21-5273

ORIGINAL

No. _____

Supreme Court, U.S.
FILED
MAR 3 1 2021
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JERRY L. WHEELER — PETITIONER
(Your Name)

vs.

RANDALL HEPP — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

JERRY L. WHEELER
(Your Name)

WAUPUN CORRECTIONAL INSTITUTION
(Address)

P.O. BOX 351, WAUPUN, WI 53963-0351
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Was Wheeler denied Effective Assistance of Counsel When Trial Counsel Failed to Contact, Interview, or Call to Testify, The 23 Eye Witness Who Slept over Night At 720 Jackson Street between October 15, 2001 and May 2, 2002.

   Answer: All The Lower Courts refuses to Answer this question

2. Was Wheeler Constitutional Rights Violated When The Trial Court Amended The Criminal Complaint at Trial over Wheeler's Objection.

   Answer: All The Lower Courts refuses to Answer this question

3. Was Wheeler Contitutional Rights to Notice Violated When He was never informed before trial The Criminal Complain Information would be Amended

   Answer: All The Lower Couts refuses to Answer this question

4. Was Wheeler denied effective Assistance of Counsel When both trial and Appellate Counsel Failed call his alibi witnesses, Steve Frer, Azell Cavon and Desmon Cavon in Boston MA. To Testify to key dates and time frame

QUESTION (S) PRESENTED

8. Did STATE COMMIT PROSECTORIAL MISCONDUCT BY ALLOWING C.A., CLARISA CRUZ, AND OTHER STATE WITNESSES TO TESTIFY FALSELY UNDER OATH

ANSWER: All The Lower Courts Refuses to answer this question

9. Did the State COMMIT PROSECTORIAL MISCONDUCT FOR FAILING TO TURNOVER TO THE DEFENSE THE STATEMENT OF THE 23 WITNESSES THAT C.A. TESTIFIED AT TRIAL SLEPTED OVERNIGHT IN THE HOUSE DURING THE TIME FRAME SHE CLAIMED SHE WAS BEING SEXUALLY ASSAULTED

ANSWER: All The Lower Courts Refuses to answer this question

10. WAS WHEELER DENIED A FAIR TRIAL BECAUSE OF ALL The Cumulative CONSTITUTIONAL VIOLATIONS AND ERRORS By The STATE, TRIAL COURT, TRIAL COUNSEL AND APPELLATE COUNSEL

ANSWER: All The Lower Courts REFUSES TO ANSWER this question

QUESTION(S) PRESENTED

ANSWER: ALL The Lower Courts REFUSES to ANSWER this question

5. WAS Wheeler CONSTITUTIONAL RIGHTS VIOLATED When The Trial Court Failed To give The requested "other ACT" 275 JURY INSTUCTION

ANSWER: The Courts ANSWERED NO

6. WAS TRIAL COUNSEL INEFFective FOR FAILing to MAKE SURE the requested "other Act" 275 Jury INSTRUCTION were given to Jury by the Court

ANSWER: The Courts ANSWER NO

7. WAS Wheeler CONSTITUTIONAL RIGHTS VIOLATED when he WAS NEVER given NOTICE By Courts, TRIAL Counsel or the State, that the requested "other Act" 275 JURY INSTUCTION WAS NOT GOING TO BE GIVEN TO THE JURY

ANSWER: All The Lower Courts REFUSES to ANSWER this question

RELATED CASES

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page Number

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LIST OF PARTIES

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

[ ] 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:

RELATED CASES

See Attached:

See Also: REHEARING Attached:

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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

[✓] 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,
[✓] 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.

[✓] 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 Wisconsin Court of Appeals ~~court~~ appears at Appendix D 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 NOV. 30, 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: April 5, 2021, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including March 19, 2020 (date) on ? (date) in Application No. A.

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 June 14, 2013. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, 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 N/A (date) on N/A (date) in Application No. N/A A N/A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Wheeler's CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED in this CASE ARE AS FOLLOWING:

1. Wheeler's CONSTITUTIONAL Rights UNder the United States CONSTITUTION, 5th, 6th AND 14th Amendment WAS VIOLATED AND Wheeler WAS denied A FAIR TRIAL, The WINNEBAGO County Circuit Court of WISCONSIN, The WISCONSIN Court OF Appeal, The WISCONSIN Supreme, The UNITED States District Court Eastern District OF WISCONSIN AND The UNITED STATES Court OF Appeals For the Seventh Circuit, REFUSES to Address the Clear Violation OF Wheeler rights INVOLVED.

(A). Wheeler WAS/IS ENTITLED TO A CERTIFICATE OF APPEALAILITY ON EACH OF HIS CONSTITUTIONAL CLAIMS

(B). The TRIAL Court Abuse its discretion When it Amended The INFORMATION during Trial denied Wheeler the right to 'Notice' At A Critical STAGE OF Court Proceeding Violated his 14th Amendment OF U.S. Contitution.

(C) The TRIAL Court FAILURE TO Give Wheeler 'Notice' At A "Critical STAGE OF Court proceedings WAS PLAIN Error And Violated His 14th Amendment OF U.S. Contitution

(D) The Trial Court Failure To Give The Requested Cautionary INSTRUCTION ON "Other Acts" Evidence Denied Wheeler OF His 14th Amendment U.S. Constitution

(E) Prosecutorial misconduct by D.A. SWANK Failure To TURNOVER The Court ordered Requested 275 Cautionary Jury INSTRUCTION Violated Wheeler's Due Process Rights Guaranteed Him. Dening Wheeler A Proper Opportunity Be Prepared For Trial. This ISSUE IS CONTRARY TO Wheeler's Rights Guaranteed By Article I § 8 And § 21 OF The WISCONSIN CONSTITUTION And The Fifth, Sixth, And Fourteenth Amendments OF U.S. Constitution

(F) Admission OF Other Acts Evidence Without given the requested 275 Agreed Cautionary Jury INSTRUCTION WAS NOT A harmless error And Violated Wheeler's Due process Rights Guaranteed Him.

(G) It WAS Prosecutorial misconduct For The Winnebago County State Attorey's And Police Department To Fail To TURNOVER The STATEMENTS OF All The Female's That SLept IN The Same Room With C.A. Between October 7, 2001 And May 1, 2002 OverNight.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. It WAS/IS Prosecutorial MisCONduct For The Prosecutors OF Winnebago County To ALLOW C.A. TO Give False Testimony And FAild TO Correct It.

(H) Appellate COONSEL IS INEFFective For FAiling To Argue Newly Discoverd Evidence Claims Violated Wheeler's CONSTITUTIONAL Rights TO FAIR MACHINE Evidentiary Hearing Violated His 6th And 14th Amendments.

1. Wheeler Contend The Evidence Is material To The ISSUE OF The First Element OF The Charge And How The Evidence IS Not merely Comulative
2. Wheeler Has Met His Burden OF Proof IN Showing A REASONble Probability Existed That The Jury Would Have Had A Reasonable Doubt OF His Guilt Had The Jury Heard The Newly Discovered Evidence.

