

MAR 10 2021

OFFICE OF THE CLERK

No. 20-7739

IN THE  
SUPREME COURT OF THE UNITED STATES

PATRICK J. GAGE — PETITIONER  
(Your Name)

vs.

REED A. RICHARDSON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Patrick J. Gage #397479, pro se

(Your Name)

Stanley Correctional Institution  
100 Corrections Drive

(Address)

Stanley, WI 54768-6500

(City, State, Zip Code)

N/A

(Phone Number)

**ORIGINAL**

**QUESTION(S) PRESENTED**

Does habeas corpus exist for state criminal defendants?

Does the Sixth Amendment Right to effective assistance of counsel exist for Gage?

Is the state court's decision reasonable when it does not act in good faith to honor the constitutional rights of Gage?

## **LIST OF PARTIES**

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Chris Buesgen (now the Warden of Stanley Correctional Institution, who has custody of Gage)

## **RELATED CASES**

### **Wisconsin Cases**

State of Wisconsin v. Patrick J. Gage, 09-CF-89, Juneau County Circuit Court. Entered on January 30th, 2014.

State of Wisconsin v. Patrick J. Gage, No. 2014AP433-CR, Wisconsin Court of Appeals. Judgment entered on October 1, 2015.

### **Federal Cases**

Gage v. Richardson, No. 16-cv-849-jdp, District Court of the Western District of Wisconsin. Judgment entered on April 29, 2019.

Gage v. Richardson, No. 19-2002, U.S. Court of Appeals for the Seventh Circuit. Judgment entered on October 21, 2020/

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

**[x] For cases from federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at 978 F.3d 522; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
 is unpublished.

**[x] For cases from state courts:**

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Juneau County Circuit court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 21, 2020.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including 60 day extension(date) on March 19, 2020 (date) in Application No. A (due in 150 days due to covid-19)

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Sixth Amendment Right to effective Assistance of Counsel

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

## STATEMENT OF THE CASE

### Background

Patrick Gage and Laura Meeks divorced in 1996, when their daughter, H.R.G., was about five years old. H.R.G. and her brother, Josh, would stay with Gage on weekends, one day during the week, and sometimes for entire summers at his home near Mauston, which is a small town between the Wisconsin Dells and Tomah in rural Wisconsin.

In August of 2008, Meeks found a diary entry of H.R.G.'s that she thought indicated an unidentified person had sexually abused H.R.G. H.R.G. wrote the journal after visiting Gage in the Cayman Islands where he had moved for his job. H.R.G. testified at trial that she was upset with Gage at the time she wrote the journal because he had moved so far away from Wisconsin, despite her later accusation that he had continually assaulted her in the preceding years.

Meeks confronted H.R.G. Meeks asked H.R.G. if the person in the journal was her father. H.R.G. would not respond. Meeks took her to a doctor. Meeks suspected the unidentified person was Patrick Gage and told a nurse that. The matter was then referred to the authorities. At trial she claimed that Gage had sexually assaulted her from about 2001 to 2004 "almost every time" she stayed with him on the weekends and for entire summers.

There was no physical evidence, no eyewitnesses to an assault, and no precise dates of offenses. That left Gage in the unenviable position of having few options of any concrete evidence to counter H.R.G.'s claims. He would have no alibi options, and very little

to work with in terms of eyewitness testimony for conduct that allegedly occurred years earlier. It would come down to a swearing contest, where H.R.G.'s credibility would be matched against his.

#### Pretrial Proceedings

On June 26, 2009, the state filed a complaint charging Gage with five counts of sexual assault. Three of those counts related to his daughter, H.R.G., while she was still a child. Two of the counts related to a child of Gage's girlfriend who had lived with Gage and H.R.G. for a time (A.L.P.), and made her allegations after the police interviewed H.R.G. and H.R.G. had told them that she thought she had seen Gage touch A.L.P. years earlier.

On December 21, 2009, an Information charged Gage with three counts of sexual assault of a child under 13 years of age in violation of WIS. STAT. § 948.02(1). The first two counts were alleged to have taken place at H.R.G.'s grandmother's house between the spring of 2001 and May 2004, some four years prior of the report to law enforcement. H.R.G. would have been between the ages of nine and twelve years old. The third count was alleged to have taken place in a cabin that was built behind H.R.G.'s grandmother's house. H.R.G. also would have been twelve years old (about 2004). The Information also charged one count of sexual assault of a child under 16 years of age in violation of WIS. STAT. § 948.02(2). Two additional counts charged Gage with committing three or more acts of sexual contact with the same child in violation of WIS. STAT. § 948.025(1)(a). Those counts related to A.L.P., the daughter of Gage's former girlfriend. Gage was acquitted of those counts.

