Docket No. 20-7783

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL A. FARRELL, Petitioner,

v

CHRIS S. BUESGEN, Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

Pro Se Petitioner,

Michael A. Farrell #248915
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

1. Are the lower court's rulings in direct conflict with Supreme Court precedent ?

2. Did petitioner make a substantial showing he's in custody in violation of his Constitutional rights ?

3. Was the denial of petitioners argument for "perjured Machner testimony" wrongfully denied and the use of this testimony in direct conflict with Supreme Court precedent ?

LIST OF PARTIES

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

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STATUTES AND RULES

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

[ ] 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 _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

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[X] is unpublished.

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

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

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[ ] is unpublished.

The opinion of the Wisconsin Court of Appeals court appears at Appendix E, F to the petition and is

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[X] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was January 5, 2021.

[ ] 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 NA (date) on _____ (date) in Application No. A_____.

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

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

The date on which the highest state court decided my case was September 4, 2018. A copy of that decision appears at Appendix G1.

[ ] A timely petition for rehearing was thereafter denied on the following date: NA, 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 NA (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

The Sixth Amendment states...

In all criminal prosecutions... the defendant to be confronted with the witnesses against him, ***to have the compulsory process for obtaining witnesses in his favor,*** and to have the Assistance of counsel for his defense.

The guarantee of counsel in criminal trials protects the fundamental right to a fair trial afforded by the Sixth Amendment. See: *Strickland,* 466 U.S. at 684-85, 104 S.Ct. 2052. To give substance to this right, counsel must be reasonably effective. See, e.g., McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.") (citations omitted).

The petitioner/defendant must show that counsel's representation was deficient. He must also show that he was prejudiced by the deficient performance, *Strickland* @ 688. Counsel's conduct is constitutionally deficient ***if it falls below an objective standard of reasonableness,*** *Id* @ 688. In order to demonstrate that counsel's deficient performance constitutionally prejudicial, the defendant must show that ***"there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."*** *Strickland*, 466 U.S. at 694.

The XIV Amendment of the United States Constitution, section (1)...

No state shell .. deprive any person of life, liberty, or property, without due process of law, nor deny to any person equal protection of the law.

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." A "reasonable doubt", at a minimum, is one based upon reason. *Jackson v. Virginia,* 443 U.S. 307, *Id* @ HN.5

Federal rules of evidence, Rule 702...

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Supreme Court Rule.. 28 U.S.C sec.2254...

Under the AntiTerrorism and Effective Death Penalty Act ("AEDPA"), a writ of habeas corpus may be granted if the state court decision on the merits of the petitioner's claim (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

However, the standards provided in § 2254(d)(1) and (2) only apply to a "claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); see *Braun v. Powell,* 227 F.3d 908, 916 (7th Cir.2000). A state court decision cannot be viewed as an " 'adjudication on the merits' " if the state court failed to resolve all determinative issues of federal law, either because they were not before the state court or because the state court's framing or analysis of the claim omitted one or more dimensions of the requisite federal constitutional analysis. *Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure* § 32.2, at 1423-24

(4th ed.2001) (quoting 28 U.S.C. § 2254).

In such a situation, the court simply asks whether the petitioner is in custody in violation of the Constitution or laws of the United States under § 2254(a). *Aleman v. Sternes,* 320 F.3d 687, 690 (7th Cir.), cert. denied, 539 U.S. 960, 123 S.Ct. 2653, 156 L.Ed.2d 659 (2003). Whether the petitioner's custody violates the Constitution depends (1) on whether substantive constitutional

rules were respected, and (2) on whether, if a constitutional error was committed, it was the cause of his custody, i.e. whether it had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " Id. (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). ***See;*** *Casey v. Franks,* 346 F.Supp.2d 1000,

28 U.S.C.S. sec. 2254(e)(1)... Factual findings by the state court that are reasonably based on the record are presumed correct unless rebutted by clear and convincing evidence.

STATEMENT OF THE CASE

It appears do to the charges no court wants to give petitioner the benefit of the doubt.

In March 2012 pro se petitioner, Michael A. Farrell was found guilty of three counts of repeated sexual assault of a child Wis.Stat. 948.025 and one count of showing harmful material to same child Wis.Stat. 948,11. Dkt.21-00. On April 12, 2012 petitioner was sentenced .to 20 years in prison 15 I.C./ 5- E.S. on counts 1,2,3 and 2 years - 1 year I.C./ 1ES on count 4, to run concurrent.

Prior to trial, ***the 8 year old girl*** gave a motive to make up these allegations. When asked why she decided to tell, she replied ***"I want to be queen of the school so no one would pick on me."***(Dkt.21-11:8). Which my jury ***never*** heard.

Petitioners jury was presented /viewed a pre trial under oath forensic interview as evidence.

The following is testimony including this interview and live testimony...

"his penis is long and thick" Dkt.21-12: 44, Ct.16:41.

"his penis would go directly into my vagina, more then once and it hurt" Dkt.21-12:45,ct17:03

"i would rub his penis until the 'juice' came out"..."the 'juice' looked like yellow pee" Dkt.21-12:44, Ct:16:58

"we used paper towels to clean up the juice" Dkt.21-12;44, Ct.16:58.

On direct examination she was asked...

Q. You said he put his penis by your vagina, what was he doing with it ..?

A. What he did was he took his penis and it almost went all the way in my vagina but not quite.

Q. Were you in a position where you could see what his penis was doing or could you only feel what it was doing?

A. Sometimes I could feel it and sometimes I could see.

Q. When he had his penis by your vagina and was putting it in the way you described **it was sort of mostly in; do I have that correct?**

A. Yes!

On Cross Examination...

Q. Your using this word penis?

A. Yes.

Q. His penis went 'half way' to 'almost all the way in' ?

Dkt.21-12: 51, L's 2-20

Q. His penis went 'all the way' in your butt more then once?

A. Yes. Dkt.21-12: 51, L's 21-25/ Dkt.21-12: 48, L's 1-13.

After the pre-trial forensic interview the investigating det. scheduled a sexual assault exam. (The exam was conducted 9 months after the last possible assault).

Examining physician Dr.Kelly Hodges' testified to the results of the exam and her opinion.

Dr. Hodges' testified... "the exam was normal" .. "it's normal to be normal".. "the [vast majority] of child sexual assault exams i perform are normal." She testified the reason for this is ..

"kids don't come forward immediately sometimes months to years"

"The Hymen, and genital tissue... heals very quickly within a few days to years"..."When i examine them, there's not any evidence."

"I get this alot when kids had said, yes, ***there was bleeding***. So I suspect there's was a injury, but when i look, I can't see an injury"

"And another reason is that a lot of times there is no injury to see. So there be contact with that area but ***not enough to cause bleeding, disruption, anything that we would see."***

State appointed defense counsel had no questions on this controversial, contradictory testimony. In fact, not a single question was asked.

