

No. **21-6567**

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

OCT 12 2021

OFFICE OF THE CLERK

DION BROWN (PRO SE) — PETITIONER
(Your Name)

V.S.

PEOPLE OF THE STATE OF ILLINOIS — RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

ILLINOIS SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DION BROWN (#Y15041) PRO SE
(Your Name)

Illinois River Correctional Center
1300 W. Locust Street / P.O. Box 999
(Address)

Canton, IL 61520-0999
(City, State, Zip Code)

N/A
(Phone Number)

Subscribed and sworn to before me

this 2 day of December, 2021

Heather N Daniels
Notary Public

HEATHER N DANIELS
Official Seal
Notary Public - State of Illinois
My Commission Expires Feb 9, 2022

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QUESTIONS PRESENTED FOR REVIEW

I

Whether the Petitioner's trial attorney was ineffective for failing to conduct a reasonable investigation into a potential defense witness, which led to the failure to present the testimony of Petitioner's former trial attorney who would have testified that the victim, Annmarie Rowe, told former trial attorney that Petitioner lived with the victim and had keys to her house on the night of the offense, which would have defeated the claim that Petitioner entered the house "of another"- a required element of the offense of Home Invasion - thereby violating the Sixth and Fourteenth Amendment of the United States Constitution.

II

Whether the Prosecution met its burden of proving Petitioner guilty beyond a reasonable doubt as to each and every element of Home Invasion and Aggravated Unlawful Use of a Weapon.

III

Whether this Court should address a fundamental question left open by the Illinois Supreme Court's decision in *People v. Simpson*, 2015 IL 116512, ¶ 31, as to whether the recipient of a prior inconsistent statement must also have personal knowledge of the event or condition described in the statement for it to be admissible under 725 ILCS 5/115-10.1.

IV

Whether the Illinois Appellate Court resolved this case based on an argument never made by the State and misconstrued both the record and the law to reach that resolution.

LIST OF PARTIES

- [**X**] 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

- *People v. Brown*, No. 11 CR 20228, Circuit Court of Cook County, Illinois. Judgment entered December 7, 2015.
- *People v. Brown*, No. 11 CR 20228, Circuit Court of Cook County, Illinois. Judgment denying Motion for New Trial entered May 12, 2016.
- *People v. Brown*, No. 1-16-2429, Appellate Court of Illinois, First Judicial District, Fourth, Division. Judgment Affirmed entered December 3, 2020.
- *People v. Brown*, No. 1-16-2429, Appellate Court of Illinois, First Judicial District, Fourth Division. Judgment denying Petition for Rehearing entered January 28, 2021.
- *People v. Brown*, No. 127006, Illinois Supreme Court. Judgment denying Petition for Leave to Appeal entered May 26, 2021.

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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 _____ 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 _____ 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 B 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 Illinois Appellate Court 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 _____.

☐ 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 _____ (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 May 26, 2021
A copy of that decision appears at Appendix B.

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

☒ An extension of time to file the petition for a writ of certiorari was granted to and including October 26, 2021 (date) on July 19, 2021 (date) in Application No. ____ A ____ (SEE APPENDIX - A)

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1) United States Constitution (6th and 14th Amendments)**
- 2) Illinois Constitution (1970, Article I, Section 8)**
- 3) 720 ILCS 5/12-11(a) (West 2011)**
- 4) Supreme Court Rules 315 and 612**
- 5) 725 ILCS 5/116-1**
- 6) 725 ILCS 5/115-10.1**
- 7) 720 ILCS 5/12-11(a)(3) (West 2010)**
- 8) 720 ILCS 5/19-6(a)(3) (West 2014)**
- 9) 720 ILCS 5/19-6 (2015)**
- 10) Illinois Rules of Evidence 801(c) (eff. Jan. 1, 2011)**
- 11) 725 ILCS 5/115-10.1 (West 2014)**
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- 15) Illinois Supreme Court Rules 341(a) and (b), (d), (h)(1)**
- 16) Illinois Supreme Court Rule 367(b) (2018)**

STATEMENT OF THE CASE

The Petitioner was charged with the offenses of Home Invasion and Aggravated Unlawful Use of a Weapon that occurred on October 31, 2011, at the residence of Annmarie Rowe (the victim). Following a Bench Trial, the Petitioner was found guilty on both offenses and sentenced to prison terms of twenty-two (22) years and three (3) years to run concurrently. The Petitioner via trial counsel, unsuccessfully filed a Motion for new trial along with three (3) amended Motions for new trial, alleging that Petitioner was not proven guilty beyond a reasonable doubt of the alleged offenses. The main issue on appeal is whether Petitioner lived with Ms. Rowe at the time of the alleged offenses and home invasion, and whether his trial attorney's performance fell below an objective standard of reasonableness for failing to investigate and summon Petitioner's first attorney who would have testified that Ms. Rowe (the victim) told her, in a formal conversation, that Petitioner was living with her at the time of the alleged offense.