Trial

Gage's jury trial took place on November 8, 9 and 10, 2011.

Seven witnesses testified: H.R.G., her mother, Laura Meeks, A.L.P., A.L.P.'s mother, Melissa Stanton, detectives Timothy Andres and Shaun Goyette, and Gage. Gage was the only witness called by the defense. Indeed, counsel did not interview any witnesses or apparently conduct any independent defense investigation.

At trial, H.R.G. testified that Gage sexually assaulted her during her visits. Indeed, she testified that it happened "almost every time I visited." H.R.G. testified that the first time it happened was sometime in 2001, while Gage lived with his mother, Nancy Gage, at her home in Marion, Wisconsin. H.R.G. described that Gage, H.R.G. and Josh would all sleep in the finished basement of the house. The stairs led down into a living room in the basement, which had an "L"-shaped couch and a recliner. The bedroom was adjacent to the living room. Its door opened right where the stairs landed in the living room. She described the space as small, and the rooms very close together. H.R.G. said that when the first assault happened, when she was nine years old, Josh was sleeping on the couch in the living room, and that the assault happened some ten feet away in the bedroom with the door closed. She testified that Gage touched her "boobs over her clothes" and tried to put his penis in her mouth. On cross-examination she said that the first time she told anyone about the details of this specific assault was in preparation for trial despite numerous police interviews, but she hadn't recalled the details until then. This was her testimony as to Count One of the Information.

H.R.G. testified that the second assault happened in the same house sometime during the summer of 2001. That time, she testified that Gage touched her vagina beneath her clothes while she was on the couch in the basement living room. Josh was sleeping in the bedroom next to the living room. She conceded that at any time either Josh or Nancy could have walked into the room. On this occasion, she said that assault ended after she cried and ran upstairs. During her time living at Nancy's home, H.R.G. testified that there was a second upstairs bedroom next to Nancy's in which she could have slept but she never chose to sleep there even after the alleged ongoing assaults.

The third alleged assault took place in the summer of 2004, in a roughly built cabin on Nancy's property. Josh slept directly below a loft area, which was H.R.G.'s sleeping space. The loft was accessible by a ladder. She testified that it was a small, open cabin, where sound travelled. She testified that one night, Gage climbed the ladder to the loft, touched her vagina with his mouth, and attempted to put his penis in her mouth. She further testified that it ended after she began to cry. They then played a video game. During the alleged assault Josh was directly below H.R.G.'s loft. She testified that this was the only assault in the cabin.

The final alleged assault took place in a small house in Lyndon, Wisconsin. H.R.G. was sleeping on the couch in the living room. H.R.G. testified that Gage came home at night, sat on the couch, and began touching her vagina over her clothes. H.R.G. kicked Gage, and it ended. She testified on cross-examination that it was a very small house, and that if someone had walked out of the bedroom into the living room they would see whatever was happening

on the couch.

H.R.G. also testified that she saw what she thought was Gage touching A.L.P. H.R.G. was on one end of the L-shaped couch, and Gage and A.L.P were laying together on the other end. They were covered by a blanket. H.R.G. thought she saw movement under the blanket near A.L.P.'s midsection. The alleged assaults of A.L.P. had taken place years earlier as well.

Throughout her testimony, H.R.G. had trouble recalling details. For example, she could only estimate that the first assault took place when she was nine or ten years old. She also made inconsistent statements, such as originally telling the police that Gage always slept naked, but then testifiying at trial that he never slept naked.

Laura Meeks, Gage's ex-wife and H.R.G.'s mother, also testified. In relevant part, she testified that she recalled that a few times when she picked H.R.G. up from a visit to Gage she looked in the rearview mirror and saw "tears down her [H.R.G.'s] face." She could tell H.R.G. was sad, but at the time thought it was because "I was taking--ripping our family apart because we weren't together." The clear inference from the state eliciting that testimony was that H.R.G. might have been crying about being abused. Meeks furhter testified, however, that H.R.G. never refused to visit her dad. And Meeks testified that H.R.G. had never, even at the time of her testimony, told Meeks the specifics of her allegations.