In 2018, after a couple of procedural delays the court granted so petitioner can pursue unexhausted claims. Dkt.:1-6, petitioner timely filed a Writ of Habeas Corpus pursuant to 28 U.S.C. sec.2254 along with a memorandum of fact and law in the United States District Court for the Eastern District of Wisconsin. Petitioner argued 9 issues for relief. The Honorable William C. Griesbach granted 5 issues to proceed and order the respondent to answer the writ, and ordered petitioner to file a brief in reply. Petitioner timely filed a "Motion of Objection", Dkt.11, asking the court to reconsider 2 issues he denied, *perjured machner testimony*, and *prosecutorial misconduct* . The court denied the motion Dkt.12.

The 5 issues granted to proceed, as the court addressed them... *trials counsel failing to*

- direct appeal -

1 *to cross examine the state's expert witness and/or call a defense expert;*

- pro se appeal -

2 *to challenge inaccurate information relied in the sentencing court;*

3 *to call technicians to address the significance of the absence of DNA evidence on items tested;*

4. *to challenge the sufficiency of the evidence; and*

5. *post conviction counsel's failure to raise one or more of such issues.*

see: Screening order. (Appendix C: 7)

The respondent filed his court ordered answer dated 2/27/2019. Dkt.21

Petitioner filed his reply brief dated 7/15/2019; Dkt.26

Petitioner filed two motions to amend his brief; Dkt's 29,31.

The U.S. District Court granted the motions to amend, but then denied petitioner's petition for relief pursuant to 28 U.S.C.sec.2254 and a "certificate of appealability" dated 7/28/2020; Dkt.32.

Petitioner timely filed a "Motion to Amend or Alter" the court's decision pursuant to ***Fed. R. A. P. Rule 59(e)*** along with a "Certification of Mailing" dated 8/25/2020, Dkt.38.

The U.S. District court denied the motion dated 9/8/2020; Dkt.39.

Petitioner timely filed a, Notice of Appeal, a motion to leave to proceed without payment of filing fees, including a "Certification of Mailing" dated 10/7/2020.

Also on 10/7/2020, petitioner filed in the Seventh Circuit Court of Appeals a "Petition of a Certificate of Appealability", along with a Memorandum of Fact and Law. Dkt. 20-2967.

The U.S.District Court for the Eastern District of Wisconsin granted petitioner's motion to leave to appeal *in forma pauperis,* dated 10/20/2020, Dkt.

The lower court's rulings are in direct conflict with Supreme Court precedent.

The United States Court of Appeals for the Seventh Circuit denied petitioner's Application or a Certificate of Appealability and supporting memorandum of Fact and Law in a one (1) page four (4) sentence ruling; (exhibit. A) stating...

> "Michael A. Farrell has filed a notice of appeal from the denial of his petition under 28 U.S.C. sec.2254 and an application for certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional rigth.
> *see* 28 U.S.C.sec.2253(c)(2).

First, This court order states it reviewed the ***"record on appeal"***, Dkt's..8,9,26,29,31,and 38 and petitioner's COA and memorandum of fact and law in 13 days! These documents were submitted for review on Dec.23,2020 (***2 days before christmas***) and decided/denied on Jan.5,2021. This time frame would also include a holiday break. It would appear the justices reviewed these documents in less then 13 days. Unacceptable! This 13 day, or so, time frame is in direct conflict with every court of appeals rulings, from all circuits. Every case law on "Westlaw" or "Lexis" web sites, that I reviewed, have a time frame of at least two and a half months. This anadequited time frame is a complete denial of petitioner's XIV amendment right of due process, equal protection of the law. ***It's also in direct conflict with this court's own rule*** "Appellate Courts must review the totality of

the evidence" *Strickland*, 466 @ 698. It would be impossible to review the "totality of the evidence" in 13 days or so.

Second, a court must review ***de novo***, *Strickland* @ 695-96, see: *Dupree v. Warden,* 715 F.3d 1295(11th Cir.2013) (the court reviews issues of law presented in a (COA) under the *de novo* standard), issues of Law were fully argued in petitioner's supporting memorandum of fact and law submitted with the (COA). Which it appears from the court ruling it never received/reviewed this document. A *de novo* review of the "totality of the evidence" would come to find your petitioner has made a substantial showing he is in custody in violation of his constitutional lights, specifically petitioner's VI and XIV amendment rights.

Petitioner has make a substantial showing he's in custodty in violation of his Constitutional Rights.

Federal courts require that the proponent of expert testimony demonstrate that the experts methods and "principles" are "reliable" and were applied reliably to the facts of the case. ***Federal Rules of Evidence* 702.** *Daubert v. Merrell Dow Pharmaceuticals Inc.* 509 U.S.579 (1993) stated..."***vigorous cross examination, presentation of contrary evidence***, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence, 509 U.S.@ 595. The state's expert "generalization diagnosis" are not "methods' and "principles" applied reliably to the facts of the case, ***"his long thick penis going directly almost all the way in her vigina, more then once and it hurt" at least 9 times,*** can no way be the [vast majority] of child sexual assault cases. Defense counsel's failing to vigorously cross examine the states expert or present a defense expert (contrary evidence) on this point

fatally affected the deliberating process. Had the Court's, reviewed the "totality of the evidence" they would have discovered petitioner has made a substantial showing he's in custody in violation of his constitutional rights.

Issue 1- failure to cross-examine the stats expert witness or call a defense witness

The record is perfectly clear defense counsel had NO QUESTIONS for the state's expert witness at trial, and presented no defense expert. Petitioner argued/proved (through state appointed post conviction counsel) failing to cross - examine the states expert (***about the possibilities of injuries***) or present a defense expert was highly prejudicial, because petitioners jury was unable to evaluate the credibility of the alleged assaults or the states expert testimony. Counsel's proceedings included 5 clinical medical studies supporting his argument, about the possibilities of injuries, Dkt.21- 4:18-23, the Circuit Court, not the trial judge, order a Machner hearing,

see: *Davis v. Alaska,* U.S. 308, 94 S. Ct. 1105, ...held.....

> "The partially of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and effecting the weight of the testimony. ***Denial of the right of effective cross-examination*** **is constitutional error of the first magnitude and no amount of showing of want of prejudice will cure it."**

The hearing was held in two parts, On Nov.11, 2013, post-conviction counsel produced medical expert, Nurse Practitioner and Professor Emeritus Ms. Van Dinter , to show that Dr. Hodges testimony was misleading and inaccurate. Ms.Van Dinter was provided to petitioner by the state public defender's office as an ***expert of 28 years in evaluating and teaching sexual assault examinations on children.*** Ms.Van Dinter Curriculum Vitae is

in the court record (Dkt. 21-4: 14-17). Ms.Van Dinter testified "***do to the facts of this case*** there should have been evidence of such sexual assaults". As this Court acknowledged in it's screening order (Appendix D:3, P.3). On ov.25, 2013, (machner hearing) defense counsel testified the reason he did not cross - examine the states expert, Dr.Kelly Hodges, about the possibilities of injuries, is because he cross-examined "the other witness instead" he testified ....

a) ...my recollection was that strategically I made a decision to cross-examine the nurse about all those issues. ***Because it's my recollection she had all the same qualifications as the so called denominated expert the state called.*** And I recall in my cross examination of the examining nurse, which I did as matter of strategie ... ***and I remember exploring those issues with her regarding injury*** and all the commonalty and all that sort of stuff through that witness. I believe I did talk about these facts to the jury. Because I felt I had dealt with all those issues with the previous examining nurse. (Dkt.27-3: 21-22, L's 21-12)

b) ..My recollection is that ***regarding the issues about whether there should have been any injury showing based on what the girl reported had had happened*** **to her,** my recollection is I asked the questions I wanted to ask the nurse who had testified earlier in the trial; because I got that information for her, ***I didn't interview the doctor.*** *see*: Dkt.26 par.21, Dkt.21-11:14-15. (Dkt,21-3: 37-38, L.'s 20-1)

c) ..***Because I had achieved the points I wanted to through the [other witness].*** Because I knew this witness would be hostile to my cross examination, and I didn't believe I'd be able to gain much that was going to be helpful to the defense through that witness, ***I thought strategically it made sense just to leave her alone at that point.*** (Dkt.27-3: 34, L.'s 19-25) (Dkt.26: par22.)