(I) Trial COUNSEL FAILURE TO ENSURE The Judge Gave The Requested CAUTIONARY INSTRUETION Severely PreJudice Wheeler And DeNIe Him OF His CONSTITUTIONAL Rights TO A FAir Trial GUARANteed By Article I § 158 And § 21 OF The WISCONSIN CONSTITUTION And The Fifth, Sixth, And Fourteenth Amendment OF The U.S. CONSTitution

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(J) TRIAL COUNSEL FAILURE TO Properly Impeach The State Key Witness Violated Wheeler 6th And 14th Amendment CONSTITUTIONAL Rights TO A FAIR TRIAL GUARANTEED By The U.S. Constitution

1. TRIAL COUNSEL FAILED TO Call, Secure or SUBPOENA WITNESSES
2. TRIAL COUNSEL FAILURE TO INVESTIGATE OUT OF STATE ALIBI WITNESSES AND SUBPOENA Those WITNESSES That Would Destroy The Credibility OF THE STATE Key WITNESS C.A. CONFLICTING Testimony WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND Violated Wheeler's Rights TO A FAIR TRIAL.

(A.) TRIAL COUNSEL Failed TO INTERVIEW WITNESSES

(K) All OF Wheeler's GROUNDS For RELIEF Should Be GRANTED AS WELL AS A CERTIFICATE OF APPEALABILITY BECAUSE The ERROR'S By The STATE And Both APPELLATE And TRIAL COUNSEL ARE PLAIN & Violated His CONSTITUTIONAL Rights TO A FAIR TRIAL

(L) The EVIDENCE PRESENTED At TRIAL WAS INSUFFICIENT TO CONSTITUTIONALLY Support Wheeler's CONVICT

1. Clearly Established Federal LAW governing SUFFICIENCY OF EVIDENCE
2. The WISCONSIN Court OF APPEALS Did NOT REASONABLY Apply JACKSON

(M) The Court Must GRANT Wheelee's Petition Based Upon The UNCONSTITUTIONAL TAKING AWAY OF His ALibi Defense

1. INEFFective Assistance of Trial Counsel

(N) The Court must GRANT Wheeler's Petition Based upon The Brady Violation, That DENied Him His CONSTITUTIONAL Rights And Protections under the 6th and 14th Amendments

(O) Prosecutorial MISCONduct And INEFFective Assistance OF Counsel

STATEMENT OF THE CASE

IN 2005 the State Charged petitioner, Jerry L. Wheeler, with Committing three or more Violations of Wis. Stat. § 948.02(1) or (2) involving a child under age 16 (C.A. DOB 2/13/1989) Contrary to Wis. Stat. § 948.025(1) & 939.50(3)(b), A Class B Felony. R.1. The Complaint Alleged that the Assaults took place between August 2001 and August 2002 in Oshkosh, Wisconsin. At the Aforementioned time C.A. was Wheeler's Stepdaughter. The Case went to trial on September 15, 2008. Wheeler was Convicted by the Jury after Slightly more than an hour of Jury deliberation. R. 166 At 670, 672. The Court did poll the Jury and its decision was Unanimous. R. 166 At 673-74. Wheeler Finally was re-Sentened on May 26, 2011. R. 209. Wheeler was represented by Attorney Jeffrey Brandt, Whom had been Appointed by the State Public Defender to represent Wheeler At his re-Sentencing hearing. R. 175. At this Sentencing hearing the Circuit Court Sentenced Wheeler to 35 years, with 25 years initial incarceration Followed by 10 years of extended Supervision. R. 209 At 26. See Also Amended Judgement of Conviction, R. 202; Appendix At 135-6. Wheeler was given 1170 days of Sentence Credit. Id.

On January 11, 2010 and April 16, 2010 Attorney Rick B. Meier Filed Wheeler's Motion For Post-Conviction

pursuant to Wis. Stats. § 809.30(2)(h). On direct appeal Attorney Meier argued from the Judgment of Conviction, Sentence and order Denying defendant's Post-Conviction motion entered in the Winnebago County Circuit Court and stated:

A) The "other act's Evidence in this Case was improperly admitted by the Circuit Court.

B) The Circuit Conditioned the admission of "other acts" evidence on a Cautionary instruction which was Never given.

C) Trial Counsel was ineffective in Failing to ensure that a Cautionary "other acts" instruction was given to the Jury by the Court.

D) The prosecutor's Closing Arguments regarding Wheeler's Silence at trial deprive Wheeler of his right to remain Silent and his right to due process of Law under the Fifth and Fourteenth Amendment and the Wisconsin Constitution, Article I, § 8(1)?

These issues was raised by post-Conviction motion. The Circuit Court answered "NO" in post-Conviction proceedings. See, Excerpt of R. 163. Appendix at 109-113, See excerpt of R. 172 at 4-6, App. at 115-117,

On appeal, the Court of Appeals rejected petitioner's arguments on these issues by Finding that the "other acts" evidence was instead something called "panorama"

evidence which was properly admitted by the Circuit Court. Decision at ¶¶ 1, ¶ 7, App. at 101-102, 104. The Court of Appeals found that trial counsel strategically did not ask for a cautionary instruction at an instruction conference. Thus, the Court of Appeals concluded that the Circuit Court was not required to give a cautionary instruction. Decision at ¶ 3, ¶¶ 10-11, App. at 103, 105-106. The Court of Appeal agreed, finding that it was bound by the Circuit Court's factual findings in this regard because such findings were not clearly erroneous. Decision at ¶¶ 9-11, App. at 105-106, and the Court of Appeals also found that the State's comments were not comments on petitioner's silence, and thus trial trial counsel thus was not ineffective in failing to object thereto. Decision at ¶¶ 12-18, App. at 106-108. The Wisconsin Supreme Court declined to review the petition on June 14, 2013.

On October 15, 2013, the petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging five grounds for relief: (1) the trial court improperly admitted "other acts" evidence; (2) the trial court never gave a cautionary instruction about "other acts" evidence; (3) trial counsel was ineffective for failing to ensure the jury heard the cautionary instruction; (4) prosecutorial misconduct during closing argument and ineffective assistance of trial counsel for failing to object to closing argument; and (5) miscarriage of justice. ECF no. 1 at 14-31. Magistrate Judge

William E. Callahan - to whom the case was originally assigned. Screened the petition and ordered the respondent to answer. ECF No. 5. Subsequently, the petitioner sought and received a stay of this case to allow him to present additional claims to the State Courts. In April 2014, the petitioner filed a motion to stay the petition to allow his to present other grounds for relief to the State Courts. ECF No. 19. Judge Griesbach's September 3, 2014 order granted the petitioner's motion to stay but did not clarify completely which grounds the petitioner would attempt to exhaust because there was many, nor did the Court request be name them all. ECF No. 31. In a subsequent filing, the petitioner informed the Court that he was being denied the opportunity to exhaust his many additional claims because the respondent denied his access to the Wisconsin Supreme Court by dening him an extension to his legal load. ECF No. 45. Because he was poor, preventing him from timely filing his petition with the State Supreme Court. The petition was denied the opportunity to make the required copies, denied the postage needed, and the denial of the requested Fund caused him to miss the thirty-day deadline required filings. The petitioner inform the United States District Court of the Eastern District of Wisconsin that this procedural default should be excused because prison administrators refused to give me the very needed legal loan. That was a clear external impediment to compliance with the State Court's and Federal Court's procedural requirements.