At the time of the alleged offenses, the Petitioner and Ms. Rowe were in a paramour relationship and living together. (*R. Vol. 2, GGG-58-64, HHH-81-83; C. 273-74, R. UUU-14-15*) On October 30, 2011, the Petitioner and Ms. Rowe, along with other family members, went out to dinner. (*R. Vol. 2, GGG-11-12*) After dinner, Ms. Rowe went to her home with the Petitioner. (*GGG 12-13*) At some point, Petitioner left the home to attend a different birthday celebration for his cousin. (*GGG 13*) Later, in the early morning of October 31, 2011, the Petitioner returned home where he lived with Ms. Rowe and her daughter, Lianna Edwards, at 8923 South Euclid, Chicago, Illinois. (*R. Vol. 2, GGG-7-9*) Ms. Rowe testified that Petitioner broke the front door window and came inside the house because she did not open the door for him. (*GGG-17-18*) The police arrived,

arrested the Petitioner, and consequently charged him with Home Invasion and Aggravated Unlawful Use of a Weapon.

Lianna Edwards testified unimpeached and on direct examination that she is the daughter of Ms. Rowe, and that she lived with her mother on October 30, 2011 and October 31, 2011. Ms. Edwards further averred that Petitioner was living at the home with her and her mother on the date of the alleged offense. (*R. Vol. 2, GGG-57-58*) and (*R. Vol. 2, GGG-64-67*)

Jerry Edwards, the father of Lianna Edwards, testified that when he first met Petitioner, the Petitioner and Ms. Rowe were living at the same residence. (*R. Vol 2, HHH-22-23*)

Kim Harris, Petitioner's cousin, testified that the Petitioner and Ms. Rowe were in a relationship and living together on the date of the alleged offense, and that they were living together for at least two (2) years prior to the alleged home invasion. (*R. Vol. 2, HHH-80-82*). Subsequent to Petitioner's arrest, Ms. Harris met with Ms. Rowe to retrieve Petitioner's personal property, which Ms. Rowe had put in storage. (*R. Vol. 2, HHH-83-85*)

During pre-trial proceedings, the Petitioner was appointed an attorney (Karen Szpajer) from the Cook County, Illinois Public Defender's Office. Ms. Szpajer subsequently retired on December 31, 2014, prior to Petitioner's trial. Consequently, Petitioner retained a private attorney (Andrea D. Bonds) to represent him at trial who subsequently filed her Appearance on March 23, 2015. (*R. AAA2, CC2-3*) Following a Bench Trial, the Petitioner was found guilty of the alleged offenses.

Following Petitioner's trial and conviction, attorney Bonds filed a Motion for a new trial on January 5, 2016, premised on the argument that Petitioner did not enter the home of 'another' since he lived at the home where the alleged offenses occurred. Attached to the Motion is an Aff-

idavit from attorney Szpajer, who averred that Ms. Rowe had called her on April 24, 2012 and told her that Petitioner lived with her and had keys to her home on the date of the offense. (C. 273; R. MMM-7-9) Szpajer further avers in her Affidavit that 1) Ms. Rowe identified herself and provided her phone number, 2) that Ms. Rowe indicated she had a recording she wished to give to her (Szpajer), but needed to schedule an interview due to her work schedule, 3) that the next day, she (Szpajer) asked her investigator to call Ms. Rowe at the number Ms. Rowe provided to arrange a date and time for her to come to her (Szpajer) office, and 4) that subsequent to that date of arrangement, Ms. Rowe personally brought a copy of the recording to her (Szpajer) office, where she and Ms. Rowe met. (*SEE: Attached Affidavit and Testimony of Attorney Szpajer, marked as Exhibit – A*).