The problem is, there was no other witness to cross-examine, (as the said U.S.District Court acknowledged in it's screening order, ruling the testimony was "***erroneous***" see:(Appendix D: P.7.)

The Machner court denied petitioner relief (adopting the state's proposed Findings of fact and conclusions of Law,(Dkt.21-12:10), ruling...

"Attorney Douglas Bihler, provided an appropriate and justifiable purpose for his decision to not cross-examine Dr. Hodges...and that in addition to believing that cross-examination of Dr. Hodges would not be productive or enhance the defense position further, ***because attorney Bihler recollected any possible issue that he would address with the doctor were already examined through other witnesses***". (Id.@ P.1, #1, #2).

The Court of Appeals ruled (after they found out there was no other witness, by ADA Winters, his strategic reason was

> ...at the post-conviction hearing, trial counsel testified that he did not believ cross examining Hodges would be beneficial. For one thing, he though the doctor would be '***hostile to my cross-examination.***' Additionally, he opined that Hodges' credential's were unassailable (Exhibit. F :P.7).

This ruling was quoted from the state's brief, see: (DKT. 21-5: 12), which trial counsel's testimony was taken out of context.

As argued to the U.S. District Court, Dkt.26:par.'s 21, 22 , the court of appeals focused on a partial part of (1) answer from (6) pages of machner testimony **(disregarding what actually happened)** see: *supra; Machner testimony* (c).

Which the U.S. District court ruled was a ***"reasonable application of Strickland"*** Exhibit C P.2 par.3 / P.3 par.1.

Wis.Stat. 901.07. ***Rule of Completeness,*** (Focusing on one part of a statement can distort the content and meaning of the overall statement.)

Furthermore, a ***"hostile witness"*** cannot seriously be argued to be a strategic reason for not cross-examining a witness.

This [Court's] rulings are so lacking in justification that there was an error so well understood and comprehended in existing law beyond any possibility of fairmined disagreement. The United States Supreme Court demands reviewing courts to review the "totality of the evidence before the judge and jury", *Strickland, 4*66 U.S. @ 698. Had the court of appeals reviewed the Machner Testimony in its totality, instead of relying on the state's brief, there's a reasonable probability the result would have been different.

The U.S. District Court further ruled in denying petitioner habeas corpus relief, "the Court of Appeals reasonably applied *Strickland* because..

> "the ***court of appeals ruled*** Farrell failed to provide examples of what questions needed to be asked, nor did he explain how those unidentified question would have helped create a reasonable probability of a different result."
> (Appendix C: 7, par. 3,/ 8 par.1.)

First, if this ruling was true, the state court never would have held a machner hearing.

Second, petitioner quoted post conviction counsels questions,

> in sexual assault of a child allegations where there is repeated penis to vagina intercourse with penetration which is painful to the victim, the victim is six to eight years old, and the accused is a adult male, is it normal to have no sign of injury?

and his 3 page explanation how it would have explanation who it would create a reasonable probability of a different result. (Dkt.26:par.26/Dkt.29)

Also see: *State v. Koller,* 2001 WI App. 253.....the court held.....

> Accordingly, at the post-conviction stage Koller need to show that if his trial attorney had asked more or better questions, those questions would have resulted in the discovery of [He might have done this by calling suspect jurors as witness at his post conviction hearing and asking them the questions he now claims his trial counsel should have asked]. There is nothing unusual about this sort of retroactive demonstration of juror bias. However, Koller makes no such showing.

As argued, *supra*, Farrell made such a showing during the post-conviction stage! see: Dkt.26:par.26.

Third, ***in petitioner's pro se brief*** (submitted to the Court of Appeals) ***there's examples of 11 questions and an explanation*** ,Dkt.21-11:24-25.

The U.S. District Court's ruling is an unreasonable determination of the facts in light of the evidence presented in the state court proceedings 28 U.S.C.S. sec.2254(d)(2).

- failure to present a defense expert -

At the Machner hearing defense counsel testified ***"he did not consult with the state's expert examining physician Dr. Hodges', "..."he did not consult with an independent expert,"*** and ***"it'snot common to consult experts in other child sexual assault cases he tried"*** Dkt.26:par.8/9. Counsels failing to consult with any physicians concerning the significance of the lack of medical evidence was highly prejudicial and fatally affected the deliberating process. There are many ways properly to assist a client. But making important decisions with no regard for a client's interests is not one of them. That much is perfectly clear without the benefit of hindsight, *Pavel v. Hollings,* 261 F.3d 210 @ [23].

see*: Beth A Townsend,* 45 A.F.L.Rev. 261,270 (1998) Defending the "Indefensible"; *A Primer defending Allegations of child sexual abuse* - (it's difficult to imagine a child abuse case where the defense would not be aided by the assistance of a expert.")

see: United States v. Tornwski, 29 M.J. 578, 580 (1989) (there's little question that child sexual abuse case often present a fertile, indeed, a necessary, area for expert assistance.")

> ***34 Geo. J. Ann. Rev. Crim. Pro. 482 (2005)***
> counsel' failure to investigate lack of medical evidence to support sexual abuse allegations was ineffective assistance and highly ineffective, *Holsomback v. White*, 133 F.3d 1382, 1385-89
>
> ***34 Geo. J. Ann. Rev. Crim. Pro. 483 (2005)***
> counsel's failure to call important fact witnesses and a medical expert at trial was ineffective assistance because testimony of this witness would have rebutted prosecutions already weak case,
> *Pavel v. Hollins,* 261 F.3d 210,217-18(2nd Cir. 2001)
>
> ***34 Geo. J. Ann. Rev. Crim. Pro. 847 (2005)***
> ineffective counsel and highly prejudicial because counsel failed to consult an expert, conduct research, and request copies of studies relied on by the medical expert *Lindstandt v. Keane,* 239 F.3d 191, 202 (2nd Cir 2001)

34 Geo. J. Ann. Rev. Crim. Pro. 478 (2005)
if counsel "entirely fails to subject prosecutions case to a meaningful adversarial testing" the adversarial process itself becomes presumptively unreliable, *U.S. v. Cronic,* 466 U.S. @ 659

The U.S. District Court ruled in denying petitioner relief... "***the Wisconsin Court of Appeals*** reasonably applied [***Strickland]*** and petitioner was not prejudiced because, ...the Court of Appeals determined (petitioner's expert) Ms. Van Dinter actually agreed with Dr. Hodges' ***on the point being contested,*** ...she based her opinion (that there should have been injuries) based on the assaults being [full penetration] despite that the trial court characterized the assaults as ***'illustrating instances of sexual contact .. and partial penetration,'***... and Van Dinters testimony is simply not as reliable as Hodges' and would not create a reasonable probability of a different result" (Appendix C: 8 par. 2, Dkt.38: par's 8-15.)