The additional claims filed by the petitioner was as following:

1. Wheeler was denied of his rights based on the "other acts" evidence admission
2. The Trial Court Abuse its Discretion when it Amended The Information During Trial Dening Wheeler The Right To 'Notice' At a 'Critical Stage of Court Proceeding Violated His 14th Amendment of the U.S. Contitution.
3. The Trial Court Failure To Give Wheeler 'Notice' At A "Critical Stage of Court Proceedings Was Plain Error And Violated His 14th Amendment of U.S. Contitution
4. The Trial Court Failure To Give The Requested Cautionary Instruction about "Other Acts" Evidence Denied Wheeler of His 14th Amendment U.S. Contitution
5. The Prosecutorial Misconduct By D.A. Swank Failure To Turnover The Court Ordered Requested 275 Cautionary Jury Instruction Violated Wheeler's Due Process Right's Guaranteed Him, To Allow Him To Properly Be Prepared For Trial, Issues Contrary To Wheeler's Rights Guaranteed By Article I § 1 § 8 And § 21 of The Wisconsin Constitution And The Fifth, Sixth, And Fourteenth Amendments of The U.S. Constitution

6. Admission of Other Acts Evidence Without Give The Requested 275 Agreed Cautionary Jury Instruction Was Not A Harmless Error And Violated Wheeler's Due process Right's Guaranteed Him.

7. It Was Prosecutorial Misconduct For The Winnebago County States Attorey's And Police Department To Fail To Turnover The Statement Of All The Female's That Slept In The Same Room With C.A. Between October 7, 2001 And May 1, 2002 Overnight.

8. Appellate Counsel Is Ineffective For Failing To Argue Newly Discovered Evidence Claims Violated Wheeler's Constitutional Rights To Fair Machner Evidentiary Hearing Violated His 6th And 14th Amendments.

9. Trial Counsel Failure To Ensure The Judge Gave The Requested Cautionary Instruction Severely Prjudice Wheeler And Denied Him Of His Constitutional Rights To A Fair Trial Guarranteed By Article I § 1 § 8 And § 21 Of The Wisconsin Constitution And The Fifth, Sixth, And Fourteenth Amendments Of The U.S. Constitution

10. Trial Counsel Failure To Properly Impeach The State Key Witness Violated Wheeler 6th And 14th Amendment Constitutional Rights To A Fair Trial Guaranteed By The U.S. Constitution

11. The ERROR's By The State And Both Appellate And Trial Counsel Are Plain A Violates His Constitional Right To A Fair Trial

12. The Evidence Presented At Trial Was Insufficient To Constitutionally Support Wheeler's Conviction

13. The Court must Grant Wheeler's Petition Based upon The UNCONSTITIONAL TAKING AWAY OF His ALIBI Defense

14. The Court must Grant Wheeler's Petition Based upon The Brady Violation, That Dinied Him OF His Constitutional Right And Protections

15. Prosecutorial Misconduct & Ineffective Assistance of Counsel.

16. Cumulative Errors.

ON JUNE 16, 2015, the petitioner Filed a lengthy motion accompanied by Several Exhibits in Support of his motion ECF NO. 37. Addressing all the issues, And Argument he exhausted in the State Court. Wheelers Filing was to

to address all of his heirt above in the United State District Court Eastern District of Wisconsin at the Same time but was delay by the respondent. The Court belief Wheeler wanted the Court to decide his petition as is, without further briefing on any additional Claims was false, and the issues merits presented to the Wisconsin State Courts did not echo the Arguments already discussed, but was Addendum to the issues already File by the petitioner, The issues was not duplicative of the Claims Addressed was procedurally defaulted because he was denied Access to the to U.S.D.C.E.D. of Wis. by the respondent and his STAFF.

ON MAY 27, 2020 District Court denied Wheeler's petition For 28 U.S.C. 2254 and dismissed the case and denied Wheeler a Certificate of Appealability. ON August 25, 2020 Wheeler's First half of his Application For Certificate of Appealability was Filed with the United STATES COURT OF APPEALS For the SEVENTH CIRCUIT

ON ~~Sep~~ September 14, 2020 Wheeler Second half of his Application For Certificate of Appealability was Filed with the United STATES COURT OF APPEALS For The SEVENTH CIRCUIT. ON November 30, 2020 Circuit Judge FRANK H. EASTERBROOK, And Circuit Judge For the United States Court of Appeals For the Seventh Circuit Chicago Illinois, Claimed to have Found NO Substantial Showing of the denial of a Constitutional right, and denied Wheeler petition and request For a Certificate

of Appealability, And Denied Wheeler's Motion For Appointed Counsel. On March 20, 2021 Wheeler Filed A Successive Petition (Second) 28 U.S.C. § 2254 in the United State Court of Appeals For the Seventh Circuit For Collateral review. On April 5, 2021 without taken into Full Consideration of All Wheeler's Alibi Witnesses out of Wisconsin and the 23 Witnesses staying overnight in the house in question and during the time Frame of the allegations, the Court order "The evidence he Now presents - A handful of letters From Former employers documenting Several months of Absence From his work, records of his unsuccessful attempts to investigate the Alibi, A letter From the victim that was read to the jury during his trial, and prison records documenting both his attempts to secure legal loans materials." The Court Denied Authorization and Dismiss Wheeler's petition and Again Denied his motion For appointed Counsel. On April 14, 2021, the denied Wheeler's AFFIDAVIT IN SUPPORT OF PETITIONER'S SECOND PETITION FOR 28 U.S.C. 2254 FOR INEFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL, and Also denied Wheeler's PETITION FOR APPOINTMENT OF A PRIVATE INVESTIGATOR based on it FINAL order dated April 5, 2021.

On April 22, 2021 Wheeler Filed A MOTION TO RECALL THE MANDATE, BRIEF IN SUPPORT OF WHEELER'S MOTION TO RECALL THE MANDATE, SUPPORT AFFIDAVET And EXHIBITS, moving the State Court of Appeal For the

Seventh Circuit to secure uniformity of decisions in its Court applying the Jackson Virginia Standard, And For A rehearing that's required because the panel decision Failed to evaluate both trial And Appeal Counsel Failure to investigate the 23 Key / Eyewitness And their Failure to evaluate the unconstitutional Amendment of the information during trial.

On May 13, 2021 United States Court of Appeals For the Seventh Circuit Addressed Wheeler's Petition For rehearing or reconsideration on his Successive Collateral Attack, And the Court denying his Application For leave. The Court Stated it was Not Authorized to Consider Wheeler's please's based under 28 U.S.C. § 2244(b)(3)(E), which shall be Filed without Action by it's Court the Court Also Order Wheeler's pro se motion to recall "MDNATE" Filed on April 29, 2021 is Denied.

