 326, P13.

P53. The Wisconsin court of appeals thus decided this important federal question in a way that conflicts with the decision of the United States court of appeals in Julian v. Bartley, 495 F.3d 487, 494 (7th Cir. 2007) (The state court could not ignore or overlook a key piece of evidence in reaching its conclusion).

P54. If it pleases the Court, the lower court ignoring the State's admitted dilatoriness in producing such a key piece as the exculpatory jailhouse phone call tapes, which caused somewhere near a year of delay, was unacceptable.

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[77] Appendix Exh. # 13
[78] R: 9-39:5
[79] Id.
[80] Id.

P55. With all due respect, government actions which are tangential, dilatory, or taken in bad faith weigh heavily in favor of a finding that a speedy trial violation occurred. United States v. Loud Hawk, 474 U.S. 302, 315-17, 106 S.Ct. 648, 656-57, 88 L.Ed.2d 640 (1986). The trial court referencing congestion, the State floundering with the question of adding charges for unrelated child pornography (which resulted in an almost three-month delay), and the State's delay until February of 2012 so it could satisfy unknown obligations (around three months), were all tangential.

P56. And with all due respect, if it pleases the Court, the State's delays weren't reasonably made as they were not intrinsic to the case itself. As Mr. Justice White stated in his concurring opinion to Barker, 407 U.S. at 537:

> "...only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at trial. 'The major evils protected against by the speedy trial guarantee exists quite apart from actual prejudice to an accused's defense.' United States v. Marion, [(1971) 404 U.S. 307, 92 Sup.Ct 455, 30 L.Ed.2d 468], supra, at 320."

P57. The addition of alleged child pornography to the charges where the pornography was unrelated to my case isn't intrinsic to the case itself. And a case can ideally be tried by any prosecutor assigned by the D.A.'s office. Then, that the courts may have been congested was no excuse for the State's failure to bring my case to trial. "Other judges were available, and if they were not, the fault lay not with the defendant but with the resources of the system of court administration in this state. Barker points out that where the delay is the result of overcrowded courts or lack of judicial manpower, "...such circumstances must rest with the government rather that with the defendant." (P. 531)." Hadley v. State, 66 Wis.2d at 363.

P58. With all due respect, if it pleases the Court, the Wisconsin court of appeals said that although I submitted pro se assertions for a speedy trial they were disregarded because the assertions weren't made by counsel. This was concluded likely because the THIRD FACTOR is entitled to strong evidentiary weight in the analysis. See Barker, 407 U.S. at 531. If it pleases the Court, the law simply suggests an affirmative, unambiguous request to the court, orally or in writing, so that no reasonable person can say that the request wasn't made, and doesn't require that request to be in the form of a formal motion filed with the court or asserted through counsel. If it pleases the Court, see, e.g., United States v. Padilla, 819 F.2d 952, 963 (letter from defendant to federal magistrate seeking to have federal charges addressed constituted demand for speedy trial).

P59. With all due respect, I was regularly asserting my right to a speedy trial but my pleas were going unheeded. I made a request for a speedy trial through a letter written by me to the trial court on June 22, 2011,[81] several pro se motions, and other correspondences[82] asserting my right. [83]

P60. If it pleases the Court, after I submitted an express motion to dismiss for violation of my speedy trial rights[84], the government, at the May 11, 2012 procedure, recognized that a demand for speedy trial by the stating: "I note from a perusal of some items in the court file, the defendant seems to be requesting a speedy trial." As a chime to these statements, defense counsel said "I would just note with regard to all the letters sent by my client they are all requests for a speedy trial." [85]

P61. With all due respect, the Wisconsin Supreme Court and court of appeals has ruled that trial counsel isn't particularly tasked with demanding a petitioner's United States or Wisconsin constitutional speedy trial. As the supreme court explains in two cases, the analysis and remedy are different:

> "The statutory speedy trial right, on the other hand, is significantly different from the constitutional right both in the manner in which a violation is determined and in the remedy afforded. Rather than requiring a case-by-case determination of whether a particular delay is justified, [WIS. STAT. §] 971.10 (2), Stats., sets forth a specific period of time within which a defendant charged with a felony must be brought to trial after a proper demand is made. Although the time period may be extended by a continuance grant by the court, sub (3) of [§] 971.10 provides that a continuance should be granted only if it is determined that the ends of justice served by it outweighs the interest of the public and the defendant in a speedy trial. In addition, instead of dismissal of the charges pending against a defendant who is denied the constitutional right to a speedy trial, the remedy afforded by [§] 971.10 is simply release from custody or from the obligation of bond pending trial." State ex rel. Rabe v. Ferris, 97 Wis.2d 63, 67-68, 293 N.W.2d 151 (1980); cited by State v. Tyler, 2008 WI App. 36, P4, 308 Wis.2d 396, 746 N.W.2d 605 (2008)(quoting same).
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> "This court has held that sec. 971.10, Stats., is merely a legislatively enacted measure to expedite trials. If does not provide the standard by which speedy trial violations are measured. See Beckett v. State, 73 Wis.2d 345, 347, 243 N.W.2d 472 (1976)." State v. Lemay, 155 Wis.2d 202, 455 N.W.2d 233.

P62. With all due respect, Wisconsin Statute section 971.10 establishes a separate statutory right that isn't implicated in my case.