First, what the two experts agreed on was ***never*** being contested. Ms. Van Dinter agreed that the [Vast majority] of child sexual assault exams are "normal." Petitioner's argument has always been.. "the alleged assaults [described and testified to] don't fall with the [vast majority] of cases and there should be evidence of such assaults." Fully argued to the U.S. District Court, Dkt.26:par.24.

Second, defense expert, Van Dinter, ***never*** stated she based her opinion on "full penetration", she testified "she based her opinion on the trial testimony of the alleged assaults. " Fully argued to the U.S. District Court, Dkt.31: par.'s 2-6,12.

Third, "his long thick penis going directly almost all the way in, more then once and it hurt," can no way seriously be characterized as ***"instances of sexual contact..and partial penetration."***

Fourth, these unfounded assumptions 'full penetration" and "mischaracterization of the alleged assaults" the courts keep quoting (disregarding the evidence, in direct conflict with *Strickland* @ 698) was submitted in the states proposed findings of fact and conclusions of law statement after the post conviction hearing Dkt.21-12: 18-24, which shows the courts never reviewed the "totality of the evidence".

Fifth, "full penetration" or "almost all the way in, more then once and it hurt", on a 8 year old girl, would make no difference in evaluating for injuries.

The following case laws prove Ms. Van Dinters opinion would create a reasonable probability of a different result and her opinion is highly reliable..."***and the states expert would be assailable"***,

see; *Tome v. United*, 115 S.Ct. 696, Supreme Court Justice KENNEDY ***stated in his ruling...***

> The physicians also testified that their clinical examinations of the child indicated that ***she had been subjected to vaginal penetrations***. *Id* @ 154, par 5

Case history 1994 WL 262340, states the abuse was in ***June 1989.*** A.T. did not tell until August,221990, ***more then a year later.***

> On ***September 14, 1990***, Dr. Karen Kuper, a local pediatrician examined A.T., Dr. Kuper observed that A.T.'s vaginal opening was enlarged, and that A.T. had an abnormally thin amount of hymenal tissue for a girl of her age. Kuper concluded that the size of the vaginal opening and the small amount of hymenal tissue were consistent with the penetration of the vagina by an object.
>
> On ***September 21, 1990***, A.T. saw Dr. Laura Reich, another pediatrician, for treatment of a rash on her thighs. Reich's examination of A.T. revealed that her hymen was not

intact and that her vaginal opening was abnormally large. Reich concluded that A.T. "had definitely had peni penetration in her vaginal area."

On ***September 3, 1991***. Dr. Jean Spiegel, a pediatrician and expert in child sexual abuse, examined A.T. Spiegel found that A.T. had a very thin rim of hymenal tissue and a large hymenal opening for her age, which findings were consistent with chronic vaginal penetration Spiegel concluded that repetitive penetration by a penis, finger, or similar object could have caused the size of A.T.'s vaginal opening.

see: *Simonson v. Hepp,* 2007 WL 5614095, 549 F.3d 1101,

Sexual assault nurse examiner Julie Kennedy-Oelhert testified, the exam she performed more then **ONE YEAR after the assault,**

"..the victim's hymen was damaged by the insertion of something into her vagina." The seven year old testified..."her father put his penis in her vagina, (one time)" Kennedy-Oelhert also testified "...if a child doesn't have an estrogenized hymen that tissue is considered friable, which means it tears easily, it's traut and tears easily.." (Dkt. 21-11:26).

see: *Michael R.B v. State,* 175 Wis.2d 736, 499 N.W.2d 641, Supreme Court of Wisconsin. The exam was performed more than 2 months after the assault, the doctor testified under oath...

"...the hymen had been more widely open for a child of her age.. this unusually wide hymenal opening was consistent with that of a child who experienced some type of vagina penetration...normal activity would not account for the amount it was open." (Dkt. 21-11:27).

see: *State v. Whitelaw*, 201 Wis.2d 214, 549 N.W.2d 791. (Court of Appeals District ONE) the exam was performed 3-4 months after the assault, the doctor reported...

"***..old hymen tears were found***". The 12 year old girl testified..
"..he put his penis halfway into my vagina". (Dkt. 21-11: 27)

see: *State v. Kelly,* 2001 Wis. App. 254, 248 Wis.2d 527, 635 N.W.2d 906 (Court of Appeals District two) .....

"the exam revealed a "***small healed tear on the child's hymenal ring***". (Dkt. 21-11:27).

see: *State v. Koller,* 2001 Wi. App. 253, 243 Wis.2d 259, 635 N.W.2d 838 (Court of Appeals District ONE). The nurse testified the exam she performed TWO YEARS after the assault, the condition was consistent with the reported assault. The report stated....

> "***Hymen was not smooth*** as would be expected with an 8 year old girl." (Dkt.21-11: 28)

see: *People v Inman,* 315 Mich. 456, 24 N.W.2d 176 (Michigan Supreme Court), the exam was performed more than ***TWO YEARS after the assault and revealed ...*** "..she had intercourse.." The court ruled..

> " ***if the private parts of the defendant entered this of a child, then only 7 years old, as the testimony of the state tends to show, the marks of penetration would be permanent.*** (Dkt. 21-11: 28).

see: *People v. Milkula,* 84 Mich.App. 108, 269 N.W.2d 195...the exam was performed 6 months after the assault and revealed ..

> "***..did not have an intact hymenal ring....and her vagina opening was unusually open for a child her age.***" (Dkt. 21-11:28)

The Machner Court further ruled, in denying relief .....