The defense strategy at trial was that H.R.G. should not be believed. Moreover, defense counsel argued that there was no physical evidence, and that H.R.G.'s lack of detail cast doubt

on the credibility of her claims. Time and time again in closing arguments, defense counsel pointed to the lack of privacy in the houses in which H.R.G. claims to have been assaulted, and the fact that either Josh or Nancy could have walked in at any moment made H.R.G.'s claims more doubtful.

And Gage advanced those very facts as best he could in his testimony. But no other witnesses were called to corroborate his testimony. Gage plainly denied any instance of sexual assault.

In his closing argument, trial counsel repeatedly pointed to Josh's proximity to the alleged assaults. Further, defense counsel argued in closing:

Josh was present in these houses at all times. Where was Josh today or yesterday? Or Tuesday. Where was he? Wouldn't you think that Josh would have had something to add to this? Wouldn't you think he'd say, well, yeah. Dad was kind of strange around H.R.G. or dad slept in the bedroom with H.R.G. or dad slept on the couch with H.R.G. and would touch her. I don't know why he wasn't here. He's a potential witness. Did anybody interview Josh? Gee I didn't hear that. Why interview Josh? We don't need somebody that might be able to say no. Dad wouldn't do that...Nobody interviewed Josh. Nobody talked to Josh. And Josh didn't testify here.

In its rebuttal closing argument, the state effectively knocked down the straw man counsel had made out of Josh. It countered that Josh should have testified for the defense. "They could of subpoenaed him. It's his son. If Patrick Gage wanted his son to testify, he could have brought him here." The state concluded: "He could have called his own son. Maybe it's because Josh had nothing to say."

The jury returned a split verdict. It found Gage not guilty on Count 1, which charged the first alleged assault. It found Gage guilty on Count 2, which charged the second alleged assault.

at Nancy's home when H.R.G. was 9 or 10 years old. It found Gage guilty on Count 3, which charged the assault in the cabin sometime in the summer of 2004. And it found Gage guilty on Count 4 which charged the alleged assault in Lyndon, Wisconsin. The jury acquitted Gage on both counts related to A.L.P.

Clearly, this was a close case when the jury found Gage guilty on Count 1, which contained the same level of detail as the counts on which it acquitted him. It also acquitted him on both counts related to A.L.P. for which H.R.G. had offered testimony specific to A.L.P.'s claims.

#### Postconviction Hearing

Gage filed a postconviction motion in which he raised his claim of ineffective assistance of counsel. Three witnesses testified at the postconviction hearing: Josh Gage, Nancy Gage, and trial counsel.

Josh Gage. Josh Gage is Patrick Gage's son, and H.R.G.'s older brother by a year and a half. He testified that during the time H.R.G. said Patrick Gage assaulted her, he and H.R.G. would visit their father every other week during the school year, and then stay with him for most of the summer.

Around 2001, the timeframe for counts one and two, Josh testified that they would stay at his grandmother Nancy's house near Mauston, which is where Gage lived at that time. He testified that he and H.R.G. always visited their dad together. Josh described the house consistently with prior descriptions of it. Specifically, he testified that the living room in the basement was adjacent to the bedroom space, and the Nancy's sewing room was open to the living room. He testified that he, H.R.G. and

their father would sleep in the basement. He and H.R.G. would leave their suitcase in the bedroom. H.R.G. usually slept in one corner of the large L-shaped couch in the living room of the basement. On cross-examination he testified that he didn't remember H.R.G. sleeping in the bedroom, which is where H.R.G. testified Count One took place. Josh would usually sleep on the pullout bed portion of the couch, but on occasion may have slept in the bedroom.

Josh also testified that Gage would usually fall asleep in a recliner by 8 p.m. Josh would sometimes try to move Gage into the bedroom, or would otherwise just leave him in the recliner. Josh stayed up the latest, and usually did not go to sleep until between 1 a.m. and 3 a.m. on most nights. He would stay up late watching movies or playing video games. H.R.G. would usually fall asleep before Josh, but well after Gage. Josh was usually the last one to go to sleep. He would turn off the TV and the lights. Josh Gage testified that he never saw Gage touch H.R.G. in a sexual way, just as he had told the police prior to trial.