P63. With all due respect, if it pleases the Court, Hadley, 225 N.W.2d at 466 states:

> "The Barker Court carefully pointed out, [t]hat the requiring some show of assertion of right was necessary to distinguish cases, such as Barker itself, where there was evidence that the defendant did not want to be brought to trial. The repeated assertion of the right to speedy trial in this case puts him completely out of the category of defendants who

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[81] R: 9-22:24, paragraph 5
[82] Appendix Exh. # 16 and 17
[83] R: 11-Appendix pages 101-02
[84] R: 9-7:1-2
[85] R: 9-40:5, In. 8-10

are consciously seeking to avoid the day of reckoning. While the language in Barker is controlling in this case, the fact situation must be sharply distinguished. In Barker the defendant's counsel admitted in court that his client did not wish to be tried. In a concurring opinion, Mr. Justice White stated that, "'...it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case,'" (P.537) "'the result would have been the deprivation of the constitutional right to a speedy trial.'" Hadley, 225 N.W.2d at 466.

P64. Finally, with all due respect, because of the Wisconsin court of appeals' wholesale adoption of the State's brief, it failed, on the FOURTH FACTOR, to candidly address my particular allegations of prejudice.

P65. Whether there was prejudice because of the delay, if it pleases the Court, is to be assessed in light of my interests, which the speedy trial right was designed to protect. See Barker, 407 U.S. at 532.

P66. With all due respect, if it pleases the Court, to begin with, the presumption that pretrial delay has prejudiced the accused intensifies over time. Doggett v. United States, 505 U.S. 647, 652, 112 S.Ct 2686, 120 L.D.2d 520 (1992)(holding that the more protracted the delay, the more prejudice may be presumed from the delay); State v. Borhegyi, 222 Wis.2d at 519-20 (held that a length of delay exceeding twelve months weighed more heavily against the State).

P67. Where the prejudice here is intensified by an 18-month delay, while extending more than 6 months beyond the bare minimum needed to trigger the presumption of prejudice additionally weighs against the State, I argue a greater increase in anxiety in that I made sufficient efforts to shield myself from prosecution by asserting my right to speedy trial, but my pleas were cavalierly disregarded. Every effort provided replenished anxieties of impending release and every denial provided a compounded concern toward the next request. With all due respect, I was tired of not having any rights. Consequently, "[a] cavalier disregard of the defendant's rights is to be weighed heavily against the State. Green v. State, 75 Wis.2d 631, 638, 250 N.W.2d 305 (1977)." State v. Benz, 2011 Wisc. App. at P11.

P68. Then, at my initial appearance it was quickly resolved that I was indigent, yet I was overburdened with a bail in the amount of $50,000 cash. An amount that the judge admitted was "substantial." The $50,000 cash bond was unattainable to me as an indigent person and thus made pretrial incarceration a certainty.

P69. With all due respect, if it pleases the Court, I contend that at least some portion of my pretrial incarceration (from January of 2011 through May of 2011) was directly related to the criminal conduct charged in the underlying information, and thus at least some minimal prejudice flowed from the length of time I was forced to wait until the criminal charges against me were resolved. If it pleases the Court, see State v. Borhegyi, 222 Wis.2d at 515:

"Because ... at least some portion of Borhegyi's pretrial incarceration was directly related to the criminal conduct charged in the underlying complaint, we conclude that at least some minimal prejudice flowed from the significant length of time Borhegyi was forced to wait until the criminal charges against him were resolved. Minimal prejudice is sufficient to support our conclusion that Borhegyi was denied his right to a speedy trial in our ultimate balancing of the Barker factors, therefore we do not analyze this factor further." Borhegyi, 222 Wid.2d at 515.

"[T]he prejudice we have already found relating to oppressive pretrial incarceration and prevention of anxiety are enough for us to conclude that the seventeen month delay resulted in at least minimal prejudice to Borhegyi. Under the circumstances of this case, minimal prejudice is all that is necessary to support our conclusion that Borhegyi was denied his right to a speedy trial and therefore we need not further analyze or develop this issue." Borhegyi, 222 Wis.2d at 518.

P70. I also allege prejudice, if it pleases the Court, because I was undoubtedly concerned and anxious about the pending charges; as in State v. Borhegyi, 222 Wis.2d at 515:

"Another interest protected by the speedy trial right is the prevention of anxiety and frustration attendant in extensive trial delays. In Green [v. State, 75 Wis.2d 631, 250 N.W.2d 305 (1977)], an incarcerated defendant learned of additional charges brought against him for another crime committed prior to his incarceration. Thirteen months passed between the time he learned of those charges and his trial. The Wisconsin Supreme Court concluded: "'During the thirteen months after he learned of the charges, and before trial, he was undoubtedly concerned and anxious about the pending charges.'" Id. at 638, 250 N.W.2d at 308. Here, Borhegyi was required to wait seventeen months between the time of his arrest and the commencement of trial. Just as in Green, Borhegyi was undoubtedly concerned and anxious about the pending charges. Even if one were to conclude that this concern resulted in only minimal prejudice because he was already being confined on a sentence imposed for unrelated conduct as a result of a probation revocation, some anxiety existed based upon the extended period of time lapsing between Borhegyi's arrest and the actual trial." Borhegyi, 222 Wis.2d at 515.