REASONS FOR GRANTING THE PETITION

IN this CASE Wheeler has prove that the evidence presen-Ted at trial WAS iNSUFFiCieNt to CONSTitutioNALLy support Wheeler's CONViCtioN - AFter TriAl C.A. reCANted parts OF her testimoney that the Jury Never had A opportuNity to heAr. C.A. grVe iNCONSiStent testimoney AND FRISe Statement Allowed by the WiNNebAge County DiSTrict ATtorney OFFiCe.

The WiNNebAgo COUNty DiSTrict ATtorney OFFiCe FAiled to turNOver the 23 eyeWitNeSS Statement C.A. Admitted AND iNCONSiStentLy testiFied ABOVe AT triAl. C.A. CLAimed She WAS SexuAlly ASSAulted ON A NightLy bASed At the preliminAry hearing, but Admitted At trial SeverAl OF the people (23) SlepT OverNight iN the SAme room with her, over the time period She CLAimed She WAS beeNg SexuAlly ASSAulted. These FACTS proves this CONSTitutioNAl VIOlATION (PlAIN erroF) deNIed Wheeler A opportuNity to preprE For trIAl, AND deNIed him A FAir trIAl.

The "Appellate Court's Should have reVersed Wheeler's CONViCtion based ON iNSUFFiCeNey OF the evidENCe is iN eFFect. A determiNATion that the goVerNment's CASe AGAINt him WAS So LACKing, that the trIAl Court should hAVe eNtered A Judgment OF ACQuittAl. Lockhart V. Nelson, 488 U.S. 33, 39 (1988). Burks V. United States, held that WheN A deFeNdANT's CONViCtion is reVersed by AN Appellate Court ON the Sole ground that the eVIdeNCe WAS iNSUFFiCient to SUSTAIN the JUry's Verdict.

REASONS FOR GRANTING THE PETITION

IN this CASE the WISCONSIN Court OF Appeal ignored All the evidence and Newly discovered evidence he Submitted to the Court in his 974.06 and Knight petition Argument regarding the SUFFICIENCY of the evidence, And AS Such, this Claim is Subject to deference under AEDPA. The Court of Appeal Undoubtedly Failed to Adjudicate Wheeler's SUFFICIENCY Claim on the Merits. The Court of Appeal FAiled to examine the evidence While Filed PRO Se in the record both trial and Appellate Counsel refused to File, including the inconsistant STATEMENTS by C.A. At the preliminary hearing and trial, the recanted Statement by C.A. and CLARISA CRUZ that took AWAY the Alleged First Allegation that Wheeler had A Constitutional right to Notice to KNOW (beginning dated). The Statements/ Letters OF Steve FAer, the AFFIVDAVIT OF LARRY BROWN, the report of INVESTIGATOR JEFF VENNE ASSIGNED to the CASE, All proves the evidence WAS/IS INSUFFICIENT For Wheeler's CONVICTION. This IS AN UNADJUDICATION ON the Merits And the Newly discovered evidence. And thus, the decision to ignore these FACTS by the Court OF Appeals is entitled to AEDPA deference, And A NEW Trial.

IN JACKSON V. VIRGINIA, the UNITED State Supreme Court held that the relevant inquiry into A SUFFICIENCY OF the evidence Claim is Whether, "After Viewing the evidence in the light most FAVORABLE to the prosecution. ANY RATIONAL trier of FACT Could have Found the essential elements of the Crime beyond a reasonable

doubt." 443 U.S. 307, 319 (1979)(emphasis in original). And while the Court looks to Wisconsin Law for the substantive elements of the crime, Federal law governs the minimum amount of evidence required by the Due process clause. Coleman v. Johnson, 566 U.S. 650, 655 (2012)(per curiam). With these standards in mind, the Court may only the State Court's finding of sufficient evidence if it was "object unreasonable." Maier v. Smith, 912 F. 3d 1064, 1074 (7th Cir. 2019). This is not an easy standard to satisfy. And indeed, review under § 2254 "involves double dose of deference. Federal Courts defer to the State Courts, which defer to the Jury." London v. Clements, 600 F. App'x 462, 466 (7th Cir. 2015). The Seventh Circuit has consistently characterized the Jackson standard as a "nearly insurmountable hurdle". Winfield v. Dorethy, 956 F. 3d 442, 455 (7th Cir. 2020).

The Wisconsin Court of Appeals unreasonably applied Jackson and relied upon objectively unreasonable findings of fact because it failed to consider evidence that Wheeler proved "directly conflicts" with the Court of Appeals' decision. Namely, Wheeler conviction is "so in conflict with the laws of nature" that no reasonable Jurist could conclude that the conviction is consistent with due process requirements of Jackson. Wheeler make this claim from the variety of facts in the record, primarily asserting that, base on the inconstitant time frame C.A. claimed she was been sexually assaulted "on a nightly bais", and "the next night," "over a dozen times" - That 23 people stayed over night during

that time Frame, And her recantation of the Alleged time Frame to Investigator Jeff Venne. The Affidavit of Carry Brown and Statements, the Letters From Steve Faer, The Affidavit of DONNA Stephens, The inconstitant Statements by State Witness Clarisa Cruz, and her recantated testimoney, that Wheeler was not in Wisconsin one Week After C.A. moved to 720 Jackson Street in Oshkosh, And that Several people was Sleeping in the Same Room With C.A. during the time Frame She Claimed She was being Sexually Assaulted. All these Fact the Jury Never had a opportunity to hear, Support to Wheeler defense he Could not possibly have been Sexually Assaulting C.A. When She moved to 720 Jackson Street on a Nightly basis between October 7, 2001 And May 2, 2002. ECF NO. 1, ECF NO. 19, ECF NO. 31, ECF NO. 37, And ECF NO. 47.

The Wisconsin Court of Appeals decision was Contrary to, And was unreasonable Application of, the Clearly established Federal Law Set Forth in Jackson And was an unreasonable determination of the Facts. The Court of Appeals did not cite to the relevant Cases such as Jackson And its Wisconsin Analogue, State V. Poellinger, 451 N.W. 2d 752 (Wis. 1990), the Court of Appeals did not engage in the proper Analysis. See Adams V. Bertrand, 453 F. 3d 428, 432 (7th Cir. 2006) (noting that Wisconsin "effectively duplicates" the Standard Created by Jackson). In this Case both the reasoning (or lack there of) And the results of the State-Court decisions Contradicts

[United States Supreme Court procedent] Wheeler need not cite the Controlling Federal case. Early V. Packer, 537 U.S. 3, 8 (2003) (per curiam)