With respect to the cabin where H.R.G. claims that Count 3 happened sometime in 2004, Josh testified that he and H.R.G. helped Gage build the cabin, and that it was an enjoyable experience with their father. He preferred staying in the cabin to staying in Nancy's house. Josh described the cabin as small and that sound would travel through it. If people were talking in the cabin, he would hear them. There was an open room, a bedroom, and a loft. Josh slept in the bedroom. H.R.G. slept in the loft, which was directly above his bed. There was a ladder that went up to the loft that made a "creaky noise" whenever someone climbed it.

Josh testified that he would stay up late just like he did when he stayed in Nancy's house, and that Gage went to sleep early, followed by H.R.G., just as they had at Nancy's home.

Josh also lived with H.R.G. and Gage at the house in Lyndon, where H.R.G. claims that Gage assaulted her (Count 4). He said it was a little bit bigger than the small cabin. It had one bedroom, a living room, and a bathroom. Josh slept in the bedroom. He worked at Kalahari Water Park from 4 p.m. to 10 p.m. Josh stayed up late, just as he always did, Gage would go to sleep early, and H.R.G. would go to sleep second, just as they had at the other residences. There was no evidence that Josh had heard or witnessed anything consistent with H.R.G.'s allegations of repeated, continuous sexual assaults.

Josh further testified that after Gage's case had been charged, he visited his father in jail. He described it as a social visit prior to Gage's trial.

Nancy Gage. Nancy Gage testified at the postconviction hearing that she recalled the time period when H.R.G. says she was sexually assaulted. Nancy recalled the relationship between Gage and H.R.G. as a normal father-daughter relationship, and that she never witnessed any change to that relationship during the time they lived with her. In the summer, when Patrick was working, Nancy was the primary caregiver for the children. Further, she testified that she had a close relationship with H.R.G., and that they would talk a lot. She offered a bedroom on the main level of the house to H.R.G., but H.R.G. preferred to stay in the basement with Josh and her father. Nancy would routinely stay up fairly late, until about 11 p.m. (which is far later than Josh testified Gage would

go to sleep). And she would routinely access the sewing room in the basement, even into the evenings. That would have required her to walk through the living room in the basement where H.R.G. said the assault took place. She also testified that from the top of the basement stairs, which landed on the main level in the entryway, she could hear conversations in the living area of the basement. Just like Josh, there was no evidence that Nancy had heard or witnessed anything consistent with H.R.G.'s allegations of repeated, continuous sexual assaults. Nancy testified that she loved H.R.G. "very much to this day." She further testified that she would not lie for Gage.

Trial Counsel. Counsel testified that he did not interview either Josh Gage or Nancy Gage. He described Gage's case as a "he-said-she-said" case, where the state is relying on the "testimony of the victims" in the absence of any physical evidence.

Prior to trial, counsel knew limited information about Josh Gage. He had information that Josh and H.R.G. were generally together on most of the visits to Gage. But he did not know if that was accurate or not. He also knew that Josh, H.R.G. and Patrick were "all more or less sleeping in the same general area of the various residences..." during each of the alleged assaults. And that the spaces in which they slept were closely confined spaces.

Most importantly, counsel had information from a police report that Josh didn't have any indication that anything sexual ever happened between his father and H.R.G. The report indicated that Josh seemed upset with his father at the time of his police interview in October, 2008. He testified, however, that a

summary of an interview of a witness in a police report is "not something I would necessarily rely on on its own." Counsel also recalls his impression from Patrick was that Patrick and Josh were "not on the best of terms at that time."

Despite the fact that counsel knew that Josh slept in the same room, or at least the same small area where H.R.G. claimed that she was assaulted by their father, counsel did not think it prudent to interview him. Rather, counsel claimed he didn't interview Josh because he did not think Josh had any favorable information, he thought Josh was upset with Patrick, and that Josh loved his sister." "So that's pretty much why he was never really considered as a viable witness for us."

But counsel testified that he did not know specifically what Josh would have said if Josh had been interviewed (for the obvious reason that he did not interview Josh). Indeed, counsel stated that he "assumed he [Josh] wouldn't add anything to the case." He testified that he didn't know that Josh was with H.R.G. every time she visited Patrick Gage. Trial counsel also testified that he thought Josh slept in the bedroom, not on the couch. He didn't know that Patrick Gage usually fell asleep early, and was the first on to fall asleep. Neither did counsel know that Josh usually stayed up the latest.