P71. Then, with all due respect, the record shows the stigma that had been attached to me after I was burdened with these types of charges, how my associations were being curtailed and how anxiety was being created in me and my family.[86] As this Court said in Moore v. Arizona, 414 U.S. 25, 94 Sup.Ct. 188, 38 L.Ed.2d 183:

"In considering possible prejudice to the defendant as a factor in determining whether there has been a denial of his constitutional right to a speedy trial, prejudice caused by delay in bringing the defendant to trial is not confined to possible prejudice to his defense in the proceedings, but also includes possible prejudice which inordinate delay may have in (1) seriously interfering with his liberty, whether he is free on bail or not, (2) disrupting his employment, (3) draining his resources, (4) curtailing his associations, (5) subjecting him to public obloquy, and (6) creating anxiety in him, his family, and his friends[.]"

P72. With all due respect, if it pleases the Court, my baby sister addressed the trial court, saying:

"MELLODY COTTON: I might cry, because I don't know the whole situation of what is going on and I have separated myself from him, because this is my everything and I'm scared to lose him. But right is right and wrong is wrong. He played a wonderful part in my kid's life. Potty trained my seven year old. She's a girl and I want to take nothing from nobody today. I just know he's a man. He loves his son and I'm just scared because I don't understand how the best thing in my life can be taken from me so fast."

P73. My baby sister's testimony shows that the 18-month delay ended up leaving her unsure of my guilt or innocence so she completely took herself and my nieces out of my life even though I'd been nothing but a loving and accommodating brother and uncle. It also shows her anxiety.

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[86] R: 9-47:20, In. 10-17 and R: 9-47:21, In. 18-22

P74. With all due respect, my mother addressed the trial court, saying:

> "CAROLYN COTTON: I'm a little filled with anger because I wasn't informed, I was told there was going to be a jury trial and I was supposed to be subpoenaed to be here. My bottom line is that boy, this is my son and he raised my grandchildren. They had to go outside in the hallway. They are crying... He did not touch those children and I got to leave this with you. If a grown man like that with a penis that size would enter any child that young, it would have busted them open. There is no way. There is no way in the world, he did not do it. If he would have did it, I wouldn't even be here today."

P75. My mother's testimony shows that the 18-month delay created anxiety in her and my nieces.

P76. If it pleases the Court, I also allege prejudice on the grounds presented n Moore v. Arizona, 414 U.S. 25, 94 Sup.Ct. 188, 38 L.Ed.2d 183:

> "In addition to possible prejudice, a court must weigh the reasons for delay in bringing an incarcerated defendant to trial, and should consider the possible impact pending charges might have on defendant's prospects for parole and meaningful rehabilitation. Hooey, 393 U.S. 374; Dickey v. Florida, 398 U.S. 30; Barker, 407 U.S. 514."

P77. With all due respect, if it pleases the Court, after my further incarceration in Racine Correctional Institution I was denied "Act 38" sentence adjustment/early parole while awaiting resolution of these sexual assault charges because it was "not in the public interest." [87]

P78. Then, I not only told trial counsel of possible witnesses with exculpatory testimonies but had given him another list of witnesses[88], believing that he'd interviewed them. But there ended up being no defense witnesses. Upon post-conviction hand-over of trial counsel's files, I found that the notes in respect to the witnesses were limited to the inaccurate cursory notes on the Amended Witness List and contained no signed or recorded statements.[89]

P79. The record also indicated that come time for trial all of the State's witnesses it had intended to use were available for trial and the police officers and nurse practitioner had complete notes. "See, e.g., Ziegenhagen, 73 Wis.2d 656 (pretrial prejudice clear when defense witnesses unavailable but prosecution witnesses available and privy to clear and complete records with which to refresh their memories)." State v. Lemay, 155 Wis.2d 202, 214, 455 N.W.2d 233.

P80. I also allege prejudice, if it pleases the Court, under the distinct interest that the Barker Court deems most serious. I was indeed faced with the prospect of going to trial to confront witnesses whose recollections were

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[87] R: 9-24:61 at 03-08-2012 to 03-16-2012
[88] R: 9-5:36 and R: 11-Appendix pages 119-20
[89] Appendix Exh. # 15

diminished on the crucial central issue of my guilt. These diminished memories impaired the defense, a result the speedy trial seeks to prevent.

P81. Kenneth's testimony reads as follows. With all due respect, if it pleases the Court, for guidance see State v. Lemay, 155 Wis.2d 202, 215, 455 N.W.2d 233, 1990 Wisc. LEXIS 242 (1990) ("Here, for example, the only other witnesses besides the defendant, are witnesses for the state, the only other eye witness is the child victim. Whether the State's witnesses' memories or lack thereof are prejudicial to the defendant's ability to present his defense can only be seen with finality at trial.").