Attorney Bonds filed a subsequent second and third amended Motion for new trial essentially alleging her own ineffectiveness, in that exculpatory evidence, i.e., information was available to Petitioner prior to trial which would have established that Petitioner did, in fact, have keys to Ms. Rowe's home, and that Petitioner did, in fact, live with Ms. Rowe on October 31, 2011, the date of the alleged home invasion. (*Supp. C. 2-20*)

At the hearing on the Motion for new trial, attorney Szpajer testified that in March of 2012, she was the Public Defender assigned to represent Petitioner in this matter. (R. Vol. 3, UUU-12-13) That on April 24, 2012, she received a phone call from Ms. Rowe where Ms. Rowe asked her "how could it be home invasion if Brown was living with me and he had keys to my house on the day of the offense, October 31, 2011?" (R. Vol. 3, UUU-14-15) Attorney Szpajer testified that, during that particular conversation, Ms. Rowe further told her that she (Ms. Rowe) called the State's Attorney's Office to inform them that Petitioner was living with her on October 31, 2011,

and that Petitioner had keys to her home, but the State never returned her call. (*R. Vol. 3, UUU-16-17*) Subsequent to the phone conversation with Ms. Rowe, Szpajer testified that she made brief notes of the conversation and included Ms. Rowe's phone number. (*R. Vol. 3, UUU-18-19*) When attorney Szpajer retired in December of 2014, she included her notes and a memo of her impressions of the case in the trial file, which she passed down to the next assigned attorney. (*R. Vol. 3, UUU-52*) The next assigned attorney was Andrea D. Bonds, the attorney who filed the referenced Motion for new trial on Petitioner's behalf.

Also, at the hearing on the Motion for new trial, further testimony was elicited by Andrea Bonds (Petitioner's 2nd Attorney) attesting that she began representing Petitioner in March of 2015 and received the trial file and the notes from attorney Szpajer about Szpajer's April 2012 conversation with Ms. Rowe. (*R. Vol. 3, UUU-58-60*) However, attorney Bonds testified that she knew prior to trial that Ms. Rowe had told attorney Szpajer in 2012 that Petitioner lived with her (Ms. Rowe) and had keys to the house but did not investigate this information, nor did attorney Bonds contact attorney Szpajer about the notes, despite Petitioner telling Bonds that Szpajer had talked to Ms. Rowe. (*R. Vol. 3, UUU-60-62*) Bonds stated that the notes she retrieved from attorney Szpajer were not carefully written out, and that the only thing decipherable in the notes is that Ms. Rowe said Petitioner was living with her. (*SEE: Attached Testimony of Attorney Bonds, marked as Exhibit – B*) Attorney Bonds further testified that the reason she did not investigate this information was because she believed that the Prosecutor was going to dismiss the Home Invasion counts and not proceed on that theory at trial. (*R. Vol. 3, UUU-62-64, 68*) Bonds also testified that she would have asked for a continuance and contacted attorney Szpajer had she believed the State would be proceeding Petitioner on the Home Invasion charges. (*R. Vol. 3, UUU-64-65*)

Attorney Bonds further testified expressly that her failure to investigate this evidence was not a trial strategy and that she (Bonds) would have performed that investigation, but for her erroneous belief that the State was dismissing the home invasion charges. (*R. Vol. 3, UUU-68-69*) Bonds also testified that before trial, when she spoke to Petitioner, she explained to him that the State wanted to go to trial that day, but Petitioner would not be going on the Home Invasion. Attorney Bonds testified that Petitioner wanted to go to trial with the understanding that the Home Invasion was going to be *nolle prosequi*. (*R. Vol. 3, UUU-90*) The Petitioner was informed by his trial counsel, Bonds, that he was not going to trial on the Home Invasion on the day of trial. The Assistant Prosecutor testified that she was the lead prosecutor on Petitioner's case. (*R. Vol. 3, UUU-101-102*) The Assistant Prosecutor further testified that she had a conversation with attorney Bonds about Petitioner accepting a guilty plea, but never told Bonds that the prosecution would dismiss the Home Invasion charges at trial. (*R. Vol. 3, UUU-106-107, 113*) (*SEE: Attached Testimony of Attorney Bonds, marked as Exhibit – B*)

The trial Court found that attorney Bonds was not ineffective, but reasoned that Bonds could have cross-examined Ms. Rowe about the conversation with attorney Szpajer. (*R. Vol. 3, UUU-146-148*). Petitioner's third amended Motion for new trial was subsequently denied by the Trial Court. (*SEE: Appendix – E*).

REASONS FOR GRANTING THE WRIT

This Court should grant this writ for two main reasons: 1) The Petitioner was denied his Sixth Amendment Constitutional Right to the effective assistance of counsel, where his trial attorney failed to investigate and present exculpatory evidence that would have impeached the victim's testimony on the most important element of the Home Invasion offense, and 2) the Prosecution did not meet its burden of proving the Petitioner guilty beyond a reasonable doubt for the offenses of Home Invasion and Aggravated Unlawful Use of a Weapon, which infringed upon his Fourteenth Amendment Right to due process.