Trial counsel also did not interview Nancy Gage. Prior to trial, Gage asked to speak with counsel about what his mother might have to say if called as a witness. Counsel went so far as to list Nancy Gage as a witness on his witness list. Indeed, counsel testified that in his view, Nancy "was the only potential witness that really had substantive or potentially substantive material."

But counsel didn't even bother to interview her, despite listing her as a witness and acknowledging that doing so might prompt the state to have a detective interview her prior to trial. Just like Josh, prior to trial counsel knew that Nancy lived at the same residence with H.R.G. during the time that she claimed Gage sexually abused her every time she visited him.

#### Postconviction Disposition

The circuit court denied the postconviction motion in its entirety. In so doing it made a few key findings. First, the trial court correctly found that H.R.G.'s credibility was "everything" and that impeaching her was critical. With respect to trial counsel's failure to investigate Josh Gage's potential testimony and call him as a witness, the court confusingly found that once counsel decided not to call Josh as a witness, counsel's decision not to interview him was reasonable:

Having made the decision not to call him [Josh] to the stand, the decision not to interview him was easy because, once you know you're not going to call the guy to the stand, there really isn't much point in wasting the time on the interview. It is unnecessary. I do not think that not interviewing a witness who you've already decided not to call is deficient conduct.

With respect to counsel's failure to interview Nancy Gage, the circuit court found "this was a credibility case. And Nancy's testimony, if believed by the jury would have undermined the credibility of [H.R.G.]. Despite that conclusion, the circuit court stated that it would not "sit here and say, 'Well gee whiz, maybe he should have called her. Maybe things would have been different.'...That's not the test that the Court has too [sic] follow."

The trial court also declined to modify Gage's sentence, which

Gage had argued amounted to a life sentence. The court commented that none of us knows "when the good Lord will tap us on the shoulder."

Wisconsin Court Of Appeals

Gage appealed the postconviction court's decision. In a Per Curiam opinion, the Wisconsin Court of Appeals affirmed the circuit court's denial of Gage's postconviction motion. It gave a short shrift to his ineffective assistance of counsel motion, disposing of it in two double spaced pages. It did not address Gage's argument on the deficient performance prong of Strickland, but rather went straight to the issue of prejudice. With respect to the legal standard for the prejudice prong, the court wrote: To prove prejudice, the defendant must additionally show that the attorney's errors rendered the resulting conviction unreliable in light of the other evidence presented."

In its brief analysis, the court noted that Josh's and Nancy's testimony was consistent with H.R.G.'s trial testimony regarding the physical description of the houses and sleeping arrangements. Specifically, the court of appeals noted that Josh testified that "he 'usually' slept on the couch and sometimes slept in the bedroom does not contradict the victim's testimony that each of the siblings sometimes slept in the bedroom and sometimes slept on the sectional couch with the pullout bed in the living room area." But that is not an accurate summary of Josh's testimony. In fact, when asked specifically about whether H.R.G. slept in the basement bedroom, Josh testified: "I recall her sleeping more on the couch. I don't remember her sleeping in the bedroom." When asked if it was possible it could have happened a few times, he agreed.

Second, the court of appeals noted that while Josh testified he was "generally the last person to go to bed" and that he never witnessed any sexual conduct between Gage and his sister, this did not undermine H.R.G.'s account because she claimed it happened late at night.

Finally, as to Nancy, the court of appeals stated that her testimony that "she did not generally go into the basement at night was consistent with the victim's testimony and did not show that Gage's mother would have been in position [sic] to witness any of the alleged incidents."

That is the entirety of the court of appeals analysis of the issue. It concluded by stating "We therefore concluded that Gage failed to establish any prejudice from any of counsel's alleged errors." It did not cite the standard of prejudice it used for its analysis other than it's introductory statement of the legal standard described above. As the district court later observed: "In reaching this conclusion, the court of appeals failed to discuss some noteworthy statements in Josh's and Nancy's ... testimony."

Gage timely filed a petition for review in the Wisconsin Supreme Court, which was denied.

#### Federal District Court

Gage filed a petition pro se in the District Court for the Western District of Wisconsin seeking a writ of habeas corpus under 28 U.S.C. § 2254. The district court found that counsel had provided deficient performance. Specifically, it concluded that counsel knew "that the case against Gage would essentially boil down to a credibility contest between Gage and H.R.G. Any

testimony that would undermine H.R.G.'s allegations could be critical. But counsel failed to even investigate whether Josh or Nancy could have provided testimony to bolster Gage's defense."