P82. Kenneth's testimony reads: [90]

> Defense Counsel: Where were you living the first time that it happened?
> Kenneth: In my new house right now.
> ...
> ...Q: And do you remember what room your were in?
> A: My mom's.
> Q: And what were you doing in your mom's room?
> A: I was downstairs when he called me.
> ...Q: Did he tell you to take your clothes off?
> A: Yes.
> ...
> ...Q: Then what did he tell you?
> A: To come here.
> Q: Then what happened?
> A: That's when he put his penis in my butt.
> ...
> ...Question: How long did that last that he put his penis in your butt?
> Answer: Five minutes.
> ...
> ...Defense Counsel: Kenneth, someone else asked you about the first time this happened...It was a woman police office. Do you remember?
> Kenneth: Yes.
> ...Defense Counsel: On [that] day isn't it true that you told the officer that you were downstairs watching T.V. when [he] called you up. And he first told you to rub his penis, and then he told you to lay on the bed, and then he started sucking on your penis, and that your cousin was there, and that you saw him put his penis in her butt, and then afterwards he gave her a dollar and Kool-Aid, and then he told you to go on the computer, and then he told you to get out but first to check to see if your mother was there?
> Kenneth: Yes.
> Question: Okay. So why did you tell us a different story today?
> Kenneth: I forget sometimes.
> Counsel: Okay. Do you forget because it is hard to remember the story?
> Kenneth: Yes.
> ...
> ...Question: [W]hy is it hard to remember?
> Answer: 'Cause it was a long time ago.
> ....

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[90] R: 9-43:15-24

P83. The record contains further examples of Kenneth's poor recollection of the events given in his statement and testimony: [91]

> Defense Counsel: Do you remember the second time that it happened?
> Kenneth: No.
> ...Question: Do you remember how many times it happened?
> Answer: Yes.
> Q: How many times?
> A: Five.
> ...
> ...Q: But you can't remember the second time that it happened?
> A: No.
> Q: Can you remember the third time that it happened?
> A: No.
> Q: What about the fourth time it happened?
> A: No.
> Q: What about the fifth time it happened?
> A: No.
> ....

P84. After giving testimony entirely different from the statement she gave to police, the next witness's poor recollection showed that not only was she unable to recall the story that she gave to police concerning Kenneth, she could also not recall the story she gave to police concerning Shalonda. She could also not recall whether an officer caller her and talked to her about the alleged incidents. [92]

> Defense Counsel: And didn't you tell the officer that Shalonda told you that [he] would rub his stuff on her stuff?
> Paris: No, I don't recall speaking to an officer that same week. Or I don't recall that.
> Counsel: What about any time after that?
> Paris: I mean, no. It's been two [*years*] - I don't remember. I don't remember talking to an officer in regard to that... I don't remember speaking to an officer, no.

(Emphasis and brackets added).

P85. With all due respect, if it pleases the Court, the extraordinary time between the filing of the complaint and trial- a year and a half- plainly hampered the witnesses' ability to clearly remember the events surrounding my being charged. The prosecutor even argued during closing arguments that "The passage of time made this fade from their brains and they don't... remember." [93] "The passage of time by itself may dangerously reduce a defendant's capacity to counter the prosecutions charges. Both the defendant's memory and the memories of the witnesses may fade. [State v. Ziegenhagen, 73 Wis.2d] at 671, 245 N.W.2d at 663." State v. Allen, 1982 Wisc. App. LEXIS, 108 Wis.2d 773, 324 N.W.2d 297.

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[91] R: 9-43:24-25
[92] R: 9-43:117-120 and 122-123
[93] R: 9-45:30, In. 22-24

P86. With all due respect, assessed in light of my interests, the fact that the span of time hampered these witnesses' ability to clearly remember these events impacted adversely on my defense because it was nearly impossible to prepare an effective defense with witnesses who could not recall with certainty the events who lead to me being charged and who testified at trial in a manner inconsistent with their earlier statements. (See particularly e.g., State v. Harding, 224 Wis.2d 644, 590 N.W.2d 282 (1999)). "The inability of the defense to prepare his case skews the fairness of the entire system." Barker, 407 U.S. at 532. A defense may be impaired ... witnesses are unable to accurately recall facts because of the passage of time, and when a defendant is hindered in his ability to contact witnesses [.] See id.

P87. And with all due respect, if it pleases the Court, the Wisconsin court of appeals ended with a prejudice conclusion in my case that conflicts with relevant decisions of this Court, the United States court of appeals, and the Wisconsin Supreme Court. The Wisconsin Supreme Court pointed out in Hadley v. State that Barker v. Wingo doesn't require that the defendant claiming the deprivation of speedy trial affirmatively show prejudice.

P88. "Barker holds that the assertion of the right to speedy trial is in itself probative of prejudice...most interests of a defendant are prejudice as a matter of law whenever the delay, not the result of the defendant's conduct, is excessive. See: Barker, pages 532, 533. If there were any doubt of this, it was laid to rest in Moore v. Arizona (1973), 414 U.S. 25, 26, 94 Sup.Ct. 188, 38 L.Ed.2d 183. The Arizona Supreme Court had concluded that a showing of prejudice to the defense at trial was essential to establish a deprivation of a constitutional right of speedy trial. The Supreme Court of the United States in Moore stated:

> "'The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim. Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial.'" (P.26)"

Hadley v. State, 66 Wis.2d at 364.

P89. Then, with all due respect, if it pleases the Court, the Wisconsin court of appeals in my case said that the circuit court was informed on several occasions that there was no speedy trial request pending because I was serving time on another charge. This conflicts with decision after decision of the Wisconsin courts and United States courts of appeals. Far more decisions that I have space to argue in this petition.

P90. With all due respect, if it pleases the Court, first, Blake v. King, 693 F.2d 677, 682 (7th Cir. 1982), held that a court-appointed attorney can't orally withdraw written demands for a speedy trial filed by a defendant. A speedy trial waiver must be made knowingly and voluntarily.