This Court should also address a fundamental question left open by the Illinois Supreme Court's previous decision in *People v. Simpson, Supra*, as to whether "the recipient of a prior inconsistent statement must have personal knowledge of the event or condition described in the statement for it to be admissible for substantive evidence."

As to reason number one, (ineffective assistance of counsel) Andrea Bonds (trial attorney) testified that when she retrieved the case file from Petitioner's first attorney (Karen Szpajer) she did not investigate nor contact Szpajer about the notes and half-sheets relating to Szpajer's conversation with Annmarie Rowe (the victim). (*R. Vol. 3, UUU-58-60*) Bonds further testified that she knew prior to trial that the victim had told Szpajer in 2012 that Petitioner lived with her and had keys to her home on the night of the offense, but failed to investigate this information. (*R. Vol. 3, UUU-61-62*). Bonds also testified that the reason she did not investigate the information was because she believed the Prosecution was going to dismiss the Home Invasion charge. (*R. Vol. 3, UUU-62-64, 68*). However, Bonds averred that, had she'd known that the Prosecution would be

prosecuting Petitioner on the Home Invasion charge, she would have asked for a continuance and contacted Szpajer. (R. Vol. 3, UUU-64-65) Bonds further averred that “from her understanding, Szpajer never met Ms. Rowe.” (SEE: Attached Testimony of Attorney Bonds, marked as Exhibit – B) This averment is contrary to the evidence which ultimately prejudiced the Petitioner, because the Prosecution used Bonds testimony in their argument which precipitated the Trial Judge to conclude that he got the impression that “attorney Szpajer did not, in fact, know if the person was Ms. Rowe, just someone who claimed to be.” (R. Vol. 3, UUU-127) The Prosecution contended at trial that attorney Szpajer and Ms. Rowe had never met, and the Trial Judge was not made aware that Szpajer and Ms. Rowe did, in fact, meet. The reason why the Trial Judge was not aware of this meeting between Szpajer and Ms. Rowe is because attorney Bonds misled the Court when she testified that Szpajer and Ms. Rowe never met. (R. Vol. 3, UUU-85) This is an exemplary showing of attorney Bonds’ deficient performance as a trial attorney, which satisfies the first and second prongs of ineffective assistance of counsel as set forth in *Strickland, Id.* This deficient performance on behalf of trial counsel indubitably prejudiced the Petitioner, because if the Trial Judge would have known that Szpajer and Ms. Rowe did, in fact, meet, the outcome of Petitioner’s trial would have been different. When the Trial Court denied Petitioner’s Motion for new trial, he asseverated that attorney Bonds was not ineffective for failing to investigate attorney Szpajer’s conversation (exculpatory in nature) with the victim, but added, **“In hindsight, Bonds could have cross-examined the victim about the conversation.”** (R. Vol. 3, UUU-146-148) The Trial Court further asserted that, **“Maybe viewing it in hindsight, had Ms. Rowe been asked, ‘Did you speak to attorney Szpajer, and did you tell Szpajer that Petitioner was living there,’ might have made a difference.”** Had Bonds effectively cross-examined Ms. Rowe, the result of Petitioner’s trial

would have been different.

In closing arguments, the Prosecution alludes to the reliability of the phone conversation between Ms. Rowe and attorney Szpajer, and the prejudicial effect on the Petitioner. (*R. Vol. 3, UUU-132*) The fact that Bonds failed to investigate or seek to enter into evidence the notes, half-sheets, and audio recording that Ms. Rowe gave to attorney Szpajer and her investigator (Curtis Yonker) when they met, culminated in Petitioner losing his best chance to defend against the Home Invasion charges and, in the deprivation of his due process constitutional right. This neglect on behalf of attorney Bonds resulted in a sheer evisceration of Petitioner's Sixth Amendment right to the effective assistance of counsel.