The Court of Appeals cannot prove or described in detail the evidence (the Alleged evidence) Supporting his Conviction. This includes the recantation of the other statements given by the State Witnesses C.A. and Clarisa Cruz, The inconsistant testimony by the State Key Witness C.A. given at the preliminary hearing in 2005 and her trial testimoney. The evidence newly-discovered and submitted in the records pro se by Wheeler is clear. The statements of the 23 people that C.A. admitted slept overnight never turned over to the defense, the several witnesses that slept in the same room as C.A. during the time Frame she Alleged (between October 7, 2001 and may 2, 2002) She admitted to at trial, and Clarisa Cruz also admitted to both under oath. The inconsistant statement given to Oshkosh police departement by C.A. and the inconsistant testimony give by the Oshkosh police department at trial. Under Wisconsin Law, prior inconsistant statements, even when not under oath, Constitute substantive evidence. See Wis. § 908.01 (4)(a) 1; Vogel V. State, 96 Wis. 2d 372, 386, 291 N.W. 2d 838 (1980). The Court has failed to discuss the newly discovered evidence, the multiple Witnesses who slept Overnight during the Charging time Frame of C.A's Allegations, and the evidence that Wheeler was working and traveling back and Forth to Boston and Chicago during the time Frame C.A. Claims she was being assaulted on a nightly basis between October 7, 2001 and may 2, 2002.

The Court Failed to Appley the Standard announced in Poellinger that the Court must affirm unless "the evidence, viewed most favorably to the State . . . is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." 451 N.W. 2d at 757-58, and therefore adhered to the standard in Jackson. The Jury was entitled to credit and discredit certain testimony as it felt appropriate, and the Court of Appeals was required to give deference to the Jury's decision on such matters. While the Court of Appeals did not explicitly review every detail of the record in its opinion, the Court of Appeals undoubtedly failed to review the record and specifically described the evidence it thought was sufficient to sustain the conviction.

This Court must take notice, there is no eye-witness evidence even though there was alway other people in the house, Wheeler argues there was no physical evidence that renders the State's theory of the case possible. He contends, trial counsel failed to properly investigate and interview witnesses to prove to Jury C.A. was not being truthful, the State withheld witness statement who was in the house, the State key witness C.A. statements, inconsistent and recanted in part, supports Wheeler claims it was impossible for him to have been sexually assaulting C.A. because he was either out of [redacted] the state are witnesses was present.

In sum, the Court of Appeals failed to follow the mandate of both Jackson and Poellinger and to find, that a reasonable trier of fact could not have found Wheeler guilty beyond a reasonable doubt on the evidence produced at trial. Wheeler has clearly put forth "clear and convincing evidence that the Court of Appeals findings were unreasonable." Janus-Iak, 937 F.3d at 888. While Wheeler's evidence, proves he could not have, and did not sexual assault C.A., the Court of Appeals ignored and/or failed to review the record in its entirely, and failed to come to a reasonable conclusion that the evidence was not sufficient to sustain the conviction. That is all that is required of it, and thus, Wheeler is entitled to relief

REASONS FOR GRANTING THE PETITION

Wheeler has made a prima facie showing that the facts underlying his claim, is proven when veiewed in light of evidence as a whole, show by clear and convincing evidence that, but for the constitutional errors, no reasonable fact-finer would have found Wheeler guilty of the offense. Because Wheeler have prove below and above that his claims satisfies the § 2244(b) requirement set forth above and below, this court has the authorization to grant his writ of certiorari based on the facts herein.

In this case Wheeler's claims [1] involved issues of federal law that was cognizable on federal habeas review, and [2] determination that Wheeler was not denied effective assistance of appellate counsel was unreasonable, in shaw and (1) defense counsel's failure to investigate murder defendant alibi clrim was deficient, and (2) defense counsel's failure to investigate murder defendant's alibi clrim prejudiced defendant. On these grounds these cases were vacated and remanded and Reversed; petition granted. See Troy R. Shaw v. Bill Wilson, no. 12-1628 and Christopher Ray Goza v. Don Hulick, no. 05-2340.

Under the Antiterrorism and Effective Death Penilty Act of 1996 ("AEDPA"), a federal court may grant habeas relief only if the state court decision was "either (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."

Miller v. Smith 765 F.3d 754, 759-60 (7th Cir. 2014)(quoting 28 U.S.C. § 2254(d)).

Wheeler received ineffective assistance of counsel when his trial counsel did not investigate or interview, or call as witnesses to testify at trial to the days and nights they slepted overnight at 720 JACKSON Street, Oshkosh Wisconsin, between October 15, 2001 and May 2, 2002, and how many times each witnesses, stayed overnight, how many times they slept in the same room as C.A. and how many times C.A. slepted overnight at their house in the same time frame. Trial counsel also failed to investigate, interview or call as witnesses to testify that Wheeler had three Jobs in Boston between August 2001 and JANUARY 8, 2002 and worked in Chicago between JANUARY 2002 and MAY 2002, Just as C.A. and her mother CLARISA CRUZ testified to at trial. Trial counsel was aware of these witnesses and some of them was on the defense witness list prior to trial counsel failure and refusal to call these witnesses severely prejudice [the petitioner] Wheeler to the point of denying him a fair trial because the only alleged evidence in this case was the many inconsistant statements and recanted statements by both C.A. and her mother Clarisa Cruz, as well as the inconsistant testmiony of C.A. Uncle Miguel Cruz.

Under Strickland v. Washington's familiar, two-pronged test for ineffective assistance of counsel, the petitioner must demonstrate that (1) his counsel's performance was deficient; and (2) that deficiency resulted in prejudice. United States v. Berg, 714 F.3d 490, 496-97 (7th Cir. 2013)(citing Strickland v. Washington, 466 U.S. 668 (1984)). The performance prong of Strickland requires a petitioner to show "'that counsel's representation fell below an objective standard of reasonableness.'" Lafler v. Cooper, 566 U.S. 156, 163 (2012)(quoting Hill v. Lockhart, 474 U.S. 52, 57 (1985)). "To establish Strickland prejudice a 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.'" Lafler, 566 U.S. at 163 (quoting Strickland, 466 U.S. at 694). Here, because C.A. testified to the facts that 23 different people slept overnight in the time frame she claimed she was being sexually assaulted on a "nightly basis", more than a dozen time before her 13 birthday and the same after her 13 birthday, and her mother Clarisa Cruz testified at trial that the sleepovers were alternate, and they both testified that several of the females slepted in the same room as C.A. in the alleged time frame, it was fair game for Wheeler to call of them because they were in the house before, during and after C.A. claimed she was being assaulted on different days and some of them more than one day.

And because there are prejudice Constitutional infirmities associated with Counsel Failure to investigate, interview, or call the 23 different eyewitness to testify at trial, it is possible to find that Counsel's performance was constitutionally deficient and that this prejudice resulted from Counsel's failure to investigate, interview and call the 23 witnesses C.A. and her mother admitted to under oath slept overnight at the allezed time. This claim has merit. Warren v. Baenen, 712 F.3d 1090, 1105-06 (7th Cir. 2013).