P91. Second, "[i]ncarceration for other reasons, no matter how legitimate they may be, is simply dead-time in terms of awaiting a trial upon a criminal charge which is delayed," Hadley, 66 Wis.2d at 364, 365. "Once a state commences a criminal prosecution, it has a duty to follow through and complete it, and the fact that the defendant is incarcerated in prison is not necessarily sufficient justification to make the delay reasonable." State ex rel. Fredenberg v. Byrne, 20 Wis.2d 504. "A prosecuting authority is not relieved of its obligation to provide a defendant a speedy trial just because he is in custody elsewhere." United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978).

P92. "If each of the first three factors weigh heavily in favor of the defendant, the defendant is not required to demonstrate actual prejudice. United States v. Davenport, 935 F.2d 1223, 1239 (11th Cir. 1991)." United States v. Schlei, 122 F.3d 944, 987, 1997 U.S. App. LEXIS 25183. When "[t]he criminal prosecutions have been pending against the petitioner almost two years, [n]o specific harm need be alleged by the petitioner." State ex rel. Fredenberg v. Byrne, 20 Wis.2d 504, 511, 123 N.W.2d 305, 1963 Wisc. LEXIS 502. "When the delay is lengthy and attributable to bad faith by the government, no showing of prejudice is required." United States v. Brown, 169 F.3d 344, 1999 U.S. App. LEXIS 2949.

Q3: INEFFECTIVE ASSISTANCE OF COUNSEL/ PRIOR CONVICTIONS

P93. Defense counsel chose to not only elicit that I'd been convicted of being a felon in possession of a firearm, carrying a concealed weapon, and theft by false representation, but volunteered the information to the jury. If it pleases the Court, the United States District Court for the Eastern District of Wisconsin conceded that defense counsel's conduct "painted [me] as an untruthful person before the jury" in a case where "credibility was crucial to the trial" and that the prior conviction corroborated Kenneth's testimony.[94]

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[94] Appendix Exh. # 18

P94. If it pleases the Court, the trial court directly confronted the issue of whether the Wisconsin rules of evidence permitted inquiry into the nature of my previous convictions where I truthfully and accurately acknowledged that there had been a conviction[95], when the judge advised me:

> "If you are asked, Mr. Cotton, have you ever been convicted of a crime, the answer is yes. How many times? The answer is five. As long as you say that, no one can go into what they're for. Do you understand?" [96]

P95. When defense counsel examined me, after some general questions, he asked me whether I'd been convicted of a crime. I answered, "Yes." [97] He then asked me whether I'd in fact been convicted on five prior occasions. I answered, "Five, yes." [98] Counsel then started offering the nature of the crimes, in the form of questions to me. [99]

P96. If it pleases the Court, the Wisconsin supreme court in Staples v. State, 74 Wis.2d 13, 24, 245 N.W.2d 679 (1976), concluded that, "where accurate and responsive answers are given to the questions, 'Have you been convicted of a crime?' and 'How many times?', the examiner is concluded and is not permitted to introduce proof of the nature of the conviction." (Quoted from Voith v. Buser, 83 Wis.2d 6-540, 546, 266 N.W.2d 304 (1978)).

P97. If it pleases the Court, in Moore v. State, 83 Wis.2d 285, 295, 265 N.W.2d 540, the Wisconsin supreme court stated:

> "When a witness has truthfully testified as to his prior convictions on direct examination, nothing further may be said about them."

P98. With all due respect, in my case, defense counsel's performance was by definition deficient and couldn't have been the result of professional judgment because (1) in its reading of the rules of evidence the trial court directly instructed all the parties that as long as I acknowledged all five of my impeachable prior convictions no one could divulge what they were for, and (2) in this credibility skirmish, defense counsel had no room to parry with any modicum of conflicting evidence without possibly tainting the jury's verdict. As this Court has made quite clear, a "verdict or conclusion only weakly supported by the record was more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

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[95] R: 9-44:10-11
[96] R: 9-44:11, In. 2-11
[97] R: 9-44:38, In. 14-16
[98] Id. at In. 17-19
[99] R: 9-44:38, In. 20 through R: 9-44:40, In. 19

P99. With all due respect, if it pleases the Court, to demonstrate prejudice, I must show that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. This Court specifically explained that I "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." 466 U.S. at 693.

P100. With all due respect, the admission, therefore, of the challenged evidence involving firearms was erroneous and prejudicial as it shows that I'd been convicted twice of being in possession of a gun. Kenneth testified to there being a gun present during the period alleged[100], i.e., I used a gun to imply or reinforce a threat, i.e., I have a record of criminal possession of guns.

P101. And the admission of the challenged evidence involving theft by false representation was erroneous and prejudicial, showing that I'd been convicted directly upon dishonesty.[101] Because this was, hands-down, a credibility contest, with no corroboration, scientific or physical evidence, and I have a criminal record of deceit, I was effectively blind-sided.

P102. With all due respect, the evidence was conflicting. It could easily have the effect of indicating to the jury my propensity to commit serious crimes with weapons and false statements[102]; and the jury may well, in the absence of the prejudicial landmine, have chosen to believe my version of the facts. A "verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' Strickland, 466 U.S. at 696.