Attorney Bonds' incompetence is highlighted further where she failed to present at trial the testimony of attorney Szpajer who attested in her Affidavit that she (Szpajer) had a phone conversation with the victim and subsequently met with the victim in her office. (*SEE: Attached Affidavit marked as Exhibit – A*). This most crucial and vital information regarding the victim's exonerating statements was never presented at Petitioner's trial which deprived him of a fair and impartial trial. Had attorney Bonds diligently investigated Petitioner's case file, which was bequeathed upon her by attorney Szpajer, and presented such evidence at Petitioner's trial, the outcome of his trial would have immeasurably been different. In this respect, attorney Bonds' performance as a trial attorney fell well below the objective standard of reasonableness. *Strickland, Id.*

Attorney Bonds had a professional obligation to investigate all facets of Petitioner's case. Her failure to perform such an investigation constitutes objectively unreasonable assistance of counsel. Her failure to investigate the exculpatory statements made by the victim and present test-

imony that would have impeached the victims trial testimony is particularly indicative of incompetence especially where, as here, witnesses were known to Bonds whose testimony were exonerating. There is nothing discerning as to why attorney Bonds did not present this exculpatory evidence where the evidence provided a solid defense to the charge that Petitioner did not live with the victim and thus entered the home of another. Attorney Bonds failure to seek to introduce this evidence by summoning attorney Szpajer, who was available to the defense to testify about her conversation with the victim, and to also impeach the victim with this information was unreasonable given the fact that Petitioner's legal residency at the time of the alleged offense was the same residency where the victim lived. Attorney Bonds was professionally obligated, both legal and ethical, to explore and investigate Petitioner's case file bequeathed upon her, and her failure to do so cannot be deemed as trial strategy in this matter. Based upon reason number one for granting the writ, reason number two is corollary in nature where the Prosecution failed to meet its burden in proving Petitioner guilty of the offenses of Home Invasion and Aggravated Unlawful Use of a Weapon.

Further, in granting the writ this Court should clarify whether the recipient of a prior inconsistent statement, made by a declarant with personal knowledge of the events, must also have personal knowledge in order to describe the prior statement at trial. Pursuant to Illinois statutory provisions, "*prior inconsistent statements are admissible so long as the statement describes events or conditions of which the witness who made that statement had personal knowledge.*" *Supra*. In affirming the Illinois Circuit Court's ruling, the Appellate Court opinionated that the contents of the conversation between attorney Szpajer and the victim were inadmissible for impeachment purposes, and ruled that attorney Bonds was not ineffective for failing to investigate or introduce

them at Petitioner's trial. (*SEE: Appendix – D*, at ¶43.) As the Appellate Court alluded, had attorney Bonds questioned Ms. Rowe at trial about her inconsistent statement and obtained an acknowledgment that Ms. Rowe made that statement, then Ms. Rowe's prior statement should have also been admissible as substantive evidence. 725 ILCS 5/115-10.1 (2014). A prior inconsistent statement is admissible as substantive evidence if made by a witness with personal knowledge of the event or condition and acknowledged by the witness at trial, but still admissible as impeachment even if not acknowledged by the witness.

There is no dispute that the *declarant* of a prior statement must have personal knowledge of the events at issue which, in this case, the declarant (victim) did, but the question for this Court remains as to whether the *recipient* of that statement must also possess personal knowledge? "To satisfy the 'personal knowledge' requirement for admitting prior inconsistent statements of a testifying witness as substantive evidence, the witness whose prior inconsistent statement is being offered into evidence must actually have seen the events which are the subject of that statement." *People v. Donegan*, IL App. (1st) 102325 (2012); 725 ILCS 5/115-10.1(c). In this case, attorney Szpajer was not inconsistent on whether Ms. Rowe told her that the Petitioner lived with her (Ms. Rowe). Instead, Szpajer, like a Police Detective or Prosecutor, was the *recipient* of the inconsistent statement made by Ms. Rowe before trial. Thus, it was Ms. Rowe, not Szpajer, who was required to have personal knowledge of the subject matter addressed in her own inconsistent statements. To that end, Ms. Rowe unquestionably had personal knowledge of whether Petitioner lived with her on the date of the alleged home invasion. Thus, Ms. Rowe's prior inconsistent statement was admissible, and Szpajer was competent to disclose that statement since she was the direct recipient of that statement. *People v. Hastings*, 161 Ill. App. 3d at 719-20. The Illinois Appellate Court de-