Further a more searching inquiry of Counsel's performance were is warranted here, as Wheeler requested, because the result would change. Wheeler have as both Trial and Appellate Counsel to request for a evidentiary hearing to call Not only the 23 different witness, but also his supervisors Name on the defendant's (Wheeler's) witness lists months before trial, and they both refused. A trial court acting reasonable cannot find Counsel's decision to be a matter of strategy. Here, Strickland demands that Counsel's strategic decision receive deference from a reviewing court. 466 U.S. at 690 ("... strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. [.]"). In this case they are clearly challengeable. And, under AEDPA, this court must afford Wheeler's determination an additional level of deference. Accordingly, this Court can find that the Wisconsin Court of Appeals unreasonably applied Strickland in assessing trial Counsel's performance.

IN this case both trial and Appellate refused to address the clearly stronger Amendment of information to continue to challenged the validity of the Amended information that would have been "obvious" At the time of trial or Wheeler's direct Appeal is beyond question. Wheele Appellate Counsel was already aware of the potential Claim-While-reviewing the trial record because Wheeler was forced to carefully preserved it by objecting, and Filing Pro Se motions in the trial records. **Sugg V. United States**, 513 F.3d 675, 678 (7th Cir. 2008)(Finding Challenge to improperly admitted evidence to be obvious because trial Counsel had objected to the admission and described the issue in A "pre-Appeal brief letter"); **MASON V. HANKS**, 97 F.3d 887 (7th Cir. 1996)("That this was An obvious one to raise on Appeal is beyond dispute). Wheeler's Appellate Counsel Abandonment of the objection to the Untimely Amended information cannot be excused on the basis that the Claim was obscure or novel.

Here, Again "Counsel's representation Fell below An objective standard of reasonableness". **LAFler V. Cooper**, 566 U.S. 156, 163 (2012)(quoting **Hill V. Lockhart**, 474 U.S. 52, 57 (1985)). Trial and Appellate Counsel Failure and refusal to Challenge of Wheeler objections, the untimely Amended-information For the Second time Without Notice, or without given Wheeler A Continuance, For A opportunity to Call New witness to the New inconsistent time Frame, establis Strickland prejudice that he must, and have proved that there is A reasonable probability that, but For Counsel's refusal and unprofessional errors, the result of the proceeding would have been different" **LAFler**,

566 U.S. at 163 (quoting Strickland, 466 U.S. at 694). Here, because the State Court of Appeals ignored both Rule pro se 974.06 Pleading it is Fair game For this Case, And because there Are Clear Constitutional INFirmities Associated with their Unprofessional 'refusal' errors to raise the untimely Amendment of the information For the Second time during trial, it is possible to Find both that Counsel's perFormance was Constitutionally deficient And that their prejudice resulted From Counsel's Failure to Ask For a Continuance or a evidentiary hearing Addressing trial Counsel's performance. This Court cannot Find trial Counsel's decision Not to Call the 23 eyewitnesses And request For a Continuance to Allow them to testify to be a matter of strategy.

IN this CASE both trial AND Appeal Counsel REFUSED to INVESTIGATE OR INTERVIEW the 23 eye WITNESSES that WAS SLEEPING IN the SAME house AND some them IN the SAME ROOM AS C.A. AT 720 JACKSON Street IN OSHKOSH WISCONSIN between October 15, 2001 AND MAY 2, 2002 DUING the time FRAME C.A. CLAIMED She WAS being SEXUALLY ASSAULTED ON A "Nightly bases" OR every Night over A dozen times" that would have bolsted Wheeler defense because they were IN the house IN requestion before, during AND AFTER C.A. CLAIM She WAS being ASSAULTED. All the Lower Courts has FAILED to EVALUATE these 23 FACTS Wheeler has INTRODUCED to the Courts IN every Level, that is clearly prejudice to Wheeler defense.

IN this CASE ALL OF the LOWER Courts ONLY FOCUSED ON ONE OF Wheeler employer, documenting he WAS TRAVILING BACK AND Forth to BOSTON AND CHICAGO. The Courts ON the Lower Levels FAILED to FOCUSE ON the EVIDENCE AND FACTS that Wheeler had more then ONE JOB IN BOSTON AND When he WAS ABSENCED FROM ONE JOB he WAS WORKING AT the Others. both TRIAL AND Appeal Counsel Were AWARE of these FACTS AND EVIDENCE because the NAMES OF Wheeler employers ARE Named IN the defendant WITNESS LISTS prior to TRIAL. The REASONS FOR GRANTING this petition IS BASES ON ALL the pro Se Exhibits Filed IN the Lower Courts the Jury Never had A opportunity to review, AND the Lower Court FAILED to EVALUATE OR EVEN Address them, excluding that FACTS that C.A. AND he mother MRS. CRUZ RECANTED their TRIAL STATEMENTS that Wheeler WAS going to AND FROM BOSTON during the begining time FRAME OF C.A.'S ALLEGATION, The Courts FAILED to EVALUATE there WAS 23 people SLEEPING OVERNIGHT

IN the house in question between October 15, 2002 and may 2, 2002, and over the weekends, and Wheeler would go to Chicago on mondays thru Friday, and returned to oshkosh on the weekends. The Courts Failed to evaluate Wheeler's pro se Exhibits Supporting these Facts. The Courts also Failed to evaluate the Facts that every time C.A. gave testimony or A Statment it was inconsistant with what She spoke the Last time on the matters. C.A. Admitted 23 people Slept in the house in question, over the time Frame in question, and Counsels Never interviewed Not one of them. Trial Counsel Never introduce None of the 23 people statements they gave to the oshkosh police Department, From the States investigation or Counsel own investigation. Trial Counsel was also ineffective For Failing to put into evidence At trial C.A.'s preliminary hearing statement April 4, 2005 to prove to the Jury She (C.A.) was Not being truthful, and her Allegations were inconsistent and False From her prior Statements.

The reasons For granting the petition because trial Counsel refused to Object to the untimely Amendment of the information and request For a Continuernce to Contract the Witnesses C.A. Admitted was in the house during the Alleged Crime, to Contact the Witnesses Counsel was aware of on the First two Witness List, to Contact All of Wheeler's employers in Boston.

The ONly evidence Against Wheeler in this Case was False, recanted and inconsistent statements by C.A. and her mother Clarisa Cruz, and this was a Credibility Case. The Jury was never given the opportunity to hear the 23 eye witnesses testimoney or review their statement given to the Oshkosh police Department during their investigation, even though some of them was Family of C.A., Friends of C.A.'s Family, and Friend and Family of the defendant (Wheeler). Nor did the Jury have an opportunity to hear All the recanted, False and inconsistance statement proven by Wheeler through his pro se Filings.

The Court must "Evaluate all the above Facts, that proves Wheeler was prejudiced by Counsel's Complete Failures to investigate and call available Witnesses they were clearly aware of. This Court must Find deficient and prejudiced performance by All Appointed Counsel's in this Case. As the Courts did in RAYGOZA V. HUBICK, 474 F.3d 958, Jan. 25, 2007 and SHAW V. WILSON, 721 F.3d 908, July 24, 2013. And grant Wheeler a new trial.