P103. The Wisconsin court of appeals in my case decided this claim in a way that: (1) while it identified Strickland as the controlling legal authority, it didn't apply Strickland's framework, and (2) conflicts with decision after decision of Wisconsin's courts of last resort and United States courts of appeals, pursuant to SCR 10 (b). In my case it was ruled:

> "Cotton contends that trial counsel provided him with constitutionally ineffective assistance when he questioned Cotton in front of the jury about the specifics of his prior convictions. We reject this argument. Cotton was forced to admit that he had five prior convictions because he decided to testify at trial. The circuit court explained that trial counsel's questions were part of a deliberate defense strategy:

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[100] R: 9-43:52, In. 6-24
[101] R: 9-44:10, In. 13-15
[102] R: 9-44:10, In. 9-16

"It was clear to the court that trial counsel did this to show the jury that the defendant had never been convicted of a sexual assault of any kind previously. It was...clearly a point of strategy....The defendant's five prior convictions may have [otherwise] caused the jury to believe that he had engaged in similar behavior with children in the past."

A claim of ineffective assistance of counsel will not lie where counsel engages in conduct based on reasonable strategy. See Strickland, 466 U.S. at 697."

P104. With all due respect, if it pleases the Court, the circuit court denied my post-conviction motion without an evidentiary hearing.[103] Trial counsel never testified as to whether he chose this path for a calculated, tactical reason.

P105. Thus, the circuit court in a but-for fashion, without squarely addressing deficiency or prejudice, without addressing if I identified a reasonable probability that counsel's error materially affected the outcome of the proceeding in such a close case, without holding an evidentiary hearing (see State v. Machner, 92 Wis.2d 797 (Ct. App. 1979)), ruled that I wasn't prejudiced by trial counsel's eliciting specifics of my prior crimes because I was forced to admit that I had five prior convictions and counsel's questions were part of a deliberate defense strategy.

P106. However, first, with all due respect, "[w]hether there was a strategic reason cannot be decided without a Machner hearing." State v. Sullivan, 2002 WI App. 34, P12 (citing State v. Howard, 2001 WI App. 137, P29). A trial court must hold a Machner hearing to make the necessary record if the defendant alleges facts with sufficient specificity which, if true, would establish both prongs of the Strickland test. See State v. Bentley, 201 Wis.2d 303, 309, 313-18, 548 N.W.2d 50 (1996). The finding of a possible state of mind on the part of trial counsel is not sufficient to constitute a finding that there was an affirmative strategic decision to offer inherently prejudicial information to the jury, made after a thorough investigation. State v. Paine, 2008 Wis. App. 1, 306 Wis.2d 849, 743 N.W.2d 166 (2007); Strickland, 466 U.S. 668, 690-91 ([S]trategic choices *made after thorough investigation of law and facts* relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.") (Emphasis added).

P107. Second, with all due respect, neither Wisconsin nor Federal law allows claims that a disclosure was strategic to insulate review of the reasonableness of that strategy. See State v. Felton, 110 Wis.2d 485, 502, 329 N.W.2d 161 (1983) (reviewing court doesn't ratify a lawyer's decision simply because it's labeled "trial strategy" by the trial court. Trial

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[103] R: 9-19:9

counsel's decisions must be based upon facts and laws upon which an ordinarily prudent lawyer would have then relied. Id. at 503. This standard "implies deliberateness, caution, and circumspection" and the decision "must evince reasonableness under the circumstances." Id. at 502); see also Campbell v. Raerdon, 780 F.3d 752, 763-64 (7th Cir. 2015) (Labeling a choice "strategic" doesn't ipso facto shield it from collateral attack. Instead, under Strickland the question is the extent to which a strategic choice is supported by counsel's preparation.); and Richards v. Quarterman, 566 F.3d 533, 564, 567 (5th Cir. 2009); United States ex rel. Hampton v. Leibach, 347 F.3d 219, 249 (7th Cir. 2003) (counsel's preparation rendered "strategic" choice patently unreasonable, and the case law doesn't mandate deference to unreasonable defense tactics.).

P108. In my case, yes, to be able to testify on my own behalf I had to admit to five prior convictions, but with all due respect that should've, by law, been the end of it. But trial counsel proffered and elicited damaging testimony from me about prior convictions *after* unnecessarily disclosing to the jury in opening statements the strong suggestion of other unsavory conduct[104]. The district court even conceded that trial counsel's conduct painted me as an untruthful person where "credibility was crucial to the trial."

P109. With all due respect, if it pleases the Court, there is no way that advising the jury that I'd previously been convicted of deception and maintaining firearms couldn't have had a negative effect on my credibility when the trial was a credibility contest, pure and simple, and Kenneth testified to a possible implied threat with a gun. It's an incomprehensible suggestion and can't be a reasonable strategic choice as the Wisconsin court of appeals ruled.

P110. The admission of the evidence was so prejudicial that it was de facto ineffective assistance of counsel. Impeaching evidence attacking his own client's credibility was inappropriate and, as a matter of law, inadmissible. If the prosecutor had done this it would've been grounds for a mistrial.

P111. Third, with all due respect, if it pleases the Court, nothing in this record or the law supports the Wisconsin court of appeals' assumption that my five prior convictions may have caused the jury to infer similar behavior in the past.

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[104] Counsel, not knowing if I'd even testify, said: "Now, Mr. Cotton you are going to see is no angel here." R: 9-42:49, In. 12

P112. Finally, although the court identified Strickland as the controlling legal authority, this was no application of Strickland's framework. Rather, in assessing whether I was prejudiced by counsel's error, the court required a but-for causation.