terminated that attorney Szpajer (the recipient of the victim's prior inconsistent statement that Petitioner lived with her on the night of these events) could not describe the victim's prior statement because Szpajer did not have personal knowledge of Petitioner's residence herself. *Id.* at ¶43. Nevertheless, the Appellate Court's reasoning in this respect is indistinct and not in alignment with Illinois statutory intent, particularly where the record, along with attorney Szpajer's Affidavit, clearly evinces that the victim met Szpajer at her office where they had a brief one-on-one conversation, and where Szpajer made a copy of the voicemail recording. (*SEE: Attached Exhibit – A*). In her Affidavit, Szpajer averred that the victim (Ms. Rowe) gave her the voicemail recording, but she was not asked on the Motion for Retrial *who* gave her the voicemail recording. (*R. Vol. 3, UUU-19,25, 26,27,45*) Statutorily, as long as the declarant of a prior statement (in this matter, a prior inconsistent statement) had personal knowledge of the crime or event themselves, the recipient of that statement is permitted to describe that prior statement at trial. The Illinois Appellate Court's *new* and *conflicting* ruling on the issue of whether the recipient of a prior inconsistent statement must also have personal knowledge of the events could have the effect of drastically altering criminal trials in Illinois.

Not only should this Court clarify whether a recipient of a prior inconsistent statement is required to have personal knowledge of the events or condition related in a prior statement be allowed to describe that statement at trial, but also clarify how a proper foundation may be laid to introduce statements made during telephone conversations. The Illinois Appellate Court further ruled that attorney Szpajer's testimony describing the victim's prior inconsistent statement was inadmissible because Szpajer and the victim had never met in person before the phone call in which the victim made the prior statement. The Illinois Appellate Court determined that attorney Szpajer

had never spoken to the victim before that phone call, and therefore would have been unable to conclusively identify the caller as the victim. *Id.* at ¶43. However, subsequent to that phone call, Szpajer and the victim *did* meet in person, pursuant to an agreement they made over the phone. (C. 273-74). Nevertheless, the Illinois Appellate Court did not even consider this most crucial evidence in its decision, rather, it focused on the peripheral scenario that Szpajer and the victim never met *before* the phone call. There is established case law in Illinois where courts have ruled that, “even when there is no direct evidence presented at trial to identify a caller, a foundation may still be laid to introduce the call if there is sufficient circumstantial evidence of the caller’s identity.” *People v. Nichols*, 378 Ill. 487, 489-90 (1941).

In Petitioner’s case, the Illinois Appellate Court determined conclusively, without considering any of the surrounding circumstances, that since Szpajer and the victim had never met in person prior to the phone call, Szpajer was incompetent to lay a foundation to establish the victim’s identity as the caller as a matter of law. *Id.* at ¶43. Nevertheless, the record substantially proffers that, had attorney Bonds chose to present this evidence at trial, she *could* have laid a proper foundation to establish that it was, in fact, the victim who called Szpajer. Attorney Szpajer’s Affidavit highlights Bonds’ incompetence where she avers that (1) The victim identified herself and provided her phone number during the phone call; (2) the victim indicated that she had a recording she wished to provide to Szpajer, but needed to schedule an interview with Szpajer due to the victim’s work schedule; (3) the next day, Szpajer asked her investigator to call the victim at the number the victim had provided to arrange a time for her to come to Szpajer’s office; (4) subsequently, the victim personally brought a copy of the recording to Szpajer’s office, where Szpajer personally met with the victim. (C. 273-74). Under Illinois Supreme Court precedent, the

assertions set forth in this Affidavit should have been sufficient to lay a proper foundation for the contents of the victim's phone call to Szpajer. The vacillating opinions of the lower courts on this issue illustrates the dire need for this Courts' clairvoyance in order to construe what exactly constitutes sufficient circumstantial evidence to lay that foundation.

One final and most compelling reason why this Court should grant this writ and clarify for the lower Courts the core meaning of the Sixth Amendment right to the effective assistance of counsel. Although Justice Gordon concurred with the other presiding Appellate Court Justices in this matter, he wrote separately based on his review of the record. Based on his review, Justice Gordon stated:

“In reviewing the testimony of the complainant, I observed that the defense did not inquire on cross-examination whether the complainant had a conversation with defendant's previous attorney, Karen Szpajer. I find the failure to ask that question on cross-examination troublesome. It would have been a foundation question to determine whether the complainant told attorney Szpajer that defendant was living with her at the time of the offense. Thus, *the defense never explored attorney Szpajer's testimony that she talked with the complainant and that the complainant told her defendant was living at her residence.*” (*Emphasis added*). *Id.* at ¶48.

The inference taken from Justice Gordon's remarks, along with the Circuit Court's reasoning that attorney Bonds could have cross-examined the victim about the conversation with attorney Szpajer, makes it quite clear that Bond's performance as a trial attorney fell below the objective standard of reasonableness and ultimately deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Don Brown

Date: 12/2/21