> ...the passage of nine to ten months between the last possible act of sexual assault and the exam, and Dr.Hodges compelling and well supported testimony on direct examination that this area of the child's body heals quickly ***with the obvious inference being that any injury sustained to the area, nine months prior, would be fully healed and not observable*** (Dkt. 21-4: 24) (Dkt. 21-4: 29, #1).(Dkt.26 par.26)

The Court of Appeals affirmed this ruling, (exhibit F) ***if four (4) highly educated judges can come to this conclusion from the doctors testimony, there's a reasonable probability Farrell's jury did as well, and wrongfully convicted.***

These case laws cited are in direct conflict with the court's ruling. Furthermore, three are from District One, Court of Appeals, same court that reviewed my case. ***I guess the court forgot about their own rulings!***

If defense counsel would have investigated he would have found these medical experts testifying under oath ***to a variety of different injuries found months to years after an assault,*** which supports Farrell's argument, Farrell's medical experts opinion Ms. Van Dinter. In fact, the Court of Appeals ruled "..Ms. Van Dinters testimony was simply not as reliable as Hodges." These cases laws prove different! A cross examination of the states expert witness, to the variety of different injuries was vital to Farrell's defense. **The exam, in petitioner's case, *is exculpatory evidence!***

Petitioners Pro Se Issues

This U.S. District Court ruled, my pro se issues 2, 3, 4 "this court was unable to reach the merits of the claim because of a procedural default" (exhibit C: pg. 9 par.2). "A criminal defendant loses federal review if the state court judgment "***clearly and expressly***" rest on a state procedural bar and the procedural bar is independent and adequate to support the decision. *Id* @ par.3. The U.S. District Court court ruled, the "Wisconsin court of appeals found Farrell claims are procedural defaulted- citing *Escalona - Naranjo* because the defendant could have raised the grounds for relief in a prior motion but did not, and there is no sufficient reason that excuses his failure to do so. The Wisconsin Supreme court held ineffective assistance of post-conviction counsel may present such a "sufficient reason" to overcome the procedural bar, but only if the defendant can show that 'a particular nonfrivolous issue was clearly stronger than issues

that counsel did present', citing *State v. Romero - Geogana* 2014 WI 83 par's 43-45". The court continues.."appellate lawyers are not required to present every nonfrivolous claims... but they are expected to select the most promising issues for review" (exhibit C: pg.10 par.1.)

An adequate and independent state ground does not, however, absolutely preclude review of a procedurally defaulted claim during federal habeas review. As equitable exception exists if the petitioner can establish cause and prejudice for the default, or establish that the failure to consider the defaulted claim will result in a miscarriage of justice. *Promotor v. Pollar*d, 628 F.3d 878 id. @ Hn. 4(7th Cir.). *Long v. butler*, 809 f.3d 299(7th Cir. 2015)

Cause for a default is ordinarily established by showing that some type of "external impediment" prevented the petitioner from presenting his claims. *Promotor,* Id. @ HN.6.

Prejudice is established by showing that the violation of the petitioners federal rights "worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimension. *Id.* @ HN. 7.

The U.S. District Court court ruled..... "The court went on to hold.. Farrell is not entitled to relief because he failed to allege facts sufficient ***to show prejudice***" *Id* @ pg.10 par.2. Prejudice is the second prong of a *Strickland* analysis! Adjudicated on the merits! A *de novo* review from said U.S. District Court (of petitioner's evidence Dkt.'s. 26, 29, 31 and 38) would come to find the state court rulings "***do not clearly and expressly"*** rest on a procedural bar. Petitioners *pro se* issues are "most promising issues for review" they are all XIV Amendment violations. Furthermore, petitioner's has met his burden to set aside

the states procedural bars, All petitioners claims argue a significant reason why they were not raised in my direct appeal (ineffective post conviction counsel) and the significant facts argued show the issues are 'clearly stronger, most promising issues for review". However, in petitioners amendment motion Dkt.31, which the court granted, ***it's argued 'it would be a Fundamental Miscarriage of Justice not to excuse the default do to my actual innocence,"*** *Promotor v. Polland,* 628 F.3d 878, and my issues/arguments are sufficient to undermine confidence in the outcome, Strickland, 466 U.S. @ 694.

Supreme Court Code 28 U.S.C.sec.2254

Under the AntiTerrorism and Effective Death Penalty Act ("AEDPA"), a writ of habeas corpus may be granted if the state court decision on the merits of the petitioner's claim (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). However, the standards provided in § 2254(d)(1) and (2) only apply to a "claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); ***see*** *Braun v. Powell,* 227 F.3d 908, 916 (7th Cir.2000). Adjudicated on the merits only applies to review under 28 U.S.c.sec.2254(d), ***if not adjudicated on the merits,*** then the court simply asks whether the petitioner is in custody in violation of the Constitution or laws of the United States under § 2254(a). see: Constitution and Statutory Provisions Involved, pg.

Ground 2.) ***TRIAL COUNSEL'S FAILURE TO CHALLENGE INACCURATE INFORMATION RELIED IN THE SENTENCING COURT.***

This argument is a XIV amendment , rigth to due process violation "most promising issue of review". ***Inaccurate information will fatally effect the deliberating process.*** Petitioners argument has all included "***the jury*** and judge" relied on inaccurate information, but the courts excluded this factor "petitioners jury" when adjudicating the claim. Which is in direct conflict with Strickland @698, "totality of the evidence." (As noted, this heading is the U.S.District Courts phraseology!)

A.) *- inaccurate statement -*

While the young was being interviewed at the Child Protection Center her mother call petitioner to inform him of his development and asked "What are you doing ?"... answer..."*I'm going out to get drunk one last time before going to jail* ***for something I didn't do***"(Dkt.211-11:37-38).

Cognizable Fact... The child's mother told the (CPC) case worker and the det. ***"I don't feel the sexual abuse took place"*** the investigating det. replied... ***"I will bring the girl to the exam if she is unwilling/unable."*** (Dkt. 21-12: 27)

On direct examination the girls mother testified about this phone conversation with petitioner, she testified...

> "He said, I'm parting or whooping it up. I'm having a few beers before I spend the rest of my life in jail."(Dkt.21-25:61,2-7

She left out for something I didn't do, and added for the rest of my life. The actual statement petitioner made was declaring his innocence. *supra.*

The Wisconsin Court of Appeals ruled.....

> A defendant must show that the information was inaccurate and the sentencing court actually relied on the inaccurate information. State v. Tiepelman, 2006 WI 66,P.P.2,26, 291 Wis.2d 179; 717 N.W.2d 1. (Dkt. 21-16:P.22)

> ***Farrell cannot demonstrate he was prejudice*** *by post conviction failures to raise this issue because he cannot demonstrate that the woman's testimony was inaccurate. He can point only to a police reports second hand account of what Farrell might have said.* (Dkt. 21-16, P.24)

A sentencing court demonstrates actual reliance on misinformation when "the court gives explicit attention to it, founds it's sentence at least in part on it, or gives specific consideration to the misinformation before imposing sentence. *Promotor v. Pollard*, 628 F.3d 878,P.24 (7th Cir,2010)

The sentencing court the Honorable Richard J. Sankovitz ruled.....

> " In judging how much of your life we should use up, ***"I think"***...you probably put it best. ***'The evidence that clinched this case' [I think] 'the evidence that made a huge difference to the jury in this case' is what you said to the girls mother on the phone that day...***"
> "you were whooping it up because you were going to spend the rest of your life in jail"...
> ***When a person says that , I don't think they mean last breathing moment they have, but they do understand that the best part of their life, they now forfeited to spend that in jail...taking those factors into consideration, I'll order as follows...***
> see; (Dkt.21-12: 81, L's 3-15)

Not only did the judge give "explicit attention to the testimony", he contributed it to the guilty verdict! The mother's testimony came after her daughter's testimony. It's obvious there was, reasonable doubt up until her mother's testimony. ***The judge's ruling cannot be interpreted any other way.*** If the judge came to this conclusion form the testimony, there's a reasonable petitioner's jury did as well and seriously undermines the confidence of the outcome. I provided the court with clear and convincing evidence (police documentation, narrative of what was actually said. (Dkt. 21-12: 38 par.2)

The Wisconsin Court of Appeals ruled...