P113. With all due respect, this is not the standard. Instead, a petitioner must demonstrate a "reasonability probability"- defined as one 'sufficient to undermine confidence in the outcome"- that counsel's errors materially affected the outcome of the proceeding. Strickland, 466 U.S. at 694.

P114. Even though in Sussman v. Jenkins, 636 F.3d 329, 359-60 (7th Cir. 2011), the United States Court of Appeals concluded that the omission of Strickland's "reasonable probability" language didn't result in a state-court decision that was contrary to Strickland, it reached the opposite conclusion about nearly identical missteps in Mosley v. Atchinson, 689 F.3d 838, 850-51 (7th Cir. 2012), and Martin v. Grosshans, 424 F.3d 588, 592 (7th Cir. 2005).

P115. If it pleases the Court, my case is more like Mosley. There the United States Court of Appeals noted that the state's case "was far from unassailable," and the state court's opinion didn't assure it that, despite the use of "shorthand," the court truly applied the correct standard. Mosley, 689 F.3d at 850. Here, in my case, the prosecutor was candid about the assailability of his case when he said:

> "When I spoke to you last at the opening statement, I told you that this case was going to be about one thing: Do you believe these two children?...The case is still about the same things.
>
> You've heard from these children and you've now heard from the other witnesses, but ultimately your decision is do you believe these children because if you do, you should find the defendant guilty, and there's no choice but you should find him not guilty if you don't." [105]

P116. And, with all due respect, if it pleases the Court, I believe I've shown that the Wisconsin court of appeals' analysis reflects the application of a more onerous standard than that called for by Strickland.

P117. Moreover, unlike Sussman, the Wisconsin court of appeals never correctly articulated Strickland's prejudice standard, or cited to a decision of the state court that does. Cf. Sussman, 636 F.3d at 360. So, as in Mosley, the Wisconsin court of appeals' decision is contrary to Strickland, or a highly unreasonable application of it.

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[105] R: 9-45:21, In. 8-19

P118. Finally, in pertinent part, I testified that at the same time I was dating Kenneth and Shalonda's mother I was also dating my own biological son's mother, going back and forth between them whenever tensions would rise. [106]I testified that I was loved by them, they were my babies, and I treated them like I treated my son.[107] Regarding my testimony the State said:

> "Now, let's talk a little about Mr. Cotton because he testified in this case...we actually learned a lot about him, just the manner in which he testified. We learned that he is a completely self-absorbed and narcissistic human being...He said when he was asked about the two women in his like that he doesn't know what it is about him and the ladies. He's willing to try and make this work with both ladies for him. He expressed no love for either of these women. In fact, he was highly critical of each of them. I do not get the impression that he cared a whit about either woman. They were only good for him...He said they love me not I love them. They love me because it's all about Mr. Cotton in his head. It's all about him...*And what sort of personality would sexually assault a child? Someone who cares only about his own pleasure. That's the only sort who could commit this sort of heinous, horrible act. That's the only person who could. Someone who freely tramples on the feelings of others. Someone who's trying to use two women for his own sexual pleasure...so we learned from Mr. Cotton a little about his personality* [.]" [108]

(Emphasis added).

P119. With all due respect, if it pleases the Court, my ineffective assistance claim here is based on my argument that the prosecutor's statement urges that if the jury members believed that I'd continue a relationship with "two women for [my] own sexual pleasure," they should also believe that I "acted in conformity therewith" by sexually assaulting Shalonda and Kenneth.

P120. Trial counsel was deficient for failing to draw the court's attention to the prosecutor's misconduct by objecting.

P121. With all due respect, trial counsel's function was to make the adversarial testing process work in this particular case. State v. Marty, 137 Wis.2d 352, 357, 404 N.W.2d 120, 122 (Ct. App. 1987). And with all due respect, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 694.

P122. If it pleases the Court, the deficiency prejudiced me such that I was deprived of a fair trial, "one in which evidence subject to adversarial testing was presented to an impartial tribunal for resolution of issues defined in

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[106] R: 9-44:28, In. 4-19
[107] R: 44:35, In. 23
[108] R: 9-44:34, In. 14 through R: 9-45:36, In. 17

advance of the proceeding." State v. Johnson, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990); Irwin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); U.S. Const. Amend. VI.

P123. The evidence was far more prejudicial than probative, the only purpose the evidence served was to portray me as a man of bad character predisposed to bad deeds, and since my case essentially boiled down to a credibility contest between the State's witnesses and me, counsel's failure to object denied me my Sixth Amendment right to effective assistance of counsel. See, e.g., Dittrich v. Woods, 603 F.Supp.2d 802, 808.

P124. With all due respect, if it pleases the Court, evidence that tended to erode my credibility and to prejudice the jury against me could've had a substantial – perhaps overpowering – impact on the jury's deliberations. See United States v. Crutchfield, 26 F.3d 1098, 1103 (11th Cir. 1994)(reversing conviction on grounds of prosecutorial misconduct where "the prejudicial effect of [the] misconduct cannot be disputed, as the case turned largely on the jury's credibility determinations of the several witnesses who testified"); see also United States v. Sanchez, 176 F.3d 1214, 1218 (9th Cir. 1999)(holding that cumulative effect of several incidents of misconduct that undercuts defendant's credibility wasn't harmless error; noting that defendant, to go free, needed to persuade the jury that he was credible and that the prosecution witnesses weren't); United States v. Watson, 335 U.S. App. D.C. 232, 171 F.3d 695, 700-01 (D.C. Cir. 1999)(no harmless error where "credibility was key"); United States v. Manning, 23 F.3d 570, 575 (1st Cir. 1994)(finding error not harmless and vacating conviction on grounds of prosecutorial misconduct what 'significantly interfered with the jury's ability to make an essential and liminal credibility determination").