The district court found, however, that the state court's analysis of the prejudice prong of Strickland was not "unreasonable."

Despite that conclusion, the district court noted specific testimony that the court of appeals failed to address:

Josh's and Nancy's testimony that they never witnessed any sexual touching or unusual behavior between Gage and H.R.G. would have made H.R.G.'s testimony at trial that Gage sexually assaulted her 'almost every time [she] visited' at least somewhat doubtful. Josh's testimony about the close sleeping quarters in all three residences where the assaults occurred and the creaky ladder in the cabin supports the defense's theory that Josh would have likely heard or seen at least one of the assaults. Nancy's testimony that she was the primary caregiver for Josh and H.R.G., that she had a close relationship with H.R.G., that H.R.G. refused her offer of a room upstairs away from Gage, and that she thought H.R.G. and Gage had a normal relationship, could have undermined H.R.G.'s credibility. And the fact that the jury acquitted Gage on count 1 suggests that they may have not found H.R.G. to be entirely credible so that testimony supporting Gage may have changed the outcome.

It concluded, though, that the decision was a "close enough [call] that reasonable jurists might resolve it differently." Accordingly, it issued a certificate of appealability on that issue.

#### Seventh Circuit Court Of Appeals

The Seventh Circuit affirmed the district court's denial of habeas relief. It ruled that AEDPA deference still applied despite the fact that the state appellate court misstated and misapplied the Strickland standard. It stated that the state court's analysis focused on the consistency between Josh's and Nancy's testimony at the postconviction hearing and H.R.G.'s testimony at trial, which

can reasonably be interpreted as "whether the proffered testimony could have affected the outcome or it's likely impact on the verdict, which is the correct standard under Strickland.

The court also ruled that the state court of appeals did not base its decision on an unreasonable determination of the facts. It stated that while the state court's finding that Josh and H.R.G. both testified that they "usually slept on the couch and sometimes in the bedroom" may not have been correct, it was not an unreasonable interpretation of the testimony, stating that a state court's factual finding is never unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance.

The Seventh Circuit concluded that there was a chance the additional testimony could have changed the jury's mind, given the case rested on the jury's determination of the credibility of the witnesses, fair minded jurists may well disagree over the extent to which Josh's and Nancy's testimony was consistent with H.R.G.'s. But without any directly contradictory testimony, it was reasonable for the Wisconsin Appellate Court to conclude there was not a reasonable probability of a different outcome had they testified.

## REASONS FOR GRANTING THE PETITION

The mistake Gage made like so many others is that he believed in the system. Gage was given a court appointed attorney and unknown to him at the time his nightmare had just begun and it would never end. Gage's attorney did nothing to investigate his innocence and at trial Gage was the only one to testify on his behalf. The prosecutor even commented on Gage's son Josh not testifying to the jury. Josh and his mother Nancy were either in the proximity of the alleged assaults or had direct contact with H.R.G. after the alleged assaults, and could testify that they saw no indications of the assaults ever happening.

The Wisconsin Court of Appeals has continually ruled that the circuit courts factual findings must be given deference, see: State v. Harvey, 139 Wis.2d 353, 376, 407 N.W.2d 235 (1987). However when the circuit court made a finding that "this was a credibility case. And Nancy's testimony, if believed by the jury, would of undermined the credibility of [H.R.G.]." The Wisconsin Court of Appeals realized the constitutional magnitude of this statement, and in effect reversed the finding, it failed to consider it, recognize it, or address it. The court also failed to address any testimony that would be benificial to Gage's claim. The Wisconsin Court of Appeals then determined that Gage was not prejudiced by any of council's alledged errors, in effect it had done what it specifically ruled it would not do, it reversed the circuit courts factual finding.

Before AEDPA the Seventh Circuit had ruled that a basis of decision applied infrequently, unexpectedly, or freakishly maybe

inadquate for the lack of notice and consistency, may show that the state is discriminating against the federal rights asserted, Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990). Because of AEDPA the district court could not address or correct this, even though it stated that any testimony that would undermine H.R.G.'s allegations could be critical. The district court ruled that the states analysis of the prejudice prong of Strickland was not unreasonable and the Seventh Circuit ruled the same. AEDPA had killed any chance Gage had at having his constitutional rights enforced.