> "Farrell cannot demonstrate the testimony was inaccurate." and "he can only point to a second hand account of what he mit have said."
> (Appendix E, par.24)

If the police report is unreliable, there can be no charges. The court's ruling is a unreasonable determination of the facts presented to the court 28 U.S.C.sec.2254(d)(2).

The Court of Appeals also ruled ***I failed to show prejudice***, the Circuit Court's ruling proves defense counsel's failure to correct this statement was highly prejudicial, ***to the fact the court contributed it to the guilty verdict.*** *Glover v United States,* 531 U.S. 198,203, 121 S.CT 696, 148 2Ed.2d 604 (in assessing whether counsel's deficient performance prejudiced a defendant, "any amount of actual jail time has Sixth Amendment significance.) Also, *United States v. Reed*, 719 F.3d 369,375(5th Cir 2013) (any amount of jail time is significant for purpose of showing prejudice.)Furthermore, petitioner submitted additional evidence to the U.S.District Court showing the court in a pre-trial hearing, referenced this actual/only statement petitioner made validating the statement. No longer making it "a second account of what petitioner mite have sad"(Dkt.31 par.8.)

The U.S. District Court ruled "the court concluded that no error was shown or the alleged error was not material. (Appendix C:11 par 1). Petitioner met his burden, for Habeas Corpus Proceedings. 2254(d)(2) and 2254(e)(1). But the court failed to review the totality of the evidence.

A.) ***-inaccurate time frame-***

Petitioners pro se proceedings, it was argued and proven the criminal complaint and jury instructions have a 17 month error of the alleged assaults. These documents Farrell's ***jury relied on*** stated the alleged abuse was over a 27 month period. From Sept. 2008 -Dec. 2010. see: (Dkt. 21-12:39) (Dkt.21-12. 91, #2)

Petitioner;s accuser testified...

"***nothing happened in first grade"*** Dkt. 21-12:45 ct. 1714.

"***it started this when i was in second grade, first time spring or summer Feb. or March***" (Dkt. 21-12: 45, Ct. 17:09) (second grade was 2009, Feb.or March would be 2010),

"they went to third grade" (Dkt. 21-12: 45 Ct.17:14) which would be Sept. 2010,

"they ended in between second and third grade" (Dkt. 21-12: 46, Ct. 17:25),

"***in the middle of third grade***" (Dkt. 21-12: 47, par. 1)

Which would be **6** or **10** months. This 17 month error is not a harmless error. If, the 9 alleged assaults (penis to vagina intercourse, as the testimony of the state tends to show) were over 6 or 10 months, this would be repeated sexual assaults. ***Which defense expert Ms. Van Ditner testified "repeated trauma, there would be evidence of injury.***" As this U.S. District Court acknowledged (Exhibit D: 3-P.3, 4-P.1). Farrell's jury deliberating this 27 month time frame would give credibility to the state's expert witness, Dr.Hodges, testimony, if they were not educated differently, which they weren't. Remember, defense counsel had no questions for Dr.Hodges or presented no counter testimony. Nothing! As argued in ground 1.

The Wisconsin Court of appeals ruled.....

> "Farrell suggested the abuse was "between six and nine months" and ***"the court was not relying on a period of time longer then the child identified,***" (Exhibit E.P.25).

These rulings are an unreasonable determination of the facts presented to the court 28 U.S.C. sec.2254(d)(2). First, ***I didn't suggest***, I proved with clear and convincing

evidence the alleged assaults were alleged to be over 6 or 10 months. Not between 6 and 10 months.

Second, the judge did not rely on the child's account of the time frame. ***Case in point,*** in the jury instructions, he prepared, it's perfectly clear he relied on the states assertion. He gave explicit attention to the 27 month time frame ***and instructed the jury*** to deliberate between Sep. 2008-Dec. 2010. I provided the jury instructions, as evidence, to the court, which they ignored. (Dkt.21-12. 91, #2)

You would think an Appellate judge would know, trial judges prepare jury instructions.

For the forgoing reasons, defense counsel's failure to correct this incorrect information, (A) (B),was highly prejudicial to petitioners defense, and fatally infected the deliberating process.

For the U.S. District Court to rule "the court concluded that no error was shown or the alleged error was not material. (Appendix C: 11 par 1).

This ruling is so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fair mined disagreement.

The Supreme Court must grant this petition!

Ground 3.) ***TRIAL COUNSEL'S FAILURE TO CALL DNA TECHNICIANS TO ADDRESS THE SIGNIFICANCE OF THE ABSENCE OF DNA EVIDENCE ON ITEMS TESTED.***

Farrell's accuser testified we had sexual intercourse in Farrell's bedroom, and on the backseat of his SUV, multiple times, and we used paper towels to clean up the "juice" (counts 2,3) also see, criminal complaint.(Dkt.21-12:39-41).

On cross examination Det Barth testified Farrell's backseat, and used paper towels found in Farrell's SUV and bedroom, ***where sent to the crime lab for DNA testing***. She further testified ***no DNA or semen was found on these items*** (Dkt. 21-26:75-81).

On direct examination Det.Barth was asked how she decided to sent the used paper towels for testing, she testified ***"I conferred with the DNA analyst and based on her experience"*** (Dkt.21-26: 11-12, L's 20-8).Det.Barth also testified she informed the analyst of the amount time that had passed (Dkt. 21-26:12,L's 10-14). (9 months) The same goes for the backseat covers, the Det. testified ***"i spoke with the DNA analyst"*** (Dkt.21-26:14-15, L's 2-1) The Det.also testified ***"it was a belief based on the totality of the information from the investigation there would be DNA evidence on these items"*** (Dkt. 21-26:16, L's 4-9). In fact, Det.Barth was so sure there would be DNA evidence ***(based on her experience and the DNA analyst experience)*** she got a judge a issue a search warrant for Farrell's DNA (Dkt.26,exhibit 9) , which she obtained by swabbing Farrell's mouth while in the county jail awaiting trial. While ADA Sara Lewis was questing the det. why other items gathered in the investigation were not sent for testing, she answered... " I spoke with the DNA analyst- - -then the judge interrupted and asked.... "Well wait a minute, did you make the decision or did the DNA analyst make the decision?" She answered " I guess ultimately the DNA analyst did". The court ruled.."Let's move on then, we need that evidence from her." (Dkt. 21-26:16-17,L's 22-18). ADA Sara Lewis tell's Farrell's jury...

> "to suggest that DNA evidence not being found nine to ten months later on item where they couldn't be specific as to whether these were the exact items used..." (Dkt. 21-12: 63, L's 5-11).

This statement contradicts the testimony. The DNA analyst new the time frame, but still ordered them to be tested "based on her experience", and the det. testified "she believed

there would be DNA evidence on these items". Furthermore, the backseat was specifically identified were the alleged assaults accrued.