Wheeler has met his burden of proof in showing A reasonble probability exist that, had the Jury heard the newly discovered evidence and recanted statment, it would have had a reasonable doubt as to Wheeler's guilt Alleged at trial. Plode, 310 Wis.2d 28, ¶¶ 33, Wheeler has clearly met this burden.

IN Shaw the State Court's determination that petitioner was not denied effective assistance of Counsel due to Appellate Counsel's Failure to argue that prosecution's Amendment of information After statutory period For Amendments was invalid was unreasonable application of Clearly established Federal-law in Strickland V. Washington And Smith V. Robbins, And thus warranted Federal habeas relief, where insufficiency of evidence argument that Counsel pursued was so weak that pursuing it was equivalent of Filing no brief at all, claim challenging Validity of Amended information would have been obvious at time of petitioner's direct Appeal, Amendment challenge had significantly more promise than Sufficiency Argument, And petitioner had reasonable chance of success on Appeal but For Counsel's deficient performance. U.S.C.A. Const. Amend. 6; 28 U.S.C.A § 2254(d); West's A.I.C. 35-34-1-5.

In this case on September 16, 2008 during 'Jury trial' portion, your defendant (Wheeler) learned For the First time From the (Trial Judge) that Count #1: Repeated Sexual Assault of a Child Charge (s) had been Amended to now reflect the Alleged date (s) of: 'Between October 2001 thru May 2002' once the defense had submitted documented 'proof!" Via A Signed / dated Apartment lease as in Exhibit A (Attached hereto For Filing, Viewin And reference.) proving Wheeler could not have committed the Alleged Crimes as he was not even in the State of Wisconsin! And thus, Wheeler's defendant's 'ALIBI DEFENSE!' See Also Exhibit B, C, D. And E.

Wheeler objected because his trial Lawyer refused to do so on the basis of Wis. Stats., § 973.12. After the petitioner's OBJECTION! to the Second-Amendment-of-the information by the HON. THOMAS J. GRITTON. 'Granted!' this Second-Amendment. And Wheeler defense was prejudiced because he was never given any Notice to prepare for the New dates.

IN SHAW this Court Address the INDIANA Code § 35-34-1-5 (1982), a statute that had long limited prosecutor's discretion to amend pending charges. The version of the statute then in effect specified that an Amendment of "SUBSTANCE" could be made up to 30 days before the "Omnibus date" (defined by State law as "a point in time from which various deadlines ... are established," I.C. § 35-36-8-1), and an Amendment of mere "Form" could be made even later if Not prejudicial. Because the precise language of the 1982 version of the statute is important to Shaw's Case, the Same language is important to Wheelers Case.

This Court Set the relevant portions in the SHAW Case and Stated: "(d) Before Amendment of any indictment or information other than Amendment as provided in Subsection (b) of this Section, the Court shall give all parties Adequate Notice of the intended Amendment and an opportunity to be heard. Upon permitting such Amendment, the Court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to Accord the defendant Adequate opportunity to prepare his defense." I.C. § 35-34-1-5 (1982).

IN this case after Wheeler was forced to make his own objection on the records because trial counsel refused to, he ask counsel to request for a continuance so he could contact the 23 witnesses that slepted over night in the house and in the same room C.A. slepted and he again refused. Wheeler was forced to file his own motions to address this argument, and make a record for appeal, because he learned his counsel was helping the state. Wheeler then ask counsel to put C.A.'s April 4, 2005 preliminary hearing transcripts into evidence on the record, and he again refused. See EXHIBIT B, C, D and E.

IN Shaw this Court conclude that this is one of the rare cases in which Counsel's performance fell below the Constitutional minimum, and that the INDIANA Appellate Court's conclusion otherwise was an unreasonable application of Supreme Court precedent. Particularly given the concession that the evidence could support "Acquittal." This Court found the sufficiency argument made by Shaw's Appellate Counsel was so weak that pursuing it was the equivalent of filing no brief at all. While sufficiency challenges always place "an extremely difficult burden" on the defendant because the evidence is viewed in the light most favorable to the verdict, United States V. Hosseini, 679 F.3d 544, 557 (7th Cir. 2012), cert. denied, — U.S. —, 133 S.Ct. 623, 184 L.Ed.2d 396 (2012), the argument Shaw's Appellate Counsel presented was a certain loser.

IN Wheelers Case both trial and appellate refused to address this clearly stronger Amendment of information

to continue to challenged the validity of the Amended Information that would have been "obvious" at the time of Wheeler's direct appeal is beyond question. Wheeler Appellate Counsel was already aware of the potential claim while reviewing the trial record because Wheeler was forced to carefully preserved it by objecting and filing Pro Se motions in the trial records. (And, as Indiana and Wisconsin case law requires, requesting a continuance, See Kidd V. Indiana, 738 N.E. 2d 1039, 1041-42 (Ind. 2000)). See State V. Strhbeen, 433 N.W. 2d 288, 291 (Ct. App). Wheeler's preservation of a claim can make it obvious. See Suggs V. United States, 513 F.3d 675, 678 (7th Cir. 2008)(Finding challenge to improperly admitted evidence to be obvious because trial counsel had objected to the admission and described the issue in a "pre-appeal brief letter"); MASON V. HANKS, 97 F.3d 887 (7th Cir. 1996)("That this issue was an obvious one to raise on appeal is beyond dispute. Mason's lawyer had, of course, objected to [the hearsay statements] at trial."). Considering in addition the language of I.C. Section 35-34-1-5 (1982) and the fact, stressed by Shaw that dozens of similar (though unsuccessful) challenges were documented in published opinions, Wheeler's Appellate Counsel abandonment of the objection to the Amended Information cannot be excused on the basis that the claim was obscure or novel.

Nor can Wheeler's Appellate ~~Counsel~~ counsel's abandonment of that claim be excused on the basis that it would not have appeared promising enough. This is a relative inquiry, and there is no doubt

that the Amendment Challenge had significantly more promise that the issues raised and argued by Wheeler's Appellate Counsel. The Amendment issue, far from being frivolous, had a better than Fighting chance at the time of his direct appeal, and this Court can again consider the text of Section 35-34-1-5 and the 1998 statement in Mask that "if the Amendement was of substance ... it was impermissible under the Statue" from 30 day before the Omnibus date. 695 N.E. 2d at 951. As it done in the SHAW case, and the substance addressed in Wheeler's pro se petitions be Filed in the trial Court. See Exhibits B, C, D and E. See also the other cases cited by Shaw from the Indiana Court that he says would have supported a challenge to the Amended information at the time of his appeal, and Wheeler knows the cases will support his case as well. The most compelling among them are Wright V. Indiana, 593 N.E. 2d 1192, 1197 (Ind. 1992), and Sharp V. Indiana, 534 N.E. 2d 708, 714 (Ind. 1989), which both include declarations that a charging document cannot be amended to change the "identity of the offense" after the deadline in Section 35-34-1-5. and by Wheeler. See: Whitaker V. State, 83 Wis. 2d 368, 373, 265 N.W. 2d 575 (1978). (An amended information is prejudicial when it provides insufficient notice to allow the defendant to prepare and defend against the charge.) State V. Meador FF, See: State V. Peters 188 Wis. 82 524 NW. 2d 649. (1994) Wis. App. Lexis 1098,