Wisconsin Eastern Court Judge Lynn Adelman has written a paper titled: "Who Killed Habeas Corpus?". As he stated in his paper the writ of habeas corpus is explicitly recognized in the Constitution. "Two great events in American history established the reach and power of the writ. The first was Reconstruction. Among the important constitutional amendments and statutes passed by the Reconstruction Congress was the Habeas Corpus Act of 1867 in which the benefit of the Writ was extended to formerly enslaved people and others convicted in state courts"..."[T]he Warren court in the 1960's extending the procedural protections in the Bill of Rights to criminal defendants in state courts."..."through habeas corpus, state prisoners could go to federal court to vindicate their rights." (Who Killed Habeas?, pg2)

Judge Adelman goes on to explain how the Supreme Court led by Warren Burger and then by William Rehnquist created new obstacles for habeas petitioners. In 1996 the Antiterrorism and Effective Death Penalty Act (AEDPA) was passed effectively preventing relief to many prisoners whose convictions are obtained unconstitutionally,

(Who Killed Habeas Corpus?, pg3).

In 2011 this Court ruled in Harrington v. Richter, 131 S.Ct. 770, that habeas corpus was only appropriate for addressing "extreme malfunctions" in state criminal justice systems "where there is no possibility that fairminded jurists could disagree." Harrington @ 786. As Judge Adelman pointed out this interpretation is not supported even by the AEDPA, taken and taken literally, would mean that a federal court could never grant relief because to do so it would have to find that none of the state court judges who denied the claim was a "fair-minded-jurist." (Who Killed Habeas Corpus?, pg 3). The interpretation in Harrington of the AEDPA stops short of imposing a completed bar on federal court relitigating claims already rejected in state proceedings, Harrington @ 786. The Harrington decision states that the reason for this is because federal habeas review of state convictions frustrates both the state's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. It distrubs the states significant interest in repose for concluded litigation, denies society the right to punish some omitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority (citations omitted), Harrington, 787.

The States Courts Decision Is Not Reasonable

Because It Did Not Act In Good Faith

What the Harrington decision has done in effect is place the states rights above individual rights. The problem with this is that the states actions are not always good faith attempts to honor constitutional rights of individuals. "[W]hereas federal

judges have life tenure, judges in most states are elected or subject to appointment or reappointment by officials who are themselves subject to elections. For a prisoner claiming she or he has been deprived of a constitutional right, there is a substantial difference between having the claim heard by a judge or judges with life tenure and a judge or judges who must be reelected or reappointed. (How Killed Habeas Corpus?, pg 4)

Gage is filing this petition pro se, he does not have expensive lawyers to do research or file it on his behalf. He is asking this Court to revisit it's ruling in Harrington v. Richter, which makes it almost impossible for any habeas claim to be granted relief in federal court. In Gage's case the state circuit court found a finding of fact that if the testimony of Nancy would of been believed by the jury, it would of undermined the credibility of H.R.G. This was a he-said-she-said case, there was no physical evidence, no witnesses other than his accuser, and yet Gage's attorney failed to interview or investigate anyone that was in the area when the alleged assaults happened. This was a close case when the jury found Gage not guilty on 3 of the 6 counts.

The state appellate court realized that there was no reasonable or strategic reason for trial counsel not to call John and Nancy Gage to the stand, so it went right to the prejudice prong of Strickland, and disregarded its own case law to reverse the state circuit courts finding of fact. It then failed to address any testimony at the postconviction hearing that would be benificial to Gage's claim.

If any case calls for revisiting the decision in Harrington, this is it. Gage asks that this court decide if the state court's

decision is reasonable when it does not act in good faith to honor Gage's constitutional rights, regardless of what reason's the state gives for denying relief.

From 2007 to 2013 this court decided twenty-eight AEDPA cases and denied relief in twenty-six (Who Kill Habeas Corpus?, pg7).

Gage asks that today this court address the following questions:

Does habeas corpus exist for state criminal defendants?

Does the Sixth Amendment Right to effective assistance of counsel exist for Gage?

Is the state court's decision reasonable when it does not act in good faith to honor the constitutional rights of Gage?

Gage respectfully asks that his Writ of Habeas Corpus be granted.

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: March 9, 2021