Defense counsel's failing to interview or call the crime lab analyst was not a harmless error and highly prejudicial. As argued in my brief, this deficiency prevented Farrell's jury from being educated. The XIV amendment, Due process, demands jury's to be educated of all relevant scientific evidence, ***Federal rules of Evidence 702***. Farrell's jury needed an explanation to why these particular items, and not others, were so important, even though 9 months had passed, for ***evidence*** do to the alleged assaults reported and testified to. Failing to educate Farrell's jury to "why, what wasn't found" was highly prejudicial and infected the entire trial with constitutional dimension and is in direct conflict with Federal. Rules of Evidence 702. Had the jury heard from the DNA expert, it would have effectively defused the state's case.

Issue 4 - failure to challenge the sufficiency of the evidence –

Petitioner provided overwhelming clear and convincing evidence (trial documentation) petitioner's accuser's testimony is so insignificant in probative value and focus that no rational trier of fact could have found petitioner guilty beyond a reasonable doubt. Petitioner's accusers was asked multiple times what position we were in when Farrell's penis was in her vagina, ***she was even given multiple options in the questions***, she answered ***"I DON'T REMEMBER"*** (Dkt.21-11,32). When she testified she rubbed Farrell's penis until the "juice" came out, (about 15 times), she was asked "what did the juice look like? She answered ***"Looked like yellow pee" ..."because it looked just like it, it looked yellow but sometime it looked green and clear."*** In my pro se proceedings I

cited three (3) case laws, with children as young as four (4) years old that could describe sexual assaults, and the color and texture of semen, from, District One, Court of Appeals. (Dkt. 21-11:32-34)

see; State v. Powels, 166 Wis.2d 1051, 481 N.W. 2d 708

> "a 9 year old girl testified after the assault she went to the bathroom and wiped ***'wet sticky white stuff'*** from herself."

see: State v. Cater, 2009 Wis.App.LEXIS 1028, Wisconsin Court of Appeals District One,

> "5 year old girl told police that Cater opened her mouth and pressed her head down on his private spot, and then moved her head up and down she stated that when he stopped, she wiped her mouth with her hand and noticed '***White Stuff"*** on her hand."

see; State v. Cantrell, 178 Wis.2d 875, 506 N.W. 2d 426

> "a 4 year old girl reported "Mickey" put his weiner on her somewhere, and that there was some ***"white stuff"***....she told Oak Creek police that "Mickey's wiener became covered with ***"Gooey White Stuff".*** She testified "Mickey" sat her on his leds and rubbed her up and down on him and that ***"some White Stuff"*** came on her stomach."

Petitioners accuser testified the alleged assaults happened in all three locations, counts 1,2,3. Then she testified ***"I THINK"*** I touched him at his place and at the planes, counts 2,3. Then she testified Farrell touched her at his place. Then she testified she ***"DON'T REMEMBER"*** Farrell touching her at his place. Then she testified that all we mostly did ***is her touching Farrell.*** (Dkt.21-11:34-35). She tells the jury she been telling her friends for two and a half years. But then she testified the first time she told anybody was the beginning of fourth grade (when these allegations came forward).(Dkt. 21-11:35-36). Petitioners accuser told her mother "I made her hand from the bathroom towel bar and preformed a lewd sex act on her" and "we performed a make believe wedding in the kitchen." Under direct examination she was specifically asked "did it happen in any other

room of your apt." She answered ***NO!*** Also, ADA Sara Lewis showed her a drawing she made, and gave to Farrell, that states "you make a wonderful husband" (making reference to this make believe wedding) she testified ***"she don't remember making it or why she made it"*** It was also argued, to the courts, insufficient evidence concerning, (count 3), cardboard in Farrell's vehicle, and (count 4) testimony of the pornographic material. She testified we covered all the windows of petitioners SUV with cardboard BOXES, the Det. testified she found 5 large pieces of cardboard, in farrell's SUV. The cardboard was not confirmed by physical evidence. ***Farrell's jury was never shown the cardboard.*** Why (?) because it did not match the det.'s testimony, or his accusers, it was 5 large pieces of tag board Farrell had in his vehicle, 3 x 4, 12 sq. feet in size. The pornographic videos found in Farrell's Apt. don't confirm anything, besides the jury never viewed the pornographic videos, why? because the child's testimony doesn't match the det.'s testimony. This testimony is insufficient to support a conviction of sexual assault,, and can be described as a modicum of evidence.

> A mere modicum of evidence may satisfy a "no evidence" standard. Any evidence that is relevant -- that has a tendency to make the existence of an element of a crime sightly more probable than it would be without the evidence -- could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum " of evidence could by itself rationally support a conviction beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307,

Fully argued to the court see Dkt.26 par.'s 73-88.

The Court of Appeals Ruled.....

> Farrell ***failed to show prejudice*** (Dkt. 21-16:10,P.19)... Here the state presented testimony from the child that Farrell sexually assaulted her and showed her pornographic videos. ***Viewed in a light most favorable to the state, this evidence was sufficient to allow the case to proceed....***(exhibit E:10,P.P.19,20).

The U.S. District Court ruled ***"the Court of Appeals reasonably applied Strickland"*** because ***"the court noted that no prejudice could be shown since the state had presented more than a prima facie case and*** "and ***"the victim's testimony alone provided sufficient evidence for the jury to convict.*** - (citing Dkt.21-16: par's 19, 20,"the court's ruling.) see: (Appendix C par.3 par.1.)

A petitioner/defendant's XIV amendment right states...

> "in light most favorable to the state, ***the evidence must be sufficient to prove every essential element of the crime beyond a reasonable doubt."***
> see: Jackson v. Virginia, 433 U.S. 3007.

You would think a reasonable minded jurist would know, guaranties of the United States Constitutional, ***"sufficient to allow the case to proceed"*** is nowhere in the United States constitution. The [court's] rulings are so lacking in justification there was a error so well understood and comprehended in existing law beyond any possibility for fair minded disagreement. This court must grant this petition! A decision involves an unreasonable determination of facts of it rests upon fact-finding that ignores the clear and convincing wight of the evidence. Your petitioner has meet his burden pursuant to 28 U.S.C. 2254(e)(1), 2254(d)(1)(2) Failure to take into account the credibility of the witness would result in a miscarriage of justice, ***United States v. Washington,*** 184 F.3d 653, 657-58(7th Cir.1999).

Ground 5. ***POST CONVICTION COUNSEL'S FAILURE TO RAISE ONE OR MORE OF SUCH ISSUES ON APPEAL OR IN A POST CONVICTION MOTION.***

Strickland makes it clear that all acts of inadequate performance may be cumulated in order to conduct the prejudice prong. *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665

N.W.2d 305. Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding. Therefore, in determining whether a defendant has been prejudiced as a result of counsel's deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under Strickland. *State v. Thiel* @ P.60. The fundamental purpose of the Sixth Amendment's guarantee of effective assistance of counsel is not to assess the overall performance of counsel but to ensure that the adversarial process functions fairly and reliably. As the Supreme Court put it:

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process the Sixth Amendment guarantee is generally not implicated.
> United States v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). This inquiry directs analysis on the issue of prejudice to the effect of deficient performance on the overall reliability of the trial. This is a substantively different focus from an overall assessment of an attorney's performance. *Id.* @ P.62

Petitioners claims presented, in his pro se proceedings, are clearly stronger fourteenth amendment violations which contained sufficient material facts that, are true, and entitle Farrell to relief. For post conviction counsel to overlook the fact that defense counsel allowed the state to convict Farrell with no evidence of a sexual assault, ***the child's testimony is exculpatory evidence*** as proven in ground's 1, 4, ***the crime lab report is exculpatory evidence*** as proven in ground 3, and allowing an inaccurate statement made during trial by the girl's mother to be contributed to the guilty verdict, and in accurate

time frame as proven in ground 2, can hardly be effective assistance of counsel as guaranteed by the VI amendment of the United States Constitution.