P125. With all due respect, the Wisconsin court of appeals in my case decided this issue in a way that: (1) while it identified Strickland as the controlling legal authority, it didn't apply Strickland's framework, and (2) conflicts with the decisions of another state court of last resort, the United States courts of appeals, and a highly relevant decision of this Court pursuant to SCR 10 (b) and SCR 10 (c). In my case it was ruled:

> "Cotton characterizes this as "other acts" evidence. See WIS. STAT. § 904.04 (2) (2015-16). We reject this argument. The jury was informed that the remarks of the attorneys are not evidence: "Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence." Moreover, the prosecutor's comments had an evidentiary basis in Cotton's testimony that he was dating the victim's mother and another woman at the same time. Counsel did not perform deficiently in failing to object to the prosecutor's closing argument on the ground that it was other acts evidence because an objection on that ground would not have been successful. See State v. Toliver, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (trial counsel was not ineffective for failing to raise a meritless claim)."

P126. If it pleases the Court, I've always argued that this was first a bad character argument.

P127. With all due respect, the bad character argument is encapsulated in WIS. STAT. § 904.04 (2) case law. With all due respect, if it pleases the Court, the statute provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."

P128. If it pleases the Court, it is a fact that in State v. Torstenson, 188 Wis.2d 80, 10, 524 N.W.2d 648 (Ct. App. 1994), the Wisconsin court of appeals ruled that the defendant Torstenson was found deprived of a fair trial where counsel failed to object when the prosecutor urged the jury to make an improper inference when she stated: "If the defendant did one perverted thing, can that lead you to believe he did another?" The Wisconsin court of appeals cited 904.04 (2), Stats., (Torstenson, at 10); then went on to say that " We read the prosecutor's statement to urge that if the jury members believed that Torstenson took H.T.'s underwear and tore it, they should also believe that he "acted in conformity therewith" by sexually assaulting H.T....This is a comment upon Torstenson's bad character...[T]he prosecutor urged the jury to use the evidence...for a purpose expressly prohibited by § 904.04 (2), STATS."

P129. With all due respect, if it pleases the Court, the prosecutor in my case said: "...what sort of personality would sexually assault a child?...[T]he only sort who could commit this sort of heinous, horrible act...someone who's trying to use two women for his own sexual pleasure..." With all due respect, this is a bad character argument if there ever was one. The prosecutor basically said to the jury that if I had sex with two women that I maybe didn't care about, my son's mother and the kids' mother, couldn't that lead them to believe that I sexually assaulted the children.

P130. With all due respect, these comments weren't fair game based on my testimony because they were neither responsive nor appropriate.

P131. Then the prosecutor said "[s]o we learned a little about Mr. Cotton's personality." If it pleases the Court, this was second a propensity argument to its core. The prosecutor blatantly said that this was my personality, or character trait. With all due respect, propensity evidence overpersuades the jury, which, uncertain of guilt will convict anyway because a bad person deserves punishment, creating a prejudicial effect that outweighs ordinary relevance. Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574.

P132. If it pleases the Court, the Wisconsin court of appeals in Torstenson concluded with: "...the trial court concluded that its instructions before closing arguments cured any error. The trial court pointed to the instruction cautioning the jury that attorney's arguments and opinions are not evidence. We hold that this general instruction,

given as it was before the statement was made, did not alert the jury to the prohibited reference. Therefore, there was a definite risk that the jury's determination of guilt was based upon this improper inference of bad character." Defense counsel was found ineffective for failing to object. His deficiency prejudiced the defense. Torstenson, 188 Wis.2d 80 at 10.

P133. With all due respect, if it pleases the Court, as in Torstenson, the trial court's instructions in my case specifically failed to admonish the jury to disregard the bad character argument and the defense counsel failed to object.

P134. A criminal defendant's 'bad character' cannot be used to argue that the defendant committed the crime for which he is being tried, or had the propensity to commit that crime. See Washington v. Hofbauer, 228 F.3d 689, 699 (6th Cir. 2000). When a prosecutor alights on a defendant's bad character in an attempt to argue that the defendant committed the charged crime, or had the propensity to commit that crime, a federal court may find prosecutorial misconduct. Id.; see also Cristini v. McKee, 525 F.3d 888, 899 (6th Cir. 2008); Hodge v. Hurley, 426 F.3d 368, 384 (6th Cir. 2005)(finding that the prosecutor engaged in misconduct by inappropriately emphasizing petitioner's bad character, which was in no way related to the crime charged).

P135. With all due respect, the Wisconsin court of appeal ultimately failed to apply the Strickland standard as to whether I demonstrated a "reasonable probability" that the identified errors materially affected the trial sufficiently enough to undermine the outcome. Strickland, 466 U.S. at 694. With all due respect, as I stated, the Wisconsin court of appeals identified Strickland as the controlling legal authority, but it didn't apply Strickland's framework.

Respectfully submitted,

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