"The ability of the State to amend a criminal complaint is a matter addressed to the sound exercise of a trial court's discretion. An appellate court will not disturb the trial court's exercise of that discretion unless a defendant received inadequate notice of the change or was prejudiced by the amendment. The appellate court will find prejudice if the amendment unfairly deprived the defendant of the opportunity to contest issues raised in the amendment."

this fully documented UNCONSTITUTIONAL 'Second-Amendment!' directly denied and deprived the defendant his FULL 'ALIBI DEFENSE!' Wheeler's Trial and Appeal Attorney's are generally not obliged to anticipate changes in the law, See Valenzuela V. United States, 261 F.3d 694, 700 (7th Cir. 2001); Mayo V. Henderson, 13 F.3d 528, 533 (2d Cir. 1994), but in some instances they are obliged to make an argument that is sufficiently foreshadowed in existing case law. See Thompson V. Warden, 598 F.3d 281, 288 (6th Cir. 2010)("[C]ounsel's failure to raise an issue whose resolution is clearly foreshadowed by existing decisions might constitute ineffective assistance of counsel.'") (quoting Lucas V'O'Dea, 179 F.3d 412, 420 (6th Cir. 1999)); Lattea V. Bennett 368 F.3d 179, 183 (2d Cir. 2004) ("To determine whether reasonable counsel would have predicted the Antommarchi outcome and objected to the trial court's supplemental Allen charge, this Court must examine the extent to which prior cases foreshadowed the Antommarchi holding.")

IN HARK, the INDIANA Supreme Court did more than Foreshadow FAJARDO; the Court explicitly stated the same rule that it later would apply in Fajardo. Although INDIANA appellate courts resisted that clear statement until FAJARDO was decided, see, e.g., TOWNSEND V. INDIANA, 753 N.E.2d 88 (IND. APP. CT 2001)(discounting HARK); DAVIS V. STATE, 714 N.E.2d 717, 721 (IND. CT. APP. 1999) (same), the fact that an intermediate court likely would have rejected the argument at the time of SHAW'S appeal is NO excuse not to make it, and the same applys to Wheeler in WISCONSIN, See MRYO, 13 F.3d at 533-34 ("[A]ttorney's omission of a meritorious claim cannot be excused simply because an intermediate appellate court would have rejected it."); Orazio V. Dugger, 876 F.2d 1508, 1513-14 (11th Cir. 1989)(holding that appellate counsel was obliged to raise a challenge that, although likely to be rejected by the appellate court, ultimately would have been successful in the State Supreme Court).

The bottom line is that Appeal Counsel was aware of this Amendment of the information strange argument because Wheeler requested that he address it several time, he was aware of the pro se motions Wheeler was forced to file himself, based on a state statute, inforced in the WISCONSIN Supreme Court's pronouncement in Whitaker V. State. In the face of these facts, Appellate Counsel refused to argue it over Wheeler objections. The records clearly showed Wheeler set out that his "ADEBI DEFESE! Violation Claim(s) are those as exactly set out under: U.S. V. Dawson, 857 F.2d 923 (3rd Cir. 1988). And in any case

"[N]o tactical reason ... can be assigned for [his] failure to raise this very strong substantial claim [] that Wheeler had. See Fagan, 942 F.2d 1155 at 1157; cf. Smith V. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)(concluding * 918 that Appellate Counsel who did not raise a claim that was questionable under Virginia law but did raise 13 more-promising claims was not deficient). Fairminded jurists who have the proper standard in mind can conclude only that Appellate Counsel's performance fell short of what Strickland V. Washington and Smith V. Robbins require. And that the Wisconsin Appellate Court's conclusion to the contrary was an unreasonable application of Supreme Court precedent, as was in the Indiana Appellate Court's conclusion.

Wheeler was clearly prejudice, because he was not give extra time to prepare for trial even after he personally objected, when the Court's granted the prosecutions second Amendment without notice. In addition to this matter. Strickland requires this Court to ask whether there is "a reasonable probability, but for [Appeal Counsel] unprofessional errors, the result of [Wheeler's direct appeal] would have been different," See 466 U.S. at 694, 104 S.Ct. 2052. In assessing prejudice, This must again bear in mind that they are making a comparative inquiry about Counsel's choices; this Court is not resolving any issue of State law, and is not telling Wisconsin Judiciary how it should approach this issue. Prejudice exists because if Clear Counsel bypassed an nonfrivolous Argument that, if successful, would have resulted in the Vacation of Wheeler's Conviction (just as the Conviction in Fagan the later

was). And Shaw. If one is entitled to a dismissal, a continuance is no comfort. This court when evaluating prejudice, unlike when evaluating attorney performance, hindsight is permissible. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L. Ed. 2d 180 (1993); Eddmonds v. Peters, 93 F.3d 1307, 1326 n. 5 (7th Cir. 1996). This means that the Wisconsin and Indiana Supreme Court's ultimate decision in Fajardo is relevant to whether the argument Wheeler Appeal Counsel jettisoned was both nonfrivolous and stronger than the other arguments he presented.

The State cannot argue Wheeler have not shown prejudice. The line of cases following Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), and Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), stand for the proposition that Strickland prejudice cannot be established if counsel's deficiency was in not making a claim that, although valid at the time of trial or appeal, has since been rejected. The rationale is that defendants must not "receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law." Wheeler "seeks relief from counsel's failure to meet a valid legal standard," See Lafler, 132 S.Ct. at 1389 and if there is any Wisconsin legislature's later decision to change that standard does not defeat Wheeler's ineffectiveness claim.

This Court and fair-minded jurists must agree that Wheeler has demonstrated prejudice: he had a reasonable chance

OF Success on Appeal but For Appeal Counsel deficient performance. Wheeler raised this issue pro se, in the trial Court, Appeal Court, Wisconsin Supreme Court, the United States District Court Eastern District Court of Wisconsin, in a petition For Certificate of Appealability in the United States Court of Appeals For the Seventh Circuit, And All Five (5) Courts have ignored these issues, And the States has never Address other than claiming they Are waive When the (DOC) (WCI) refused to give Wheeler A Legal LOAN to timely Appeal these issues to the Wisconsin Supreme Court. The Courts have Never Address these FACTS, claims And Evidence, And relief must be granted to Which Wheeler is entitled to A New trial, A New direct Appeal, because Wheeler's trial Counsel And Appeal Counsel's performance was deficient And Wheeler Suffered prejudice As A result, the decision of this United States Supreme Court must VACATE his Conviction because it is UNConstitutional.

CONCLUSION

The petition For A Writ of Certiorari Should be granted

Respectfully Submitted

Jerry L. Wheeler

JERRY L. Wheeler #436066

Date June 10, 2021