-PERJURED TESTIMONY, PROSECUTORIAL-

Petitioner respectfully moves this court to include the two grounds/issues the United States District Court denied from proceeding forward.

Ground 2 - perjured Machner testimony, Ground 7 - prosecutorial misconduct,

The said U.S. District Court ruled....

> "Neither of these claims warrant further consideration. Counsel's erroneous testimony at the hearing on Farrell's post conviction motion, whether intentionally false or not, was clear from the record and had no impact on the state court decisions denying his motion." (Appendix D: 4 par.4)

The court continues.....

> "And the claim that the assistant district attorney submitted perjured proposed findings of fact has no [basis on the record]""in any event, the court is responsible for its own proposed findings of fact and conclusions of law." (Appendix D:5 par.1.)

These ruling are so lacking in justification -

First - it's true courts are responsible for its own findings of fact and conclusions of law, but that's not what happened, the state Circuit Court adopted ADA's proposed findings of fact and conclusions of law, [it does have a basis on the recorded], in denying petitioner post conviction relief. (Dkt. 21-12: 10)

Second - the record is perfectly clear the machner testimony is ***not ture***/perjury, ADA Sara Lewis vouched for defense counsel's testimony in her, court ordered proposed findings of fact andconclusions of law document, which the machner court adopted in a one page ruling denying petitioner relief, (Dkt.21-12: 10). ADA Sara Lewis intentionally mislead the court (she knows there was no other witness, she prosecuted the case)

WIS. SUP. CT. R.20: 3.3(a)(1) a lawyer shell not knowingly make a false statement of material fact or law previously made to the tribunal by the lawyer,

WIS. SUP. CT. R.20: 8.4(c) it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit, ***or misrepresentation***"

see: petitioners "Motion of objection" Dkt.11, to the U.S.District court's order (Appendix.D) . ADA Sara Lewis had a duty not to mislead the court. Instead she kept the facts secret in the face of a long-standing rule of constitutional statute reguiring disclosure, and then present testimony in such a way as to suggest the opposite of what she alone knew to be true, *Brown v. Borg*, 951 F.2d 1011.This is a textbook case of improper-vouching. The prosecutor engaged in one of the forms of argumentation that the Supreme Court repeatly has identified as improper: implying that a jury should believe a witness based an evidence that was not presented to the jury, see *Jorden v.Hepp,* 831 F.3d 837(7th Cir.2016). On this record, the prosecutor's improper vouching for the credibility of defense counsel went to the heart of the matter. I argue [counsel's erroneous testimony] had insignificant impact on the states court's decision, do to the fact the court adopted the states findings of fact. In fact, that's all the court stated on the record. (21-12: 10)

REASONS TO GRANT THE PETITION

1.) The court failed to review petitioners pro se proceedings "liberally".

2.) This court needs to clarify the [reasonable doubt] standard.

3.) Petitioner has made a substantial showing he is in custody in violation of his constitutional rights.

4.) Petitioner has provided overwhelming, credible, compelling evidence of his actual innocence. *Hymen v. Brown,* 197 F.Supp, 3d 413

5.) The Court's ruling are in direct conflict with Supreme Court precedent.

Petitioner has made a substantial showing he is in custody in violation of his constitutional rights. The arguments within prove defense counsel did nothing to even try to put on a defense. ***Doing nothing cannot be an option!***

No Cross Examination

No Defense Witnesses

No Defense Medical Witness

No Meaningful Adversarial Testing

No Meaningful Investigation (by his own omission)

Trial counsel was ineffective by virtue of his failing to present any defense theory whatsoever, or, at a minimum, to fully investigate same.

There is little tactical wisdom in counsel resting on his hands and assuming the government would make the defense case for him, *Goodman v. Bertrand*, 466 F.3d 1022(7th Cir.2006). These highly prejudicial errors denied petitioner's jury the opportunity to deliberate "reasonable doubt."

Prejudice - meaning an error which so infected the entire process that the conviction violated due process, *Sulla v. Hepp*, 2019 U.S.Dist. 41089.

Pursuant to the familiar Strickland two- prong test, trial counsel's conduct is ineffective if his or her acts or omissions at the time of trial were "outside the wide range of professionally competent assistance", *Strickland v. Washington,* 466 U.S. @ 690.

More specifically, failing to cross examine or to call witnesses at trial, where a credible defense exists, falls below an objective reasonable standard of representation, thus

constituting ineffective assistance of counsel. *Harris v. Reed*,894 F.2d 871, 878-91(7th Cir.1990). Not developing a defense is tantamount to presenting no defense at all where lends credible support for the defense, *Davis v. Alabama*, 596 F.2d 1214, 1218(5th Cir.1979). In fact, such inaction has been found to be "a clear breach of the duty a defense attorney owes to his client" Id.@ 1219. Moreover, not presenting a viable defense cannot be found to be a tactical decision, it simply represents ineffective assistance, Weidner v. Wainright, 708, F.2d 614, 616 (11th Cir.1983).

Petitioner has provided overwhelming, credible, compelling evidence of his actual innocence, *Hymen v. Brown*, 197 F.Supp,3d 413.

i.) Petitioner has provided (now) 11 medical experts opinions showing/proving, the states experts opinion was, ***at least***, misleading and her findings of a 'normal exam", when applied reasonably to the facts of the alleged assaults in this case (Fed. R. of E. Rule 702) ***is exculpatory evidence.*** Had defense counsel presented any one of these experts it would have effectively defused the state's case against petitioner, and would give the jury a powerful reason to acquit!

ii.) Petitioner has provided (quoted trial testimony) compelling evidence petitioner's accuser's testimony is so insignificant in probative value and focus that no reasonable trier of fact could have found guilt beyond a reasonable doubt.

The following facts do not and cannot support a sexual assault conviction.

Fact: She can't describe sexual positions, **"she don't Remember."**

Fact: She can't describe the **color** and **texture** of semen.

Fact: "**I think**" I touched him at his place, then, that's all we mostly did is her touching Farrell.

Fact: She says Farrell touched her at his place, when asked what parts, she **"don't remember"**

Fact: She tells her mother of an assault in the bathroom, at trial it only happened in her bedroom.

Fact: She tells her mother about a make believe wedding, at trial **"she don't remember it."**

CONCLUSION

For the reasons within, this petition for a writ of certiorari should/must be granted.

Respectfully submitted,

Michael Farrell

Michael A. Farrell, Pro se petitioner

Date: April 2, 2021